COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Appeal from District Court, County of Douglas Case No. 13CV30571 Opinion Issued June 12, 2014 by Hon. Paul A. King County Court, County of Douglas County Court Case No. 13C1511 Hon. Susanna Meissner-Cutler	
Petitioners-Appellants: **Surrey Ridge Architectural Control Committee,** a Colorado unincorporated nonprofit association, and **Dean Schrader, Thomas Hryniewich, and Kenneth Elliott** v. Respondents-Appellees: **George Botsonis and Kerri Botsonis**	**▲COURT USE ONLY▲**
Attorneys for Petitioners-Appellants Dean Schrader and Kenneth Elliott: Aaron C. Acker, #40479 Pelz & Associates, P.C. Colorado Club Building, Suite 500 4155 East Jewell Avenue Denver, CO 80222 Telephone: 303-409-3573 Facsimile: 303-758-8237 E-mail: acacker@pelzlaw.com Paul R. Danborn, #24528 Frie, Arndt & Danborn, P.C. 7400 Wadsworth Boulevard, Suite 201 Arvada, CO 80003 Telephone: 303-420-1234 Facsimile: 303-431-7644 E-mail: pauldanborn@friearndt.com	**Case No.:**
PETITION FOR WRIT OF CERTIORARI	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Writ of Certiorari complies with all requirements of C.A.R. 28, 32, and 53 including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that it complies with C.A.R. 53(a):

_X_ It contains 3,303 words.

___ It does not exceed 12 pages.

The undersigned acknowledges that this Petition for Writ of Certiorari may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and 32.

PELZ & ASSOCIATES, P.C.

By: _/s/ *Aaron C. Acker; original signature on file*
Aaron C. Acker (40479)

FRIE, ARNDT & DANBORN, P.C.

By:*/s/Paul R. Danborn; original signature on file*
Paul R. Danborn (24528)
Attorneys for Petitioners-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The sole issue for determination is whether the District Court erred in finding that the Surrey Ridge planned community was not a "common-interest community" governed by the provisions of the Colorado Common Interest Ownership Act ("CCIOA"), §38-33.3-101, C.R.S. *et seq.*, and therefore precluded Petitioner's award of attorney fees pursuant to §38-33.3-123(1), C.R.S.

II. REFERENCE TO UNOFFICIAL REPORT OF THE OPINION

The Douglas County District Court, reviewing this matter pursuant to §13-6-310, C.R.S., issued an opinion on June 12, 2014 affirming the decision of the County Court. A copy of the opinion is attached, see Appendix.

III. GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

The jurisdiction of the Supreme Court is based upon C.A.R. 49 and §13-6-310(4), C.R.S. This Petition for Certiorari is timely filed pursuant to C.A.R. 52(a).

IV. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

Petitioners-Appellants Dean Schrader and Kenneth Elliott ("Petitioners") are individual homeowners within the Surrey Ridge common interest community ("Surrey Ridge"). This case was originally filed in the County Court of Douglas County by Petitioners, Thomas Hryniewich (another homeowner in Surrey Ridge), and the Surrey Ridge Architectural Control Committee ("ACC") seeking a permanent injunction to prevent Respondents-Appellees George Botsonis and Kerri Botsonis ("Respondents") from constructing a 2,240 sq. ft. outbuilding on their lot in Surrey Ridge. The case was tried in a four-day trial before the County Court of Douglas County, and on September 4, 2014 it rendered its verdict, entering a permanent injunction in favor of Petitioners and finding that the Respondents violated the covenants by failing to submit detailed plans for their outbuilding and by beginning construction despite the ACC's denial of their plan for that outbuilding.

The Petitioners in their prayer for relief requested that attorney fees be awarded pursuant to CCIOA, §38-33.3-123(1), C.R.S., applicable to Surrey Ridge by §38-33.3-117, C.R.S. The County Court never made a specific

finding that Surrey Ridge was not a "common-interest community". However, it declined to award attorney fees to Petitioners.[1]

Pursuant to C.R.C.P. 411, Petitioners appealed the denial of attorney fees to the Douglas County District Court. On June 12, 2014, the Hon. Paul King issued an order affirming the County Court. The only question before the District Court was whether Surrey Ridge is a "common-interest community". The District Court found that Surrey Ridge was neither a "common-interest community" as defined by CCIOA, nor a "common-interest community by implication" as contemplated by *Evergreen Highlands Assoc. v. West*, 73 P.3d 1 (Colo. 2003) and therefore affirmed the denial of attorney fees. (District Court opinion, pg. 13).

