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December 12, 2007

Cambridge Park Property Owners Association, Inc.
C/o Lloyd Palmer via email: lp37383@aol.com

Re: Governing Document Observations and Recommendations

Dear Association Board:

This is to provide the Board of the Cambridge Park Property Owners Association, Inc. (the Board and the Association) my opinion regarding my review of the Governing Documents in anticipation of the owners of the Cambridge Park Addition (the Development) to Oklahoma City, Oklahoma modifying their Governing Documents (collectively described as the Issue).

1. Documents Reviewed for Opinion (collectively, the Governing Documents).

- 1.1. Development, Section 1 Restrictive Covenants and Bill of Assurance filed at Book 6598, Page 204.
- 1.2. Development, Section 2 Restrictive Covenants and Bill of Assurance filed at Book 7067, Page 264.
- 1.3. Development, Section 3 Restrictive Covenants and Bill of Assurance filed at Book 7450, Page 297.
- 1.4. Spot "Amendment 1" to Restrictive Covenants and Bill (sic) of Assurances for Sections 1, 2, and 3 filed at Book 9270, Page 803 [check for internal section reference in each set of covenants for accuracy]
- 1.5. Spot "Amendment 2" to Restrictive Covenants and Bill (sic) of Assurance for Sections 1, 2, and 3 filed at Book 9646, Page 1781 [check for internal section reference in each set of covenants for accuracy]
- 1.6. Articles of Incorporation for "Cambridge Park Property Owners Association, Inc." filed with the Oklahoma Secretary of State on August 18, 1995
- 1.7. Bylaws. The Bylaws I reviewed are unsigned and undated, but they were presumably drafted in April 2004.
- 1.8. Warranty Deed from original Declarant to POA?

- 2. Disclosure.** I hereby disclose that I have in the past and presently do represent ERC Properties, Inc., the original Developer to the Development. However, I did not represent ERC at any time or in any regard as to the Development and my current representation of both ERC and the Association does not appear to present any conflicts.

Observations and Recommendations

Following are several **observations** regarding amending the existing Governing Documents:

1. **Multiple covenants.** Three separate sets of complete covenants are filed for each Section of the Development (Sections 1, 2, and 3). There are minor differences between each set of covenants.
2. **Amendment clauses within Sections 1 and 2 Covenants.** Section 1 and Section 2 Covenants contain virtually verbatim amendment clauses on the first page of each set of Covenants. The amendment clauses provide:

These Covenants shall be binding upon all parties and all persons claiming under them through December 31, 2001 (Section 1) [and] December 31, 2005 (Section 2), at which time they shall be automatically extended for an additional ten (10) years, unless by a vote of at least two-thirds of the then owners of the lots in the Addition...it is agreed that these Covenants should be changed, amended, or terminated in whole or in part. (emphasis added)

The Covenants' amendment clauses purport to allow one extension of ten years each. Presumably, should the Covenants continue through the end of the one ten year extension period without being changed or amended, the Covenants will terminate automatically. In regards to the required procedure for amending covenants having similar amendment language, the Oklahoma Court of Civil Appeals has addressed substantially similar covenant language in the case of *In Re Wallace, 1994 OK CIV APP 73*. See, **Attachment 1**. In the *Wallace* case, the court held the "at which time" language in a covenant amendment clause to restrict amendment to one hundred percent during the restrictive periods and to the lesser given percentage on the "at which time" date.

As this pertains to the Development Covenants, the "at which time" date for Section 1 was December 31, 2001 and for Section 2 on December 31, 2005. This means that presently to amend Section 1 or 2 Covenants would require 100% approval from each Section. To alleviate such burdensome situations as this, the Oklahoma Legislature adopted 11 O.S. §42-106.1 which would allow 60% of the owners within Section 1 and 70% of the owners within Section 2 to vote to amend the Covenants. This is due to the length of time each set of Covenants have been on file with the county clerk. See, **Attachment 2**.

