Mark Payne

From: Mark Payne
Sent: Saturday, December 04, 2010 7:36 PM
To: Ken Elliott
Subject: RE: mandatory HOA dues
Attachments: image001.jpg; SRHOA Dues revision (MKP revisions).doc

Hi Ken:

The Association's authority to levy assessments doesn't come from S.B. 100. I'll explain below my opinion of the source of the Association's authority to levy assessments, and the role of S.B. 100.

You have provided me with re-typed copies of (1) the Declaration of Protective Covenants for First and Second Filings of Surrey Ridge; (2) a similar but not identical Declaration of Protective Covenants for Third Filing of Surrey Ridge; and (3) a similar but not identical Declaration of Protective Covenants for Unit 4 of Surrey Ridge. The Declaration for the First and Second Filings, and the Declaration for the Third Filing contain identical provisions in paragraph 18 that establishes the homeowners association to provide services, maintain roadways and to maintain bridle paths and wilderness areas. One of the provisions of each of these paragraphs is that the owners of lots in filings 1 and 2 of Surrey Ridge shall be members of the association (the provision in the Declaration for Filing 3 should probably refer to the owners in filing 3, but it does not – it only refers to the owners in filings 1 and 2). Paragraph 18 of the Declaration for Unit 4 provides that the owners of lots in filings 1, 2, 3 & 4 of Surrey Ridge shall be members of the association. While none of the Declarations specify what the association is, Surrey Ridge Assn. was formed in 1967 by filing Articles of Incorporation with the Colorado Secretary of State, and this is apparently the association that has been operating as the association referred to in the Declarations since that time. In addition to being required to provide the services specified, the Douglas County Assessor shows Surrey Ridge Homeowners Association as the owner of four separate tracts of real property. The discrepancy between the name of the title holder (Surrey Ridge *Homeowners* Association as compared to Surrey Ridge Assn) may not be an issue, but is not something that I will deal with here.

None of the Declarations expressly give the Association the authority to levy assessments. Nevertheless, I believe, under various provisions of Colorado law, that indeed the Association has that authority. My opinion is based on the following:

1. The community is a "common interest community" as that term is defined in the Colorado Common Interest Ownership Act ("CCIOA"). While there is no express obligation in any of the Declarations that owners pay assessments, the Declarations and the Association's Articles of Incorporation clearly contemplate that the Association will have certain obligations and powers, including the obligation to provide certain services that benefit the owners in Surrey Ridge (who are also the Association's members). This translates into an obligation to pay for

insurance premiums, maintenance or improvements of other real estate (e.g., the tracts owned by the Association). This obligation is what creates a "common interest community." It would be impossible for the Association to carry out its responsibilities if it did not have the power to levy assessments.

2. In a 2003 Colorado Supreme Court decision in Evergreen Highlands Association v. West, the court determined that the association, even in the absence of an express covenant imposing mandatory assessments, had the implied power to collect assessments from its members, based on the association's ownership of a piece of real property and its obligation to maintain it. While somewhat factually distinguishable, the Evergreen Highlands case is sufficiently similar to Surrey Ridge's circumstances that I believe a court would reach the same conclusion.

So my conclusion is that the Association has an obligation to perform certain obligations, and a commensurate right to raise monies to do so.

When CCIOA became effective in 1992, it applied (with certain exceptions not relevant here) to all common interest communities formed after July 1, 1992. However, many of its provisions apply to common interest communities formed before July 1, 1992, including an extensive provision that gives the Association a right to a lien for unpaid assessments, and including a super-priority lien which has priority over even a first mortgage for six months worth of budgeted assessments.

When CCIOA was first enacted, there were a number of CCIOA provisions that applied to pre-CCIOA associations, and over the last several years, our legislature has adopted many more. One of those was S.B. 100. S.B. 100 was not separate legislation that created any mandatory assessment obligation. S.B. 100 was simply the bill number for the legislation that effectively amended CCIOA, and its provisions, for the most part, were integrated into, and became part of, CCIOA. So S.B. 100 does not stand on its own. The proper reference is to CCIOA.

In 2005, when S.B. 100 became law, it amended CCIOA in part to require that every association adopt certain mandatory responsible governance policies (there were seven of them then; since then our legislature has required two more). Those are the policies that we prepared for the Surrey Ridge Association. (Based on my records, it appears that the Association does not have the 2 most recent policies – one addressing dispute resolution, and one addressing reserve studies, and these should be put in place). One of the original policies that we prepared, and the Association's Board adopted, addressed collection of delinquent assessments. This policy is based on our opinion that the Association has the right to levy assessments, and its members have an obligation to pay. It does not create the obligation itself, but only establishes the policy and procedure for the Association to follow if an owner does not pay the assessments levied.

I've modified your draft letter somewhat, and it is attached. Please give me a call if you have any questions concerning the above or the letter.

Thanks.

WINZENBURG LEFF PURVIS & PAYNE

Mark K. Payne
Attorney at Law
mpayne@wlpplaw.com
1660 Lincoln Street, Suite 1550
Denver, CO 80264
303.863.1870 Telephone
303.863.1872 Fax