B. Statement of Facts

Surrey Ridge is a semi-rural, equestrian community consisting of approximately one hundred and twenty (120) homes and additional vacant lots reflected on a plat-map recorded with the Douglas County Clerk and Recorder and part of the Declaration of Protective Covenants for Surrey

[1] The County Court stated mid-trial that it did not think CCIOA was applicable to Surrey Ridge. Petitioners immediately raised their objection to this and requested that the trial court withhold ruling on the matter until the end of trial. The trial court never issued a ruling on whether Surrey Ridge was subject to CCIOA. Trial Tr., Ruling by the Court, 10:15 – 14:13, Sept. 4, 2013.

Ridge[2] ("Declaration"). Surrey Ridge encompasses four residential filings and there are four additional tracts of land, owned by the Surrey Ridge Homeowners' Association, Inc. ("Association"), which are common areas for the use and enjoyment of the owners in Surrey Ridge. These common areas include a private park, wilderness areas, trail easements, a riding arena and picnic area.

Paragraph 18 of the Declaration provides in relevant part:

> *"*A homeowners' association is hereby established to provide services not provided by governmental authorities. All owners… shall be members of said association and shall be entitled to one vote for each lot owned… The purpose of the association is to maintain existing roadways… and to provide maintenance to all bridle paths and wilderness areas for the term of these covenants…".

However, the Declaration does not specifically require owners to pay assessments to the Association. The Association is governed by its Articles of Incorporation and Bylaws. Both the Declaration and the Bylaws provide that all owners in Surrey Ridge are members of the Association. The Bylaws provide for the payment of dues and create two classes of membership: "full membership", granted to owners who have paid dues, and "associate membership" for those owners that have not paid dues. The only

[2] Surrey Ridge is governed by three sets of covenants, with nominal differences. The Declaration of Protective Covenants for First and Second Filings is recorded against the Respondents' property and therefore are the operative documents and will be referred to as the "Declaration".

distinction in the two classes is that only full members can hold office on the Board of Directors of the Association.

The monies paid by the dues-paying members are used to provide maintenance to the common areas of the Association, pay real estate taxes, directors and officers liability insurance, property insurance and general commercial liability insurance. To date the contributions of the dues-paying members have been sufficient to meet the obligations of the Association.

V. ARGUMENT FOR GRANTING THIS PETITION

This Court should exercise its discretion to issue a writ of certiorari pursuant to C.A.R. 49(a) because the District Court has interpreted CCIOA and rendered a decision which is not in accord with the decisions of this Court. The District Court's opinion is contradictory to both *Evergreen Highlands, supra*, and *Hiwan Homeowners Assoc. v. Knotts*, 215 P.3d 1271 (Colo. App. 2009).

Alternatively, in the event the District Court correctly distinguished the case at bar from *Evergreen Highlands*, the District Court has decided a question of substance not heretofore determined by this Court -- namely, whether a community required to own and maintain common areas must subsist on voluntary contributions from owners, and can choose to "opt-out" of CCIOA.

A. **Review of This Matter on Certiorari is Necessary to Define What Constitutes a Common Interest Community Under CCIOA and Ensure Consistent Application of This Court's Ruling in *Evergreen Highlands*.**

Common-interest ownership has been an ever-growing form of property ownership and governance. As a result of the growing trend in common-interest ownership the Uniform Common Interest Ownership Act (UCIOA) was adopted in 1982, resulting in the first comprehensive scheme for common-interest community governance. Colorado is one of the many states to adopt a form of the UCIOA, through CCIOA. The entirety of CCIOA applies to common-interest communities created on or after July 1, 1992[3], while nearly one-half of CCIOA's statutes applies to common-interest communities existing prior to that date such as Surrey Ridge[4]. Among these latter statutes is C.R.S. §38-33.3-123, which applies to pre-CCIOA communities by virtue of C.R.S. §38-33.3-117(1)(g) and mandates the award of attorney fees to prevailing parties enforcing the terms of a declaration. The only question, then, is whether Surrey Ridge constitutes a "common interest community" as defined by C.R.S. §38-33.3-103 and applicable case law.