3. **Amendment clause within Section 3 Covenants.** Section 3 Covenants contain an amendment clause on the first page of the Covenants. The amendment clause provides:

These Covenants shall be binding upon all parties and all persons claiming under them through December 31, 2008, at which time they shall be automatically extended for an additional ten (10) years, unless by a vote of at least two-thirds of the then owners of the lots in the Addition...it is agreed that these Covenants should be changed, amended, or terminated in whole or in part. (emphasis added)

As noted under number 2 above, the case of *In Re Wallace* provides that Section 3 owners must vote unanimously to amend their Covenants, except on December 31, 2008, which at that time they will get a 2/3 majority. Therefore, it is my opinion that the Section 3 Covenants may be amended before December 31, 2008 with 100% approval of the current lot owners, or on November 13, 2008 with 70% approval of the current lot owners under 11 O.S. §42-106.1, or on December 31, 2008 with 2/3 (67%) approval of the current lot owners.

4. **Amendment 1.** Amendment 1 is purportedly adopted by one individual, Joseph C. Allen, with no designation as to who this person is or what he represents. Joseph C. Allen is neither an original incorporator nor a signer to any of the original Restrictive Covenants, Articles of Incorporation, or Bylaws. I would question the legitimacy of this Amendment 1.
5. **Amendment 2.** Amendment 2 is purportedly adopted by Resolution of the Board, and executed by Gordon Nichols as treasurer for the Association. Given our discussion of amending the Covenants above, I would question the legitimacy of this Amendment 2.

Governing Document Amendment Recommendations

Following are several **recommendations** for amending the Governing Documents:

1. Given the relative difficulty of administering the multiple Development Governing Documents over administration of one complete and unified set of governing documents, I would propose the adoption of a restated and reconciled set of covenants that includes a) each set of covenants for Sections 1, 2, and 3, b) the prior amendments to the Governing Documents (See, observation numbers 4 and 5 above), and c) the proposed current amendments to the Governing Documents.

2. Because of the restrictive period within the Section 3 Covenants, the Development owners should plan to make any Development-wide Covenant amendments on or before¹ December 31, 2008.
3. Some associations have found the use of covenant drafting committees helpful. A covenant drafting committee is a committee comprised of owners selected by the board, with one board member serving as the chair of the committee. The board drafts a resolution that outlines the goals, tasks, and scope of authority for the committee. The committee then typically conducts formal/informal surveys of the owners, reviews sample covenant language, and ultimately comes up with a list of issues, a report, or an actual covenant draft to submit to the board.
4. I would recommend filing a change of registered agent form with the Oklahoma Secretary of State to change the current agent to a person within the Development.

Other Observations and Recommendations

Following are several other **observations** and **recommendations** relative to the Governing Documents:

1. I observe that each set of Covenants seems to create an Architectural Review Committee separate and distinct within each Section. I recommend merging these three Committees into one for administrative purposes. It is also crucial for the valid formation of this Committee that a majority of owners within each Section vote to appoint the three Committee members.
2. I recommend amending Article 4 within the Covenants to allow fines to be the subject of a lien.
3. I observe that the Covenants contain differing minimum square footage requirements on residences. These differences should be reflected in any restated Covenant.
4. I observe that Section 2 Covenants lack Article 7.1 as reflected in Section 1 and Section 3 Covenants.
5. I observe Section 1 Covenants lack Article 8.7 as reflected in Section 2 and Section 3 Covenants.
6. I observe that each set of Covenants lack a prevailing party attorney's fees provision for suits to enforce the Covenants. I recommend any restated Covenants include such a provision.
7. I recommend filing a change of registered agent form with the Oklahoma Secretary of State.

¹ It is possible to conduct the voting before December 31, 2008 and have the document filed with an effective date of December 31, 2008.

8. I recommend a Board of 5 operating in staggered terms as provided by the Articles.
9. I recommend amending the Bylaws in the following respects:
 - a. Article 1.A to include all three Sections.
 - b. Article 1.E to include all three Covenants or the amended and restated covenants to be adopted.
 - c. Article 2 to represent a more current principle place of business.
 - d. Article 4.1 to allow the Board to set the annual meeting during a particular quarter and not on a specific day.
 - e. It may be wise to streamline the Nominating Committee and Election Committee provisions found within the Bylaws.

