

September 20, 2022

Via email

Board of Directors
Cherry Park Owners Association, Inc.
c/o Johnny Castellano
cherrypark.info@yahoo.com

Re: Document Review Report
Our File No.: 3153.0002

Dear Members of the Board:

Orten Cavanagh Holmes & Hunt, LLC has been retained by the Cherry Park Owners Association, Inc. (“Association”) to review and provide a document evaluation report regarding the following: the Declaration of Covenants, Conditions and Restrictions for Cherry Park Subdivision (“Cherry Park Declaration”); the Declaration of Covenants, Conditions and Restrictions for El Vista Subdivision (“El Vista Declaration”); the Articles of Incorporation of Cherry Park Owners Association, Inc. (“Articles”); and the Bylaws of Cherry Park Owners Association, Inc. (“Bylaws”). The Cherry Park Declaration, El Vista Declaration, Articles, and Bylaws are collectively referred to as the “Governing Documents.”

Background

Cherry Park Subdivision and El Vista Subdivisions are planned communities consisting of 321 Lots (“Community”).

The Association was formed as a nonprofit owners association when the Articles of Incorporation were filed with the Colorado Secretary of State on May 30, 1997.

The original Cherry Park Declaration was recorded with the Arapahoe County Clerk and Recorder on November 14, 1977 at Reception No. 1683836 and was amended by the Amendment No. 1 dated March 30, 1978 and Amendment recorded on November 13, 2014 at Reception No. D4107276.

The original El Vista Declaration was recorded with the Arapahoe County Clerk and Recorder on February 18, 1975 at Reception No. 1169191 and was amended by the Amendment recorded on November 13, 2014 at Reception No. D4107277.

We do not have a copy of the original, recorded plats for either subdivision. If you would like for our office to request a title company perform a search for these maps, please let us know.

Approvals Needed for Amendments

1. **Declarations.** The Cherry Park Declaration and El Vista Declaration require 90% of the lot owners to approve an amendment through November 12, 2044 and thereafter amendments may be by 75% of the lot owners.
2. **Articles.** The Articles of Incorporation may be amended by a vote of at least a majority of the members present at any meeting of the members at which a quorum is present.
3. **Bylaws.** The Bylaws may be amended by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors, following notice and opportunity to comment to all Members, at a duly called meeting of the Board.

Discussion

CCIOA Applicability to Cherry Park Owners Association, Inc.

Cherry Park Subdivision and El Vista Subdivision are not considered “common interest communities” under the Colorado Common Interest Ownership Act (“CCIOA”), C.R.S. § 38-33.3-101 – 401. The Association created is considered a voluntary association and the declarations do not impose any assessment obligation on the lot owners. As such, CCIOA does not apply to Cherry Park Owners Association, Inc.; however, the Colorado Revised Nonprofit Corporation Act (“Nonprofit Act”) applies to this Association.

Cherry Park Declaration

1. References to the Declarant and any rights reserved to the Declarant can be eliminated throughout the Declaration. These references are obsolete and no longer applicable and may be confusing to owners.
2. In Article II, Section 1, the existing committee members may appoint a designated agent to act as the Committee. However, in order to change the composition of the Committee (either its members or number) a majority of the lot owners must execute a recorded instrument. There is an assignment and acceptance of assignment that has been provided with the Declaration. The Articles also appoint the Cherry Park Owners Association, Inc. as the designated representative. The Assignment and Articles were presumably approved by a majority of the Committee Members but I cannot tell from the documents themselves whether this occurred. Ideally, this would be reflected in Committee minutes. That being said, the documents effectively changed the composition of the Committee to consist solely of the Association and its Board members. If this is the case, then the instruments should have also been approved by a majority of lot owners.

3. Article II, Section 1 mentions rule making authority, but I recommend clarifying the scope of such authority in the Declaration.

4. Article II, Section 2 addresses the application process. I recommend expanding on this section to clarify the authority of the Committee. The Board may want to consider expanding this section to define what improvements and activities require prior approval, generally. For instance, it may be expanded to include landscaping, any demolition or removal of structures, etc. Trees and grading are addressed in Article III, Section 11 and 12 but could be added to this Article as well to clarify it is subject to same approval standards and procedures.

