

November 6, 2020

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Canyon View Homeowners Association, Inc.
Attn: Jennifer Richardson, President
C/O Western Slope HOA Management, LLC
P.O. Box 153
Mack, CO 81525-0153

Of Counsel

Shelly S. Dackonish

Re: Canyon View Subdivision (“Canyon View”)

Enforcement of Building Restrictions by Canyon
View Homeowners Association, Inc. (the “Association”)

Associates

Jon T. Burtard
Samuel H. Fresher
Kate E. Jaquith
Charlotte L. McEwen
Lauren F. O’Dell*
Bruce C. Walters

Dear Board of Directors:

You asked that we advise you regarding the Association’s rules and procedures which govern the Canyon View Architectural Control Committee’s (“ACC”) approval or disapproval of new buildings or improvements within Canyon View. Our review also included an analysis of the building restrictions which encumber Canyon View and the Association’s ability to enforce those restrictions. The conclusions reached in this letter are based on the Association’s governing documents that you provided to us, including the Amended and Restated Declaration of Covenants, Conditions and Restrictions for Canyon View Subdivision adopted August 31, 2009 (the “Declaration” or “Decl.”), in addition to applicable Colorado law.

Retired Partners

William H.T. Frey
Richard H. Krohn
Laird T. Milburn

D. J. Dufford
(1919-1998)

William G. Waldeck
(1923-2009)

APPLICABLE LAW

According to the Declaration, the Association elected to be governed by the Colorado Common Interest Ownership Act, C.R.S. § 38-33.3-101, *et seq.* (“CCIOA”). CCIOA governs all “common interest communities” (“CICs”) – Canyon View falls within this definition – and is intended to create “a clear, comprehensive, and uniform framework for the creation and operation of [CICs].” C.R.S. § 38-33.3-102(1)(a). Under CCIOA, homeowner associations are charged with managing CICs and are subject to the terms of CCIOA as well as the association’s declaration, bylaws, and any additional governing rules. *See* C.R.S. § 38-33.3-301.

Because of the overlap between CCIOA and a community’s governing documents, it is critical to be mindful of any discrepancies between the two when interpreting and enforcing Canyon View’s rules and regulations. For instance, CCIOA specifically requires that a community’s declaration sets forth standards and procedures concerning the approval or denial of an owner’s application for architectural construction or improvements made on the owner’s lot. C.R.S. § 38-33.3-302(3)(b). In light of this requirement, most declarations provide for the creation of separate architectural

+ Also admitted in Oregon
* Also admitted in Utah
~ Also admitted in Wisconsin
↔ Also admitted in Wyoming

committees tasked with reviewing owner applications for construction or improvements. Under CCIOA, an architectural committee's approval or refusal to approve must be reasonable, must be made in good faith, and must not be arbitrary or capricious. *Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners*, 155 P.3d 621 (Colo. App. 2007). And, where an association seeks to enforce any building restrictions contained in a declaration against a noncomplying owner, CCIOA mandates that any legal action brought for this purpose must be commenced within one (1) year from the date the violation became known. C.R.S. § 38-33.3-123(2).

As we discussed, this firm's review of CCIOA and Canyon View's governing documents is limited to the role played by the Association and the Association's architectural control committee and how Canyon View's building restrictions are enforced against owners. We did not identify any contradictions or discrepancies as between CCIOA and the Association's governing documents which might require action by the Board of Directors. This is not to suggest that there are no discrepancies between Canyon View's governing documents and CCIOA, only that the Association's current procedures for architectural review and for enforcement of building restrictions in Canyon View are not inharmonious with applicable provisions of CCIOA.

CANYON VIEW GOVERNING DOCUMENTS

Canyon View's Declaration recites the restrictions and covenants of Canyon View Subdivision, which are deemed "covenants appurtenant" and therefore bind all owners within the Subdivision. (*See* Declaration, Art. III, § 3.2). Consequently, when an individual purchases a home or vacant lot within Canyon View, they take that property subject to the Declaration's covenants. These covenants necessarily include what rights each Canyon View owner enjoys with respect to his/her lot. The Declaration provides for the creation of the Association and tasks the Association, through its Board of Directors (the "Board"), with enforcing the restrictions set forth in the Declaration. (Declaration, Art. I, § 2.5). The Association, in turn, is governed by the Restated Bylaws of Canyon View Estates Homeowners Association, Inc. (Reception No. 2023547) (the "Bylaws"). According to the Bylaws, the Board is responsible for conducting the business of the Association. (*See* Bylaws, Art. III).

