RANCHO GABRIELA HOMEOWNERS ASSOCIATION
P.O. BOX 25466
TEMPE, AZ 85285

Board of Directors Meeting - Open Session
Thursday, May 23, 2019 @ 7:00 PM
Rosefield Charter School

Meeting Minutes

I. Meeting was called to order at 7:00 p.m. by Louis Lugo, President. Jeanette Landis, Angie Kreger, John Norton and Jim Verpoten were in attendance. There was not a member quorum to hold the Annual Meeting.

II. Review and approval of the Board of Directors Meeting Minutes dated April 25, 2019.

III. Treasurer's Report:
   a. Review and acceptance of the Income Statements dated April 30, 2019.
   b. Invoice approval— AZ Rec (1), DECA Southwest (1), Somerset (2)
   c. 2018 Mansperger Patterson management rep signature letter/draft audit—Draft received, completed audit should be available for the June meeting.

IV. New Business:
   a. Review of proposals from BKB (2) for wall repairs due to tree root damage—2 proposals approved for repairs.
   b. Annual Meeting—2nd Attempt Thursday, June 27, 2019
   c. Design Review Committee Appointment—Robin McGee appointed to the DRC.

V. Old Business:
   a. Status of Somerset project for Sissoo tree removal—In process, first step is to chemically treat to kill the trees and their root system.
   b. Damaged palm tree--Removed
   c. Palm tree trim--Complete
   d. Security Patrol updates—Report from Signal 88 Security

VI. Tabled/Pending Items:

a. 2018 Year-end audit—June meeting
b. Basketball court resurface project—On hold
c. Retention signage—On hold
d. Additional drinking fountains (2)--Ordered

VII. Open Discussion:

a. Homeowner asked about capital projects—what will we do to make Rancho Gabriela stand out from other communities? Capital monies are used to keep the neighborhood looking good and we don't have extra land to build. Homeowner was asked to submit suggestions and the board will look into them.
b. Discussion about apartment complex proposed @ Reems and Cactus.
c. Only homeowners can vote in the annual elections, tenants cannot.
d. Newspapers in driveways—Talk to neighbors, remove and recycle, suggested homeowner to call/e-mail Surprise Today newspaper to be removed from delivery service.
e. Homeowner had a piece of furniture out in driveway after yard sale for pick up and received a letter 2 weeks later. Recommended to call/e-mail/put a note on it if it is being donated, etc. this way a letter isn't sent.
f. Homeowner requested more communications, e-mail notifications for meeting schedule —HOA already sends out quarterly postcards and anyone can visit the HOA website at www.ranchogabrielahoa.com at any time.
g. Homeowner asked about day care/Hippopotamus school status—School owners will be notified first of decision.

VIII. Adjournment at 7:58 p.m.

Minutes prepared and submitted by, Jeanette Landis – Secretary

X _____ 6/27/19 _____ Minutes approved/date

Supplemental Minutes of Board Regarding Hippopotamus School

The issue before the Board of Directors is whether the operation of a pre-school/daycare called Hippopotamus School at the residence of Garth P. and Juliet M. Beguin, 14958 West Cameron Drive, constitutes a violation of Article 4, Section 4.12 of the Declaration of Covenants, Conditions and Restrictions. Given the importance of the issue to the Beguins and the community, the Board is providing these supplemental minutes.

A. Procedural Background.

The Board reviewed the Beguins' November 27, 2018 correspondence requesting a hearing regarding the operation of a pre-school/daycare at their residence called the Hippopotamus School. Although not required, the Board granted the Beguins' request in order to provide the Beguins and others an opportunity to be heard and present any testimony or additional materials on the issue. The Beguins had previously provided materials to the Board, including undated letters from Juliet Beguin (with enclosures) and Garth Beguin and letters of support for the School from some of their patrons. Mrs. Beguin enclosed a Handbook for Hippopotamus School and referred the Board to the Hippopotamus School Facebook page.

