



GODFREY & LAPUYADE

PROFESSIONAL CORPORATION

DAVID R. STRUTHERS
STRUTHERS@GODLAP.COM

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Ms. Kate Botkin, President and
Board Members
Homestead-in-the-Willows
Homeowners Association
5896 E. Geddes Avenue
Centennial, CO 80112

HOMESTEAD IN THE WILLOWS ARCHITECTURAL REVIEW AND ENFORCEMENT OPINION LETTER

This Opinion Letter is provided to trace the exact source of authority upon which the governing Board of the Homestead-in-the-Willows Homeowners Association (Association or HOA) can rely in making decisions about the Architectural Control Committee (ACC), to include the ability of the ACC, through the HOA to levy fines, file liens, and take other action for violations and enforcement of the governing documents of our HOA.

A. The Source of Authority for the Architectural Control Committee and Our Homestead Restrictions, Covenants and Residential Improvement Guidelines

1. The Colorado Nonprofit Corporations Act.

Colorado statutory law allows our Board the authority to act relative to the ACC. Like the government of our United States of America, founded upon our Constitution, with statutory governing law flowing from the United States Code, the original grant of authority for our non-profit Association flows from the Colorado Revised Nonprofit Corporations Act (the Act) which, at present, is found at Title 7 of the Colorado Revised Statutes, Articles 121-137. (C.R.S. 7-121-101 through C.R.S. 7-137-301). The Act itself provides broad and specific authority to our Association and our Board in conducting the affairs of our HOA, for example, C.R.S. 7-123-102 allows the Board:

to do all things necessary or convenient to carry out its affairs,
including the power ... (c) to impose dues, assessments, admission,
and transfer fees upon its members.

The Act also contains many broad grants of authority to the governing Board of our non-profit Association, too numerous to mention here.

2. *The Colorado Common Interest Ownership Act (CCIOA).*

Homeowner Associations such as Homestead-in-the-Willows are also subject to the statutory requirements of the Colorado Common Interest Ownership Act, know as CCIOA and frequently pronounced as Kiowa. The statute is found at C.R.S. 38-33.3-101 through 38-33.3-319 and includes the much discussed and publicized provisions contained in Senate Bill 2005-100, which became effective January 1, 2006 or before and Senate Bill 2006-89 which became effective when signed into law on May 26, 2006. CCIOA will be discussed below as it bears on the specifics of issues facing Homestead.

3. *Articles of Incorporation of Homestead in the Willows HOA.*

The Articles of Incorporation (Articles), dated September 26, 1974, provide the founding bedrock of authority for the Board to act in many capacities, including by and through the ACC. In particular, Article IV, *Purpose and Powers of the Association*, contains many grants of authority, from the general to the specific. To begin with, the broadest grant derives from the introductory paragraph, where “the specific purposes for which [the HOA] is formed are to ... promote the **health, safety and welfare** of the residents.”

Then, in this same Article IV, paragraphs (a) and (b) the Association has the purpose to:

- (a) exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain *Declaration of Restrictions* ... [and]
- (b) fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the term of the Declaration ... [and]
- (c) have and to exercise any and all powers, rights and privileges which a corporation organized under the Non-Profit Corporation Law of the State of Colorado by law may now or hereafter have or exercise.

Article VII of our Articles of Incorporation, granting authority to our Board, states: “the affairs of the Association shall be managed by a Board of five directors.”

4. *The Amended & Restated By-Laws of Homestead-in-the-Willows Homeowners Association, Inc.*

Our Homestead By-Laws provide authority for our Board to act relative to the ACC. The By-Laws, by definition in the Nonprofit Corporations Act, means the code or codes of rules for the regulation or management of the affairs of our Association. Stated differently, the bylaws are the internal governing documents for our non-profit organization and generally contain some

details of our day-to-day operations. For example, in our By-Laws at Article VII, Section 1 (c) our Board is granted very broad authority to:

exercise for the Association all powers, duties, and authority vested in or delegated to this Association and not reserved to the membership by other provisions of these By-Laws, the Articles of Incorporation, or the Declarations [referring to our Homestead Declaration of Covenants, Conditions and Restrictions].

But more specifically as related to the Architectural Control Committee, our By-Laws mandate that the Board, acting for the Association:

shall appoint an Architectural Control Committee, as provided in the Declaration.

Thus, ample authority exists for the formation and existence of our Architectural Control Committee from our By-Laws.