---

[3] C.R.S. §38-33.3-115.
[4] C.R.S. §38-33.3-117.

The purpose of CCIOA is to establish a clear, comprehensive and uniform set of laws; promote economic prosperity and enhance financial stability; and promote effective and efficient property management. C.R.S. §38-33.3-102.

As of December 31, 2013, the Colorado Division of Real Estate has registered over 8,857 homeowners' associations[5] in Colorado, comprising of over 880,326 units (*See* 2013 Annual Report of the HOA Information Office and Resource Center, pg. 5, attached, Appendix). Planned communities registered with the Colorado Division of Real constitute 74.6% of all units registered. *Id.* Many of the planned community homeowners' associations in this state, whether registered or unregistered, are similar to Surrey Ridge in that they own common elements but rely on "voluntary" assessments to meet their financial obligations (i.e., their covenants do not specifically require the payment of assessments).

This Court noted in its 2003 *Evergreen Highlands* decision that Colorado included some 2,000 such communities, housing an estimated 450,000 people[6]. This Court clearly intended its *Evergreen Highlands* decision to apply to all such communities, including Surrey Ridge, but the

[5] Surrey Ridge Homeowners' Association is duly registered as a homeowners' association with the Colorado Division of Real Estate.

[6] *Evergreen Highlands, supra, at p.4 (see footnote 3).*

District Court – despite nearly identical facts as those in *Evergreen Highlands* – improperly distinguished the case at bar and refused to follow that decision. This results in a chilling effect on the Association, the ACC, and individual homeowners within Surrey Ridge, who now have to personally fund expensive litigation in order to enforce their rights under the Declaration and Bylaws, and strips them of the myriad additional protections afforded by the approximately half of CCIOA applicable to pre-CCIOA communities.

Guidance by this Court is needed to reinforce the message of *Evergreen Highlands* and definitively bind all lower courts to its finding that planned communities such as Surrey Ridge are "common interest communities by implication" and thus governed by CCIOA. Such ruling would benefit not only these 2,000 Colorado communities and their members, but also the real estate and legal professionals working with these communities.

The District Court's determination that Surrey Ridge was not a "common-interest community" was based on the fact that Surrey Ridge's board of directors had taken steps to "negate CCIOA's application to Surrey Ridge", and because the governing documents of Surrey Ridge did not impose an "obligation" to pay assessments. District Court Opinion, pp. 2, 3,

6, 11. Petitioners contend that such ruling is not in line with the facts of the case, is inequitable, against the mandates of CCIOA, and is contrary to *Evergreen Highlands.*

The District Court's reliance on the failure of Surrey Ridge to "adopt" CCIOA is clear error. The Court's rationale presumes that being designated a common-interest community is an "opt-in/opt-out" proposition, which is contrary to the notion that all common-interest communities are governed by the Act[7].

Curiously, the District Court's Order notes that the Association had engaged the services of a homeowners' association attorney, who had advised the Board they were subject to those portions of CCIOA applicable to pre-CCIOA communities, and that they should comply with the new mandates imposed under C.R.S. §38-33.3-209.5 and create responsible governance policies. However, the Board of the Association had ignored this advice and instead simply decided they would not be subject to CCIOA. The District Court apparently believed this fact justified a finding that

[7] As noted above, the entirety of CCIOA is applicable only to those common-interest communities created after July 1, 1992. Although CCIOA does contain an "opt-in" procedure for those pre-CCIOA communities wishing to adopt it in its entirety, roughly half of CCIOA applies to all pre-CCIOA communities regardless of whether they "opt-in" or not. C.R.S. §38-33.3-117.

Surrey Ridge was not a common-interest community. District Court Opinion, pp.8-9. This is clear error. The failure of an association to adopt reasonable governance policies under CCIOA, or whether its board of directors "decides" the association is not subject to CCIOA (against the advice of its own counsel, no less), is completely irrelevant to an analysis of whether that community is a common-interest community. Setting such a standard is downright dangerous; in no other instance is a person entitled to decide which laws apply to him.