In its letter to the Beguins, the Board stated that it would decide whether the operation of the Hippopotamus School at Beguins' residence is (1) a prohibited business or trade under Article 4, Section 4.12 of the Declaration of Covenants, Conditions and Restrictions or (2) an exempted business activity under criteria (i)-(vi) of that Section.

The Board provided notice and placed the matter on its agenda for discussion by the Beguins and any homeowners expressing an interest in the matter for Tuesday, March 5, 2019, 6 p.m. at Rosefield Charter Elementary School. The Beguins confirmed their intent to attend, and did in fact attend and presented testimony in favor of the School. Approximately twenty people spoke at the hearing, mostly in support of the School. At the request of the Board at the hearing, the Beguins provided additional materials as attachments to Garth Beguins email dated March 18, 2019.

Notably, Board member James Verpoten recused himself from all Board actions regarding the Hippopotamus School, including the Board's decision to grant a hearing, the Board's deliberations on the matter, and the Board's decision and these supplemental minutes. Mr. Verpoten and his spouse Michelle are neighbors of the Beguins and have complained of the School in a residential setting, claiming excessive traffic, parking, and noise throughout the day, which they believed constituted a nuisance.

In making its decision, the remaining Board members considered all materials, correspondence, and hearing testimony presented to the Board on this matter. The

Board has exercised its discretion and judgment to the best of its ability and understands the importance of these issues to the Beguins and the community.

B. Operation of Article 4, Section 4.12 of the Declaration.

Article 4, Section 4.12 of the Declaration consists of two parts. The Board must decide whether the operation of the Hippopotamus School at the Beguin residence is (1) a prohibited business or trade under Article 4, Section 4.12 of the Declaration of Covenants, Conditions and Restrictions or (2) an exempted business activity under criteria (i)-(vi) of that Section.

1. Article 4, Section 4.12 Generally Prohibits All Non-Single Family Residential Uses, Including Businesses, Trades, Occupations, and Professions.

Article 4, Section 4.12 sets forth a general prohibition on all non-Single Family residential uses, including businesses, occupations, professions, or trades. The Section states in pertinent part:

> [T]he Lots and Parcels shall be used, improved and devoted exclusively to residential use by Single Families. No gainful occupation, profession, trade or other non-residential use may be conducted on any Lot or Parcel or in or from any Dwelling Unit....
>
> The terms "business" or "trade" as used in this Section shall be construed to have ordinary, generally accepted meanings and shall include, without limitation, any occupation, work or activity undertaken on an ongoing basis which involves the provision of goods or services to Persons other than the provider's family and for which the provider receives a fee, compensation or other form of consideration, regardless of whether (a) the activity is engaged in full or part time; (b) the activity is intended to or does generate a profit; or (c) a license is required for the activity.

This general prohibition applies to the Hippopotamus School at the Beguin residence. The School is a business, trade, profession, or occupation operating at a Single Family Residence in Rancho Gabriela. No one contests this conclusion, including the Beguins. Evidence supporting this conclusion includes the following.

- By Warranty Deed dated June 11, 2018, the Beguins took ownership of the single family residence located at 14958 West Cameron Drive, otherwise known as Lot 295 of Rancho Gabriela Phase 2, according to the Plat of record in the Maricopa County Recorder's Office, recorded in Book 608 of Maps, Page 2. The

Warranty Deed specifically subjects the residence to all covenants, conditions and restrictions as may appear on record.

- At the time of the Beguins' purchase of the residence, Rancho Gabriela was subject to a certain Declaration of Covenants, Conditions and Restrictions recorded April 12, 2002 as Instrument No. 2002-0378484 with the Maricopa County Recorder's Office (as amended).

- The Beguins admit reading the Declaration, including Article 4, Section 4.12 prior to the purchase of their home in Rancho Gabriela. The issue was important to the Beguins because they operated an unlicensed form of the Hippopotamus School at their prior residence. (Mrs. Beguin letter at 1; Mr. Beguin letter at 1-2). However, the Beguins did not seek approval of the Hippopotamus School or advice from the Association regarding Section 4.12 or the School before continuing the School in their new community Rancho Gabriela.

