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SENT VIA EMAIL ONLY

(davecr102@yahoo.com)

Board of Directors
Circle Tree Owners Association
461 W. Holmes Ave
Mesa, AZ 85210

RE: Convicted Felon Restriction and HUD 4/4/16 Guidance

Dear Members of the Board:

We have been asked to provide guidance with regard to the enforceability of the Association's restriction prohibiting Convicted Felons from renting, leasing, or occupying a Unit for any period of time – in light of the enclosed April 4, 2016 guidance by HUD's Office of General Counsel. As described in detail below, we conclude that HUD's recent guidance does not automatically invalidate the Association's restriction, because the prohibition of Convicted Felons exists for the legitimate, nondiscriminatory reason to protect the residents and their property. As such, although the restriction may still be challenged for an alleged disparate impact on protected classes of individuals under Fair Housing laws, the Association's restriction remains valid and enforceable.

The First Amendment to the *Declaration of Horizontal Property Regime and Declaration of Covenants, Conditions and Restriction for Circle Tree Condominiums*, recorded in the Official Records of the Maricopa County Recorder's Office at Instrument Number 2015-0087528, was effective on February 9, 2015. It added a new restriction that, among other things, prohibits Convicted Felons from renting, leasing, or occupying a Unit for any period of time. "Convicted Felon" is defined as individuals convicted of a felony within seven (7) years of potential commencement of occupancy.

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On April 4, 2016, the U.S. Department of Housing and Urban Development (“HUD”) issued the enclosed guidance from its Office of General Counsel stating that a “housing provider violates the Fair Housing Act when the provider’s policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate”. HUD states that such discriminatory effects and disparate treatment may occur with the refusal to rent or renew a lease based on an individual’s criminal history. Discriminatory effects are assessed under a three-step burden-shifting standard. This standard requires a fact-specific analysis, meaning that discriminatory effect and disparate impact is evaluated on a case-by-case basis.

Step One: the accuser must prove that a criminal history policy has a discriminatory effect.

- ✓ Evidence proving the practice actually or predictable results in disparate impact
- ✓ Facts or statistics showing that a certain race, color, religion, sex, disability, familial status, or national origin is disproportionately impacted by the prohibition of Convicted Felons

Step Two: the accused must prove that the criminal history policy is justified.

- ✓ Evidence proving the practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest
- ✓ Facts or statistics showing that prohibiting Convicted Felons actually assists in protecting resident safety or property

Step Three: the accuser must prove that such interest could be served by a different practice that has a less discriminatory effect.

- ✓ Evidence proving that considering information other than criminal history is an effective alternative in protecting resident safety and property

The standard requires that an individual accusing the Association of discrimination based on its Convicted Felon restriction must first show, for example, that the prohibition of Convicted Felons prohibits more minorities than non-minorities (race is the protected class for purposes of this example) from occupying the Association.

The Association would then have the burden to prove that its Convicted Felon restriction does, in fact, protect residents and their property and is not otherwise a pretext for excluding protected classes. For example, the Association could offer statistics on recidivism of convicted felons within seven years of conviction and also data from its community or others showing a reduction in crime after exclusions of Convicted Felons. We are happy to conduct this research for the Association now, in preparation for defense

of possible accusations in the future, but it is important to note that this type of data is likely to fluctuate year-to-year and is constantly changing. In the event we obtain these facts now, it will be necessary to update the information regularly – or at least at the relevant time of a discrimination allegation.

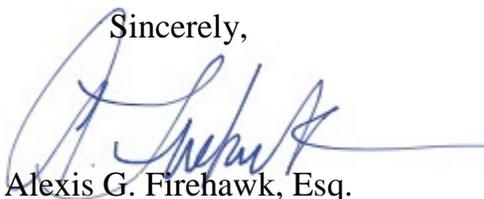
Also with regard to Step Two, the Association’s restriction is not a “blanket prohibition” as described in HUD’s guidance. Instead, the restriction is a more tailored policy with specific criteria: (1) conviction, (2) felony, meaning punishable by imprisonment, and (3) occurrence within the last seven years.

Finally, the accuser must identify an alternative policy that would otherwise protect resident safety and property. HUD acknowledges that such alternative could include making an individualized assessment of “relevant mitigating information beyond that contained in an individual’s criminal record”. For example, the Association could also assess the circumstances surrounding the criminal conduct, the person’s age at the time, relevant tenant history, and rehabilitation efforts.

Ultimately, HUD’s recent guidance does not automatically invalidate the Association’s restriction and it remains valid and enforceable. The prohibition of Convicted Felons exists for the legitimate, nondiscriminatory reason to protect the residents and their property. The determination of unjustified discriminatory effect and disparate impact requires a fact-specific analysis evaluated case-by-case. While we can never predict the outcome of a Fair Housing complaint or investigation, based on the analysis of the relevant three-step standard above, we believe that the Association can successfully uphold its Convicted Felon restriction in the event of a discrimination allegation.

I hope this information is helpful. Please contact us with any questions. As always, we are happy to meet with the Board to further discuss.

Sincerely,

A handwritten signature in blue ink, appearing to read "A. Firehawk", with a long horizontal flourish extending to the right.

Alexis G. Firehawk, Esq.

for

CARPENTER, HAZLEWOOD, DELGADO & BOLEN, PLC