Silverheels New Amended Covenants Committee (SNACC)

Minutes of 02/15/23 Meeting
(7:00 PM via Zoom)
Approved 02/21/23

Attendance and Quorum (11 lots)
Members Present: Rich Bainbridge, Susan Barden, Tony Boccio, Gail & Steve Kloppel, Mary Manka, Mike Peterson, Kylie & Tyler Pontius, Charlie Schultz, Maria Smaldone, Jeff Togie, Lillian Wissel
Members Late: Lane Mathison,
Members Absent: Luis Canales, Zach Loos, Maria Mitchell
Moderator: JB Burghardt
Quorum: The Quorum requirement was met with 13 lots represented at the outset.

Review and Approve Minutes of 2/1/23
The Minutes of the 2/1/23 meeting were provided days in advance to all Members. They were unanimously approved.

Complete the review of Article VI, using Draft v27 of the New Amended Covenants, starting at Section 6.7: move on to Articles VII and VIII.
JB began the discussion with a question about changing the Roman numerals used in the Article titles to Arabic numerals in an effort to simplify the Covenants. No Members spoke in favor of retaining Roman numerals, and several spoke in favor of Arabic numerals. Therefore, JB will attempt to change all numerals to Arabic in the next Draft.

Section 6.7 - Obligation for Assessments (Former 6.8)
At the last meeting JB was tasked with redrafting this Section into subsections to facilitate ease of interpretation and understanding. His redraft divided it into three subsections. There was a short discussion about the types of assessments referred to in this section. JB noted that we previously had approved the definition of the term "Assessment" as follows: "Any Annual Assessment, Special Assessment, or any other fee, fine, or charge made or assessed hereunder by the Association against an Owner and/or the Owner's Lot in accordance with the provisions of Article 6." Several Members pointed out the need for the collection of all Assessments, since Annual Assessments generally cover the Association's regular yearly expenses and provide a workable reserve for possible unexpected issues in the Common Areas, whereas Special Assessments would cover anything major that cash reserves or volunteer work by SROA members cannot address (and Special Assessments require vote by a majority of Owners at an Annual Meeting or a special meeting called for that purpose). Mike pointed out that without the volunteer help of some Owners there would have been costly projects in the past, such as improvement of the drain system for the augmentation pond that Charlie voluntarily designed, and the construction of which was paid for with reserves. If that had not been the case, a Special Assessment would have been necessary. Mike pointed out that providing for the possibility of major problems outside of the anticipated budget is standard for HOAs. A motion was made and seconded to approve this Section as rewritten. It passed by a vote of 12 to 1 and reads as follows:

Section 6.7 Obligation for Assessments.

a. Each Owner, by accepting a deed to a Lot, covenants and agrees to pay all Assessments levied pursuant to this Article, whether or not this obligation is expressly stated in the deed. The obligation to pay Assessments is a separate and independent covenant for which each Owner of a Lot is jointly and severally liable. Each Assessment, together with interest calculated from its due date at the rate prescribed in the Bylaws, plus costs and reasonable attorneys' fees, shall constitute the personal obligation of the Owner and is secured by a Lien against the Owner's Lot until paid in full.

b. Any failure by the Board to establish an Assessment or to deliver an Assessment notice to an Owner shall not constitute a waiver, modification, or release of the Owner from the obligation to pay Assessments. In event of such failure with regard to an Annual Assessment and until a new Annual Assessment is levied, each Owner shall continue to pay the Annual Assessment on the same basis as required for the previous fiscal year.

c. No Owner is exempt from liability for Assessments by non-use of Common Areas, abandonment of the Owner's Lot, dissatisfaction with the performance of the Board, or for any other reason. No diminution, abatement, or setoff of any Assessment may be claimed or allowed based on any act or failure to act by the Board.

Section 6.8 - Effect of Nonpayment of Assessments. This Section was approved at the 2/1/23 meeting and therefore was not reviewed again tonight.

