FRUITA CITY COUNCIL
WORKSHOP MEETING
AUGUST 23, 2016
6:30 PM

1. FRUITA CITY CHARTER REVIEW (6:30 – 6:50 PM)
2. DISCUSSION ON LAND USE TOPICS (6:50 – 7:50 PM)
3. ROBINSON RENTAL (7:50 – 7:55 PM)
4. OTHER ITEMS (7:55 PM)
5. ADJOURN

FRUITA
COLORADO

City of Fruita
325 E. Aspen,
Fruita, CO 81521
(970) 858-3663
www.fruita.org

AGENDA ITEM COVER SHEET

TO: FRUITA CITY COUNCIL AND MAYOR
FROM: MARGARET SELL, FINANCE DIRECTOR
DATE: AUGUST 23, 2016
RE: CITY CHARTER REVIEW

BACKGROUND

The City of Fruita became a home-rule city with the adoption of a Charter in 1981. Since that time, charter provisions have been reviewed and modifications offered for public consideration in 1984, 1986, 1988, 1998 and 2004. Section 5 of Article XI of the Charter requires that the Charter be reviewed by the City Council at least once every six years. The last review took place in 2010.

Home-rule status allows a municipalty the full right of self government in matters of local concern with provides them with greater flexibility when seeking solutions to local issues without involving the state legislature or being subjected to limitations imposed statewide. State law applies to home-rule cities in the absence of a charter or ordinance provision. Home rule is the embodiment of the principle that the best government is one that is closest to the people. Statutory towns and cities are limited to exercising powers that have been granted by the state and are subject to those provisions and limitations that have been imposed by the state.

Potential issues for discussion and consideration for potential amendments include:

- Term limits for elected officials
- Sale of city owned property and election vs ordinance requirements (clarification)
- Other issues?

Staff will continue review of the Charter with any input from the City Council on potential amendments and present a summary of proposed changes (if any) prior to the end of the year.

FISCAL IMPACT

Review of the Charter has minimal fiscal impact. If items are identified for potential amendment of the Charter, there will be some additional costs associated with an election to place proposed amendments on the ballot in 2018, or more significant costs if a determination is made that a special election needs to be held.

APPLICABILITY TO CITY GOALS AND OBJECTIVES.

The Fruita City Charter is the basis of government for the City of Fruita and provides for local control in matters of local concern. This framework of government allows the city more flexibility in responding to and addressing the city's overall goals and objectives.

FRUITA
COLORADO

AGENDA ITEM COVER SHEET

TO: **FRUITA CITY COUNCIL AND MAYOR**

FROM: **MICHAEL BENNETT, CITY MANAGER**

DATE: **August 23, 2016**

RE: **DISCUSSION ON LAND USE TOPICS**

BACKGROUND

The purpose of this item is to conduct a general discussion about specific land use issues, questions or scenarios that have come up within the recent months. Specifically, I would like to discuss the purpose and applicability of conditional use permits; consider the types, number of and boundaries of existing zones; and discuss recent requests for exceptions and considerations City Council has been asked to consider at a policy level.

FRUITA
COLORADO

AGENDA ITEM COVER SHEET

TO: **Fruita City Council and Mayor**

FROM: **Community Development Department**

DATE: **August 23, 2016**

RE: **Robinson Rental Conditional Use Permit**

BACKGROUND

This is a request for a Conditional Use Permit (CUP) for a bed & breakfast use (also known as a vacation rental by owner, or VRBO) in a residential zone. The subject property contains 16,157 square feet and is located at 1424 Niblick Way in the Adobe Falls PUD Filing 1 Subdivision. The 400 square foot guest house attached to the 2,587 square foot main house on the property is intended to be used as a bed & breakfast. The Land Use Code requires a CUP for a bed & breakfast use in all residential zones.

No review agencies expressed a concern regarding this proposed use. The proposed CUP for this bed & breakfast use meets all approval criteria that must be considered for a bed & breakfast use **with one exception**. Supplemental zoning standard #7 of Section 17.07.070.A of the Land Use Code states that it is the responsibility of the applicant to demonstrate that any declarations, covenants, conditions or restrictions on the property allow for a bed & breakfast use.

The attorney for the homeowners association (HOA) for this subdivision has provided a letter stating that this use violates the covenants. All other property owners, including the developer of this subdivision who still owns a majority of the lots, also have provided written statements opposing this use and agreeing that the use violates the covenants.

Because the supplemental zoning standard requiring the applicant to demonstrate that the use is allowed by the covenants has not been met, staff recommends denial. Approval criteria that must be considered for CUPs requires that the application be consistent with the Land Use Code. Because the supplemental zoning standards for bed & breakfast uses has not been met, the application is not consistent with the Land Use Code.

This issue does not require staff (including the City Attorney) or the Council to make a determination as to which party has interpreted the covenants correctly because it is the applicant's responsibility to prove that there are no violations, and this has not been proven. If the applicant desires to take the issue to civil court, certainly then the city can abide by that order of the court regarding which party has interpreted the covenants correctly according to law.

At the August 9, 2016, Planning Commission public hearing, the HOA's attorney and several of the surrounding property owners spoke out against the proposed bed & breakfast use. Other than the applicants, no one spoke out in favor of this CUP request. The Planning Commission voted 5-1 to recommend denial of the proposed CUP. Commissioner Van Etten voted against the motion to deny the CUP because he believes that interpretations of ambiguous covenant language should allow the applicant greater freedoms in the use of their property.

Community Development Department
Staff Report
August 3, 2016

Application #:	**2016-11**
Project Name:	**Robinson Rental**
Property Owner:	Travis and Ellen Robinson
Representative:	Travis and Ellen Robinson
Application Type:	Conditional Use Permit
Location:	1424 Niblick Way
Zone:	Adobe Falls PUD
Request:	This is a request for approval of a Conditional Use Permit for a Vacation Rental by Owner (Bed And Breakfast). The Fruita Land Use Code requires a Conditional Use Permit to operate a Bed and Breakfast in residential zones.

Project Description:

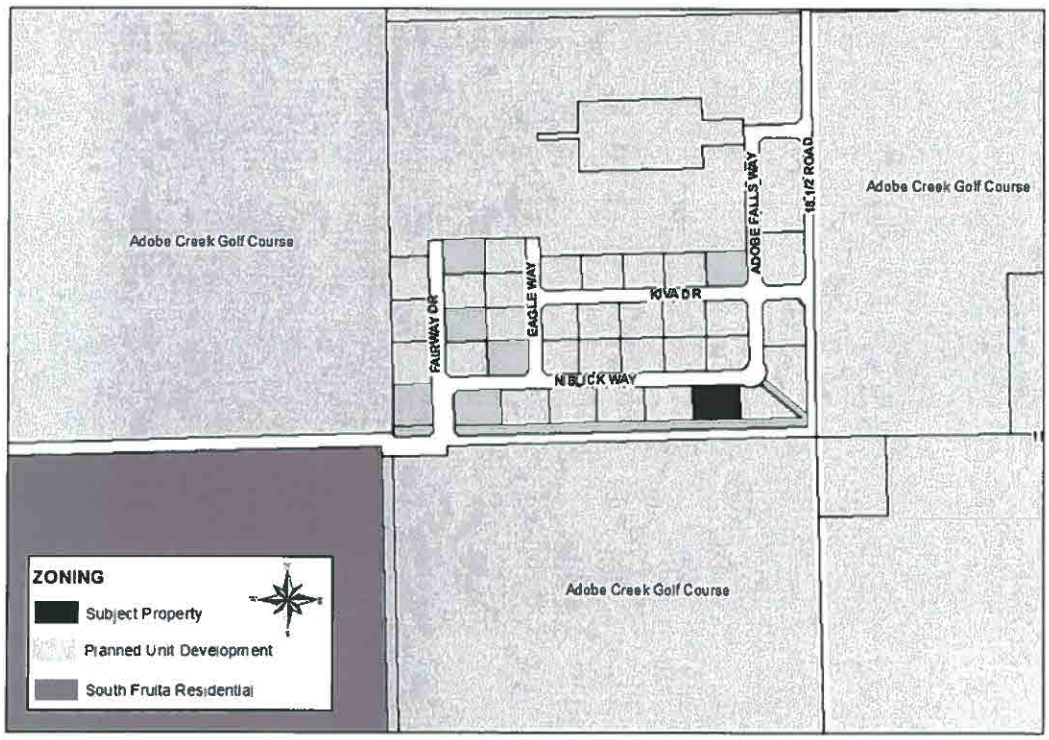
The subject property contains a 2,987 square foot detached single family house and a 400 square foot finished attached guest house on an approximately 16,120 square foot lot which is located on Niblick Way in the Adobe Falls subdivision. The 400 square foot attached guest house is attached by a roof; however the actual guest house is separate from the main house. The property owner has requested a Conditional Use Permit (CUP) to use the guest house for a vacation rental by owner.

