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October 1, 2012

Tracy Paine  
Hyalite Foothills Home Owners' Association  
P.O. Box 1994  
Bozeman, MT 59771

*Via U.S. Mail, copy by E-Mail:tracypaine@mac.com*

RE: Hyalite Foothills Subdivision Covenants and Bylaws  
Our file no: 73072/001

Dear Tracy:

Thank you for contacting this office with regard to your questions about the Hyalite Foothills Covenants. In particular, you wished to know: (1) whether the Board of Directors of the Association has the authority to implement a fine system for covenant violations; and (2) whether the Association can amend the provision pertaining to the keeping of chickens within the subdivision or whether it should completely revise the covenants.

In response to the first question regarding the implementation of a fining system, the Bylaws of the Hyalite Foothills Subdivision permit the Board of Directors to "publish and enforce rules and regulations governing the use of Hyalite Foothills Subdivision and facilities when said rules and regulations have been properly adopted at a membership meeting." Although the Bylaws require the presence of at least 60% of the total membership vote, in person or by proxy, to conduct any business at a meeting, they do not specify what percentage vote is required to adopt rules and regulations of the Association. Absent a contrary provision in the Association's Articles of Incorporation, Bylaws, or covenants, Montana statute provides that, if a quorum is present, the affirmative vote of the votes represented and voting, if they are a majority of the required quorum, is the act of the members. *See* Mont. Code Ann. § 35-2-538. Thus, provided you have a quorum, the affirmative vote of a majority of the members in attendance, by person or proxy, should be sufficient to adopt rules and regulations authorizing the Board to fine owners for covenant violations. The proposed rules and regulations that will be presented for a vote at the meeting should be published to your membership in accordance with the notice requirements set forth in the Bylaws (not less than 10 nor more than 50 days in advance of the meeting).

Your second question concerned amending the covenants to address the keeping of chickens within the subdivision. You also wished to know whether we thought it advisable to replace and supersede the existing covenants with a single revised and restated version.

As presently drafted, the covenants prohibit the keeping of fowl within the subdivision without the permission of the Association. Unless your membership prefers to grant permission to keep chickens on a case-by-case basis, which I believe could be handled by majority vote at any special or regular meeting of the members, amending the covenants to allow chickens as a matter of right would be necessary.

While the Bylaws specify a 60% majority vote is necessary for the approval of any given amendment to the Bylaws, the restrictive covenants do not provide a written procedure for amendment or specify what percentage approval is required for passing an amendment. Furthermore, unlike the right to adopt rules regulating the Association, the Bylaws do not provide any express authority for amending the covenants.

Covenants are construed as contracts running with the land. In purchasing their lot, each owner has agreed to be bound by those covenants that are recorded against their property at the time of their purchase. The covenants for the Hyalite Foothills Subdivision specifically permit the developer, and subsequently the Association, to approve "reasonable modifications or exceptions to the ... Reservations and Restrictive Covenants, where in the sole discretion of the [Association], such modifications or exceptions will not defeat the purpose of the overall Reservations and Restrictive Covenants." However, because neither the covenants nor the Bylaws specify a lesser percentage required for amending the covenants, arguably, all members would have to agree to the amendment in order for it to be enforceable.

On the other hand, the developers clearly intended for the business of the Association to be governed by the Bylaws. The Bylaws allow for amendment at any regular or special meeting of the membership upon a 60% affirmative vote of those present in person or by proxy. The Association has amended the covenants only once in the past (to prohibit the further division of lots where the division would result in a lot less than two acres in size). This amendment, dated June 6, 2000, was passed 62 to 13 and presumably met the 60% approval requirement. To my knowledge, the validity of this amendment has not been challenged.

Furthermore, the covenants declare the developers' intention that the Association be governed by a non-profit corporation to be called "Hyalite Foothills Landowners' Association" and that all purchasers of property in the subdivision, by acceptance of a deed, agree to the formation of the non-profit association and agree to be members of the association.<sup>1</sup> The covenants thus place purchasers on record notice that an owners' association exists, which in turn, is governed by a set of corporate bylaws, also of record. It arguably follows that a 60% majority vote of the members should be sufficient to amend the covenants.