Section 6.9 - Lien for Assessments

At the last meeting JB was asked to shorten and simplify this section and to eliminate anything that was covered by the Colorado statutes that did not need to be restated here. Discussion centered around the automatic nature of the Lien described in the Section vs. the reason for still filing a Notice of Lien when the need arose (the reason is to clearly give notice to everyone, and especially title insurance companies, that the Lien is there to cover an unpaid Assessment); that the text provided for the Lien to come ahead in priority of any homestead exemption; and how the homestead exemption actually works. A motion was made and seconded to approve this Section as revised. It passed by a vote of 13 to 1 to read as follows:

Section 6.9 Lien for Assessments.

a. The recording of this Declaration constitutes record notice and perfection of the Lien described in this Article. No further recordation of a Lien for any Assessment is required; however, the Board in its discretion may cause Notices of Lien to be recorded for unpaid Assessments to assure that the public records are complete. The costs and expenses of such filings shall be added to the amount of the Assessment.

b. The Lien described herein shall be superior to any homestead exemption now or hereafter provided by the laws of the State of Colorado or the United States. The

Owner's acceptance of a deed to a Lot shall constitute an absolute waiver of any homestead or other state or federal exemption from the Lien.

Section 6.10 - Surplus Funds. This Section was approved at the 2/1/23 meeting and therefore was not reviewed again tonight.

Article VII - Insurance

JB again explained that he did not have any meaningful background regarding insurance matters and could not suggest anything substantive regarding the topic of insurance; however, there were ways to make Article more readable without changing any substance. As no Member of this Committee has an insurance background, it was suggested that the Article, in its entirety, be accepted with JB's proposed revisions for clarity and grammar which do not change the content, but then be sent to the Board recommending review review by SROA's lawyers and insurance professionals before being voted on by the Owners. A motion was made to do so and seconded, with the single change noted by Charlie that personal liability insurance coverage for Board members and any member of a Board-approved committee should be mandatory, rather than optional. A proposed revision to the definition of "Allocated Interest" also was included in this motion. The motion was unanimously approved. Article VII in its entirely, as amended and approved, reads as follows:

Section 7.1 Insurance. To the extent reasonably available, the Association shall obtain and maintain insurance coverage as set forth in this Article. If such insurance is not reasonably available, or if any policy is canceled or not renewed without a replacement policy having been obtained, the Association shall cause notice of that fact to be delivered to all Owners.

Section 7.2 Property Insurance Coverage. To the extent that the Common Areas are comprised of insurable improvements, the Association shall obtain property insurance on the Common Areas for broad form covered causes of loss and on all personal property owned by the Association. The property insurance will be for an amount equal to one hundred percent (100%) of the full insurable replacement cost of the insured property less applicable deductibles, exclusive of land, foundations, excavations, and other items normally excluded from property policies.

Section 7.3 Commercial General Liability Insurance. The Association shall maintain commercial general liability insurance in an amount determined by the Board, but in no event less than $2,000,000. Reasonable amounts of umbrella liability insurance in excess of the primary limits may also be obtained. This insurance shall cover all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, existence, or maintenance of the Common Areas and the activities of the Association; and may also include, if applicable, comprehensive automobile liability insurance, liability for property of others, host liquor liability, contractual liability, and such other risks as reasonably determined by the Board.

Section 7.4 Other Insurance. In addition, the Association may obtain and maintain insurance as the Board deems necessary or reasonable, or as required by applicable law or regulation. Such insurance may include fidelity coverage, but shall include personal liability insurance to protect Directors, Officers, and Committee Members from personal liability in relation to their duties and responsibilities acting in those capacities. In addition, the Association may maintain insurance against such other risks as the Board may reasonably determine, including workers' compensation insurance and insurance on such other property and/or against such other risks as the Board may reasonably determine.

Section 7.5 General Provisions of Insurance Policies. All policies of insurance carried by the Association shall be in blanket policy form naming the Association as insured, or its designee as trustee and attorney-in-fact for all Owners, and each Owner shall be an insured person under such policies with respect to liability arising out of the Owner's membership in the Association. Additionally, each Owner and each holder of a security interest in a Lot shall be a beneficiary of the policy in a percentage equal to the Allocated Interest associated with that Lot. The Association shall furnish a copy of such policy or renewal thereof, with proof of premium payment, to any Owner or holder of a security interest in the Owner's Lot, upon request. All policies of insurance carried by the Association shall also contain waivers of subrogation by the insurer against any Owner or member of such Owner's household. Further, all policies of insurance carried by the Association shall contain waivers of any defense based on invalidity arising from any acts or neglect of an Owner where such Owner is not under the control of the Association. *[A&RC 7.5]*

Section 7.6 Deductibles. The Board may adopt and establish written non-discriminatory Policies and procedures relating to the responsibility for deductibles.

