



DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Parkway Golden, Colorado 80401	
<hr/> HIWAN HOMEOWNERS ASSOCIATION, a Colorado nonprofit corporation, Petitioner, v. PATRICK KNOTTS; REBECCA HICKS; J. STEPHEN MERCER; and KARLA MERCER, Respondents.	<div style="text-align: center;">   </div> <hr/> Case No: 08-CV-1662 Division 9 Ctrm: 5F
ORDER	

On April 25, 2008 petitioner Hiwan Homeowners Association filed a petition to obtain court approval of proposed amendments and restatements of the “Hiwan Restrictive Covenants” that currently govern homeowners in the Hiwan residential subdivision, as described therein. The Hiwan subdivision or community consists of 368 homesites located five miles north of downtown Evergreen, Colorado. Its restrictive covenants have been recorded in the county real estate records and are attached to the petition as Exhibit A. The covenants provide that they will expire in the year 2013, unless amended or extended. Since their promulgation on July 30, 1963, they have never been amended or modified. Regrettably, there is no provision in the covenants that provides a mechanism for amending them. Section 23 says that 75% of the lot owners may “release” or terminate any one or all of the covenants, but otherwise there is no provision for simply amending or modifying them.

Accordingly, the homeowners association, which is referenced in section 30 of the covenants (it was originally an unincorporated association, but since October 1987 has been a Colorado nonprofit corporation) filed the petition in this case to obtain court approval of proposed amendments and restatements (Exhibit B to the petition) of the current covenants under the provisions of the Colorado Common Interest Ownership Act, C.R.S. §§ 38-33.3-101 *et seq.*

If the Act applies, it contains a mechanism in Section 38-33.3-217 for seeking court approval of a proposed amendment if, among other applicable conditions, unit owners to which are allocated more than 50% of the number of votes necessary to adopt the proposed amendment have voted in favor of the proposed amendment. Since the restrictive covenants at issue here, as previously stated, have no amendment provision, they must be deemed to require at least 75% pursuant to section 23 -- and perhaps 100% -- homeowner approval to rewrite them. However, if Hiwan is subject to the Act, Section 38-33.3-217 disallows any percentage vote larger than 67% as “contrary to public policy.” The Act requires a district court to grant a petition like the one here after a hearing if all of the preconditions have been fulfilled and no more than 33% of the unit owners have filed written objections to the proposed amendments prior to the hearing.

Nevertheless, the Hiwan Homeowners Association has not been able to obtain even a 67% approval of the proposed amendments, and respondents, who are objecting to them, claimed that at least 41% of the homeowners entitled to vote were in opposition to the proposed amendments at the time of the hearing on the petition, which was June 23, 2008. Indeed, by the end of the hearing when it appeared that some of the earlier approvals had recanted, both sides agreed that even the minimum 50% approval required by Section 38-33.3-217(7)(a)(III) of the Act likely had not been obtained.

Of course, all of this is academic if the Act does not apply. Accordingly, I took the matter under advisement to determine the applicability of the Act. The Act refers to a “Declaration” rather than “Restrictive Covenants,” see C.R.S. § 38-33.3-103(13), but this is not fatal since the definition of “Declaration” means *any* recorded instruments “however denominated” that create a “common interest community.” See *Evergreen Highlands Ass’n v. West*, 73 P.3d 1, 8-9 (Colo. 2003) (court considered, in addition to the recorded covenants, the plat, deeds, and the homeowners association articles of incorporation).

Moreover, even though the Act did not come into existence until July 1, 1992, certain provisions apply to all “common interest communities” created in Colorado before that date, including the “declaration amendment” provision of Section 38-33.3-317, as it existed prior to January 1, 2006. This is true whether or not any organization created prior to July 1, 1992 formally elects to come under all the provisions of the Act pursuant to Section 38-33.3-118 (which Hiwan has not).