5. In Article II, Section 2 there is an automatic approval after 30 days unless the requested improvement otherwise violates the covenant. The Association may want to consider removing the automatic approval or requiring owners to send to the Association (via certified letter) an intent to proceed with the improvements and provide the Association an additional 30 days to respond after receipt of such letter.

6. Article II, Section 2, I recommend adding a standard of review. For instance, certain factors the Committee may consider in whether to approve or deny may include harmony of external design, effective location and use of existing improvements and proposed improvements, preservation of aesthetic beauty and conformity with specifications and purposes generally set forth in the Declaration and the Design Guidelines, relation to natural environment; street visibility, etc.

7. Article II, Section 2, I recommend adding authority of the Association to engage consultants (such as engineers or architects) and charge back the costs to the applicant. The Association may also want to consider adding provision related to owner duty to commence and complete work within a certain timeframe from approval. Article III, Section 6 has a one year time frame for construction but this appears intended for new home builds. The one year time frame could be extended to any improvements.

8. Article II, Section 2, I recommend adding an enforcement provision and remedies. This should include sending a notice of noncompliance to the owner and the general authority to fine or exercise other remedies (see note below). The Association may also want to add language that approval of any application (or failure to respond) does not waive the right of the Association to deny approval for other similar applications.

9. Article II, Section 2, I recommend expanding on the last sentence to clarify that the Committee is not liable for any design, quality, structural integrity or soundness of the improvements or compliance with building codes, ordinances, zoning, etc.

10. Article III, Section 1, I recommend removing the restrictions on occupancy to one couple and their lineal descendants. This restriction presents possible familial and marital status discrimination claims under Fair Housing Laws.

11. Article III, Section 1 limits use to residential purposes. As such, I recommend adding language to the Declaration clarifying what is considered a business use. The Association may permit certain business activity such as home business provided certain requirements are met (e.g. no external impact, no signs/advertising etc.).

12. Article III, Section 2, I recommend clarifying this applies to new construction or such renovations as required by City/County Code.

13. Given the date of the Declaration, the Association may want to consider updating Sections 3 and 4 of Article III to reflect current standards and construction in the community. Also, if the 50 foot setback has not been enforced or is no longer desired Section 5 should be updated. See also setbacks in Section 24 of Article III, as amended.

14. Article III, Section 8, I recommend adding that the exterior materials, colors, etc. can be set forth in Design Guidelines.

15. Article III, Section 9, the language here is fine, but please note for antennae and dishes the FCC will control and there are certain reception devices the Association must allow. This does not need to be stated in the Declaration, but rather can be addressed in any design guidelines, rules or policies of the Association.

16. Article III, Section 10, does the Association enforce the three-day rule for parking in front of the residence? Please note for any public streets this covenant would not be enforceable, but the Association can regulate parking on lots if it is desired. The three days seems overly restrictive and a burden to enforce and the Association may want to consider revising or removing in its entirety.

17. Article III, Section 16 addresses garbage. Does the Association provide or desire to provide a trash service for the community? If so, I recommend adding the authority to do so here and charging back the owners.

18. Article III, Section 20, I recommend adding subdivision of lots are subject to Committee approval.

19. Article V, Section 1 addresses enforcement. I recommend expanding this section to expressly provide for additional remedies to enforce covenants as well as rules and regulations as may be adopted by the Committee. In addition to legal action, remedies may include fines,

suspending rights of members, suspending services (if any), exercising self help, and recording notice of violation in the county records.

20. Generally, while there are provisions that touch on maintenance of the lots, the Declaration may also be amended to include a more extensive list of maintenance items and to further delineate maintenance responsibilities of the owners.

21. If the Association desire to regulate any uses of the lot not currently expressed in the Declaration, such as leasing, then this should be added via amendment.

El Vista Declaration

1. References to the Declarant and any rights reserved to the Declarant can be eliminated throughout the Declaration. These references are obsolete and no longer applicable, and may be confusing to owners.

2. Article II, Section 1 – same comments as above for Cherry Park Declaration.

3. Article II, Section 2 – same comments as above for Cherry Park Declaration. Also, there is waiver of liability for approvals of the Committee. This should be added to the covenants.