This concludes my opinion and recommendation. Should you need any further assistance, please do not hesitate to contact me.

Sincerely,

VAUGHN & WINTON PLLC

A handwritten signature in black ink, appearing to read "Matthew L. Winton". The signature is fluid and cursive, with the first name "Matthew" and last name "Winton" clearly distinguishable.

Matthew L. Winton, Esq.

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Wallace's Fourth Southmoor Addition to City of Enid, In re
1994 OK CIV APP 73
874 P.2d 818
65 OBJ 1729
Case Number: 81923
Decided: 05/05/1994

Cite as: 1994 OK CIV APP 73, 874 P.2d 818

IN RE WALLACE'S FOURTH SOUTHMOOR ADDITION TO THE CITY OF ENID. PROPPS, INC.,
APPELLANT,
v.
DOROTHY J. ROGERS, TRUSTEE OF THE R.L. ROGERS CHILDRENS TRUST, AND BESSIE L.
ROGERS AND ROBERT L. ROGERS, CO-TRUSTEES OF THE BESSIE L. ROGERS REVOCABLE
TRUST DATED JUNE 12, 1992; LURAN V. BROWN, APPELLEES.

Appeal from the District Court of Garfield County; John W. Michael, Judge.

AFFIRMED

Dennis W. Hladik, Johnston & Hladik, Enid, for appellant.
Owen D. Wilson, Wilson & Wilson, Enid, for appellee.

OPINION

GARRETT, Vice Chief Judge

¶1 Propps, Inc. (Appellant) filed an action for a declaratory judgment that a protective covenant on property located in Wallace's Fourth Southmoor Addition, City of Enid, Oklahoma, had been amended or changed. Appellant desires to construct classrooms and activity rooms on the north 297 feet of Block three (3) to be used for convalescent home purposes, similar to those used at the Sunnyside Center, a convalescent home operated by Appellant and located on Block six (6) of the property. The use of the property, without the amendment, is restricted to use as a residential plot. Paragraph 1 of the covenants provides:

1. All lots within the subdivision shall be known and designated as residential building plots, except Blocks 5 and 6, which are reserved for retail business use and Tract A for Church use. No structures shall be erected, altered, plated or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage for not more than 2 automobiles and other outbuildings incidental to residential use of the plot.

¶2 Appellant filed a motion for summary judgment and attached evidentiary materials including, *inter alia*, written ballots from property owners of the Addition. Appellant alleged in the motion that a majority of the owners had consented to the amendment and it was entitled to a declaratory judgment that the protective covenants were amended.

¶3 Appellees, who owned lots in the addition, objected to the proposed amendment. Appellees also filed a motion for summary judgment. The court denied Appellant's motion but sustained Appellees' motion. The trial court's order contained the following:

1. Pursuant to paragraph 10 of the protective covenants, any amendment, unless the vote is unanimous must take place at ten year intervals, with the next being on January 1, 1994.
2. For ballot counting purposes, the Petitioners are adjudged to be the owners of Lots One through Ten, Block Three and Lot One, Block Six, with each of those lots having one vote. Rogers is deemed to be the owner of Lots Two and Three, Block Six with each lot having one vote.
3. The ballot signed by Floyd Cline pertaining to Lot Eight, Block Two will not be counted as either a yes vote or a no vote for the reason that the property is owned by Floyd and Bonnie Cline and both have not joined in the vote. . . .

¶4 Paragraph 10 of the covenants provides:¹

10. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them until January 1, 1974, at which time said covenants shall be automatically extended for successive periods of ten years unless by a vote of a majority of the then owners of the lots, it is agreed to change said covenants in whole or in part.

¶5 Subsequently, Appellant filed a second motion for summary judgment, wherein it alleged that its prior motion had not correctly set out the affirmative votes of the property owners in the text of the motion, although the ballots were attached showing the correct votes. Additionally, Appellant attached more ballots with affirmative votes and alleged the total votes (29 of 52 total) constituted a majority of the property owners and was sufficient to amend the covenant. The court denied Appellant's second motion and held "the issues were determined in the April 23, 1993, hearing and that at such hearing the Motion for Summary Judgment of Propps, Inc. was denied and the Motion for Summary Judgment of Rogers and Brown was sustained, which terminated the case and there was no basis for the filing of the Second Motion for Summary Judgment."