Further, without a defined application of CCIOA to communities such as Surrey Ridge, there is an incentive for developers and associations, through careful drafting and manipulation, to cleverly exempt themselves from CCIOA, stripping homeowners of its much-needed protections.

Petitioners next contend the District Court misapplied §33-33.3-103(8). The Court improperly emphasized and relied on the fact that assessments were "voluntary". What it failed to recognize, however, is that despite the lack of mandatory assessment language in the covenants, those same covenants require the Association – of which all owners are members – to maintain the four common areas and enforce the covenants for their benefit. The missing element in the District Court's analysis is liability. It

simply looks at the obligations of the Association members and not the liabilities.

As a hypothetical, Petitioners urge this Court to consider a scenario where the Association fails to maintain property insurance on riding trails[8] and an invitee is injured, sues, and obtains a judgment against the Association. Doesn't the non-paying owner have as much at stake as the dues-paying owner? Won't a lien filed against the Association's property affect all owners equally? That the non-paying members of the community are propped up by a civic segment of the community does not diminish the fact that all owners through the Declaration have an interest in the common areas, and a corresponding obligation to share in liabilities flowing from those areas.

The result of the District Court's ruling is that the Association, the ACC, and individual homeowners wishing to enforce the covenants must incur significant personal costs to do so. The Court's failure to grant Petitioners' attorney fees has had a chilling effect as the Board, the ACC, and individual homeowners are now even more reluctant to use legal resources to prosecute meritorious claims. This was exactly the result that

[8] Which is required by CCIOA; see §38-33.3-313, C.R.S.

Evergreen Highlands was intended to prevent, and this Court at length recited the significant public policy concerns:

> "In order to avoid the grave public policy concerns this outcome would create, we today adopt the approach taken by many other states as well as the Restatement of Property, which provides that "the power to raise funds reasonably necessary to carry out the functions of a common interest community will be implied if not expressly granted by the declaration." *Evergreen Highlands* at 4.

Here, the District Court's ruling ignores these grave public policy concerns as its practical effect is to encourage covenant violations and disregard for the governance of the community, and burdens individual owners with the costs of enforcing the community's rules. To force the few to bear the burden of remedying such misconduct is inequitable and exactly the result that CCIOA and *Evergreen Highlands* sought to preclude.

B. **The District Court's Opinion Misapplies Provisions of CCIOA and is in Direct Contradiction to the Established Precedent of *Evergreen Highlands*.**

The District Court found that Surrey Ridge was not a common interest community under CCIOA because owners were not "obligated" to pay dues, and because the Association had taken affirmative steps to not "opt-in" to CCIOA. Both reasons misapply CCIOA and are contrary to the established

precedent of this Court and pursuant to C.A.R. 49(a)(2) certiorari should be granted as the District Court has decided a question of substance not heretofore determined by this Court and not in accord with *Evergreen Highlands.*

The District Court misinterpreted CCIOA's definition of "common-interest community", which states in relevant part that a common-interest community is:

> "real estate described in a declaration with respect to which a person, by virtue of such person's ownership… is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate…." C.R.S. §38-33.3-103(8).

The District Court placed undue emphasis on the word "obligated" in this definition and found that obligation must be explicitly set forth in the Declaration. That is error; the lack of an express obligation is not determinative. As noted above, just because the dues are "voluntary" does not negate the obligations and liabilities the Association has as a result of its ownership of common property.

More importantly, the District Court's decision is in direct opposition to the clear precedent that was established in *Evergreen Highlands.* Although there is no express obligation in the Declaration to pay assessments, the ruling ignores the implied obligation to do so that this Court imposed on all owners in communities such as *Evergreen Highlands.*

The District Court erred by not following *stare decisis* and finding that Surrey Ridge, like the community in *Evergreen Highlands*, is a "common-interest community by implication".