Building Restrictions. Article IV, Section 4.2 of the Declaration sets forth the building restrictions in Canyon View. The Article IV building restrictions establish what owners may or may not do with respect to any construction or improvement activities on lots within Canyon View. The Declaration also dictates that the ACC is the Association's governing body for reviewing any plans to construct or improve an existing structure within Canyon View and for ensuring compliance with the Declaration's Article IV building restrictions. (*See, e.g.*, Art. IV, § 4.2, subparts (A) through (N)). Though the ACC is not charged with actively enforcing building restrictions against owners – this responsibility belongs to the Board of Directors – when an owner submits an application for construction to the ACC, the ACC has the obligation to ensure that the proposed construction does not violate the Declaration's building restriction covenants.¹ For instance, subpart (N) of Section 4.2 mandates that permitted outbuildings must be constructed using the same materials/finishes used on the owner's primary structure. On review of an owner application to construct an outbuilding on the owner's lot, the ACC must confirm that the owner follows subpart (N) of Section 4.2.

¹ "The Architectural Control Committee shall have authority to enforce or administer restrictive covenants to the construction of other modifications or improvements to homes already constructed upon lots within Canyon View Estates." (Bylaws, Art. IV, subpart (1)).

Finally, Section 4.2 generally prohibits an owner from changing or modifying any exterior wall, roof, deck, or patio without first obtaining approval from the ACC. (Declaration, Art. IV, § 4.2(M)). Thus, it is incumbent on the ACC to have a comprehensive understanding of the building restrictions set forth in Article IV of the Declaration if and when a lot owner decides to modify, change, or otherwise improve their lot or any preexisting structure on their lot.

Architectural Control Committee. All new construction within Canyon View is subject to Article IV of the Declaration. According to Article IV, “[a]ll construction within the Subdivision shall be new construction or replacement construction and shall be subject to ACC approval.” (Declaration, Art. IV, § 4.2(A)). Under the Bylaws, the ACC shall have the authority to enforce or administer restrictive covenants to the *construction* of other modifications or improvements to homes already constructed [within Canyon View].” (Bylaws, Art. IV, subpart 1). The ACC’s membership consists of three (3) to five (5) persons appointed by the Board. (Declaration, Art. V, § 5.2).

The Declaration and Bylaws each require that, before any owner is entitled to construct, improve, modify, or erect on any lot in Canyon View, the owner must first submit “plans and specifications” to the ACC for review. (See Decl., Art. V, § 5.1; see also Bylaws, Art. IV, subpart 2). Section 5.3 of Article V in the Declaration outlines the submission materials (“plans and specifications”) that must be provided by owners to the ACC. The ACC may also require that a submitting lot owner provide any additional details which are necessary for the ACC to understand any feature of an improvement project. (Decl., Art. V, § 5.3). Finally, as per the Bylaws and the Declaration, the ACC is able to develop its own “reasonable” rules and procedures to assist with its review of lot owner submissions, provided such rules are not made “arbitrarily or capriciously”. (Bylaws, Art. IV, subpart 3; Decl. Art. V, § 5.5). What is “arbitrary” or “capricious” is a fact-intensive inquiry; a potential issue might arise where the ACC creates a new policy exempting one or several of the Declaration’s building restrictions and is unable or unwilling to explain why the exemption(s) are a “reasonable” exercise of the ACC’s rulemaking powers.

Once a lot owner has submitted “plans and specifications” the ACC is tasked with providing its *written* approval or disapproval of an owner’s application within thirty (30) days after sufficient “plans and specifications” have been provided to the ACC. (Decl., Art. V, § 5.4). If the ACC fails to provide its decision, in writing, within 30 days of receipt of the owner’s application, approval will be presumed despite the presence of any potential violations of the Declaration. (*Id.*) Approval or disapproval by the ACC shall be established by majority vote of the members of the ACC and the ACC’s decision is binding on the owners. (Decl., Art. V, §§ 5.4, 5.5).