- Hippopotamus School is a Montessori preschool for children ages 3 through 6 years old. (Mrs. Beguin letter at 1). The School began in 2013, and continued at the Beguins' new residence in June 2018, the month they purchased the residence. (Mrs. Beguin letter at 1; Hippopotamus School Facebook Page).

- The Beguins would have preferred to operate the School outside of the home. Ms. Beguin stated: "Because we used all of our savings and my husband's retirement to buy this home, we had plans to open the school outside of the home within 5 years." (Mrs. Beguin letter at 1).

- Ms. Beguin is a certified Montessori instructor. (Beguin recorded testimony; Hippopotamus School Facebook Page). Ms. Beguin's 22-year old daughter serves as an assistant at the School. (Beguin recorded testimony).

- The Hippopotamus School operates for profit. The Detailed School Handbook ("Handbook") for the School discusses the enrollment policy, security deposit, payment and payment procedures, late fees for late pickup, and other related matters. The School has a business page on Facebook, which includes tuition rates for half days, basic days, and extended days.

- "Meals provided by Hippopotamus School," including snacks. (Handbook at 5).

- "Normal hours of operation are Monday through Friday from 7:30 a.m. to 5:30 p.m." (Handbook at 3).

- The School schedule follows Dysart District Annual Calendar. (Handbook at 4).

- The Beguins provided to the Board copies City of Surprise Business License No. 1021772 for the Hippopotamus School, showing the business location as 14958 West Cameron, Surprise, Arizona 85379-5217, with effective dates of 10/15/2018-12/31/2018 and 01/01/2019-12/31/2019. The description of the business is "Nursery/Daycare."

Clearly, the Hippopotamus School is a business operating within a Dwelling Unit of a Single Family Residence at Rancho Gabriela under the general prohibition of Article 4, Section 4.12 of the Declaration. Still, the School may be an exempted business if it can meet all criteria set forth in (i) through (vi) of Article 4, Section 4.12.

2. A Business Is Exempted from the General Prohibition If It Meets All of the Criteria Set Forth in (i) Through (vi) of Section 4.12.

Article 4, Section 4.12 of the Declaration provides an exception to the general prohibition of businesses. A "business activity within a Dwelling Unit" is allowed "so long as" the business activity meets the following criteria:

(i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from the outside the Dwelling Unit;

(ii) the business activity conforms to all zoning ordinances and requirements for the property;

(iii) the business activity does not involve person coming on to the Lot or Parcel or the door-to-door solicitation of Owners or other Residents in the Property;

(iv) the business activity does not involve the delivery of products or other materials to the Lot or Parcel (other than once a day document or package delivery services and once a day document or package pickup services, such as Federal Express);

(v) the business activity does not violate any provisions of this Declaration, the Design Review Guidelines or the Association Rules; and

(vi) the business activity is consistent with the residential character of the Property and does not constitute a nuisance or a hazardous or offensive us or threaten the security or safety of other Owners, Occupants and Residents in the Property, as may be determined from time to time in the sole discretion of the Board.

As written, it appears that a business activity must satisfy all the criteria (i) through (vi) to be exempt from the general prohibition of businesses. The following reviews the evidence pertaining to these criteria.

i. **Is the business activity apparent or detectable by sight, sound or smell outside the Dwelling under (i)?** Requirement (i) is a simple and straight-forward. The evidence under this criterion weighs heavily against the School. By its very nature, the School is undeniably apparent and detectable, thus failing to meet requirement (i).

- The School schedule follows Dysart District Annual Calendar. (Handbook at 4).

- "Normal hours of operation [of the School] are Monday through Friday from 7:30 a.m. to 5:30 p.m." (Handbook at 3).

- According to Ms. Beguin's hearing testimony, the School currently has enrolled 12 students. She stated that the City permits only 4 children at a time. Each child has a 3 hour session. The School Handbook at 3 also discusses "Drop-Off/Pick-Up" procedures for children.

