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VIA Email and US Mail

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Re: Follow-up on April 29, 2011 Letters

Dear Steve,

I write in response to your April 29th letters regarding our April 19th meeting and your clients' preservation obligations. First, while I appreciate your review of Newland's development of the Cinco Ranch community and its standards of development, as I stated in my April 1st letter it appears that we will just have to agree to disagree on the use of the term "commercial" property, whether it be the industry use of the term or Newland's use. As we have discussed, Newland's maps of Cinco Ranch have consistently depicted commercial property separate from multi-family residential. These representations are also consistent with Newland's own definition of commercial property on its website.

Our apparent disagreement on this critical issue underscores the importance of your clients' preservation obligations. You state in your April 29th letter that you would like to "discuss whether litigation is substantially likely given the burdens of a litigation hold and what we think might actually be material *if* holds are to be put in place." (emphasis added). As you know, on April 1, 2011 I mailed preservation letters to both Newland and Mr. Tartt regarding anticipated litigation concerning Newland's C-5 and C-6 tracts of commercial property. Based on your letter, however, it appears that your clients have not put a litigation hold in place despite their receipt of my preservation letter and their clear duty to do so.¹

¹ In addition, and as we discussed at our April 19, 2011 meeting, shortly after your clients' receipt of the preservation letter Newland instructed Cinco Ranch home builders to "throw away" maps depicting the Cinco Ranch development which included Tract C-5 and C-6. Although you state that

Your April 29th letter appears to claim that your clients have no preservation obligations in light of the April 26th post on the www.stopspringlakeapartments.com website, which states that neither I nor my firm legally represents the community group as a whole. Your clients' position is flawed for several reasons. First, it ignores the fact that the very same post states that "our community should look into possibly retaining a firm that specializes in these types of land dispute issues to advise the group as a whole and its individual members, as well as providing a proposed budget for that work." Clearly, this is evidence of a substantial likelihood that a claim will be filed regarding the commercial property at issue.

Second, the April 26th post was made nearly a month after your clients receipt of my preservation letter. Your clients' preservation obligations began – at the latest – upon their receipt of my April 1st preservation letter.

Third, the mere fact that I am not personally representing members in this legal matter does not mean that litigation is not likely to ensue. As you know, I am a resident of Cinco Ranch Southwest whose home is situated on Spring Lake directly across from Tract C-6. Accordingly, I have a personal interest in the development of this property. Moreover, as I expressly stated during our meeting, should your clients take action to sell or develop the property for multi-family use, I would have no option but to seek redress for the resulting damages.

Fourth, the community's organization of a protest and website (which your clients are monitoring) discussing legal action to be taken against your clients is cause enough to institute a litigation hold.

And finally, the fact that your clients have retained you to represent them in this dispute is evidence that they subjectively believe that litigation is likely. It is apparent from our discussions with you and your clients, that your clients intend to sell Tract C-6 (and potentially C-5) for a multi-family development and already have a letter of intent for such a development. As you and your clients are aware, such action is adamantly opposed by me and numerous other residents of Cinco Ranch who relied on Newland's representations that Tracts C-5 and C-6 would be developed as high-end, light traffic, mixed commercial retail property. Given our respective divergent positions, litigation is likely and your clients are, and have been, under a

Newland itself has copies of the maps previously used, this does not justify Newland's destruction order. As you admit in your letter, one issue of relevance to the dispute is the representations made to homebuyers. Among other methods, those representations were made through maps provided to homebuyers by Newland via builders. Thus, the builders' possession of such maps is relevant and would be discoverable evidence.

duty to preserve evidence related to Tracts C-5 and C-6.² See *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993) (“[S]ubstantial chance of litigation’ . . . simply means that litigation is ‘more than merely an abstract possibility of unwarranted fear’ and can even occur ‘before the plaintiff manifests an intent to sue.’”); see also, *Trevino v. Ortega*, 969 S.W.2d 950, 956 (Tex. 1998) (duty to preserve arises when “after viewing the totality of the circumstances, the party either actually anticipated litigation *or* a reasonable person in the party’s position would have anticipated litigation.”)

Your clients’ destruction of evidence and failure to put litigation holds in place will be addressed at the appropriate juncture of litigation. I (and other members of the community who pursue legal action) may seek redress from the Court for your clients’ spoliation in the form of default sanctions, monetary sanctions, preclusions sanctions and/or adverse inference sanctions. See *Trevino*, 969 S.W.2d at 953 (noting that trial judges have “broad discretion to take measure ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions.”) To avoid any further spoliation by your client and the sanctions which may flow therefrom, I again request that your clients immediately impose a proper litigation hold and take all efforts necessary to identify the extent of the evidence already destroyed. In addition, as requested in my April 19th letter, please provide assurances that Ms. Herff’s April 13th email to builders (and any similar correspondence regarding evidence destruction) is retracted and that such correspondence, including all meta-data, is preserved.

On a final note, based on our meeting it was my understanding that each side would provide advance notice to the other before taking any action with respect to Tracts C-5 and C-6 (*i.e.* I would provide notice before formally filing a lawsuit and your clients would provide notice prior to selling the property to any multi-family property developer). Your April 29th letter now states that Newland and Mr. Tartt will not provide notice of any sell. If that is the case, your clients would be well-advised to provide any potential buyer with notice of the community’s protest to the development of apartments on Tracts C-5 and C-6, so as to avoid

² Contrary to your assertion, I have not requested a “blanket preservation order”. My April 1st letter itemizes specific categories of documents which are relevant to the anticipated litigation. Although not all-inclusive of materials which are potentially relevant to the anticipated litigation (since your clients are in possession of the materials and, thus, are in the best position to know if there exists additional relevant material), my letter is sufficiently specific and relates to representations regarding Tracts C-5 and C-6 that were made by your clients, your clients’ intent regarding the development of the property, and potential damages resulting from false representations and /or fraud committed by your clients. All such documents would be relevant and discoverable in the anticipated litigation. See Tex. R. Civ. P.192.3(a) (allowing for broad discovery of any information which “is relevant to the subject matter of the pending action”); see also, *Trevino*, 969 S.W.2d at 957 (a party’s duty to preserve covers “what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, [or] is the subject of a pending discovery sanction”).

future litigation with such buyer in addition to litigation which may be brought by me and/or other Cinco Ranch residents. *See Smith v. Nat'l Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979) (holding that the seller in a real estate transaction “is under a duty to disclose all material facts which would not be discoverable by the exercise of ordinary care and diligence on the part of the purchaser”).

Again, I appreciate you and your clients taking the time to meet with Jon and I last month regarding this dispute. As I told you during our meeting, we remain open to working with your clients on alternative non-multi-family developments for Tracts C-5 and C-6 that are in line with Newland’s prior representations and the community’s expectations.

Best regards,



Chad M. Hagan

cc: Jon Prather (jprather@McGriff.com)