In short, there are good arguments on both sides for requiring all, or less than all pursuant to the Bylaws, of your membership's approval on any given amendment. While unanimous approval by your membership is more likely to ensure the validity of the amendment, obtaining every member's approval, or even vote for that matter, can be challenging. It may be more practical for your membership to vote on an owner's request to have chickens on a case-by-case basis.

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The 1974 Declaration contemplates incorporation of the "Hyalite Foothills Landowners' Association." However, the Bylaws adopted in 1979 are for the "Hyalite Foothills Subdivision No. 1 and 2 Homeowners Association, Inc." The Hyalite Foothills Subdivision No. 1 and 2 Homeowners Association, Inc. was involuntarily dissolved in 1985. The "Hyalite Foothills Landowners' Association" was registered with the Secretary of State in 2011.

You also asked if there were any other areas in the covenants or Bylaws that I recommended be changed. Aside from the amendment process itself, there is no one provision in the covenants that strikes me as particularly unusual or problematic. Rather, the question of whether or not to amend the covenants depends upon the needs and objectives of your Association. I generally don't recommend the complete abandonment and overhaul of a subdivision's covenants unless absolutely necessary. The time and expense involved in drafting and obtaining membership approval can be significant. Although the covenants are very basic, they appear to be functioning for your subdivision. Therefore, except for the possible amendment to allow chickens (which is up to your membership to decide) I don't suggest any revisions to the covenants at this time.

As for the Bylaws, you may wish to confirm that the 1979 Bylaws for the Hyalite Foothills Subdivision were properly adopted by the Hyalite Foothills Landowners' Association. Evidently, the Association was originally organized as Hyalite Foothills Subdivision No. 1 and 2 Homeowners Association, Inc. This corporation was involuntarily dissolved by the Montana Secretary of State in 1985. It appears that the corporation may have been "re-filed" with the Secretary of State in 2011 as the Hyalite Foothills Landowners' Association. I suspect the new corporation was intended to reinstate the first Association; however, technically, a new entity was formed. If it hasn't been done already, the Board of Directors should consider recording minutes at its next regular meeting explaining that the new corporation was filed to reinstate the first home owners' association and the 1979 Bylaws are intended to continue to govern the "new" reinstated association. Please let me know if I've misunderstood the corporate structure of the owners' association in any way.

The only other area that may warrant amendment is at Article V, paragraph 3 of the Bylaws. This section contains contradictory statements as to whether assessments must be approved by written ballot of the membership or whether they may be approved by a simple majority vote at any annual or special membership meeting. Since adopting assessments is a regular function of home owners' associations, you may wish to resolve this inconsistency. On the other hand, if this isn't presenting a problem currently, immediate action probably isn't necessary.

In summary, the covenants' prohibition against keeping chickens and other fowl on properties with the Subdivision could be eliminated through an amendment to the covenants. To pass, the amendment requires one hundred percent membership approval; however, an argument could be made that only 60% approval is necessary as this would be consistent with the previous amendment and procedure for amending the Bylaws. Alternatively, the Association could grant permission to those owners wishing to keep chickens on a case-by-case basis. This could be accomplished with a simple majority vote at a meeting of the members.

The Association may also adopt reasonable rules and regulations authorizing the Board to implement a fining system for non-compliant owners pursuant to the affirmative vote of members attending the annual or special meeting.

Finally, a complete revision of the covenants and Bylaws does not appear to be justified at this time. The Bylaws do contain an inconsistency with regard to the approval of assessments; however, unless this is presenting an issue currently, this amendment could probably be addressed at a later time.

Tracy Paine  
October 1, 2012  
Page 4

I hope this review is helpful as you prepare for your annual meeting. Please don't hesitate to contact me with questions about any of the matters discussed in this letter.

Sincerely,



JENNIFER L. FARVE

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