The “restrictive covenants” currently governing Hiwan partake of both affirmative and negative covenants, a distinction going back at least to the fifteenth century. See C. BERGER, *LAND OWNERSHIP AND USE* at pp. 421 *et seq.* (1968). If the covenants “run with the land,”¹ then they are “real covenants,” and the common law devised a set of technical guidelines that often seemed baffling and, at times, oppressive.

¹ See Section 23 of the Hiwan Restrictive Covenants: “All the restrictions contained herein shall constitute covenants running with the land as to all of the lands within Hiwan.”

Affirmative covenants require the landowner to perform an affirmative act, such as keeping the homeowner's parcel tidy (*see, e.g.*, Section 18 of the Hiwan Covenants) and to pay mandatory assessments (*See, e.g.*, Section 30). Negative covenants, prohibiting certain conduct on one's land, arrived on the scene much later. *See, e.g., Tulk v. Moxhay*, 2 Ph.774, 41 Eng. Rep. 1143 (Ch. 1848). *See*, as examples of negative covenants in Hiwan, sections 2, 3, 9, 12, 13, 14, 15, and 17 of the Covenants.

Seeking to protect residential neighborhoods from being overrun by the grimier aspects of urban industrial life, nineteenth-century landowners began to subject their holdings to this new form of restraint, wherein landowners would agree not to develop their land for a proscribed use and sometimes not to develop their land at all. The enforceability of such covenants against nonpromising successors to the servient estate eventually became the order of the day.

The use of homeowner associations to own or maintain neighborhoods had its beginnings in two neighborhoods which survive virtually unchanged for more than 150 years. In 1831 Samuel Ruggles drained a crooked little swamp in Manhattan, laid out a square, surrounded it with an eight-foot fence, and installed gates that only neighboring residents could unlock. Title to the park was vested in trustees for the benefit of the owners of the 66 surrounding plots. The area's name: Gramercy Park. *See* URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK at 39 (1964).

Boston's famed Louisburg Square, once a pasture belonging to artist John Singleton Copley, was developed in 1826. Its originators made no provision, however, to maintain the neighborhood park. In 1844, owners of the 28 homesites organized a three-person "Committee of the Proprietors of Louisburg Square," levied an initial assessment not to exceed \$150 per lot, and invested the Committee with responsibility for improving and maintaining the park area.

One of the early privately planned subdivisions appeared in Riverside, Illinois, in 1871. Land there was sold "only to an absolute settler who [would] agree to build immediately or within one year from the time of purchase a home costing at least \$3,000, to be located 30 feet back from the front of the lot line, which 30 feet [was to] be retained as an open court or dooryard."

By the 1910s, with tract development now the fashion, deed restrictions based on the developer's plan were appearing routinely; understandably so, for public controls such as zoning and subdivision approval did not then exist. Generally, unless statutory limitations exist, the parties creating an easement, covenant, or "equitable servitude" have complete initial control over the duration and scope of their agreement. Thus, they may agree that it will be perpetual, or that it will terminate in x years, or when a stated event occurs, or when a specified purpose is accomplished, or, as is often done in residential subdivisions, when a stated percentage of the benefited landowners agree. BERGER, *supra*, at 510. The general law is now well established that a covenant running with the land in a subdivision may be modified upon the consent of a specified percentage of lot owners. *See Brown v. McDavid*, 676 P.2d 714, 718 (Colo. App. 1983).

Since the Hiwan Covenants, again, contain no modification mechanism, the homeowners association hoped to take advantage of the amendment procedures, including access to court, of Colorado's Common Interest Ownership Act. The pivotal question, then, is whether Hiwan is a "Common interest community," as defined in C.R.S. § 38-33.3-103(8). This provision states that a "Common interest community" means "real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration."

Courts have a fundamental responsibility to interpret statutes to effect the General Assembly's intent, giving the words in the statute their plain and ordinary meaning. Courts also accept the intent of the drafters of a uniform act as the General Assembly's intent when it adopts that uniform act. *See Giguere v. SJS Family Enterprises Ltd.*, 155 P.3d 462, 467 (Colo. App. 2006).

