



HindmanSanchez

June 3, 2009

Via Electronic and U.S. Mail

Board of Directors
Ponderosa Hills Civic Association, Inc
c/o Board of Directors
P.O. Box 2127
Parker, CO 80134

Denver Office
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**CONFIDENTIAL COMMUNICATION
ATTORNEY CLIENT PRIVILEGED**

*Re: Ponderosa Hills Civic Association, Inc./Enforcement of Protective Covenants
Our File No. 4000.434*

Dear Members of the Board:

HindmanSanchez P.C. has been retained to provide an opinion regarding the obligation of the Ponderosa Hills Civic Association (the "Association") to enforce the Protective Covenants of Ponderosa Hills Filing No. 1 & 2 (the "Community"). This letter is in response to that inquiry.

QUESTIONS and RESPONSES

What is the obligation of the Association in regards to the enforcement of the Protective Covenants of Ponderosa Hills Filing No. 1 & 2?

The Association has no obligation to enforce the Protective Covenants. The Association appears to have been formed for the purpose of providing community support and education to its members, but does not appear to have an affirmative duty to enforce the covenants¹.

RECOMMENDATION

If the Association desires to assume a roll in the enforcement of the Protective Covenants, the Association should amend its Bylaws to permit the Association, on behalf of its members, to enforce the Protective Covenants.

FACTS

The Ponderosa Hills community was formed upon the recordation of those certain Protective Covenants of Ponderosa Hills Filing No. 1 & 2, recorded March 19, 1962, in Book 143, at Page 11, of the Douglas County Records (the "Protective Covenants"). The Protective Covenants created an Architectural Control Committee of three specific named individuals. Those individuals were authorized to review and approve submittals for the construction of all improvements built within the Community. On February 11, 1965, the Ponderosa Hills Civic Association, Inc. was created by the filing of Articles of Incorporation with the Colorado Secretary of State. The Association is a voluntary association and owns no property, so is not classified as a Common Interest Community pursuant to the Colorado Common Interest Ownership Act. The Association currently does not enforce any of the protective covenants.

¹ The Articles of Incorporation available from the Colorado Secretary of State seem to be missing page 1, Articles I-III. These Articles typically establish the name of the entity; duration of the entity, and powers of the entity.

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DISCUSSION

As the existence of the Association was not contemplated when the Protective Covenants were recorded, the only authority the Association has is that specific authority granted in the Articles of Incorporation and Bylaws. The Protective Covenants have two main enforcement mechanisms; the first being the Architectural Control Committee. Article 3, states: "No building shall be erected, placed or altered on any residential lot until the constructions plans and specifications and a plan showing the location of the structure have been approved by the Architectural Committee." This provision specifically grants unto the ACC the authority to review and approve applications for the construction of improvements. The Protective Covenants also establish a mechanism for the appointment of new members to the ACC. Unless members of the ACC are appointed in the manner proscribed in the Protective Covenants, a court may not recognize the authority of the ACC. The Association does not have the specific right to appoint members to the ACC but, rather, the ACC appoints its own members.

The second enforcement mechanism is vested in each owner. Each owner may bring an action to enforce the Protective Covenants. The enforcement right to the Protective Covenants is defined in Article 16, fourth subparagraph of the Protective Covenants which states, "Enforcement shall be by proceeding at law or in equity against any person or persons violating or attempting to violate the aforesaid provisions, restrictions and covenants..." As each owner in the Community is a beneficiary of the Protective Covenants, the law permits them to enforce the Protective Covenants in their on name. As mentioned above, since the Association was created after the Protective Covenants, the Association has no specific right to enforce the provisions of the Protective Covenants.

Since the Association is made up exclusively of members of the Community, the Association could be vested with the power to enforce the Protective Covenants, but does not currently have that authority. The Civic Association also only has the powers specifically granted to it by the Articles of Incorporation and Bylaws. Upon review of these documents, it does not appear that the Association has this authority. The Articles of Incorporation give the Association the authority to disseminate information, provide for cooperation with other Associations, and provide for education of its members and other general powers. These general powers should be further defined in the Bylaws. The Bylaws, however, do not give the Association the authority to enforce the Protective Covenants on behalf of its members. As permitted by the Colorado Revised Non-Profit Corporation Act, the Association has the authority to sue or be sued on behalf of its members. If this is a power the Association desires, it should amend its bylaws to permit the enforcement of the Protective Covenants. However, the Association does not have the authority to adopt any rules that would be binding on all owners beyond the provision of the Protective Covenants.