The finished guest house is intended to be available for rent on a less than month-to-month basis. The Land Use Code defines this type of use as a Bed & Breakfast which requires a CUP in the Community Residential (CR) zone.

Surrounding Land Uses and Zoning:

The subject property is surrounded by PUD zoning, the majority of the land surrounding the property is vacant lots. Directly to the south is the Adobe View Golf Course. To the north, south, and west are residential lots and homes. The uses in these zones are primarily single family residential dwelling units.

Zoning Map



2015 AERIAL PHOTOGRAPH

Review of Applicable Land Use Code Requirements:

Table 17.07.060(F) of the Land Use Code requires a Conditional Use Permit (CUP) for Bed & Breakfast type of land use in the Community Residential zone. The Land Use Code defines a Bed & Breakfast as a facility of residential character that provides sleeping accommodations with or without meals for hire on a day-to-day basis with no more than four guest rooms. It is not required to be owner occupied.

Section 17.07.070, Supplemental Zoning Regulations and Standards, Section A, identifies conditions and standards that must be met for a Bed & Breakfast use:

1. **Where the applicable zoning district allows bed and breakfast uses as a Conditional Use, the use must be a residential dwelling that contains no more than four (4) guest bedrooms where overnight lodging, with or without meals, is provided for compensation. Bed and Breakfast uses with more than four (4) guest bedrooms are considered hotels or motels;**

   The building to be used as the vacation rental is the finished guest house which includes a bathroom and a bedroom area and a living room. The main house, which contains four bedrooms according to the Mesa County Assessor's Office, will not be used as part of this vacation rental business.

2. **Kitchen and dining facilities in bed and breakfast dwellings may serve only residents and guests and shall not be operated or used for any commercial activity other than that necessary for bed and breakfast purposes;**

   The project narrative says, "We will not be offering any sort of food or beverage services."

3. **The bed and breakfast use shall not change the residential character of the dwelling if located in a residential zone or area;**

   According to the project narrative, "the guest house will be set up as a residential home." Staff interprets this as not changing the residential character of the dwelling or neighborhood.

4. **In residential zones (including residential developments in the CMU zone), there shall be no advertising display or other indication of the bed and breakfast use on the premises other than a sign that is in compliance with the provisions of Chapter 17.41;**

Chapter 17.41 of the Land Use Code permits an Address or Identification Sign, identifying the address and/or the occupants of a dwelling unit or of an establishment, with a maximum size of two square feet and a maximum height of four feet for a sign in this zone. No illumination of this sign is permitted. There are no signs on the subject property at this time. And based on the project narrative,"We will also not have any signage at the property."

5. **A minimum of one parking space per guest bedroom and resident bedroom shall be required. Screening may also be required;**

The parking for this vacation rental will be in the driveway as stated in the project narrative "We have dedicated off street parking in our driveway, so this will not add to cars in the street". There are a total of 6 off street car parking spaces available. No screening is recommended.

6. **The bed and breakfast facility shall comply with all Building Codes adopted by the city;**

The house was built in 2014 and has received a Certificate of Occupancy. Staff has no reason to believe the building doesn't continue to meet the building codes.

7. **It shall be the responsibility of the applicant to demonstrate that the relevant subdivision's declarations, covenants, conditions or restrictions allow for a bed and breakfast use and/or associated signing; and**

According to the project narrative, "The HOA does not specifically prohibit operating a Bed and Breakfast." All property owners within 350 feet of the subject property have been notified of this CUP application. At this time, staff has received written comments addressing this CUP in the form of a letter and a signed petition that is overwhelmingly against this CUP application. The letter and petition have been included in the Staff Report.

Staff has received a copy of a letter sent to Travis and Ellen Robinson from Richard Livingston of Livingston & Mumby, LLC, which states "The application for a Conditional Use Permit (CUP) for your property to operate a B & B will be in violation of the Declaration of Covenants, Conditions and Restrictions for Adobe Falls Subdivision. Article V of the Declaration restricts the use of lots to residential purposes only." It is unclear if Mr. Livingston represents the HOA or an individual property owner.

8. **Where a bed and breakfast use is subject to Conditional Use Permit approval, any existing or proposed uses in addition to that of a**

dwelling unit (e.g. home occupation, accessory dwelling unit, etc.) are considered as part of the conditional use review.

Staff is unaware of any other existing or intended use of this property other than as a dwelling unit and/or as a short term rental as proposed by this CUP request.

Based on this information, this CUP request for a Bed & Breakfast meets all but one of the supplemental zoning regulations and standards of the Land Use Code. Supplemental zoning standard #7 states that it is the responsibility of the applicant to demonstrate that there is no violation of the covenants. This has not been demonstrated.

Chapter 13 of the Land Use Code identifies the approval criteria that must be considered for Conditional Use Permit (CUP) requests. The Code defines a CUP as a use which, because of its unique or varying characteristics, cannot be properly classified as an allowed use in a particular zone district. After due consideration, as provided for in Section 17.13.040 of the Land Use Code, of the impact upon neighboring land and of the public need for the particular use at a particular location, such conditional use may or may not be approved.

Section 17.13.040, Conditional Uses, of the Land Development Code requires that a conditional use be approved after considering the following:

1. **The proposed use is consistent with the provisions and purposes of this Title, with the purposes of the zone in which it is located, and with the city's Master Plan;**

   Based on this review, the proposed conditional use can be consistent with the provisions and purposes of this Title, which is to promote the health, safety and welfare of the present and future inhabitants of the community, and with the purposes of this Planned Unit Development (PUD) zone, which is to allow for moderate density single-family neighborhoods. If the supplemental zoning regulations and standards (identified above) are met along with the approval criteria for CUPs, this criterion has not been met because supplemental standard #7 requires the representative to demonstrate that the proposed Bed and Breakfast (VRBO) would not be in violation of any of the subdivisions covenants. The Land Use Code is one of the main documents used to implement the goals and policies of the City's Master Plan.

2. **The proposed use is compatible with existing and allowed uses surrounding or affected by the proposed use, pursuant to the criteria in Section 17.07.080;**

Section 17.07.080 requires that a proposed development be compatible with adjacent properties, considering both existing and potential land uses on adjacent properties. For all land uses, "compatibility" is provided when a proposed land use can coexist with other existing uses in the vicinity without one use having a disproportionate or severe impact on the other use(s). The city decision-making body may consider other uses existing and approved, and may consider all potential impacts relative to what customarily occurs in the applicable zone and those which are foreseeable, given the range of land uses allowed in the zone. The review authority may require conditions of approval to promote compatibility between a proposed use and existing uses in the vicinity to ensure compatibility.

It appears that this proposed vacation rental will be able to coexist with other existing houses in the area without having a disproportionate or severe impact on the neighborhood. Due to the characteristics of the surrounding land uses it appears that this Bed & Breakfast will be compatible with the zoning that surrounds the subject property. Staff sees no negative impact to the neighborhood or the proposed use being disproportionate to the current land uses in the surrounding area. This criterion has been met.