5. The Declaration of Restrictions of Homestead-in-the-Willows Homeowners Association.

Sanford Homes established Homestead-in-the-Willows as a covenant controlled community. A covenant in this context is a promise that each homeowner makes to every other homeowner who agrees to live here. The covenants in this context are also the conditions established for every homeowner to live by and are, generally, set forth in another of our binding governing documents called The Declaration of Restrictions of Homestead-in-the-Willows Homeowners Association (Declarations). The Declarations contain the promises we homeowners made to each other – called “covenants and restrictions” – as a condition to purchasing property in Homestead. According to the Declarations those covenants and restrictions:

shall run with such property and shall be binding on all parties having or acquiring any right, title or interest in such property.

But the Declarations reinforce the authority of the Board to appoint an Architectural Control Committee in Article VIII, Section 1 titled *Architectural Committee*. The Declarations then become quite specific about restrictions on virtually anything affecting the external appearance of our properties. Article VIII, Section 2 states:

Section 2. Restrictions on Construction, Maintenance and Improvements. The following restrictions are applicable to construction, maintenance, and improvements on The Properties:

A. No building, fence or other structure shall be erected, placed or altered on any lot until the construction plans and

specifications and a plot plan showing the location of the structure have been approved by the Architectural Control Committee as to the quality of workmanship and materials, harmony of external design and color with existing structures, and as to location with respect to topography and finished grade elevations. The Committee shall have the right to refuse to approve any such plans, specifications or grading plans which are not suitable or desirable in its opinion for aesthetic or other reasons. These plans and specification are to be approved in writing by the Committee, and finally approved plan shall be lodged permanently with said Committee. All subsequent changes, or additions, as affecting the external appearance of said structure including but not limited to fences, roofing material, basketball backboards, awnings, antennae, air conditioners and coolers shall be subject to prior approval of the Architectural Control Committee.

Given this section of the Homestead Declarations, in combination with the other and considerable grants of authority, it is fair to say that any change to our properties which affects the external appearance may be subject to prior approval of the Architectural Control Committee, including landscaping.

6. *The Residential Improvement Guidelines for Homestead-in-the-Willows.*

Periodically throughout the three decades of the existence of Homestead, the ACC and the Board have issued Residential Improvement Guidelines (Guidelines) to allow our members and homeowners to know more specifically what is acceptable in the community. Authority for issuing and updating these Guidelines, from March, 1993, until the present, flow from the same, multiple grants of authority in the Homestead governing documents cited above. Our governing documents, as well as the state statutes, provide more than ample authority to issue the guidelines contained in the "*Residential Improvement Guidelines*" as well as additional guidance as evolved and published periodically by the ACC and the HOA Board, such as the "Homestead in the Willows Colonial Aesthetic" guidelines.

7. *Statements of Policies.*

Consistent with the statutory requirements of Senate Bill 100 and Senate Bill 89 and in full compliance with the policy adoption procedures of our HOA, the Board passed a series Policy Statements which apply to and are accessible to all homeowners. Relative to the authority of the board to apply covenant restrictions and enforce them, several Policy Statements overlap and are applicable, including:

1. The general letter of policy dated January 4, 2006
2. The Collection Policy of February 16, 2006
3. The Notice, Hearing and Enforcement Policy and Procedures of November 30, 2005
4. The Architectural Control Committee Policy of February 12, 2008

In addition to the formal governing documents and the formally-adopted policies just listed, the continuing efforts of the Board to refine the architectural requirements and to inform the community about them are also authorized by the Covenants and authorize the Board to apply and enforce the architectural requirements. This includes the Homestead-in-the-Willows Colonial Aesthetic, periodically updated, and various articles and constant reminders in the *Homestead Herald*.

8. *Enforcement of the Declarations, the Guidelines and Decisions of the Architectural Control Committee.*

a. The Declarations.

In line with each of the governing documents in general and specifically as flows from the Declarations, the Board is charged with and has the authority to enforce the Covenants. Article XI, titled *General Provisions* allows the Association to enforce the covenants and the Declaration. Specifically, Section 3 sets out the various actions that the Association may take to enforce the covenants and the Declaration, to include the recovery of attorney fees on the part of the Association. Among other remedies, the Association can: (1) recover damages for any violation; (2) restrain any violation; and/or (3) modify or remove a violating structure.

In the realm of architectural control, it is important to note that this same Article XI, Section 3, allows no controlling precedent to be established merely because every covenant is not enforced every single time:

Failure of the Association or of any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

b. The Guidelines.

