Statement to the HOA pertaining to the 1998 Covenants.

Background. In 1998 the original Covenants for CMRHOA were dated and attached to the Plat map by the Redstone Land Company, Inc. and were recorded with the Montezuma County Clerk and Recorder. The Redstone Land Company is listed as the Grantor. The original 1998 Covenants contain Covenant 32, which states that "the Grantor reserves to itself the right to vary or modify the aforesaid covenants." Over the past years, previous CMRHOA boards sought to change the original 1998 Covenants. In 2005 and again in 2008, Amendments were filed. Neither of these versions was signed by the Grantor, and the Grantor did not approve or initiate the document.

This has caused confusion as to the version of the Covenants that CMRHOA should be following. In January 2022, the Board of CMRHOA voted and approved to have this matter researched and documented by our attorney, Tyler Denning, of the Newbold Chapman law firm in Durango Colorado. After several months, the Legal Memorandum was delivered to the Board at a closed session in May 2022.

Analysis and Documentation. There are three different court cases that were referred to in the Legal Memorandum created for CMRHOA Inc. by Newbold Chapman. These are cases in which CMRHOA found itself in: the 2012 case, the 2017 case, and the 2018 case. Each of these cases was performed in the Montezuma Courts. *Montezuma County Court Case No 11CV200; No 2016CV18; and No 2018CV8.*

The courts in these cases would refer to the 1998 Covenants. In the case 2016CV18 the court referred to applying the 1998 Covenants and referred to a specific covenant from 1998. Memo page 6: "*By applying1998 version of Covenant 27, and not the amended version appearing in the 2005 Amendments, the Court implied without directly deciding that the 2005 Amendments were not effective.*" In the case 2018CV8 the District Court, on appeal, upheld the County Court decision. *Memo page 6: "…relied on the language of Covenant 27 from the 1998 Covenants to support the assessment of dues for road maintenance."*

In the course of the analysis and discovery, it was shown that there is no evidence that the assignment of rights to the 1998 Covenants were ever assigned to CMRHOA Inc. Memo Page 5: *"We have been unable to locate any document that assigned Redstone's rights under the covenants to any other person or entity."* There is no documentation that has been available that shows that the Redstone company assigned the rights to CMRHOA.

It was declared by the court that CMRHOA Inc. is not CCIOA – and thus not obligated to follow the CCIOA rules. Memo Page 5: *"In an order dated April 25, 2012 in Montezuma County District Court Case No 11CV200, the Court determined that the CMRHA was not a "CCIOA Community" and thus was not subject to the statutory governing provisions of the Colorado Common Interest Ownership Act ("CCIOA")".* In the later cases this was upheld and CMRHA was referred to as a 'common interest community by implication', but not CCIOA.

While the 2005 Covenants and the 2008 Covenant Amendments were discussed, neither was used in the judgments handed down. Memo page 8: *"…the District Court has twice recognized that CMRHA recorded the 2005 and 2008 covenant amendments in the county property records and that these amendments were not authorized or signed by Redstone."*

Conclusions. Upon meeting in closed session in June 2022 the Board of CMRHOA decided unanimously that the best interests of Cedar Mesa Ranches would be served by identifying that the 1998 Covenants will be the version followed by CMRHOA and that other versions will be dismissed. This is also stated in the Resolution that was created and signed by the President and Treasurer.

Further, the Board of CMRHOA agreed that this Statement should be created and approved by the Directors, and then communicated to the membership of the HOA as this is their fiduciary responsibility as Directors. The membership has every right to understand the impact of this decision as it affects everyone and that the membership dues produced the Legal Memorandum.

Finally, the Board of CMRHOA considers this matter as a closed chapter in the history of Cedar Mesa Ranches. From this, we now move forward.

All excerpts are from the Review of the Covenants for Cedar Mesa Ranches Homeowners Association Inc., by Newbold Chapman, Tyler Denning in April 2022.

Statement to the HOA pertaining to the Intent to have Redstone Assign Rights of the 1998 Covenants to CMRHOA Inc.