3. **The proposed use will not materially endanger the public health or safety; and**

Use of the house for a vacation rental is not expected to endanger the public health or safety. This criterion can be met.

4. **Public services and facilities including, but not limited to, transportation systems, wastewater disposal and treatment, domestic water, fire protection, police protection, and storm drainage facilities are adequate to serve the proposed use.**

Public services and facilities have been available to this property and will continue to be available to this property while it is used as a vacation rental. The impacts are not expected to be any greater than those generated by a single family residence. This criterion has been met.

Based on this information, this requested Conditional Use Permit does not meet all approval criteria for Conditional Use Permits and all supplemental zoning standards. Because supplemental zoning standard #7 requires the representative to demonstrate that the proposed Bed & Breakfast (VRBO) would not be in violation of any of the subdivisions covenants, and what has been

demonstrated is that the issue is debatable, this supplemental zoning standard has not been met.

Review Comments:

All review comments received are included with this Staff Report. There are no concerns from review agencies regarding this Conditional Use Permit request.

Public Comments:

Public comments have been received and have been included with this Staff Report.

Staff Recommendation:

Staff recommends denial of this CUP because the representative has not demonstrated that the proposed Bed and Breakfast would not be in violation of the subdivisions covenants as required by the supplemental zoning standards of the Land Use Code.

Fruita Planning Commission: August 9, 2016

Fruita City Council: September 6, 2016

LAND DEVELOPMENT APPLICATION

Project Name: Robinson Rental
Project Location: 1424 Niblick Way Fruita CO 81521
Current Zoning District: PUD Requested Zone: None
Tax Parcel Number(s): Number of Acres:
Project Type: Conditional Use Permit

Property Owner: Travis & Ellen Robinson
Property Owner:
Address: 1424 Niblick Way
City/State/Zip: Fruita CO 81521
Phone: 970.640.8641 Fax:
E-mail: travisjrobinson@gmail.com

Developer:
Contact:
Address:
City/State/Zip:
Phone: Fax:
E-mail:

Please designate a representative as the coordinator for this application. The representative should attend all conferences/hearings, will receive all correspondence, and communicate all information to the property owners.

Owner Rep:
Contact:
Address:
City/State/Zip:
Phone: Fax:
E-mail:

Engineer:
Contact:
Address:
City/State/Zip:
Phone: Fax:
E-mail:

This Notarized application authorizes the owner's representative, if designated, to act on behalf of the property owners regarding this application.

The above information is correct and accurate to the best of my knowledge.

Travis Lane Robinson — Name of Legal Owner
Signature
4.21.16 — Date

Name of Legal Owner — Signature — Date

Name of Legal Owner — Signature — Date

STATE OF COLORADO)
) ss.
COUNTY OF MESA)

The foregoing instrument was acknowledged before me this 5th day of May, 2016

My Commission expires:

DEBRA WOODS
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID #20094002789
My Commission Expires January 23, 2017

Notary Public

May 3rd, 2016

My wife and I are looking to rent our property located at 1424 Niblick Way Fruita, CO 81521. We have a 400 sq ft guest house at our primary residence and would like to host overnight guests via peer to peer accommodations tools such as AirBnB.com. We typically share the property with our guests during the rental periods (average stay is two nights), and we have a number of tools to research and vet our guests before agree to rent to them. We check our guests in and out, handle the bookings and clean the property ourselves.

Having the property set up as a peer to peer accommodation / AirBnB will not materially affect the neighborhood. Our property currently backs up to a public golf course so we are in an area of mixed use with residential and commercial use. The HOA does not specifically prohibit operating a Bed and Breakfast. It will be strictly enforced that we will share our property with short term rental guests.

The guest house will be set up as a residential home. It will be fully furnished with a living room, bathroom, and one bedroom. We advertise the space to accommodate one to three guests at a time. We also expect that the bulk of the guest stays will be during the spring festival and mountain bike season. We plan to rarely have guests during the summer and winter.

We intend to list the property with AirBnB, an established vacation rental company to help control who rents the guest house. The renters agree to the contract provisions of AirBNB and must place a $500 deposit. We will not be offering any sort of food and beverage services. We have dedicated off street parking in our driveway, so this will not add to cars in the street. We will also not have any signage at the property.

Thank you for your time in considering our conditional use permit.

Sincerely,

Travis and Ellen Robinson

LIVINGSTON & MUMBY, LLC
ATTORNEYS AT LAW

J. Richard Livingston
jrl@lmgjlaw.com

2764 Compass Drive, #200A
Grand Junction, CO 81506
(970) 242-7322 Fax (970) 242-0698

Keith G. Mumby
(1931-2014)

July 7, 2016

Via Email & First Class Mail

Dahna Raugh
City of Fruita Planning Department
325 E. Aspen Avenue
Fruita, CO 81521

Re: Robinson Rental CUP
2016-11

Dear Dahna:

Enclosed please find a Petition in Opposition to the above-referenced CUP Application scheduled for the July 12, 2016 Planning Commission meeting. The Petition has been signed by all the property owners in Adobe Falls Subdivision except the Applicant. Please enter the Petition in the file for this matter.

It is my intention to appear for any hearing on this matter. I would appreciate it if you would advise me as to any scheduling changes should they occur.

Thank you for your time and assistance.

Sincerely yours,

LIVINGSTON & MUMBY, LLC

J. Richard Livingston

JRL:jlc
Enclosure
cc: Adobe Falls, LLC

PETITION IN OPPOSITION

The undersigned, with due respect for individual property rights, oppose the application for a bed and breakfast conditional use permit at 1424 Niblick Way, Fruita, CO, as such use would violate the residential use only restriction contained in the covenants for Adobe Falls Subdivision.

Signature	Printed Name	Address
	Janet M. Elliott	1306 Niblick Way, Fruita CO
	Denise M. Hoctor	1332 Niblick Way Fruita, CO
	Judy Thornburg	1354 Niblick Way, Fruita, CO
	Joan K. Ehrlich	1406 Kiva Dr
	Clarence D. Ehrlich	1406 Kiva Dr
	Brooke Griffin	1483 Adobe Falls Way
	Shari M. Holland	1466 Adobe Falls Way
	Mike Holland	1466 Adobe Falls Way
	Robin Smith	1444 Niblick Way
	Rod Smith	1444 Niblick Way
Adobe Falls, LLC	Alan Parkerson, Mgr	Vacant Lots

LIVINGSTON & MUMBY, LLC
Attorneys at Law

J. Richard Livingston
jrl@lmgjlaw.com

2764 Compass Drive, #200A
Grand Junction, CO 81506
(970) 242-7322 Fax (970) 242-0698

Keith G. Mumby
(1931-2014)

June 27, 2016

Mr. and Mrs. Travis Robinson
1424 Niblick Way
Fruita, CO 81521

Re: Conditional Use Permit

Dear Mr. and Mrs. Robinson:

The application for a Conditional Use Permit (CUP) for your property to operate a B & B will be in violation of the Declaration of Covenants, Conditions and Restrictions for Adobe Falls Subdivision. Article V of the Declaration restricts the use of lots to residential purposes only.

Please be advised that the CUP application will be contested and, if approved, contested further in the Mesa County District Court. Reconsideration of your decision to pursue a business activity on your property will avoid such legal proceedings.

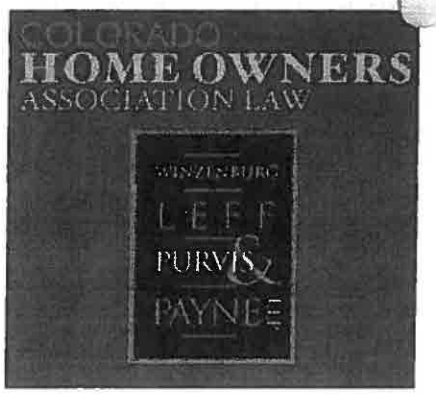
Should you or your attorney have any questions, please contact me.