Section 7.7 Payment of Insurance Proceeds. Any loss covered by an insurance policy described in this Article must be adjusted with the Association, but the insurance proceeds for that loss shall be payable to any insurance trustee designated for that purpose, or otherwise to the Association, and not to any holder of a security interest. The insurance trustee or the Association shall hold any insurance proceeds in trust for the Association, Owners, and security interest holders as their interests may appear. Subject to the provisions of Section 8.2 ***[NOTE TO BOARD: see Note re: Section 8.2 below]***, the proceeds must be disbursed first for the repair, restoration, or replacement of the damaged property; and the Association, Owners, and holders of security interests are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired, restored, or replaced and any budget or reserve deficit funded, or unless the Community is terminated.

Section 7.8 Insurance to be Maintained by Owners. An insurance policy issued to the Association does not obviate the need for Owners to obtain insurance for their own benefit. The Owner of each Lot is solely responsible for insurance coverage on the Owner's Lot and any Improvements thereon, as well as on all personal property, furnishings, and

fixtures belonging to the Owner. Owners are strongly encouraged to maintain policies that provide replacement cost coverage, as well as personal liability coverage.

Section 7.9 Damage or Destruction. Any portion of the Community for which property insurance is carried by the Association, and which is damaged or destroyed, must be repaired or replaced promptly by the Association ~~except as may otherwise be provided in the Act~~ ***[NOTE TO BOARD: There is no definition of "the Act" anywhere in the Amended and Restated Covenants from which this provision was taken verbatim. Nothing in the Nonprofit Act appears to address insurance in this context, and insurance requirements in CCIOA arguably would not apply to SROA as a "limited expense planned community". Therefore, we suggest deleting the clause shown as stricken-through above unless SROA counsel advises otherwise and explains what "Act" this is referring to]***. The cost of repair or replacement that is covered by insurance carried by the Association, but which is in excess of insurance proceeds and reserves, is an Association expense.

Article VIII - General Provisions

Section 8.1 - Enforcement

Discussion centered around the text in Draft v1 which would allow not only the Board, but any Owner, to have the right to sue another Owner for failure to comply with the provisions of the Governing Documents. JB voiced the opinion that this could open up a Pandora's Box of potential litigation that none of us should want. Several Members also voiced dislike for the concept, because if an Owner has a problem over noncompliance with the Covenants he or she should go to the Board. If the issue also involves a dispute between two neighbors, (e.g. a neighbor causing damage to another neighbor's property) a private right of action would exist that did not need to involve the Covenants. JB was asked whether he thought an Owner would have the right to sue another for breach of the Covenants if we made the deletion we are discussing. He reminded everyone that he can't and doesn't any longer give legal advice, but if the provision does not state that an Owner *cannot* sue a neighbor for breach of a Covenant then perhaps he still can. But JB said he felt that there was almost always another way to deal with such a problem, and asserting breach of a Covenant would not be the most direct way to do it. A motion was made and seconded to accept the revision, deleting "and any Owner". It was approved with revisions and the omission of "and any Owner" by a vote of 9 to 5. The Section as revised and approved will read as follows:

Section 8.1 Enforcement. The Association shall have the right, but not the duty, to bring legal or equitable action against any Owner for failure to comply with the provisions of the Governing Documents or with decisions of the Board made pursuant to the authority granted to the Association in the Governing Documents. The prevailing party in any such enforcement action shall be entitled to recover its costs and reasonable attorneys' fees, as well as any and all other sums awarded by the court. Failure by the Association to enforce compliance with any provision of the Governing Documents shall not be deemed a waiver of the right to enforce any provision thereafter. All remedies set forth in the Governing Documents shall be cumulative of any remedies available at law or in equity. The decision to pursue enforcement action in any particular case shall be left to the Board's reasonable discretion. Without limiting the generality of the foregoing

sentence, the Board may determine that under the circumstances of a particular case: (a) the Association's position is not strong enough to justify taking any or further action; (b) the covenant, restriction, or Policy being enforced is, or is likely to be construed as, inconsistent with applicable law; (c) although a technical violation may exist or may have occurred, it is not of such a material nature as to be objectionable to a reasonable person or to justify expending the Association's resources; or (d) that it is not in the Association's best interests, based upon hardship, expense, or other reasonable criteria, to pursue enforcement action. Such a decision shall not be construed as a waiver of the Association's right to enforce such provision at a later time or preclude the Association from enforcing any other covenant, restriction, or Policy.

