



WIDNER MICHOW & COX, LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: Honorable Mayor Wolfe and Town Council members
CC: Larry Brooks, Town Manager
FROM: Eric Heil, Town Attorney
DATE: September 25, 2009
SUBJECT: Application of Short Term Overlay District and Wildridge PUD

Summary: On September 22, 2009, the Town Council approved first reading of Ordinance No. 09-12 establishing a Short Term Rental Overlay District and approved expanding the overlay zone district to include Eaglebend Drive, Nottingham Road, and the Wildridge Planned Unit Development ("PUD"), which includes Wildwood. This memorandum addresses legal issues raised by conflicts between the Short Term Rental Overlay district and the Wildridge PUD. A short term rental use cannot be approved for the Wildridge PUD through the adoption of an overlay zone district because the Wildridge PUD expressly excludes short term rental use. A PUD Amendment is the legally appropriate procedure to change or alter the current restriction of short term rentals in the Wildridge PUD.

Wildridge PUD: The Wildridge PUD was approved by the Town of Avon in 1981. Note 4 of the PUD Plat states:

Definitions: Dwelling Unit – one or more rooms in addition to a kitchen and bath facilities, in a permanent building, designed for use as a dwelling exclusively by one family or one or more human beings as an independent housekeeping unit and independent of other families: **such dwellings shall not include** mobile homes, **hotels, lodge units**, clubs, hospitals, temporary structures such as tents, railroad cars, trailers, motor homes or campers, campers, street cars, metal prefabrications sections or similar units. [emphasis added]

The question of whether short term rental use is allowed in the Wildridge subdivision was recently litigated. The Colorado Court of Appeals ruled that the original 1979 zoning and the original Wildridge PUD language exclude short term rentals use, stating:

The plain language of the subdivision plat and zoning ordinance defined permitted use of a "dwelling" to exclude use of the dwelling as a hotel or lodge unit. Because the subdivision plat and ordinance specified that the permitted use of the subject property was a duplex, and that such use of the duplex as a hotel or a lodge was not permitted, their objective import clearly was to prohibit uses inconsistent with the residential character of the area. See *Town of Alta v. Ben Hame Corp.*, [836 P.2d 797](#), 801 (Utah Ct.App.1992); see also Ord. No. 79-12, art. V, § 5.1(f) ("In residential . . . districts, business or commercial activity is prohibited at all times except that limited home occupation offices may be allowed under special review uses in certain residential areas

To: Mayor and Town Council
Re: Short Term Rentals
Date: September 25, 2009
Page 2 of 2

as specified in Section 3.2."). This reading of the subdivision plat and ordinance comports with the general purposes those regulations serve. Among the objectives to be served by zoning is to avoid mixing together of industrial, commercial, business, and residential uses. *Cf.* § 31-23-301, C.R.S.2006. The subdivision plat and ordinance should thus legitimately maintain the character of a residential neighborhood. *Jackson & Co. (USA), Inc. v Town of Avon*, 166 P.3d 297 (Colo. App. 2007).

Due to the express language of the original Wildridge PUD approval and the direct ruling in the *Jackson & Co* case, an amendment to the Wildridge PUD is required to alter the prohibition on short term rental use. Both the Avon Municipal Code and state statute provide specific procedures for amending planned unit developments.¹ Avon Municipal Code section 17.20.110(k)(2) requires the Town to provide notification to "owners of all property within the PUD that may be affected by the proposed amendment (as determined by the Community Development Director)." If required notice procedures are not properly followed, the local government may not approve an amendment to a planned unit development. *Whatley v Summit County Board of County Commissioners*, 77 P.3d 793 (Colo. App. 2003). Finally, the consent of property owners is not required to approve an amendment to a PUD, *Whatley*.

Wildridge Protective Covenants: Wildridge is subject to protective covenants that define dwelling units with the verbatim language used in Note 4 of the PUD plat (i.e. no short term rental use allowed). Paragraph 4 states that, "It is the intention of [Wildridge Development Company] that the Town and its [Design Review Board] shall follow and utilize the Architectural and Landscape Design Guidelines and other appropriate provisions of these covenants." According to Paragraph 4, the Covenants Committee may object to a decision of the Town or Design Review Board within seven (7) days of the decision (although no remedy is specified other than the ability of the Covenants Committee to enforce the covenants). Paragraph 33 provides that the Town of Avon, Design Review Board, the Covenants Committee, or any property owner of the subdivision may enforce the covenants. Paragraph 32 provides that the protective covenants cannot be amended unless approved by written consent of 75% of the privately owned real property owners.

The Wildridge Protective Covenants allow the Town to enforce the covenants but do not create an obligation by the Town to enforce the covenants. The Covenants Committee and individual property owners retain the ability to enforce the Protective Covenants.

Conclusion: The Town of Avon cannot extend the proposed Short Term Rental Overlay Zone District to the Wildridge PUD area through the current zoning adoption process. An application to amend the Wildridge PUD to modify Plat Note 4 would be required to allow short term rental use in Wildridge. Furthermore, any such amendment would require providing mailed notice to each property owner of the proposed amendments. Based on the information provided, the Town is neither bound nor obligated to follow or enforce the Wildridge Protective Covenants. However, unless the Wildridge Protective Covenants are modified by written consent of 75% of the property owners, the Covenants Committee or any property owner in Wildridge could legally prevent any short term rental use as a private enforcement matter even if the Town approved an amendment to the Wildridge PUD that allowed Short Term Rental use.

¹ Avon Municipal Code section 17.20.110 requires Planning Commission and Town Council review of PUDs and PUD amendments through the formal hearing process. C.R.S. §24-67-106(3)(b) requires notice and hearing prior to any modification of a PUD.