Sincerely yours,

LIVINGSTON & MUMBY, LLC

J. Richard Livingston

JRL:jlc
cc: Client
Fruita Planning Department



09 | 14 | 2015 Posted By Stephane Dupont

Short Terms Rentals may not be Commercial Use of Property

In a recent decision [*Houston v. Wilson Mesa Ranch Homeowners Association, Inc.*, 2015 WL 4760331 (D. Colo. August 13, 2015], the Colorado Court of Appeals held that an association's covenants stating that homes could not be occupied or used for any commercial or business purpose did not prohibit a homeowner from renting out his property for short-term vacation rentals.

A homeowner in the community advertised and rented his home for rent through the VRBO website. In response to the homeowner's actions, the association passed an amendment to its 'administrative procedures' prohibiting its members from renting out their properties for a period of less than thirty days without prior board approval and establishing a $500 fine for violations.

The Court found that a short-term rental constitutes a residential and not commercial use of the property and found in favor of the homeowner. However, had the covenants contained a specific prohibition against short term rentals, it may have reached an opposite conclusion. Additionally, the Court found that the 'administrative procedure' adopted by the association was improper as it was contrary to the terms of the covenants. In other words, since the covenants did not prohibit short term rentals, the association could not restrict rentals absent a homeowner approved amendment to the covenants.

This case illustrates how caution needs to be utilized before an association attempt to interpret its covenants too broadly. The dispute could have been avoided had the covenants specifically prohibited short term rentals.

* This was given to the Planning Commissioners on the night of the Planning Commission meeting (Aug 9th 2016)

From: Travis Robinson [mailto:travislrobinson@gmail.com]
Sent: Monday, July 25, 2016 8:51 AM
To: Henry Hemphill
Subject: Re: [Privileged] Short-Term Residential Use of Your Property Re: Robinson File - HOA Covenants and attorney letter

Hi Henry, I hope you had a good weekend and also found this case (Houston 1997 1997) helpful. I'm traveling this morning, so I'll try to reach you and Donna this afternoon. Thanks, Travis

On Friday, July 22, 2016, Travis Robinson <travislrobinson@gmail.com> wrote:

Hi Henry, here's the case and my attorney's analysis.

Have a great weekend. Travis

---------- Forwarded message ----------
From: **O.Shane Balloun** <o.shane@ballounlaw.com>
Date: Tuesday, July 5, 2016
Subject: [Privileged] Short-Term Residential Use of Your Property Re: Robinson File - HOA Covenants and attorney letter
To: Travis Robinson <travislrobinson@gmail.com>

Disclaimer: this is attorney-client privileged and confidential. It is not a guarantee of title or otherwise, and it does not represent a formal title opinion. Rather, this missive is a discussion of your options with respect to litigating or making claims regarding the short-term residential rental use of your property.

Travis:

Houston 1997 1997 v. Wilson Mesa Ranch Homeowners Ass'n (Colo. App. 2015)

http://caselaw.findlaw.com/co-court-of-appeals/1710512.html

As I remembered, ambiguous covenant language is to be narrowly construed in Colorado, and candidly, this case is perfectly on point.

In *Houston 1997 1997*, the court distinguished between the covenants at issue, and the holding in *Jackson & Co. (USA), Inc. v. Town of Avon*, 166 P.3d 297, 298–300 (Colo. App. 2007). In *Jackson*, the earlier court held that the short term rental of a duplex with six individual bedroom-bathroom suites was impermissible under the relevant municipal ordinance and subdivision plat, which explicitly prohibited the use of the property within the residential subdivision as a lodge. But in *Houston 1997 1997*, the court here found no such prohibitory language or definition to "residential" in the HOA restrictive covenants and thus distinguished the facts. Even still, the previous *Jackson* court appeared to hold the vacation rentals impermissible not because of the HOA covenants but because of restrictions in the plat and/or the municipal land use ordinances.

As you read, the *Houston 1997 1997* court narrowly construed the restrictive covenants at issue, which prohibited commercial activity and allowed residential activity to include short term residential rentals, because it found no express restrictive language prohibiting short-term rentals in the HOA restrictions, the plat, or in the municipal land use ordinances.

I looked up the plat map for your subdivision and was unable to find any pertinent restrictions on the recorded plat. It is attached. As we talked about, the Adobe Falls restrictive covenants do not define "residential purposes" in any way, which leads me to believe, like you, that the *Houston 1997 1997* view applies: short-term residential rentals are residential in nature vis-à-vis the restrictive covenants' use of the term.

A bed and breakfast facility, as you likely already know, is defined as "[a] facility of **residential** character that provides sleeping accommodations with or without meals for hire on a day-to-day basis."

Thus, if you succeed in obtaining the CUP for bed and breakfast use, the FMC will only serve to disambiguate the HOA's restrictive covenants in your favor and strengthen your claims under *Houston 1997 1997*, because the covenants do not define "residential" in any interpretive clauses, but the Municipal Code will define your conditional use to be residential.

If/when the permit is granted, there appears to be no further legal impediment to you using your property to rent out via AirBNB, and at this point, there appears to be no case in Colorado that would support your opponent's position.

O.Shane

Balloun Law Professional Corporation

355 Harris Avenue, Suite 201

Bellingham, Washington 98225

(360) 318-7778 | (206) 501-3073 | (650) 899-2992 | (307) 200-7594

(360) 318-7798 fax | (360) 483-5960 vfax

http://www.ballounlaw.com

On Fri, Jul 1, 2016 at 6:25 PM, Travis Robinson <travislrobinson@gmail.com> wrote:

Hi O.Shane, The address is: 1424 Niblick Way Fruita, CO 81521 Attached are the CC&Rs and the letter from the HOA attorney. Thank you again for taking a look at this.

Best, Travis

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HOUSTON 1997 1997 v. WILSON MESA RANCH HOMEOWNERS ASSOCIATION INC

HOUSTON 1997 1997 v. WILSON MESA RANCH HOMEOWNERS ASSOCIATION INC

Print 17 Font size: A A Reset

Colorado Court of Appeals, Div. III.

David HOUSTON, Trustee of the David Houston 1997 Trust dated October 6, 1997, Plaintiff-Appellee, v. WILSON MESA RANCH HOMEOWNERS ASSOCIATION, INC., a Colorado nonprofit corporation, Defendant-Appellant.

14CA1086

Decided: August 13, 2015

Solomon Law Firm, P.C., Joseph A. Solomon, Telluride, Colorado, for Plaintiff-Appellee Dewhirst & Dolven, LLC, Miles M. Dewhirst, Jeffery D. Bursell, Denver, Colorado; Garfield & Hecht, PC, Mary Elizabeth Geiger, Glenwood Springs, Colorado, for Defendant-Appellant

¶1 In this dispute regarding the scope of restrictive covenants, defendant, Wilson Mesa Ranch Homeowners Association, Inc., appeals the district court's judgment on the pleadings in favor of plaintiff, David Houston, Trustee of the David Houston 1997 Trust dated October 6, 1997. We affirm.

I. Background

¶2 Wilson Mesa Ranch is a subdivision in San Miguel County. The subdivision is subject to protective covenants that are enforced by the Association's board of trustees. The covenants provide, as relevant here, that "the lands within Wilson Mesa Ranch [are intended to] be developed and maintained as a highly desirable scenic and secluded residential area;" that all tracts designated on the recorded plats by number "shall be residential tracts;" and that "[n]o lands within Wilson Mesa Ranch shall ever be occupied or used for any commercial or business purpose nor for any noxious activity and nothing shall be done on any of said lands which is a nuisance or might become a nuisance to the owners of any of said lands."

¶3 Houston owns a single-family residence in the subdivision. Beginning in December 2012, Houston began renting out the property for short-term vacation rentals. He advertised the residence on the website of VRBO, a company that facilitates the booking of such rentals. When the board learned that Houston had been renting out the residence, it adopted an amendment ("Section 11") to its administrative procedures that prohibited Association members from renting out their properties for periods of less than thirty days without prior board approval. Section 11 also provided for a $500 fine for each violation of this prohibition.

