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Kirk Sessions
Star Valley Ranches HOA
Thayne, Wyoming

Via e-mail obh1234@gmail.com

RE: Covenant enforcement

Dear Kirk:

The Board has asked Jim Sanderson and I to address a number of issues following the Supreme Court's recent decision affirming the District Court's nullification of the Amended Covenants.

Future Amendments. The Star Valley Ranches Covenants at Article IX, Section 4 state that they can only be amended during a six month window just prior to the expiration of twenty year periods. Per that language, the next window would be July 1, 2031 through December 31, 2031. All of the eleven sets of covenants contain that same language.

I briefly researched that issue for another homeowner's association. There isn't a lot of case law on it, though there is some. The research reflected that courts are inclined to uphold the window provision, even though an amendment might be sorely needed. The reasoning is that owners bought into the subdivision and its covenants because the covenants would be stable and could not be amended time and again at the will of dissatisfied owners. The six month window provision was pled as a defense by Daley, Kittleson, Goglio, and Logan in the recent case, but the Wyoming Supreme Court declined to address it at all in its opinion.

If the Board and owners were intent on amending the covenants in the near future, I would recommend filing a Declaratory Judgment action with the District Court to first determine whether the six month window limitation precludes any such amendments prior to July 1, 2031.

Barn/Silo. Jim Sanderson and I do not agree whether the barn/silo redevelopment can be accomplished by regular assessments or must be done by special assessments. I previously opined on this issue per my letters to the Board of February 7 and March 2, 2014. Those letters state that regardless of how you describe the redevelopment, it will be construed as a "capital expenditure" requiring a two-thirds

vote of the membership. A good argument can certainly be made that regardless of whether the redevelopment is a "capital expenditure", it may not be subject to the two-thirds voting requirements for a special assessment, and can be paid for via current bank funds, regular assessments, and/or borrowing.

I recently spoke with Matt Kim-Miller, the attorney for Daley et al, about this and other HOA issues. His clients are very concerned. Their position is that the barn/silo can be redeveloped, refurbished, repaired, etc. without a special assessment. However, if new amenities are included, then it requires a special assessment.

Whether or not they are correct about a special assessment being required for amenities, it would be worthwhile to sit down with them and go over the plans to see what would and would not be acceptable. While they shouldn't be given a veto power, it might prevent another lawsuit that could *possibly* have been avoided. If an understanding could not be reached, the Board would have to make the call whether to proceed forward and see what happens, or file a Declaratory Judgment action. The danger in moving forward with reconstruction without an understanding with those members is that a judge might slap a restraining order on construction, which would really be detrimental to completion.

Uniform Rate Of Assessments For each of the eleven covenant filings, the HOA assessments started on a different date. Section 3 of Article VI of each covenant filing gives a different start date for calculating assessments along with the maximum annual increase. The first seven set of covenants do not have a gradual increase over the seven year period from 1970 through 1977. Thereafter the start amount gradually increases but takes a big jump in 1986.

PLAT	YEAR	AMOUNT	DATE
1 & 2	1970	$75	1-1-1972
20	1970	$75	1-1-1972
3	1971	$75	1-1-1972
5 & 6	1971	$75	1-1-1972
7 & 8	1972	$75	1-1-1972
9 & 10	1976	$75	1-1-1977
12, 13 & 14	1977	$75	1-1-1978
15 & 16	1979	$80.75	1-1-1980
17 & 18	1980	$89	1-1-1981
21	1983	$121	1-1-1984
4, 11 & 22	1986	$250	1-1-1987

My understanding is that the formula for each set of covenants was not precisely followed, and that some owners have paid less, and some owners more, than if

the formulas were strictly applied. The possibility exists that those who have allegedly paid more might request a refund. And of course, extracting more money from those who have paid less would be a very unpopular position for the Board.

The Wyoming Supreme Court interprets covenants in accordance with contract law. The statute of limitations for a contract in writing is ten years. Thus, if the overpayments were before 2004, it is likely that those payments are barred under the statute of limitations. Additionally, legal defenses of "laches" and "estoppel" might apply and preclude any such claims even if within the last ten years.

It would likely take an accountant a considerable amount of time to go back and calculate the differentials. Even if an accountant were able to do so, lots have traded hands over the years which would make it very difficult to find and compensate those owners. Recent purchasers would claim that they are entitled to the overage as the successor owner to the particular lot.

Other Issues

On July 6, 2014 I sent Bob Harmon a letter regarding a number of issues, including past covenant violations, pending permits, large trucks and trailers and garage sizes. Those paragraphs are set forth below verbatim followed by my comments.

> Past Covenant Violations. There is nothing that should be done about past covenant violations that were approved by prior Boards and/or Architectural Committees (ACs), irrespective of whether those Boards or ACs should have allowed the same. Those owners who legitimately acquired additional garages, buildings, setbacks, or other amenities that exceed the Covenant by having gone through the proper process, now have vested property interests. For lack of a better word, they are "grandfathered", and no court is going to require them to remove a structure under those circumstances. There will no doubt be owners now requesting such amenities who will point out that they aren't asking for anything more than what there neighbor already has. While each of us would feel the same in their shoes, the Board can't undo the past and must enforce the Covenants as written from here on out.

