

ATTORNEY-CLIENT PRIVILEGED CONFIDENTIAL COMMUNICATION

April 17, 2020

Via email

Board of Directors
Bannockburn Homeowners Association, Inc.
c/o Jack Shuler, President
shuler61@gmail.com

**Re: Association Member Voting Rights
Our File No.: 2877.0002**

Dear Members of the Board:

Orten Cavanagh & Holmes, LLC has been retained by Bannockburn Homeowners Association, Inc. (“Association”) to review governing documents and render an opinion as to the manner of voting between resident owners and members in good standing. This letter addresses such options.

QUESTIONS AND BRIEF ANSWERS

1. What is the approval required by Owners/Members to amend the Covenants?

In order to amend the Covenants the amendment must be approved by at least 66 2/3% of all “Resident Owners”, regardless of the Owners’ status as “Members in Good Standing”. “Resident Owner” is defined in Article II, Section 4 of the Bannockburn Protective Covenants (“Covenants”).

2. Does failure to pay assessments (dues) sever an owner’s status a member of the Association?

No. Failure to pay assessments constitutes a violation of the Covenants, which may be asserted as a breach of contract claim, but it does not sever the Owner’s status as a Member of the Association.

RECOMMENDATIONS

1. If amendments to the Covenants are being considered, the proposed amendments should be presented to all Resident Owners for voting, not just those who are current in the payment of dues or otherwise “in good standing” with the Association.

2. The Association should consider amending the Covenants to clarify voting procedures and who is entitled to vote on particular matters. For example, the Covenants could be amended to provide as follows: “only Members in Good Standing are entitled to vote.”
3. Without an amendment (as is possible and reviewed above), Owners should not be disenfranchised from voting on amendments to the Covenants simply because they haven’t paid nominal annual dues to the Association – they are still members of the Association with an interest in property in the community. If the failure to pay dues adversely impacts the Association, the Association has other rights and remedies available to it to seek compliance and payment.

FACTS

The protective covenants for Bannockburn Filings 1 through 6 were originally established through a series of instruments initially recorded between the years 1970-1976 in Douglas County, Colorado. The protective covenants have been amended and/or supplemented by numerous instruments of record.

The Association is in the process of drafting and proposing additional amendments to the Covenants in order to, among other things, incorporate various provisions of the Colorado Revised Nonprofit Corporation Act and the Colorado Common Interest Ownership Act (“CCIOA”).

As a general matter, CCIOA does not apply to common interest communities created in Colorado prior to July 1, 1992, with two important exceptions: (1) C.R.S. § 38-33.3-117 contains a list of CCIOA provisions which expressly apply to pre-existing communities, and (2) the community may elect to be governed by CCIOA pursuant to C.R.S. § 38-33.1-118.

The governing documents for the community contain multiple provisions addressing voting by owners and/or members. Article III, Section II of the Covenants provides that “[o]nly Bannockburn Homeowners Association members who are Resident Owners . . . shall be entitled to vote on matters related to [the] covenants.” In addition, Article II, Section 4 of the Association’s Bylaws states “[i]n all affairs of this Corporation, only a Member in Good Standing shall be entitled to vote and each member in Good Standing shall have one (1) vote.”

The Board of Directors has requested clarification regarding who is entitled to vote and what is the vote that’s required to amend the Covenants.

DISCUSSION

A. Voting Requirements to Amend the Covenants

In Colorado, the dictates of plain English are used to interpret restrictive covenants and if the covenant is clear on its face, it will be enforced as written.¹

The Covenants contain a clear and unambiguous amendment provision that is binding on the Owners. Specifically, Article X, Section 4 (entitled “Amendment”) provides:

“The conditions, restrictions, stipulations, agreements and covenants contained herein shall not be waived, abandoned, terminated, or amended except by written consent of sixty-six and two-thirds percent (66 2/3%) of the Resident Owners of the privately owned land included within the boundaries of Bannockburn, as the same may then be shown by the plat on filed in the office of the Clerk and Recorder of Douglas County, Colorado.” (Emphasis added)

In other words, at least 66 2/3% of all Resident Owners must approve the amendments, not just Resident Owners who are “in good standing”. “Resident Owners” is defined in Article II, Section 4 of the Covenants as “[a]ll owners whose principal place of residence is in Bannockburn.”

The Bylaws are intended as a supplement to CCIOA, the Colorado Revised Nonprofit Corporation Act, and the Covenants. Article XI, Section 2 of the Bylaws states in relevant part that “[t]he Bannockburn Protective Covenants are a separate instrument *which must be amended according to the procedures set forth therein.*” Therefore, the Bylaws cannot in any way alter the clear language in Article X, Section 4 of the Covenants.

With that said, certain privileges may still attach to Members in Good Standing that do not apply to other members, as more particularly set forth in the Bylaws. For example, Article VII of the Bylaws states that only Members in Good Standing can vote to elect Board members, and Article V, Section 1 states that the dues may only be changed with the requisite approval of the Members in Good Standing.

B. Failure to Pay Assessments (Dues)

The second question presented to us is whether an owner’s failure to pay assessments (sometimes referred to by the Association as “dues”) severs the owner’s status as a member of the Association.

¹ *Allan v. Reed*, 155 P.3d 443, 445 (Colo. App. 2006). See also, *Houston v. Wilson Mesa Ranch Homeowners Association, Inc.*, 360 P.3d 255, 257 (Colo. App. 2015)(restrictive covenants are construed according to their plain language).

Under Article III, Section 1 of the Covenants, ownership of property within the community is the sole qualification for membership. As such, membership is appurtenant to and runs with title to the land, irrespective of the status of assessments on a property.

An owner's failure to pay assessments constitutes a breach of the covenant to pay assessments set forth in Article III, Section 1 of the Covenants. Violations of restrictive covenants in Colorado common interest communities are consistently treated as both a breach of covenant and/or breach of contract as between the owner and the Association.

Although an Owner's failure to pay assessments constitutes a breach of the Covenants/contract, it does not terminate the owner's membership status. An Owner's membership is only terminated upon conveyance or transfer of the property to a new owner.

CONCLUSION

In summary, we conclude that amendments to the Covenants must be voted on and approved by at least 66 2/3% of all Resident Owners. Furthermore, any provisions in the Bylaws which purport to restrict voting to Members in Good Standing are invalid to the extent they conflict with Article X, Section 4 of the Covenants governing changes to the Covenants.

The 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 are set forth on Schedule A.

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,



Aaron J. Goodlock
ORTEN CAVANAGH & HOLMES, LLC

SCHEDULE A

1. Bannockburn Protective Covenants dated September 18, 2012.
2. Articles of Incorporation of Bannockburn Homeowners Association, Inc, filed with the Colorado Secretary of State on February 4, 1974.
3. Bylaws of Bannockburn Homeowners Association, Inc., dated October, 1998.