¶4 The board notified Houston of its adoption of Section 11 and ordered him to comply with it. Houston objected to Section 11 as an unlawful attempt to amend the covenants. The board responded that short-term rentals were a commercial use that was already prohibited under the covenants, and that Section 11 was simply adopted to clarify the board's position and set forth procedures for seeking an exception to the prohibition.

¶5 After the board denied Houston's request to continue leasing the property on a short-term basis, he took two additional rental reservations through VRBO. The board treated these reservations as anticipatory breaches of the covenants and Section 11 and fined Houston $500 for each reservation.

¶6 Houston then filed this action, seeking a declaration that the Association could not bar the short-term rental of his property based on the commercial use prohibition in the covenants. The Association counterclaimed for a declaration that the covenants barred rentals of less than thirty days; that Section 11 was enforceable against Houston; and that Houston was in violation of the covenants and Section 11 by advertising, and taking reservations for, short-term rentals of his property. The Association also sought a permanent injunction requiring Houston to comply with the covenants and Section 11.

¶7 Both parties moved for judgment on the pleadings pursuant to C.R.C.P. 12(c). In a detailed written order, the district court entered judgment in favor of Houston and dismissed the Association's counterclaims. It reviewed the covenant language, found no Colorado case law that was "dispositive on the issue of whether a prohibition on commercial use bars short term rentals or conversely whether the requirement of residential use is somehow inconsistent with short term rentals," and reviewed cases from other jurisdictions that the parties had cited. The court concluded that nothing in the covenants prohibited short-term rentals, either expressly or by implication; that the covenant language was ambiguous regarding the permissibility of short-term rentals; and that, because such ambiguity required that all doubts be resolved in favor of the free and

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unrestricted use of property, the covenants did not prohibit or limit Houston's short-term vacation rentals. It also found that Section 11's "differentiation between forbidden 'short term' rentals and permitted 'long term' rentals [was] arbitrary and not plainly within the confines of the [c]ovenants;" thus, the fines imposed against Houston were not enforceable.

II. Discussion

A. Standards of Review and Applicable Law

¶8 Our review is de novo, both because the district court's judgment was a judgment on the pleadings, see Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C., 2012 CO 61, ¶17, and because the court construed a written instrument. See In re Estate of Foiles, 2014 COA 104, ¶20.

¶9 We construe restrictive covenants according to their plain language, interpreting them as a whole and keeping in mind their underlying purpose. See Evergreen Highlands Ass'n v. West, 73 P.3d 1, 3 (Colo.2003); Good v. Bear Canyon Ranch Ass'n, 160 P.3d 251, 253 (Colo.App.2007). A covenant will be enforced as written if it is clear on its face. Good, 160 P.3d at 253. However, if there is any ambiguity or doubt as to the meaning of a covenant, we must adopt the construction that favors the unrestricted use of property. Id. at 253–54; see also Double D Manor, Inc. v. Evergreen Meadows Homeowners' Ass'n, 773 P.2d 1046, 1048 (Colo.1989).

B. Scope of the Covenants

¶10 It is undisputed that the covenants do not expressly prohibit short-term rentals of residences within Wilson Mesa Ranch. The issue is whether such rentals are prohibited by necessary implication based on covenant language that (1) Wilson Mesa Ranch is to "be developed and maintained as a residential area," with all subdivision tracts to be "residential tracts," and that (2) "[n]o lands within Wilson Mesa Ranch shall ever be occupied or used for any commercial or business purpose." The Association contends that the district court erred in failing to construe the "commercial use" prohibition as precluding unapproved rentals of less than thirty days, and in failing to recognize that such short-term rentals are inconsistent with the covenants' "residential use" requirement. We disagree.

¶11 We are aware of no Colorado case that has addressed the meaning of prohibitions against "commercial use" or requirements of "residential use" in the context of short-term rentals of residences. With the exception of Double D Manor, discussed below, Colorado case law discussing these terms in other contexts affords little guidance in resolving the issue before us.

¶12 Like the district court, we find the two Colorado cases on which the Association relies—Jackson & Co. (USA), Inc. v. Town of Avon, 166 P.3d 297, 298–300 (Colo.App.2007), and E.R. Southtech, Ltd. v. Arapahoe County Board of Equalization, 972 P.2d 1057, 1059–60 (Colo.App.1998)—to be distinguishable. The Jackson division concluded that a duplex with six individual bedroom-bathroom suites, used for short-term vacation rentals, qualified as a "lodge" under the definition of that term in a municipal ordinance; thus, such short-term rentals were impermissible under the ordinance and a subdivision plat that explicitly prohibited the use of property within the residential subdivision as a lodge. There is no such explicit prohibition in the covenants here.

¶13 In Southtech, the division held that, for property tax purposes, rentals of space in a large housing complex for less than thirty days should be taxed as a "hotel-type commercial use," while longer rentals should be taxed as "apartment-type residential" use. The division relied on constitutional and statutory provisions that excluded "hotels and motels" from the definition of "residential real property" for property tax purposes but included "apartments" in that definition. Again, the covenants at issue here do not contain similar definitional language.

¶14 We therefore look to the plain meaning of the covenant language, and we find guidance in cases from other jurisdictions that have applied this language in situations involving short-term rentals of residential property.

1. Requirement That Subdivision Tracts Be "Residential"

¶15 "Residential" is defined as "used, serving, or designed as a residence or for occupation by residents." Webster's Third New International Dictionary 1931 (2002). "Residence" means "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place." Id.; see also The American Heritage Dictionary of the English Language 1483 (4th ed.2000) (defining "residential" as "[o]f, relating to, or having residence," or "[o]f, suitable for, or limited to residences," and defining "residence" as "[t]he place in which one lives; a dwelling," or "[t]he act or a period of residing in a place").

¶16 " 'Residential use,' without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode." Lowden v. Bosley, 909 A.2d 261, 267 (Md.2006); see also Mullin v. Silvercreek Condo. Owner's Ass'n, 195 S.W.3d 484, 490 (Mo.Ct.App.2006) (A place used for "residential purposes" is, according to its plain and ordinary meaning, "one in which people reside or dwell, or which they make their homes, as distinguished from one which is used for commercial or business purposes." (quoting Blevins v. Barry–Lawrence Cnty. Ass'n for Retarded Citizens, 707 S.W.2d 407, 408 (Mo.1986))).

¶17 Although "residential" unambiguously refers to use for living purposes, courts have recognized ambiguity in the term in cases involving short-term rentals or other situations where those residing in the property are living there only temporarily, not permanently. See Yogman v. Parrott, 937 P.2d 1019, 1021 (Or.1997) ("The ordinary meaning of 'residential' does not resolve the issue between the parties. That is so because a 'residence' can refer simply to a building used as a dwelling place, or it can refer to a place where one intends to live for a long time."); Scott v. Walker, 645 S.E.2d 278, 283 (Va.2007) (Restrictive covenant's requirement that lots be used for "residential purposes" was "ambiguous both as to whether a residential purpose requires an

intention to be physically present in a home for more than a transient stay and as to whether the focus of the inquiry is on the owner's use of the property or the renter's use. Moreover, if the phrase 'residential purposes' carries with it a 'duration of use' component, it is ambiguous as to when a rental of the property moves from short-term to long-term."); see also Dunn v. Aamodt, 695 F.3d 797, 800 (8th Cir.2012) (phrase "residential purposes" in restrictive covenant was ambiguous as to short-term rental of property). These courts concluded that, because ambiguities in restrictive covenants were to be construed in favor of the free use of property, short-term rentals were not precluded as inconsistent with residential use.