Canyon View ACC Discretion. Under the Declaration, the ACC must “use reason and good faith” in reviewing an owner’s application and applying the Declaration’s criteria. (Decl., Art. V, § 5.6). Notwithstanding the Declaration’s building restrictions, the ACC has discretion to “determine and base its approval or rejection upon the fact of whether said proposed Improvements are *reasonably compatible* with other Improvements erected and planned in the Property.” (Decl., Art. V, § 5.7) (emphasis added). Thus, in a situation where the ACC deviates from the Declaration’s covenants on approval/disapproval of an owner application, and a disgruntled owner disputes that, so long as the ACC decision-making was “reasonable” and not “arbitrary” or “capricious”, it is likely to be upheld in the event of litigation. Under CCIOA, the situation would be substantially similar.

Enforcement. Article X of the Declaration states the enforcement rights held by the Association and Canyon View owners. Per Article X, the Association and any owner each possess the equal right to enforce by legal proceeding all restrictions, covenants, and other rules contained in the Declaration or any of the Association's governing documents. Section 10.2 of Article X provides that an owner shall remove, at his or her own expense, any building, improvement, or landscaping that is constructed or maintained in violation of the Declaration.

The Association has absolute discretion to enforce the Declaration's covenants and restrictions. Should the Association or ACC fail or decide not to enforce any of the Declaration's covenants or restrictions, the failure to enforce shall not be deemed a waiver of the right to do so in the future. (Decl., Art. X, § 10.1).

RECOMMENDATIONS

Review of Non-Complying Projects. If the ACC is confronted with an owner application for new construction or improvement which is facially non-compliant with the Declaration, we encourage the ACC to notify the owner-applicant of the non-compliance within the 30-day period set aside for ACC review and to permit the owner an opportunity to cure the non-compliance if feasible. Furthermore, to better understand the owner-applicant's position, the ACC may request additional "plans and specifications" which are "necessary to explain any feature or component of the Improvements." (Decl., Art. V, § 5.3). If additional "plans and specifications" would not cure the non-compliance, and the ACC reasonably determines that the application should therefore be denied, the ACC's written decision should fully explain the basis for its disapproval by providing citation to the relevant building restriction(s) within the Declaration or any of the Association's other governing documents. Providing a clear basis for the ACC's decision for approval or disapproval will better protect the ACC if and when the ACC's decision is later called into question by Canyon View owners. And, in the event that the ACC chooses not to enforce a building restriction in acting on an owner application, the ACC's written decision should explain the basis for the variance or exemption and that basis should be reasonable under the circumstances.

Guidance to Homeowners & ACC. As stated above, the ACC may develop its own rules to better perform its duties to review applications and enforce the building restrictions. As written, the Declaration is fairly specific with respect to the type of construction and improvements which are permissible in Canyon View. Based on my conversations with Jennifer Richardson, Association President, it seems the Board is not interested in revising the current ACC procedures as stated in the Declaration, and we agree with the Board that such action is unnecessary. Modifying the Declaration is often a cumbersome process given that it requires a requisite voting majority of owners to approve any amendments to the covenants.² Rather, the ACC should consider working with the established rules and considering enacting new policies which summarize the ACC review process in a manner that is easily understood by the ACC and Canyon View owners.

I understand that the Association has already created forms which owners are asked to fill out and provide to the ACC prior to proceeding with any new construction or improvements. One option for the Board to consider would be to thoroughly review the current ACC forms and confirm that the documents comply with the Declaration and that they adequately address each of the steps an owner must take in the

² The Declaration requires the vote or agreement of Owners of Lots to which at least sixty-seven (67%) of the votes in the Association are allocated. (Decl., Art. XI, § 11.2).

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ACC review process. Ideally, the forms should include a recitation of all the “plans and specifications” an owner must submit, and the ACC must review, prior to the ACC acting on the application.

CONCLUSION

Our hope is that this letter may serve as a resource for the Board and the ACC to use when confronted with situations involving the ACC’s review of an owner application for new construction or improvement within Canyon View. Of course, these matters can be complicated and involve careful review of CCIOA as well as the legal documents that govern communities. If you have any questions or concerns regarding the substance of this letter, please do not hesitate to contact me. Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Bruce C. Walters', with a long horizontal flourish extending to the right.

Bruce C. Walters