- Using Ms. Beguin's numbers, twelve vehicles drop off children, and twelve vehicles pick up children. A combined 24 drop-offs/ pickups occur throughout the day at the School. The vehicles are parked in the neighborhood, and the adult takes the child to or inside of the Beguin home. Obviously, the business activity is apparent or detectable by sight or sound by the drop-off and pickup of children throughout the day and the coming, parking and going of motor vehicles.

- In addition to the regular drop-offs and pickups, the "Open Door Policy" of the School allows parents to call or drop in to see their children at any time. (Handbook at 3).

- Further, the School also has parent-teacher meetings after scheduled hours. (Handbook at 3).

- The School Handbook states: "Outside play time will take place no less than 3 times a week as the weather permits." (Handbook at 5-6). Ms. Beguin stated at the hearing that there is no current outside play time.

- Neighbor Michelle Verpoten reported the existence of the School to the Association on the basis of drop-offs and pickups of children. She also claimed that noise and traffic made her aware of the operation of a daycare at the Beguin residence.

- Not counting the Verpotens, two of the speakers at the hearing complained of vehicles coming and going at the School, including one having to wait due to drop-off of children for the School. Another speaker observed vehicles coming and going, but does not believe it causes additional traffic. Other speakers do not view traffic as a problem.

- Not only is the School detectable and apparent in the neighborhood, the School has a presence on social media. The School has a business page on Facebook (https://www.facebook.com/pg/hippopotamus.school). The Facebook page provides a variety of information for the School, including services statement, tuition rates and deposit, Montessori philosophy, qualifications of Ms. Beguin, business reviews, community posting, and contact messaging to Ms. Beguin for those interested in the School.

ii. **Does the School conform to all zoning ordinances and requirements under (ii)?** Ultimately, the City, County and State will determine if the School satisfies all zoning ordinances and requirements for the property. The Beguins currently have a Business License from the City. Ms. Beguin testified that she is seeking a license from the State of Arizona, but it is unclear if this is a requirement for the operation of the School. At present, the Board has no information to indicate that the Beguins' business activity fails requirement (ii).

iii. **Does the School involve people coming on to the Lot under (iii)?** Like criterion (i), criterion (iii) is a simple and straightforward requirement that "the business activity does not involve persons coming on to the Lot." Clearly, the Beguins do not meet this requirement. A minimum of 24 people come on to the Lot every day for the School.

iv. **Does the business of the School require the delivery of products or other materials to the residence under (iv)?** The Beguins state that the School does not require the delivery of products to the home. However, the School Handbook states: "Meals provided by Hippopotamus School," including snacks. (Handbook at 5). The Board has no information that reconciles these points.

v. **Does the operation of the School result in violation of any CC&R provisions under (v)?** Apart from Article 4, Section 4.12 itself, the only other restriction which may be implicated is Article 4, Section 4.26 of the Declaration. If employees of the business were parking vehicles in the streets longer than a three day duration, a violation would exist. Acccording to Ms. Beguin's testimony, her 22 year-old daughter assists her and she lives at the residence. At present, the Board has no information showing a parking violation. Increased temporary street parking is apparent, however.

vi. **Does the operation of the School result in a "nuisance" to other Owners under (vi)?** Although a nuisance was alleged by Michelle Verpoten, she did not testify at the hearing. At present, the Board has no evidence sufficient to show that the operation of the Hippopotamus School constitutes a "nuisance."

C. Board's Decision.

The attendees of the March 5 hearing were largely supportive of the Hippopotamus School. Ms. Beguin is a certified Montessori teacher. Ms. Beguin wants the best education for her students and works hard for the students under her care. The Board has heard many praises from parents of students. Hippopotamus School has a waiting list through 2021, which speaks of the School's reputation.

Article 4, Section 4.12 of the Declaration, however, does not judge the quality of the businesses permitted within Rancho Gabriela. Section 4.12 is a general prohibition on businesses operating in Single Family Residences. Section 4.12 permits businesses (regardless of their merit or the good they do) only if they meet all the requirements (i)-(vi) of that Section. The requirements are largely straightforward and fact-driven. They are litmus tests for exempted businesses. If and only if all the requirements are met, can the business be exempted from the general prohibition. On its face, Section 4.12 allows businesses such as home offices, where the businesses are hidden from view, with no detectable existence outside of the Dwelling Unit.