¶6 For reversal on appeal, Appellant contends:

1. The court erred in ruling that the protective covenants affecting Wallace's Fourth Southmoor Addition to the City of Enid were not modified by a majority vote of the property owners;
2. The court erred in its second ruling that the issues were determined in the first motion and that there was no basis for filing the second motion for summary judgment;
3. The court erred in denying Appellant's second motion for summary judgment;
4. The court erred in ruling that "Pursuant to paragraph 10 of the protective covenants, any amendment, unless the vote is unanimous must take place at ten year intervals, with the next being on January 1, 1994"; and
5. The court erred in ruling the ballot signed by Floyd Cline could not be counted because the other property owner, Bonnie Cline, did not join in the vote.

¶7 If the language in a restrictive covenant is ambiguous, the intention of the parties generally controls its construction. However, if the language is not ambiguous, the plain language of the covenant must be given effect. In construing a restrictive covenant, the rule requires strict construction favoring unencumbered use of real property. *Jackson v. Williams*, 714 P.2d 1017, 1021 (Okla. 1985); *Pirtle v. Wade*, 593 P.2d 1098, 1100 (Okla.App. 1979) (Cert. denied 1979). Neither *Jackson*, supra, nor *Pirtle*, supra, addressed the precise issue of whether a covenant can be amended or modified more often than a designated time period, and, if so, whether unanimity is required.

¶8 However, we find *Johnson v. Howells*, 682 P.2d 504 (Colo. App. 1984), in which the Colorado Court of Appeals considered a covenant similar to the one at issue here, to be persuasive. The covenant, considered in *Johnson*, provided:

"Change in Covenants: These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty (20) years from the date hereof after which time said covenants shall be automatically extended for a successive period of 20 years unless an instrument signed by sixty percent of the then owners of the property has been recorded, agreeing to change said covenants in whole or in part."

The trial court held the amendments invalid because less than 60% of the needed property owners had agreed to them. The Colorado Court of Appeals agreed with the appellant that the trial court erred in holding the covenants could be amended within the 20 year period without unanimous consent of the owners. The *Johnson* Court stated:

We consider the crucial phrase to be 'after which time.' The plain meaning of the paragraph in question is that the covenants will be binding for twenty years, *after which time* they are automatically extended *unless* sixty percent of the property owners agree to change them and record an instrument to that effect. . . .

To interpret the paragraph in question as the trial court did would be to render meaningless the reference therein to a twenty-year period. If the owners had intended that the covenants could be amended at any time by sixty percent of the owners, they would not have needed to include any reference to a twenty-year period.

Accordingly, the summary judgment in favor of plaintiffs is affirmed, but we hold that, barring unanimous agreement (emphasis added) among the owners to rescind or change the restrictive covenants, see 5 R. Powell, *The Law of Real Property* § 679[1] (P. Rohan rev. 1981); 2 *American Law of Property* § 9.23 (A.J. Casner ed. 1952), the covenants may not be amended within the initial twenty-year period. (Citations omitted) (Emphasis in original).

¶9 Similarly, the covenant in the instant case prescribes a definite time period of ten years for modification by a majority of the owners. We hold the phrase "at which time" in paragraph 10 relates to "January 1, 1974"; and, the subsequent phrase, "for successive periods of ten years", refers to time periods ending on January 1, 1984, January 1, 1994, January 1, 2004, etc. The clear reference to "periods of ten years" would be meaningless if the covenant could be amended by a majority vote (less than unanimous) at any time on or after January 1, 1974. Thus, the plain language of the covenant causes the reference to "periods of ten years" to be a restriction, as to the frequency of amendment by less than a unanimous vote. Of course, if every owner votes to amend or change the covenant, then the restriction as to frequency of amendment by majority vote (less than unanimous) would not apply; and, a change by unanimous vote may be made at any time.