The Homestead-in-the-Willows Residential Improvement Guidelines provide a listing of general and some specific guidance concerning many specific types of improvements that a homeowner may wish to make. The Guidelines also set out the procedural steps in the architectural review process and further discuss and set out the authority for enforcement of our covenants, Guidelines and the decisions of the ACC.

Section III of the Guidelines again verifies that prior approval is always required, except for circumstances where no external change will result to the property.

Paragraph 3.13 lists the allowable means of enforcement:

1. Any manner allowed at law or in equity including:
2. Imposition of fines
3. Enforcement of other established penalties following notice and hearing
4. Injunctive relief through court action to:
 - a. Prohibit commencement or continuation of improvements not previously approved
 - b. seeking damages through court action
5. Recover of attorney fees
6. Filing a lien against the Owner's property for all amounts owed
7. Pursuing legal action to collect all amounts owed.

The *Guidelines* reinforce the basic governing document, the Declarations, concerning the issue of "precedent:"

Failure by the Association to enforce these Residential Improvement Guidelines, or any provision contained herein, shall in no event be deemed a waiver of the right to do so thereafter.

c. The Policies.

The various statements of policy enumerated above further refine the authority and the methods of enforcement available to the Board. For example, page two of the general letter of policy dated January 4, 2006, sets forth the Notice, Hearing and Enforcement steps and discretionary options available to the Board, including the "option to impose a lien on the Homeowner's home." The Collection Policy of February 16, 2006, discusses, among other things, fines and, in paragraph 7, reminds the homeowner that the accumulation of fines allow the Board to file a lien against the homeowner's property.

The Notice, Hearing and Enforcement Policy and Procedures of November 30, 2005, sets out in additional detail what the process of notice and hearing will entail, including the imposition of enumerated fines in Paragraph 6. This policy statement further specifies on page 3 that any fines that may be imposed are "enforceable as provided in the Declaration," again granting to the Board the full panoply of enforcement tools.

Finally, the Architectural Control Committee Policy of February 12, 2008, again sets out in greater detail both the authority and the process of enforcement, refining the notice and hearing mandate of fairness, state statutes and our governing documents. With this policy statement, an additional statement of fines is defined for our community.

9. Conclusion.

The Homestead-in-the-Willows Board of Directors and its Architectural Control Committee have solid authority to both impose architectural guidelines and to enforce them, including homeowner compliance with the reasonable process or architectural review.

B. Response to Specific Inquiries

As background please keep in mind that our governing documents allow the Board to require that any external change to our properties require advanced approval by the ACC. It would be impossible and no court would require that every item of architectural or landscaping detail be specifically listed in our Guidelines. The common sense view of the entire *raison d'etre* for living in a covenant-controlled community would be to ask first about whether or not an external change to the homeowner's property is subject to ACC review. We have our own Homestead Manager for that purpose, as the initial step.

Does the ACC have the authority to govern back yard playground equipment? Section 2.56 on page 8 of our Guidelines specifically addresses this query. ACC review is required.

Does the ACC have the authority to govern garage doors? Again, if there is a change to the exterior appearance of the original house with the installation of new and different garage doors, ample authority exists to govern garage doors. Our adopted policies and statements of the aesthetic concretely and adequately cover this external feature of the homes in Homestead, to include the types of windows, hinges, handles, etc., that may be applied.

Does the ACC have the authority to levy fines if someone does not comply with the ACC requirements? Yes, more than adequate authority exists to levy fines to enforce the ACC requirements, as discussed above.

Does the HOA have the authority to subject a homeowner's house to a lien for failure to pay fines imposed by the HOA? Yes, ample authority exists as discussed in detail above to apply a lien as one of the tools of enforcement available to the Board.

Is our ACC process compliant with the laws of the State of Colorado, including the Colorado Common Interest Ownership Act (CCIOA)? Based upon counsel's review, as set out in this letter, our ACC process is fully compliant with the laws of the State of Colorado, including CCIOA.

If there are specific additional, specific items about which an opinion is needed, please let me know. I believe that the opinions stated here can be freely shared with all members of our Homeowners Association, if the Board so chooses.

Cordially,

GODFREY & LAPUYADE, P.C.

A handwritten signature in black ink, appearing to read "D.R. Struthers". The signature is written in a cursive style with a large initial "D" and "R".

David R. Struthers

DRS/