4. Article III, Sections 1-9 – same comments as above for Cherry Park Declaration.

5. Article III, Section 10, please note that the 3 day limitation is not stated here. I recommend removing the 3 day limitation or otherwise amending these restrictions to be consistent with one another other the situation of the lots require otherwise.

6. Article III, Sections 11-20 – same comments as above for Cherry Park Declaration.

7. Article III, Section 21 addresses livestock, poultry and pets. This restriction is not in the Cherry Park Declaration. If currently enforced, then the Association may want to consider adding a similar restriction to the Cherry Park Declaration. If not enforced, then this should be removed from this declaration and pets regulated by City/County ordinances only.

8. Please note that the setback requirements set forth in Cherry Park Declaration Article III, Section 24 and street lighting in Article VI are not included in this declaration.

9. As to both declarations, if the Association decides to amend I recommend consolidating the declarations. I also recommend adding reference to the Association in the

declaration and include authority to charge for services as well as insurance that it maintains under the Articles of Incorporation (even if only to the voluntary members).

Articles

1. Generally the Articles met statutory requirements and includes indemnification language which is highly recommend.
2. No amendments are needed to comply with current law, but as to purposes and powers, please see comment above about the 30 day review of applications.

Bylaws

1. As with the Declaration and Articles, references to the declarant can be eliminated throughout the Bylaws.
2. In Section 2.1, I recommend clarifying this section to state that directors must be Members (in good standing) in order to serve as a director.
3. The term “Owners” is used in Section 2.3 regarding removal of Directors. I recommend changing to “Members” of the Association.
4. I recommend updating Section 2.7 regarding location of meetings to include option for virtual meetings. I also recommend this for Section 3.4 regarding location of member meetings.
5. I recommend deleting Section 3.1(a) option and using the procedures in option (b) for notice of membership.
6. In Section 3.1, the procedure for becoming a member is binding on future purchasers. Is this enforced? i.e., if a subsequent owner fails to pay dues does the association pursue collection or does it treat the membership as terminated? I recommend updated the Articles and Bylaws to reflect current membership procedure.
7. Section 3.9(b), a proxy terminates after 11 months unless another date is provided on the proxy appointment form per the Nonprofit Act. As such, I recommend revising this provision to 11 months.
8. The Association may consider adding the Bylaws provisions concerning:
 - a. Voting procedures, such as by voice, by show of hands, by consent, by mail, by electronic means, by proxy, by written ballot, or as otherwise determined by the

- Board of Directors prior to the meeting or by a majority of the Members present at a meeting.
- b. Additional qualifications on serving as director. Customary qualifications require that Board members must be current in the payment of assessments and otherwise in good standing (e.g., not in violation of the governing documents), as well as limitations on co-owners serving concurrently on the board (e.g, husband and wife or joint tenants cannot serve on the Board at the same time).
 - c. Virtual Meetings, generally and director proxies. The Board may have greater flexibility in conducting business by amending the Bylaws to (a) expressly allow Board members to participate in meetings by phone *or other electronic means* (e.g., Zoom, Microsoft Teams, etc.), and/or (b) granting their proxy to another director.
 - d. A standard of conduct for Board members and officers. We recommend adding a provision to outline the standard of care set out in the Nonprofit Act.

Amending Governing Documents – Additional Considerations and Recommendations

If the Board determines to seek amendments to the Declaration, Articles or Bylaws based on the recommendations in this letter, the Board should solicit and obtain community support and input. By receiving feedback from Members early in the process, the Board can gauge the level of owner support and will be able to better identify potential areas for amendment which resonate with the membership.

Obtaining Member support and input also allows the Board to educate the membership on the benefits of updating the Governing Documents. That way, when it is time to vote, progress will not be delayed while membership is brought up to speed. Education can be accomplished through informational meetings and regular communication such as community newsletters, emails, etc.

Closing

If you have any questions regarding this report or would like our office to begin drafting any of the documents needed to carry out the recommendations set out above, please contact us.

Sincerely,



Kelly K. McQueeney
ORTEN CAVANAGH HOLMES & HUNT, LLC