The *Evergreen Highlands* case involved nearly identical facts to those present here: like Surrey Ridge, the common areas in *Evergreen Highlands* included a park area with hiking and equestrian trails; the common areas were open to all residents; the HOA was formed for the purpose of maintaining the common areas; and it was able to maintain the common areas for a number of years solely from the voluntary contributions of various owners. *Evergreen Highlands* at 2. The covenants in *Evergreen Highlands* did not even mandate that owners were members of the Association, whereas Surrey Ridge's covenants do. The *Evergreen Highlands* Court held:

> "Without the implied authority to levy assessments… communities are placed in the untenable position of being obligated to maintain facilities and infrastructure without any viable economic means by which to do so. In order to avoid the grave public policy concerns this outcome would create, we today adopt the approach taken by many other states as well as the Restatement of Property, which provides that 'the power to raise funds reasonably necessary to carry out the functions of a common interest community will be implied if not expressly granted by the declaration.' Restatement (Third) of Property: Servitudes § 6.5 cmt. b (2000). **We therefore hold that, even in the absence of an express covenant mandating the payment of assessments, the Association has the implied**

> **power to levy assessments against lot owners in order to raise the necessary funds to maintain the common areas of the subdivision."** *Id. at 4* (emphasis added).

The District Court attempted to distinguish *Evergreen Highlands* by stating:

> "The homeowner association in *Evergreen…* never weighed the CCIOA's relevance to its community and did not consider the Act prior to its covenant modification. The *Evergreen* court's decision to hold the subdivision a "common interest community by implication" stemmed directly from the homeowner association's counterclaim against the Respondent for uncollected assessments. The implication creating the common interest community came from the implied power to levy assessments against lot owners to provide for maintenance of the common areas in the *Evergreen Highlands* community as Respondent had refused to pay his share. No such implication can be drawn by the facts in this case." District Court Opinion, p. 11.

Such rationale is not persuasive and ignores the clear mandate in *Evergreen Highlands* that there is an implied power of an Association to levy assessments, and a corresponding obligation of owners to pay the same, and such communities are still common-interest communities subject to CCIOA.

Further, the District Court ignored the application of *Hiwan Homeowners Association v. Knotts,* 215 P.2d 1271 (Colo.App. 2009). The *Hiwan* Court found that even where a community had no common areas to maintain, its obligation to enforce restrictive covenants alone was sufficient to render it a "common interest community by implication" and grant it the

authority to impose a mandatory assessment obligation.

VI. CONCLUSION

The *Evergreen Highlands* case seems to be clear in holding that communities owning and maintaining common areas for the benefit of its members are "common interest communities by implication" thus subject to significant portions of CCIOA, including the right to attorney fees if they prevail in an action to enforce the covenants. However, both the County Court and the District Court here read into that decision much more restrictive terms -- including, apparently, that communities that subsist on voluntary contributions and whose boards decide they are not subject to CCIOA don't have to comply with those statutes.

It will be a major benefit for all 450,000 Colorado residents living in some 2,000 associations like Surrey Ridge and Evergreen Highlands (as well as for real estate professionals and attorneys serving those associations) for this Court to clarify and amplify its holding in *Evergreen Highlands* and *Hiwan* by granting certiorari in this case.

For the foregoing reasons, Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari, and reverse and remand to the District Court for entry of an award of Petitioners' attorney fees, including appellate attorney fees.

Respectfully submitted this 23rd day of July, 2014.

PELZ & ASSOCIATES, P.C.

By:*/s/ Aaron C. Acker; original signature on file*
Aaron C. Acker (40479)
Attorneys for Petitioners-Appellants

FRIE, ARNDT & DANBORN, P.C.

By:*/s/Paul R. Danborn; original signature on file*
Paul R. Danborn (24528)
Attorneys for Petitioners-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2014, I filed and served the foregoing PETITION FOR WRIT OF CERTIORARI via ICCES efiling service upon the following:

Jerry Cardwell, Esq.
Attorney for Respondents-Appellees George and Kerri Botsonis
9458 N. Palomino Dr.
Castle Rock, CO 80108

/*s/ Emily Byrne; original signature on file*
Emily Byrne

APPENDIX

1. Opinion of the Douglas County District Court dated June 12, 2014 (attached).

2. 2013 Annual Report of the HOA Information Office and Resource Center (attached).