During the June 2022 closed session of the Board discussing the 1998 Covenants, the Board of CMRHOA agreed to pursue locating the Grantor at the Redstone Company. The intent is to start a dialogue to have Redstone assign the rights of the Covenants to CMRHOA.

That contact has been made; the Grantor is willing to assign the rights of the covenants to CMRHOA; and the Board has agreed to have the proper legal documents created, signed, and recorded in the County Clerk's office.

The intent is that once the rights have been legally assigned to CMRHOA, that any future amendments to the 1998 Covenants will require a 2/3 vote of the entire membership for approval.

Statement to the HOA addressing the Short Term Rentals in CMRHOA.

Background. In 1998 the original Covenants for CMRHOA were dated and attached to the Plat map by the Redstone Land Company, Inc. and were recorded with the Montezuma County Clerk and Recorder. The Redstone Land Company is listed as the Grantor.

During the past decade, the growth of the short term rental business, both across the nation and Colorado, is well documented. This has caused confusion as to how our covenants should be interpreted in addressing this issue of short term rentals. In January 2022, the Board of CMRHOA voted and approved to have this matter researched and documented by our attorney, Tyler Denning, of the Newbold Chapman law firm in Durango Colorado. After several months, the Legal Memorandum was delivered to the Board at a closed session in May 2022.

Analysis and Documentation. After reviewing the 1998 Covenants the following determinations were made. Memo page 9: "*Currently, there do not appear to be any restrictive covenants in either the 1998 Covenants or 2005 Amendments that specifically address short term rentals.*"

In the past several years, this issue has been brought to the courts and the Colorado Court of Appeals has held that a blanket prohibition on commercial uses and a restriction of property for residential purposes does not prohibit short term rentals. *Houston v. Wilson Mesa Ranch Homeowners Association Inc.* Memo Page 10: *from Houston: "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."*

Conclusions. Upon meeting in closed session in June 2022 the Board of CMRHOA decided unanimously that the best interests of Cedar Mesa Ranches would be served by identifying that the 1998 Covenants do not address short term rentals and that the Board cannot prohibit short term rentals. This is also stated in the Resolution that was created and signed by the President and Treasurer.

The recommended avenue open to us at this time, should we decide to move forward with amending the covenants concerning short term rentals, is to pursue have the rights

of the 1998 Covenants assigned to CMRHOA, and then work to amend those covenants to clarify what the desires of the HOA would be in this regard. Any amendment would be subject to a 2/3's vote of the membership in order to approve a change. This would be a lengthy and expensive process.

Finally, the Board unanimously agreed to work with the homeowners in the situation of short term rentals to benefit the community, with the express purpose of working with those owners in the use of those properties with short term use, including road speed and campfire control.

Further, the Board of CMRHOA agreed that this Statement should be created and approved by the Directors, and then communicated to the membership of the HOA as this is their fiduciary responsibility as Directors. The membership has every right to understand the impact of this decision as it affects everyone and that the membership dues produced the Legal Memorandum.

Finally, the Board of CMRHOA considers this matter as a closed chapter in the history of Cedar Mesa Ranches. From this, we now move forward.

All excerpts are from the Review of the Covenants for Cedar Mesa Ranches Homeowners Association Inc., by Newbold Chapman, Tyler Denning in April 2022.

LEGAL MEMORANDUM

TO: **ALLEN GIANNAKOPOULOS,** Board President
Cedar Mesa Ranches Homeowners' Association, Inc.

FROM: **TYLER DENNING**

RE: **QUESTIONS RELATED TO PROPERTY COVENANTS**

Date: **4/26/2022**

Cedar Mesa Ranches Homeowners Association, Inc. ("**CMRHA**") is a non-profit domestic corporation formed under the laws of the State of Colorado on August 3, 1998. Currently, CMRHA operates as the homeowner's association for Cedar Mesa Ranches Subdivision ("**Subdivision**.") There are 139 residential lots in the Subdivision. Over time, questions have arisen regarding the enforceability of certain covenants and restrictions related to the subdivision. The purpose of this memorandum is to outline the current status of the covenants related to the Subdivision and to answer questions posed by the CMRHA Board.