As set forth above, the Hippopotamus School cannot meet all the requirements, most notably criterion (i) and (iii) as set forth above. The Beguins and many of the attendees have urged the Board to approve the Hippotamus School anyway, by changing the rules, construing Section 4.12 in a way to permit the School's continued operation, or other means. In their March 13 submittal, the Beguins highlighted many sections of the Declaration addressing the Board's discretion.

The Board does have important discretionary functions. However, the Board's discretion is not unbridled. In Tierra Ranchos Homeowners Association v. Kitchukov,

216 Ariz. 195, 165 P.3d 17 (App. 2007), the Arizona Court of Appeals set forth the judicial standard for judging a community association's discretionary decisions. In doing so, the court adopted the approach of the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.13 (2000) (the "Restatement").

> Under the Restatement approach, a member challenging an action of the association bears the burden of proving that the association breached its duty. In addition, when the action is one within the association's discretion, the member bears "the additional burden of proving that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common-interest community."

216 Ariz. at 201, 165 P.3d at 179 (citations omitted). Thus, "unlike jurisdictions requiring the association to prove the reasonableness of its actions, the Restatement approach requires the member challenging the association to establish that its actions were unreasonable." Id. at 201-02, 165 P.3d at 179-80. The Tierra Ranchos court unambiguously endorsed this test: "We find the Restatement approach to be well-reasoned and see no reason to adopt a different standard by which to review the discretionary decisions of a community association." Id. at 202, 165 P.3d at 180. The court emphasized that "[t]he purpose of imposing these burdens on the member is to protect 'the collective decision making processes of common-interest communities from second-guessing by the judiciary and to protect the community from the expenses of too-ready resort to litigation by disgruntled community members, while at the same time protecting individual members from improper management and imposition by those in control of the association.'" Id. at 201, 165 P.3d at 179.

The extent or breadth of the Board's discretion depends upon the particular job or task being carried out, whether architectural review, pet nuisances, restrictive covenant enforcement, budgeting, common area maintenance, and so forth. In Tierra Ranchos, for example, the court found that the association had fairly broad discretion on architectural matters if it considered a number of aesthetic factors. Id. at 202-03, 165 P.3d at 180-81. However, an association's discretion is far more limited on matters of restrictive covenants. Unlike a Board-adopted rule, restrictive covenants are specifically enumerated in the Declaration, recorded in the County, and binding on all Lots with the development in perpetuity. In fact, Arizona courts have found that associations have a duty to enforce recorded restrictive covenants.

Like the Members, the Directors are bound to the restrictive covenants, including Section 4.12. In exercising its discretionary function in this matter, the Board is limited to evaluating the evidence to determine (1) if the Hippopotamus School is a business, and (2) if the Hippopotamus School is an exempted business that meets all the requirements (i)-(vi) of Section 4.12. The Board has no discretion to disregard Section

4.12, adopt rules contrary to Section 4.12, or twist its plain language to get a desired result (even if the owners and the Board want that result).

Given the language of Article 4, Section 4.12 of the Declaration, the only method of allowing businesses like Hippopotamus School in Rancho Gabriela is the recorded amendment of Section 4.12. Article 15, Section 15.2 of the Declaration (as amended by Instrument 2002-1033628) sets forth the rigorous amendment process. At least seventy-five percent (75%) of the Membership must adopt any amendment to the Declaration. The Board has no authority or discretion to adopt amendments of the Declaration on its own and cannot adopt any rules or regulations contrary to the terms of the Declaration. Only the Membership has the authority to amend the Declaration.

Therefore, by unanimous agreement of all of the Directors (except for Mr. Verpoten who recused himself from this matter), the Board has determined that the operation of the Hippopotamus School at the Beguin residence is (1) a prohibited business or trade under Article 4, Section 4.12 of the Declaration of Covenants, Conditions and Restrictions and (2) the School is not an exempted business activity under requirements (i)-(vi) of that Section. The Beguins must cease operating the School at their residence.