Comment: I suggest keeping a separate "grandfather" filing system for each of the various topics (garages, setbacks, etc.) so that the Board or AC will have a history of which lots received grandfather status and why that status was granted. As mentioned in Large Truck/Trailers below, express "findings" are recommended. That will hopefully cut down on owners claiming "everyone but me" got to do it, and allowing the Board or AC to justifiably deny future requests that aren't warranted.

Pending Permits. There is currently pending the Pierantoni variance request to build two garages, as well as two other building permits that don't comply with the Covenants. As I understand it, those owners either purchased their respective lot during the time, and in reliance on the 2011 Covenant Amendment, or expended substantial funds to start construction in reliance on the 2011 Covenant Amendment. It does appear that the HOA, and hence owners and prospective purchasers, were justifiably relying on counsel that the 2011 Covenant Amendment was valid and would be upheld in Court. For that reason, the Board and/or ACC should allow by variance or otherwise, any building permits caught in that limbo.

Comment: As with the garages, large trucks and trailers or anything else that was granted during the limbo period in which the new covenants were adopted and subsequently nullified, those should be grandfathered where the owner relied on the approval and spent a substantial amount of money in reliance on that approval. However, if an owner's ¾ ton truck was grandfathered in, that status does not last forever and once the owner sells, they are back to a ½ ton or less. Same with removing and replacing a structure.

Large Trucks/Trailers. Likewise, if any owners purchased their property during that limbo period in reliance on the amended covenants, the Board and/or ACC should grant *reasonable* variances, or make a written resolution not to enforce the particular covenant and why. Express "findings" are recommended. The example which comes to mind is the large (greater than half ton) truck prohibition and parking of travel trailers, where at least one owner purchased in reliance on the amended covenants allowing the same.

Besides oversize trucks, the storage of RV trailers, ATVs, and other "toys" on lots is prohibited. It has been proposed that the air strip be converted to a site for parking those items. Other subdivisions use portions of the common area for such storage. Unless the airstrip is somehow a "dedicated" use on the plat or the common area otherwise restricted, the Board can certainly change the use and require all RV trailers, ATVs, and other "toys" not enclosed in garages to be parked on that common area. That requirement would then also apply to those owners who bought during the limbo period.

Comment: I suggest moving forward with this concept and that the Board require all illegal RV trailers, ATVs, and other "toys" to be parked in the common area parking area. If a portion of the air strip were converted for storage, and the cost kept minimal or even free, that would encourage owners with legally parked items to move them to the collective storage area.

Garage Sizes. The Covenants allow for one garage, which may be "for not more than three cars". Article VIII (first paragraph). The Covenants do not further define the height, number of doors, square footage, or anything else. Thus the Board and/or AC must use its reasonable discretion in allowing or

denying certain garage applications. The Board should apply the **plain and ordinary meaning** of those words "for not more than three cars".

Some owners will want a garage to also store the recreational vehicles. To allow a garage much over 1,000 square feet probably doesn't comport with the Covenants. The same for allowing it to have habitable space. Owners may get creative in trying to skirt the garage restrictions, but the Board need only apply common sense and everyday understanding in determining whether such building applications comport with the Covenant language and its obvious intent.

Comment: This will necessarily have to be a case-by-case determination.

Variances Making this exceptionally difficult is that there is not a provision for variances in any of the Covenants. Nor is there a provision for enacting "rules and regulations". Even Article VII, Architectural Control, does not provide for the granting of variances.

The issue becomes whether the Board has inherent authority to grant variances. I litigated the Dwan v. Indian Springs Ranch Homeowners Association, Inc. case which went to the Wyoming Supreme Court twice. In the first Dwan case the Wyoming Supreme Court held that the Board had inherent authority to grant a variance for a roof pitch on an addition. Dwan had previously obtained a variance from the developer years before for the roof pitch on the main part of her house. The developer simply handed her the variance and didn't require her to go through the variance procedure. When it came time for the addition years later, the Board required Dwan to properly apply for, and obtain a variance. Dwan refused on principle, and won round one when the Court said the Board had inherent authority to grant the variance.

I'm not sure how far that ruling can be extended to Star Valley Ranches where the covenants don't provide for variances of any kind. My recommendation is that the Board only grant variances where it would create a bona fide hardship not to do so. They should be few and far between and the exceptions should not swallow the rule.

Future Covenant Enforcement. The Board is empowered and has the duty to enforce the Covenants that are in effect. Covenants without enforcement are ineffective. Enforcement requires judgment and the exercise of discretion.

The present Board wants to "draw a line in the sand" with respect to Covenant enforcement, particularly going forward. That judgment and discretion will likely be tried by various owners in the coming months and years. We will want to choose our battles carefully.

Plat Representative Committee The Bylaws in Article IX provide committees for Standing Committees for Finance and Legal, House and Entertainment, Utilities, and Golf. While there is not a "Plat Representative Committee" designation set forth in the Bylaws, the Board can always create committees to assist with its duties as long as the committees are merely advisory. I encourage such committees as this is a large community and there are too many details and too much work for five volunteer Board members.

Executive Session I recommend that the above matters first be discussed in executive session with Jim Sanderson and I. Coming out of executive session, the Board may want to discuss some of these matters, particularly if raised by an audience member, or may want to take action such as establishing a committee to determine suitable parking of RVs, etc. on a portion of the airstrip.

Sincerely,

Frank Hess