CONCLUSION: The Association is a voluntary association. The Association was formed after the creation of the Community. Questions have been raised as to the ability of the Association to enforce the Protective Covenants.~Since the Association is not a Common Interest Community, the Association may not make rules regarding the interpretation of the Protective Covenants. The Association may only rely on the written Protective Covenants. While each owner is vested with a right to enforce the Protective Covenants, the Association does not appear to have the authority to enforce the covenants on behalf of its members.

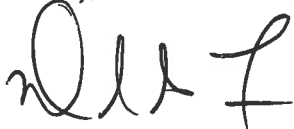
Our recommendations and opinions are based on the facts stated or assumed and known to us as of the date of this letter, but are not a guarantee of results or a specific outcome. The documents relied upon in preparation of this letter are set forth on Schedule A.

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We hope this letter satisfactorily addresses the question presented to us. Should you have any further questions or comments or desire further clarification, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read 'DAF', written in a cursive style.

David A. Firmin, Esq.
HindmanSanchez P.C.

HindmanSanchez

SCHEDULE A

Documents Reviewed:

1. Protective Covenants of Ponderosa Hills Filing No. 1 &2 recorded on March 29, 1962, at Book 143, Page 11 of the Douglas County Records.
2. Bylaws of the Ponderosa Hills Civic Association, Inc.
3. Articles of Incorporation for The Ponderosa Hills Civic Association, Inc., as filed with the Colorado Secretary of State.

From: David Firmin <DFirmin@hindmansanchez.com>

To: 'ponderosahillsco@aol.com' <ponderosahillsco@aol.com>

Subject: RE: Ponderosa Hills Civic Association/Enforcement of Protective Covenants

Date: Wed, 3 Jun 2009 4:37 pm

<http://mml.lettermark.net/ortenhindman/lhead/HindmanSanchez_Main.map>

Lyle,

Sorry to raise more questions. However, you are in a different type of situation.

1. Each owner is empowered, in any covenant protected community to sue on their own behalf. Therefore, if an owner builds something that violates the Protective Covenants, that owner may sue. They can not act as the ACC and must show that the improvement violated a specific covenant such as "an owner is using a portion of their property as a dumping ground". The complaining owner could sue to have the junk removed.

2. As far as the existence and composition of the ACC, the best guidance we have is a case known as Maldin v. Panella. In a situation almost identical to yours, an community was created in 1962 with a three person ACC. The owners attempted to amended the declaration creating a new ACC but it did not get recorded until one day after the 25th anniversary of the community. A new owner came in and sought approval for an improvement. The new ACC denied the request. The court stated that since the amended was not completed in time, it was the old ACC that controlled. In you case, unless the Association was nominated by the named ACC members, a court could still hold that they are the appropriate parties to be making ACC determinations. If the existing board is making ACC decisions, there should not be any liability for this action, however, if challenged, an owner may have a detrimental decision set aside.

To make sure I responded to all of your questions, I answered the rest of the questions in the text below.

David Firmin<http://mml.lettermark.net/ortenhindman/card/MPHF_11.map>
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<<http://www.lettermark.net/emailhelp.asp?id=Hindman%20Sanchez>>

-----Original Message-----

From: ponderosahillsco@aol.com [mailto:ponderosahillsco@aol.com]
Sent: Wednesday, June 03, 2009 4:04 PM
To: Linda C. Engel
Cc: David Firmin
Subject: Re: Ponderosa Hills Civic Association/Enforcement of Protective Covenants

David, can you please clarify a few things for me? I'm unclear as to the implication of an individual homeowner suing to enforce the covenants. In the absence of an ACC, could an individual homeowner claim approval authority of any and all building projects in PH? NO, IN ORDER TO OFFICIALLY ACT AS THE ACC, THEY MUST BE APPOINTED BY EITHER AN ORIGINAL MEMBER OF THE ACC OR ONE OF ITS SUCCESSORS. Could a group of homeowners just assume the authority of the ACC, with or without PHCA participation? NO