¶10 It must not be forgotten that while a "restrictive covenant" forbids or requires certain uses of the real property which it covers, it also confers vested rights in those owners who desire to own property where the subject uses are either required or forbidden. One of the vested rights is the method required to amend, change, or abolish the covenant.

¶11 In an equity case, an appellate court must review the record and may substitute its judgment on factual issues as long as it pays sufficient deference to the trial court's opportunity to judge the credibility of witnesses and to resolve disputed testimony. *Pirtle v. Wade*, 593 P.2d at 1099. The trial court's finding that the Clines had not both voted is obviously correct and supports the court's holding that the vote was not unanimous. Additionally, no one disputes the fact that other owners, besides the Clines, within the Addition had not voted for the amendment. The trial court thus properly sustained Appellees' motion for summary judgment. Also, Appellant's second motion for summary judgment, which did not establish unanimity among the property owners, was properly denied. The additional votes received did not help Appellant's position, being short of unanimous. It becomes unnecessary to consider Appellant's remaining arguments.

¶12 AFFIRMED.

¶13 HUNTER, P.J., and BAILEY, J., concur.

Footnotes:

¹ The proposed amendment of paragraph one of the covenants is: 1. All lots within the subdivision shall be known and designated as residential building plots except Block Five and Six, which are reserved for retail business use and Tract A for church use, and Block Three, which is reserved for convalescent home purposes. Convalescent home purposes will be defined to include classroom and activity rooms. [*] No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single family dwelling not to exceed two and one-half stories in height and a private garage for not more than two automobiles and other outbuildings incidental to residential use of the plot.

*Underlined portion indicates the proposed addition.

Section 42-106.1 - Amending Restrictive Covenant

A. Any restrictive covenant on property contained in a residential addition may be amended if:

1. The restrictive covenant has been in existence for at least ten (10) years and the amendment is approved by the owners of at least seventy percent (70%) of the parcels contained in the addition or the amount specified in the restrictive covenant, whichever is less; or
2. The restrictive covenant has been in existence for at least fifteen (15) years and the amendment is approved by the owners of at least sixty percent (60%) of the parcels contained in the addition or the amount specified in the restrictive covenant, whichever is less.

B. Where a preliminary plat has been filed for a residential addition, the requirements of paragraphs 1 and 2 of subsection A of this section shall include all the parcels contained in the preliminary plat.

C. In the absence of a provision providing for the amendment of the restrictive covenants of a residential addition the requirements of paragraphs 1 and 2 of subsection A of this section shall apply. A thirty-day notice of any meeting called to amend the restrictive covenants shall be provided to the owners of every parcel contained in the addition. Each parcel shall be entitled to one vote.

D. The recorded restrictive covenants on property contained in a residential addition may be amended by the addition of a new covenant creating a neighborhood association for the addition that would require the mandatory participation of the successors-in-interest of all record owners of parcels within the addition at the time the amendment is recorded. The amendment must be approved by the record owners of at least sixty percent (60%) of the parcels contained in the addition and shall be subject to the following:

1. The amendment shall provide that participation in the neighborhood association created by the amendment shall not be mandatory for persons who are record owners of parcels within the residential addition at the time the amendment is filed of record, but such participation shall be mandatory for all successors-in-interest of the record owners;
2. The amendment must provide that the concurring vote of not less than sixty percent (60%) of the record owners of parcels contained in the addition shall be necessary for the establishment or change of dues for the neighborhood association; and
3. Following approval, the amendment shall be filed of record in the office of the county clerk of the county wherein the residential addition is located against all parcels within the addition. The term amendment may apply to an existing covenant or to a new subject not addressed in existing covenants.

A thirty-day written notice of any meeting called to approve any such amendment shall be provided to the owners of every parcel contained in the residential addition. The notice of such meeting shall be published in a newspaper in the county at least fourteen (14) days before the meeting. The notice shall also be given by publication in the neighborhood newsletter. Each parcel within the addition shall be entitled to one vote. Any amendment approved and recorded pursuant to this subsection may thereafter be revoked by approval of sixty percent (60%) of the record owners of parcels within the addition.