¶18 Other courts have found no ambiguity, reasoning that, as long as the property is used for living purposes, it does not cease being "residential" simply because such use is transitory rather than permanent. In Lowden, 909 A.2d at 267, the court summarized cases applying the term "residential" to a variety of structures used for habitation purposes and recognizing that the transitory or temporary nature of such use did not defeat the residential status. It concluded that "[w]hen the owner of a permanent home rents the home to a family, and that family, as tenant, resides in the home, there obviously is no violation of the [d]eclaration. While the owner may be receiving rental income, the use of the property is unquestionably 'residential'." Id. In Pinehaven Planning Board v. Brooks, 70 P.3d 664, 667–68 (Idaho 2003), the covenants at issue restricted the use of residential property to the construction of a single-family residence, which could not be used for commercial, industrial, or business purposes. The Idaho Supreme Court held that renting a property to people who used it for residential purposes, whether short or long term, did not violate the covenants. Id. at 668–69; see also Slaby v. Mountain River Estates Residential Ass'n, 100 So.3d 569, 579 (Ala.Civ.App.2012) ("[P]roperty is used for 'residential purposes' when those occupying it do so for ordinary living purposes. Thus, so long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities they are using the [property] for residential purposes."); Ross v. Bennett, 203 P.3d 383, 388 (Wash.Ct.App.2008) (rejecting argument that short-term vacation rentals were distinguishable from permitted long-term rentals and concluding that: "Renting the home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the . [c]ovenant. The transitory or temporary nature of such use by vacation renters does not defeat the residential status.").

¶19 In this case, the pleadings and attached documents do not suggest that renters used Houston's residence for anything other than ordinary living purposes, and the Association does not so argue.1 In these circumstances, we agree with the courts that have held that mere temporary or short-term use of a residence does not preclude that use from being "residential." Moreover, even if we were to find the covenants ambiguous in this regard, we would be required to adopt the construction of "residential" that favors the free and unrestricted use of Houston's property. See Good, 160 P.3d at 253–54.

2. Prohibition Against Commercial Use

¶20 "Commercial" means "occupied with or engaged in commerce related to or dealing with commerce [or] having profit as the primary aim." Webster's Third New International Dictionary 456 (2002). "Commerce," in turn, means "the exchange or buying and selling of commodities esp. on a large scale," but it can also mean "dealings of any kind." Id. A "commercial use" is one "that is connected with or furthers an ongoing profit-making activity." Black's Law Dictionary 1775 (10th ed.2014).

¶21 As with the requirement of "residential use," the dictionary definitions of "commercial" and "commercial use" do not by themselves resolve the question of whether short-term vacation rentals are prohibited under the covenants at issue here; and the covenants do not further define those terms.

¶22 As in cases construing "residential use," some courts have recognized an ambiguity in the term "commercial use" when deciding whether prohibitions against commercial use apply to short-term rentals of residential property. See Yogman, 937 P.2d at 1021 ("commercial" use encompasses a broad range of meanings, from merely using the property in a way that generates revenue up to operating a business, such as a bed and breakfast, with profit as its primary aim); see also Russell v. Donaldson, 731 S.E.2d 535, 538–39 (N.C.Ct.App.2012) (where covenants did not define "business or commercial purpose," they were ambiguous as to whether short-term residential vacation rentals came within the prohibition against use of lots for such purpose; however, upon review of cases from other states, and given requirement that ambiguities be construed in favor of unrestricted use of property, court held that prohibition did not bar short-term residential vacation rentals).

¶23 Other courts have held that prohibitions against commercial or business uses unambiguously do not bar short-term vacation rentals of residences where a renter uses the premises for residential activities such as eating and sleeping and not for commercial activities such as running a business. In Slaby, a residential association claimed that property owners' short-term rentals of their cabin violated restrictive covenants prohibiting commercial use. 100 So.3d at 571. However, the court reviewed case law from other states and agreed with "the majority of other jurisdictions" that rental of the cabin for eating, sleeping, and other residential purposes did not amount to commercial use. Id. at 580–82; see also Pinehaven Planning Bd., 70 P.3d at 668 ("[R]enting [defendants'] dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood."); Lowden, 909 A.2d at 267 ("The owners' receipt of rental income in no way detracts from the use of the properties as residences by the tenants."); Mason Family Trust v. DeVaney, 207 P.3d 1176, 1178 (N.M.Ct.App.2009) ("While [the owner's] renting of the property as a dwelling on a short-term basis may have constituted an economic endeavor on [his] part, to construe that activity as one forbidden by the language of the deed restrictions [prohibiting use for business or commercial purposes] is unreasonable and strained. Strictly and reasonably construed, the deed restrictions do not forbid short-term rental for dwelling purposes.").

¶24 We agree with the cases discussed above and conclude that short-term vacation rentals such as Houston's are not barred by the commercial use prohibition in the covenants. Our conclusion is consistent with the

Colorado Supreme Court's holding, in a different context, that receipt of income does not transform residential use of property into commercial use. In Double D Manor, the court addressed a homeowners association's challenge to use of property in the subdivision as a home for developmentally disabled children. 773 P.2d at 1046. In rejecting the association's argument that such use was not a permissible "residential use" because Double D used the property to earn money to pay wages and cover costs, the court stated: "Double D's receipt of funding and payment to its staff to supervise and care for the children do not transform the use of the facilities from residential to commercial." Id. at 1051.

¶25 Finally, we are not persuaded to reach a contrary conclusion based on the cases on which the Association relies.

¶26 Ewing v. City of Carmel–By–The–Sea, 286 Cal.Rptr. 382, 388 (Cal.Ct.App.1991), cited by the Association for the proposition that short-term vacation rentals are inconsistent with the residential character of a neighborhood, was addressing the validity of a municipal ordinance explicitly prohibiting rentals under thirty days in an area zoned for single-family residential use; it was not interpreting a covenant lacking any such explicit prohibition. In Mission Shores Ass'n v. Pheil, 83 Cal.Rptr.3d 108, 110–13 (Cal.Ct.App.2008), the amended covenants—unlike the covenants here—expressly prohibited rentals of under thirty days. Similarly, in Munson v. Milton, 948 S.W.2d 813, 817 (Tex.App.1997), the court relied on specific language in the covenants that defined "business use" to include "transient-type housing" as supporting a conclusion that short-term rentals were prohibited.

¶27 Finally, in concluding that short-term rentals were prohibited under the covenants at issue in Benard v. Humble, 990 S.W.2d 929, 930 (Tex.App.1999), the court applied a Texas statute requiring that covenant language be "liberally construe[d]." Noting the tension between the statutory requirement and the common law, the court observed:

The present case is a prime example of the dilemma: The deed restrictions in question do not explicitly contain language covering temporary renting of property. Were we to give construction against the drafter of the covenant [instead of liberally construing it], we would be required to reverse the trial court's judgment [finding that short-term rentals are prohibited].

Id.at 931.

¶28 Unlike Texas, Colorado adheres to the common law principle that ambiguities in covenants are construed in favor of the unrestricted use of property.[1]

¶29 In sum, we conclude that Houston's short-term vacation rentals are not barred under the covenants.

C. Validity of Section 11

¶30 The Association further contends that the district court erred in concluding that Section 11, the amendment to the board's administrative procedures that precludes unapproved short-term rentals and imposes fines for violations of that prohibition, was arbitrary and thus unenforceable. We agree with the district court that Section 11 is unenforceable, although we reach that conclusion for reasons other than those stated by the district court. See Meister v. Stout, 2015 COA 60, ¶8 (where district court reaches correct result, its judgment may be affirmed on different grounds that are supported by the record).

¶31 The Association argues that Section 11 was adopted at a "duly called and duly conducted board meeting" to "clarif[y] that the [covenants'] prohibition on commercial and business uses of property prohibits the unapproved short-term rental" of lots within the subdivision. However, as set forth above, the covenants do not prohibit such rentals.

¶32 Thus, while the Association has the authority to enforce the covenants, it cannot rely on that authority to enforce a nonexistent covenant provision. For short-term vacation rentals to be prohibited, the covenants themselves must be amended. It is undisputed that the amendment procedure set forth in the covenants—which, among other things, requires a vote of three-fourths of the Association members and permits such vote only at ten-year intervals—was not followed here. The board's attempt to accomplish such amendment through its administrative procedures was unenforceable. See Mauldin v. Panella, 17 P.3d 837, 838–39 (Colo.App.2000) (purported amendments to restrictive covenants that would have precluded the plaintiff's proposed use of his property were invalid because they were not promulgated in compliance with covenant provisions regarding amendment procedures); Johnson v. Howells, 682 P.2d 504, 505 (Colo.App.1984) (same); cf. Good, 160 P.3d at 253–55 (where covenants allowed amendment and amendment procedures were followed, amendment prohibiting construction of guest houses and caretaker residences was valid).