What are the implications of the PHCA enforcing the covenants in the past? NONE,

THE ASSOCIATION ACTED ON BEHALF OF ITS MEMBERS, AND WHILE POTENTIALLY NOT SPECIFICALLY AUTHORIZED TO DO SO, THERE IS NO LIABILITY FOR THIS ACT AS IT WAS DONE IN GOOD FAITH AND APPROVED BY THE MEMBERS OF THE ASSOCIATION. Does that make the PHCA liable for those decisions? NO, AGAIN, AS THE ASSOCIATION WAS ACTING IN GOOD FAITH, NO LIABILITY ATTACHES, ADDITIONALLY, YOU WERE ONLY ACTING ON BEHALF OF YOUR MEMBERS, NOT THE COMMUNITY AS A WHOLE. Does it set a precedent that the PHCA is obligated to enforce the covenants (ignoring the issue of needing to amend the bylaws and the covenants)? NO, THE ASSOCIATION IS ONLY ACTING ON BEHALF OF ITS MEMBERS AND NOT NECESSARILY THE ENTIRE COMMUNITY. YOU HAVE NO DUTY TO ENFORCE AND THEREFORE ARE NOT REQUIRED TO DO SO.

If there is no liability and no obligation, should the PHCA even be concerned about the covenants? ONLY TO THE EXTENT THE MEMBERS WANT AN ENTITY TO SHARE IN THE COST OF ENFORCING THE COVENANTS SO INDIVIDUAL OWNERS DON'T NEED ENFORCE ON THEIR OWN BEHALF. If we just say we are not going to enforce the covenants and will rely on Douglas County, are we done with the matter? YES, YOU CAN RELY ON DOUGLAS COUNTY OR INDIVIDUAL OWNERS. This was a point that I discussed with you at length and an important issue for us.

Finally, what would it take to legally abandon the covenants? You mention that each homeowner is protected by the covenants and can sue to enforce them. Does it mean that 100% of the residents would need to legally waive their protection under the covenants? LEGALLY ABANDONING THE COVENANTS CAN BE ESTABLISHED IN A COUPLE OF WAYS. FIRST, EVERYONE IN THE COMMUNITY CAN IGNORE THEM TO THE EXTENT THAT A REASONABLE PERSON ENTERING INTO THE COMMUNITY WOULD BELIEVE THERE ARE NO RESTRICTIONS. IN THIS CASE YOU WOULD BE DEEMED TO ABANDON THE COVENANTS. THIS IS DIFFICULT AS EACH OWNER WOULD NEED TO IGNORE THE COVENANTS. THE SECOND MANNER IN WHICH THIS CAN BE ACCOMPLISHED IS USING THE AMENDMENT PROVISION IN THE DECLARATION. YOUR COVENANTS RUN FOR AN INITIAL PERIOD OF 25 YEARS (3/29/1987). UNLESS AN INSTRUMENT SIGNED BY AT LEAST 50% OF THE OWNERS IS RECORDED PRIOR TO THAT DATE, THE PROTECTIVE COVENANTS AUTOMATICALLY EXTEND FOR 10 YEAR PERIODS. BASED UPON THE ABOVE MALDIN V. PANELLA CASE, THIS MEANS THAT YOU MUST RECORD A REVOCATION OR AMENDMENT PRIOR TO THE 10 YEAR ANNIVERSARIES. AS A RESULT THE NEXT OPPORTUNITY TO AMEND THE COVENANTS IS 3/29/2017.

Thanks

Lyle

-----Original Message-----

From: Linda C. Engel
To: 'PonderosahillsCO@aol.com'
Cc: David Firmin
Sent: Wed, 3 Jun 2009 11:20 am
Subject: Ponderosa Hills Civic Association/Enforcement of Protective Covenants

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Good morning!

I am David Firmin's legal assistant. He asked that I forward the attached opinion letter regarding enforcement of protective covenants by Ponderosa Hills Civic Association. Hard copy of this letter is also being placed in the US Mail. Please let me know if I can be of further assistance.

Linda C. Engel

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