In 1991, the General Assembly enacted the Colorado Common Interest Ownership Act based on the Uniform Common Interest Ownership Act ("UCIOA") "to establish a clear, comprehensive, and uniform framework for the creation and operation of common interest communities." *Id.* The Uniform Act's definition of a "common interest community" is virtually word-for-word identical to that contained in Colorado's Act *See* UCIOA § 1-103(7). By the common import of the words, a homeowner (owner of a "unit") at Hiwan is obligated to pay for "maintenance" of "other real estate described in the Restrictive Covenants (the "declaration"), *i.e.* section 1, which refers to "each and every lot shown on the Plat of Hiwan." (The definition of "declaration" in Colorado's Act includes "plats and maps," *see Evergreen Highlands Ass'n v. West, supra*).

The question then becomes whether a Hiwan homeowner is required to pay for “maintenance” of real estate described in the “declaration” *other than his own.*” The answer is yes, even though the “other” real estate in the case of Hiwan is not “common property.” Under section 30 of the Restrictive Covenants, there are mandatory assessments against property owners to be paid to the homeowners association “which has as its function the maintenance of the subdivision.”

As noted in the UCIOA “the definition of a common-interest community used in [UCIOA] is broader than that used (for example) in California . . . because it includes communities with mandatory membership associations empowered to enforce the servitudes *whether or not there is common property*” (emphasis added).

This distinction is also noted in the RESTATEMENT (THIRD) OF THE LAW OF PROPERTY (Servitudes), Ch. 6 (“Common-Interest Communities”), ² which contains the following definition:

A “common-interest community” is a real estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal

- (a) To pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners,
- or**
- (b) To pay dues or assessments to an association that provides services or facilities to the common property **or** to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

(emphasis added).

² The Colorado Supreme Court in *Evergreen Highlands Ass’n v. West, supra*, has expressly relied on this provision of the RESTATEMENT. 73 P.3d at 4.

A comment to this RESTATEMENT provision reads: “Most common-interest communities have both commonly held property and mandatory membership associations, but the existence of either is sufficient to constitute the property bound by the servitude requiring payment to a common-interest community. The distinctive feature of a common-interest community is the obligation that binds the owners of individual lots or units to contribute to the support of common property, or other facilities, or to support the activities of an association. . . .”

Moreover, the following illustration provided by the RESTATEMENT fits Hiwan:

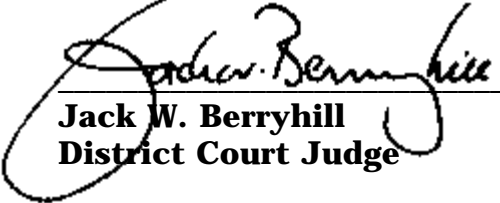
The declaration for Green Acres, a subdivision of 400 lots, imposes restrictions governing setbacks, size and type of permitted structures, and parking, and prohibiting nonresidential uses. The declaration provides for creation of an association of property owners that is charged with the responsibility for enforcing the restrictions, but includes no provision for assessments or other funds to support enforcement activities. A judicial decree is entered declaring that the association has the power to levy assessments against each of the lots in Green Acres for the amounts reasonably necessary to enforce the restrictions. Green Acres is a common-interest community.

I similarly conclude, for all the foregoing reasons, that Hiwan is a “common-interest community” as defined in the Colorado Common Interest Ownership Act. *See generally Evergreen Highlands Ass’n v. West, supra*, 73 P.3d at 9 (holding that the declarations for Evergreen Highlands were sufficient to create a common interest community by implication).

I therefore have jurisdiction to consider the Hiwan Homeowners Association's petition in this case. However, since the parties have agreed that at the present time the minimum percentage approval of the proposed amendments to the Restrictive Covenants has not been met under the provisions of C.R.S. § 38-33.3-217(7)(a), the petition is hereby **DENIED**.

DATED: August 6, 2008

BY THE COURT:


Jack W. Berryhill
District Court Judge