D. Attorney Fees

¶33 Given our resolution of the issues raised in this appeal, we deny the Association's request for attorney fees under section 3833.3–123(1)(c), C.R.S.2014.

III. Conclusion

¶34 The judgment is affirmed.

FOOTNOTES

FOOTNOTE.

1. In a letter to the Association (which, because it was attached to Houston's verified complaint, could be considered by the district court in ruling on cross-motions under C.R.C.P. 12(c), see Van Schaak v. Phipps, 38

Colo.App. 140, 143, 558 P.2d 581, 584 (1976); see also C.R.C.P. 10(c)), Houston's counsel explained the use of the property as follows:The HOA also argues that the current use is a commercial use. It is not. Mr. Houston has owned his Wilson Mesa home for over twenty years. At one point, he used the home for long-term rental. After that time, he made the decision he did not want the wear and tear on the house that permanent tenants bring. As a consequence he stopped renting it and hoped to use it more.However, it became apparent without people in the house and the accompanying maintenance, the house actually suffered. Mr. Houston decided the best solution for the property was to have it used to some extent, and thus he has been leasing it out for some vacation rental use.The home is very small. Occupancy is limited to a maximum of four guests. It is typically used by a couple, or a single adult. Mr. Houston also has a local caretaker handling maintenance and other related home needs.The amount of people staying in the residence with one vehicle certainly presents less road traffic than if Mr. Houston had a permanent tenant with two vehicles. Also, Wilson Mesa is usually quite vacant. Most properties are rarely occupied second homes. Very few homes are occupied on a full time basis. Also, these are seven acre parcels and do not have neighbors wall to wall.

2. In its reply brief, the Association also cites unpublished cases from three other jurisdictions. Because these unpublished opinions are not to be used as precedent under the rules of those jurisdictions, we do not consider them.

Opinion by JUDGE VOGT *FD* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24–51–1105, C.R.S.2014.

JUDGE LICHTENSTEIN and JUDGE FOX concur.

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Doug Van Etten read the application as follows:

Application #:	2016-11
Applicant:	Travis and Ellen Robinson
Application Name:	Robinson Rental
Application Type:	Conditional Use Permit
Location:	1424 Niblick Way
Zone:	Adobe Falls PUD
Description:	This is a request for approval of a Conditional Use Permit for a Vacation Rental by Owner (Bed And Breakfast). The Fruita Land Use Code requires a Conditional Use Permit to operate a Bed and Breakfast in this PUD zone.

Travis Robinson- I just have a few comments for you guys. This is a request for a B & B in a residential area. We came to the City (Staff) and found out we needed a C.U.P. (Conditional Use permit) in May (2016), we also reached out to the developer and the HOA to tell them this is our plan and please let us know if you have any concerns, we would be happy to address them. The next time I heard from anyone about this was when we received a letter in the mail from Rich Livingston saying that this (B&B) violates section 5 of our covenants, it violates specifically the residential use only no commercial use covenant, which is very broad. My wife and I are excited to have people stay with us, it is not actually a Bed & Breakfast, it is our home that we are sharing. We are very involved in the community. I serve on the Tourism Board, I now realize that is the easy Board. My wife brought the Fruita Monassori, to Fruita. I served on the Fruita Area Chamber of Commerce for a number of years. We own a business in downtown Fruita as well. We are heavily involved in the community, the AirBnB concept I think is great for the community. It brings additional tax dollars to the City. That is how I learned about the CUP, I went to Henry and said that we have done this a few times during the Fat Tire Festival; we think it is really cool how do I pay lodging tax because I think it is a competitor to our hotels. So fast forward ahead, my wife was approached a couple times and told by our neighbors that what you are doing is illegal and you need to stop. We have done our homework in advance to know, currently, Colorado common law states that short term rentals are residential use. The courts in Telluride held this last year and it was reaffirmed in San Miguel county last October. That is what you guys have in front of you, it is just a lawyer blog, someone's opinion but it summarizes what was found last year. That is why I think the letter we received and the neighborhood meetings that were held without us, all they did is whip up a bunch of opposition without ever giving us a chance to talk with them. At the end of the day, using this as a short term rental is in line with our covenants, it is a residential use. We think we have met all the criteria of the CUP. Even though Staff recommended to deny, we would ask that you recommend to approve because our HOA has

a mechanism to stop this and that is, go in and amend the covenants to prohibit short term rentals. That is what the HOA in Telluride is going to do (referring to one of the handouts) to this homeowner when they have their opportunity. So we would like you to approve this and we would like to ask our neighbors to work with us, because we have built a home that we love, that lifted the property values of everyone else in the neighborhood. We built a home to raise our kids in, I am from Fruita, and we plan to be here for a very long time. We simply want to have the right to invite guests into our home if we choose.

Mel Mulder- Do you have record of that conversation you had with the HOA?

Travis Robinson- It was a phone call. But it was around May 8th. It was the weekend after I spoke to Henry and learned that we needed to go through the permitting process. You know you have approved so many of these applications, so my understanding is that this is a pretty simple process. This is a residential use, and unless they amend the bylaws to prohibit short term rentals we want to be able to use it in this fashion.

Dahna Raugh- This is a request for a Conditional Use Permit for a Bed and Breakfast or Vacation Rental by Owner. I am going to go through individual supplemental zoning standards that apply to these land uses and the individual Conditional Use Permit approval criteria, because I know we have another Vacation Rental issue after this hearing item as well so I think it helps both groups. So the first requirement, where the applicable zoning district allows a Bed & Breakfast uses as a conditional use and pretty much every residential land use category in the Land Use Code requires a Conditional Use Permit. It must be a residential dwelling unit that contains no more than 4 guest bedrooms where overnight lodging with or without meals is provided for compensation, so in this case the application meets that requirement. It is a residential house with 4 bedrooms, but they are not using all 4. So that has been met. The second requirement is the kitchen and dining facilities may serve only the residents and guests and shall not be operated or used for any commercial activity other than what is necessary for the Bed & Breakfast, the applicants have stated that they don't intend to use the kitchen facilities for anything but themselves and their guests. The third, the Bed & Breakfast use shall not change the residential character of the dwelling if located in a residential zone or area. The applicants have indicated they have no intention of changing the character of the dwelling unit to anything other than the residential dwelling unit that it is. The forth, in residential zones there shall be no advertising, display or other indication of the Bed & Breakfast other than a sign that complies with the provisions of the Sign Code. The applicants have stated in their narrative that they will not be doing any advertising on the property. The fifth, a minimum of one parking space per guest bedroom and resident bedroom shall be required, and screening of the parking may also be required. There is definitely at least one car parking space per each guest and resident bedroom. Staff is not recommending any screening, it is basically a big driveway and a big garage. The sixth, the Bed & Breakfast facilities shall comply with all building codes adopted by the City. This house as build in 2014, it received a Certificate of Occupancy and Staff has no reason to believe that it doesn't continue to meet the building codes. We understand that the Building Department (Mesa County Building Department) and the Fire Marshall (Lower Valley Fire Department) that Bed & Breakfasts and Vacation Rentals are held to the same standards of any