Section 8.2 - Limitation of Liability

Discussion began with the question of whether this Section was redundant of Section 5.2, which covers the Association's indemnification of Directors, Officers, and Committee Members. The question also was raised as to whom Section 8.2 was directed, and whether it made sense to protect the *Association itself* (not only the Directors, Officers, and Committee Members) from liability. After further discussion the Committee unanimously concluded that it cannot vote on anything regarding this Section before the Board gets its legal counsel to review it and make recommendations. The following will be sent to the Board:

> Section 8.2 Limitation of Liability. The Association, the Board of Directors, the ARC, and their respective Directors, officers, and members shall not be liable for any action or for any failure to act unless the action or failure to act was not in good faith and was done or withheld with malice. ***[NOTE TO BOARD: This text was neither approved nor disapproved by SNACC. The Board's legal counsel should be consulted regarding the interaction between this Section 8.2 and Section 5.2.]***

Section 8.3 - Electronic Delivery; Registration of Owner's Address

JB pointed out a few grammatical changes to this Section. No further comments were made. A motion to approve it was seconded and passed unanimously to read reads as follows:

> Section 8.3 Electronic Delivery; Registration of Owner's Address. Unless otherwise required by applicable law or this Declaration, any requirement to deliver any notice, statement, demand, document, or record to an Owner shall be deemed satisfied by sending the same by electronic delivery if the Owner has provided an electronic mail or delivery address to the Association. Otherwise, an Owner shall register his U.S. Postal Service mailing address with the Association, and any notice, statement, demand, document or record intended to be delivered upon an Owner must be sent by U.S. mail, postage prepaid, to the Owner at such address. However, if any Owner fails to notify the Association of a registered address, then any notice, statement, demand, document or record may be delivered or sent to such Owner at the address shown on the records of the Association.

Section 8.4 - Headings

The question was raised as to the necessity for this Section. JB said that in his prior legal experience it seemed to be a customary term of most contracts, because misinterpretation of headings has been

used to justify lawsuits in the past. A motion was made and seconded to approve this Section. It was unanimously approved and reads as follows:

> Section 8.4 Headings. The headings contained in this Declaration are provided only as a matter of convenience and for reference, and in no way define, limit, or describe the scope of the terms and provisions of this Declaration or the intent of any provision thereof.

Section 8.5 - Gender
No discussion took place on this Section. A motion was made and seconded to approve. It passed unanimously and reads as follows:

> Section 8.5 Gender. The use of the masculine gender refers to the feminine gender, and vice versa, and the use of the singular includes the plural, and vice versa, whenever the context of this Declaration so requires.

Section 8.6 - Waiver
No discussion took place on this Section. A motion was made and seconded to approve. It passed unanimously and reads as follows:

> Section 8.6 Waiver. No provision contained in this Declaration is abrogated or waived by reason of any failure to enforce the same, irrespective of the number of violations or breaches which may occur.

Section 8.7 - Severability
Some grammatical revisions were pointed out and the term "severable" was explained. A motion was made and seconded to approve. It passed unanimously and reads as follows:

> Section 8.7 Severability. All provisions of this Declaration are severable. Invalidation of any provisions of this Declaration by judgment, court order, or otherwise, shall in no way affect or limit any other provisions, all of which shall remain in full force and effect.

As this was the end of the document, Kylie asked who signs the signature page. Mike explained that the vote of each SROA Member in favor of passage must be documented and appended to the end of the document to show that a majority of all lots (least 101 of the 201 lots) had approved it. To that end, when SROA members are mailed the completed document to vote on, there will be a signature page with each Member's copy. If majority approval is achieved, all signature pages of Owners approving the document must be attached to the document before it can be filed with the Park County Clerk and Recorder.

New Business: Tony Boccio's proposal for dealing further with the STR issue.

Tony was asked if he wanted to present his case for addressing STRs beyond our drafting of Section 3.18. He felt his email to the whole Committee a few days ago explained his beliefs well,

so would not take a lot of the Committee's time to review it again. In his email he emphasized: (i) the explosive growth of STRs everywhere; (ii) the attraction that Silverheels will have to potential STR owners, especially given that Fairplay has a limit on STRs of 6 1/2 % (only 20 homes), but that Silverheels is the neighborhood closest to Fairplay that has no current restrictions on STRs; and (iii) the very real negative consequences that an explosion of STRs in our community could have on the quality of life we all want to continue to enjoy here. He felt that the first thing to be done is to create a committee to thoroughly examine all aspects of STRs and inform the entire SROA of its conclusions (this had been urged at the last Annual Meeting but had not been acted upon thereafter). He also felt SNACC should address STRs by adding a new Section 3.19 to Article III, and he had drafted one that he had sent to JB to ask for assistance in making it as concise as possible. JB had agreed and drafted a revised version that he had sent to all SNACC Members very shortly before tonight's meeting.

JB summarized the intent of Tony's email by pointing out two primary principles: (i) it is essential for the Board promptly to submit the proposed new Section 3.19 to competent HOA legal counsel to determine whether it would be legally enforceable; and (ii) the Board needs to find out how strongly the membership feels about STRs by including questions about STRs in its survey.

Discussion of the necessity for this new Section took the remainder of our meeting time. Most Members again voiced their own concerns regarding STRs and recognized the validity of Tony's argument. JB pointed out that Section 3.18 - *Camping; Short Term Rentals; Bed & Breakfasts*, approved at the 11/30/22 meeting, addresses the Board's general authority to regulate STRs as follows: "The Board is specifically authorized under Section 3.2 to establish and enforce Policies on these matters [camping, STRs, B&Bs] that are otherwise more restrictive than any applicable Laws". Tony's Section would define more specific provisions that the Board could consider taking beyond this general statement of authority. The proposed new Covenant would not set forth exactly what the restrictions should be (this is for the Board, not the SNACC, to decide), but would clearly empower the Board to do so.

The biggest problem now is uncertainty as to the current status of the law on this issue. It was once again noted that the Board will need clear legal advice from attorneys competent and current in HOA law to know how much detail must be placed into the Covenants in order to make STR limitations or restrictions enforceable. It appears that the State, and perhaps most or all smaller jurisdictions, identify STRs as "residential" rather than "commercial" in nature. This may limit how HOAs such as our Association can address STRs in their covenants. Mike emphasized that the Board is taking into account all information available and will look at Tony's suggestions. In the upcoming second segment of the Board's survey regarding our proposed New Amended Covenants, he said they are going to ask questions specific to STRs as to what Owners want done or not done.

Some SNACC members were concerned that if it wasn't addressed in the Covenants it would fall to the wayside due to the overriding issue of passage of the our proposed New Amended Covenants and the belief by members of the Board that private property rights take precedence over rights of others in a community. Mary expressed the belief that there is nothing in Tony's suggestion that eliminates a property owner's rights; it simply would allow for reasonable restrictions that provide protection to the community. She also said she thought the debate is not about property rights as

much as it is about whether STRs are really businesses. Again, input from lawyers specializing in HOA law is needed.

Several Members explained how various Colorado counties are taking it upon themselves to develop restrictions. Lane suggested going directly to the Park County Commissioners -- as did citizens of Summit County, which just passed a moratorium on STRs until further study is done. The concept of "grandfathering-in" existing STRs was mentioned. It was suggested that a group from SROA should approach the County Commissioners to press on this issue. Charlie expressed his belief that that waiting for the County to do anything has never worked in the past. Lane suggested submitting Tony's ideas as a question to the Board to be sent out to the community. He felt it could be included in the second part of the survey which will be going out soon. Mike was of the mind that neither he nor Lane could commit to that without the other Board members' input. Everyone on SNACC wants the Board to pay attention to the STR issue.

JB suggested the best way to handle the new language Tony has requested would be to work it into Section 3.18, rather than having a completely separate Section 3.19 which might later be found to conflate with Section 3.18's provisions. Tony agreed to this approach. A motion was then made and seconded to have JB modify Section 3.18 to include Tony's more specific detailed points regarding STR's. The vote was 8 to 6 in favor of having JB revise 3.18 to include all elements of Tony's suggestion into Section 3.18. JB agreed to produce the revision and email it to Members later tonight, requesting that any comments, suggestions, or issues to be provided promptly.

Next Meeting. The need to meet one more time was discussed, the purpose being to approve the Minutes of this meeting and approval of final revisions identified tonight. As Kylie and/or JB would be unable to meet in the next couple of Wednesdays, JB suggested sending an email with the proposed Minutes and the final wording of the Sections revised tonight. The Members agreed to this.

Adjournment. The meeting was adjourned at 9:24 PM.