other house, nothing special in terms of commercial building code. The seventh requirement, it shall be the responsibility of the applicant to demonstrate that the relevant subdivisions declarations, covenants, conditions and restrictions allow for a Bed & Breakfast use and associated signage. It is the applicant's responsibility to demonstrate that the covenants allow this use, with the letters we have received from the neighborhood and the letter from a Lawyer, I think what the applicant has demonstrated is that this is a very debatable issue. Certainly the residences in the neighborhood that we have heard from think that this is not permitted and certainly the applicant thinks it is permitted. What we have proven is that there is an argument, there is no proof that the HOA and the covenants allow this. It is because of that, and that alone, that Staff is recommending that this application be denied because this one criterion (Supplemental Zoning Standard #7) has not been met. The eighth, where a Bed & Breakfast use is subject to a Conditional Use Permit approval any existing or proposed use in addition to the dwelling unit (like a home occupation or an accessory dwelling unit) is considered part of the Conditional Use review. Staff is not aware of any other conditional type uses on this particular piece of property. There are also four criteria for Conditional Use Permits of any type that have to be considered and should be met for every Conditional Use Permit application. The first, the proposed use shall be consistent with the purposes and provisions of the Land Use Code, the zoning which it is located, and also the City's Master Plan. The Land Use Code is one of the primary documents used to implement the City's Master Plan, and if all the approval criteria for conditional use permits and all the Supplemental Zoning Standards can be met then this application will certainly meet the Master Plan and the Land Use Code and the zoning in which it is located. But again it doesn't meet that one Supplemental Zoning Standard that states that it is the applicants responsibility to demonstrate that there is no issue with the Covenants. So that approval criteria for Conditional Use Permits has not been met. The second, the proposed use shall be compatible with existing and allowed uses surrounding or effected by the proposed use. Staff believes that the proposed Vacation Rental is compatible with everything that is around it as the applicant has stated and as I think everybody knows the City of Fruita has granted many Conditional Use Permits in many different neighborhoods and only once has one been denied and it was for the same issue, it violated the covenants. We don't know of any significant problems in any of the neighborhoods, we do believe these are for the most part very compatible with just about every residential neighborhood in the city. That approval criterion has been met. The third, the proposed use shall not materially endanger the public health and safety, we don't believe using the house as a vacation rental will be a problem for public health and safety. The last approval criteria, public services and facilities should be available and adequate to serve the proposed use, of course it is a house and we don't expect any utility or other service demands to be above and beyond what we would normally find in any other house. This approval criterion has been met. Again, this application for a Vacation Rental meets all the approval criteria except that it looks like it violates the covenants or at least it looks very debatable. So that approval criteria has not been met and therefore, the very first approval criteria for Conditional Use Permits has not been met, it doesn't comply with the Land Use Code. Staff has received a lot of written public comment, all the public comments we received are included in your packets tonight.

PUBLIC COMMENTS:

Denise Hoctor 1332 Niblick Way- Denise explained why she and her husband chose to move to Fruita and why they chose to move into a neighborhood with strict covenants. They chose Adobe Falls because they didn't want to be in a neighborhood where people were doing business out of their homes and didn't want strangers in the neighborhood all the time. They chose Fruita for safety and community.

Judith Thornberg 1354 Niblick Way- There were no covenants where she used to live, she read the covenants in Adobe Falls and interpreted them and understood them that there would be no auto repair places close, and no Bed & Breakfasts. There are 2 empty lots next to her and the Robinsons and she could see that if the Robinsons are allowed to use their home as a Bed & Breakfast, then the lots next door will be Bed & Breakfasts.

Mike Milholland 1466 Niblick Way- Travis and Ellen are great people but the main point is the majority, if not all, of the neighborhood is against this application.

Clarence Ehrlich 1406 Kiva Drive- The whole neighborhood is not in favor of this application. Everyone has invested a lot into their homes in this subdivision. In his opinion, the covenants do not allow for this type of use. He feels that if this use is to be allowed, that would set a statement and open the door for more uses just like this. Feels the covenants should protect the homeowners. He doesn't want any friction in the neighborhood.

*Someone talked but I couldn't make out what they were saying.

Rich Livingston- The attorney for the Adobe Falls homeowners association. The existing owners, all of them except the applicant, have executed a petition in opposition. They didn't do that lightly, we had an extensive discussion and talked about all of the applicable issues. And if you read the petition it says "the undersigned, with due respect for individual property rights." All of the owners in Adobe Falls were sincere about that point but as they had their discussions back and forth, over this application, questions came up relative to compatibility of uses. Staff has indicated that they conclude that this is compatible with the existing use. But if you look at the advertisement that is on the internet for this particular property, what it says is brand new casita on golf course. And if you look at the photograph that accompanies the application you can see that they show the home, the casita is behind the home. When you talk about compatible uses and a more traditional Bed & Breakfast, you're not talking about a separate structure that is going to have people coming and going. There is numerous materials online that talks about access by way of lock box and no contact with anybody at the facility. A couple of the residences have testified tonight about their reasoning for coming to Adobe Falls and one of the nice features of a community that we are able to enjoy here in Fruita, is that we are out of the major urban corridors.

Rich Livingston went on to discuss the requirements of the Staff Report and how he interprets how this application does not meet any of the rules and regulations. Strongly recommends denial of this CUP application.

Keith Schaefer- So the developer can change the covenants if they needed to?

Rich Livingston- In theory, yes they can.

Mel Mulder- Are you hired by the HOA for this issue?

Rich Livingston- I am.

Mel Mulder- If the petitioner is to pursue this further, to the courts, would you be representing the HOA?

Rich Livingston- Yes I would be.

Mel Mulder- I think this is an issue for our attorney too.

Janet Elliot 1306 Niblick Way- Janet Elliot was the person the Mr. Robinson reached out to about this particular use at their house, Janet said she was busy and couldn't really understand the questions Mr. Robinson was trying to ask. She feels like the Robinsons did not do their homework and have not approached anyone in the neighborhood.

Ellen Robinson- Ellen addressed some of the comments made by Mr. Livingston. The Robinsons were not invited to the meeting that was held when everyone signed the petition to oppose the application. Ellen knocked on all the doors in the neighborhood and talked with most people in their home. She mentioned that they live on a public golf course with a public trail the surrounds the subdivision and made a point that the neighborhood is fully accessible to the public.

PLANNING COMMISSION COMMENTS:

Janet Brazfield- Mrs. Brazfield talked about the definition of 'residential uses' in covenants based on the laws in Colorado. And says, if you are renting to the public at your home for compensation, this makes it different then residential uses. Agrees with Supplemental Zoning Regulation #7 in the Staff Report.

Mel Mulder- The recommendation of denial to City Council is in order. And believes Mr. Livingston is prepared to go to court with the applicants.

Keith Schaefer- Mr. Schaefer feels that the Conditional Use Permits do nothing for the neighborhood. And feels that this specific C.U.P. application is not an appropriate use in this area.

Dave Karisny- Mr. Karisny talked about how the City of Fruita created a process of controlling the Vacation Rental by Owners back when the code was amended. He discussed how VRBO's have been heard in the past and that most are not in HOA controlled neighborhoods and that it is okay for the Planning Commission to hear what the neighborhood had to say when considering the recommendation to the City Council with their decisions. The intent was to hear what the neighborhood has to say about the applications and not to turn neighbors against one another. With the neighborhoods comments and actions for denial of the application, Mr. Karisny feels the application should be recommended for denial based on the neighborhoods comments.

Heidi Jo Elder- Mrs. Elder agrees with Staff's decision for denial. The applicant has not proven that it is not in violation of the covenants. She thinks that if the Robinsons can prove and talk to the other homeowners and get that changed then bring the application back to Planning Commission and she would be all for the VRBO. But at this moment, she is recommending denial.

Doug Van Etten- Mr. Van Etten is in favor of the C.U.P. application due to the fact that it is the Robinsons private property and they should be allowed to use it in this way and that they should have full use of their property under the law. He thinks all homeowners in the neighborhood would want to use their property in the ways that they want to. The language in the covenants is arguable.

Keith Schaefer- I recommend that we deny this C.U.P. because the representative has not demonstrated that the proposed Bed & Breakfast would not be in violation of the subdivision covenants as required by the Supplemental Zoning Standards of the Land Use Code.

Heidi Jo Elder- Second.

5 Yes votes; 1 No vote. Motion passes.