I. Questions Presented

The Board of Directors for CMRHA has asked the following questions:

1) Do the Articles of Incorporation for CMRHA limit the organization to only provide Road Maintenance?

2) Does Covenant 32 require that all amendments to the 1998 plat covenants have the approval of the Redstone Land Company, Inc. ("Redstone")? If so, have there been any changes in the law that modify this requirement?

3) Is it possible for CMRHA to receive an assignment of any right reserved to Redstone?

4) What is the procedure for amending the covenants of CMRHA?

5) What avenues exist for CMRHA to address short term rentals?

II. Brief Answer

1) **No. The purpose stated in the Articles of Incorporation include the maintenance of roads, the enforcement of covenants, and the operation of a property owners association.**

2) **Yes. Although the issue is still undecided, for the reasons set forth below, it is likely that the Montezuma District Court would find that Redstone must act to amend the covenants. There have been no changes in the law that would modify this requirement.**

3) **Yes. If the Grantor is willing, an assignment of all rights to the CMRHA is possible.**

4) **As set forth below, the process for amending the Covenants is dependent on whether the Redstone assigns its rights to CMRHA.**

5) **CMRHA would likely need to amend its covenants in order to address short term rentals.**

III. Factual Background

A. Creation of CMHRA and the 1998 Covenants.

The Subdivision was formed by the recording of a plat by Redstone Land Company, Inc. ("Redstone" or "Grantor") with the Montezuma County Clerk and Recorder at Reception No. 473996, on September 9, 1998 (the "Plat.") The Plat contains 32 covenants and property restrictions under the heading "Covenants, Easements and Restrictions." (hereinafter "1998 Covenants.") All lots located in the Subdivision are subject to and governed by the 1998 Covenants, however, no separate declaration of covenants for the Subdivision was recorded by the original declarant when the Plat was recorded. The 1998 Covenants do not specifically mention the assessment of dues.

The 1998 Covenants contain the following relevant clauses:

30. These covenants, restrictions and easements may be enforced by the owner(s) of any lot in said subdivision (including Grantor) against any person or persons violating or attempting to violate any provision hereof, either to restrain the violation thereof or to recover damages caused thereby. The failure to enforce any of these covenants, restrictions or easements shall in no event be deemed a waiver of the right to do so thereafter. Invalidation of any of these covenants, restrictions and easements shall not affect any other of these provisions which shall thereafter remain in full force and effect. Any lot owner who violates any of these covenants, restrictions and easements shall be liable for the reasonable attorneys' fees and legal expenses of any other lot owner who is successful in a legal action to enforce such covenant, restriction or easement.

31. These covenants, restrictions and easements may also be enforced by the Board of County Commissioners. The County shall likewise be entitled to recover the reasonable attorney's fees and legal expenses of enforcement in a successful legal action.

32. The Grantor reserves to itself the right to vary or modify the aforesaid covenants, restrictions and easements, in cases of hardship or practical difficulty where the basic intent and purposes of said covenants, restrictions and easements would not be violated, subject to approval by the Cedar Mesa Ranches Homeowner's Association.

The Plat makes various references to the existence of a property association including the following notice:

> The covenants for this subdivision requires [sic] compliance with the Montezuma County Land Use Code Chapter 5, Section 1, which are enforceable by the County. Additional Covenants, [sic] are enforceable by the Developer/Landowner and or the Homeowner's Association, and are on file with this Plat, and shall be provided to any purchaser or a tract or lot within thus subdivision.

The Articles of Incorporation creating CMRHA were filed with the Colorado Secretary of State's office on August 3, 1998. The purpose of the corporation as stated in the Articles of Incorporation is:

> The purpose for which the Corporation is organized is to provide an entity for the maintenance of roads and enforcement of covenants and operation of the property owners association which is part of Cedar Mesa Ranches Subdivision development, according to the protective covenants now or hereafter recorded in the public records of Montezuma County, Colorado, located in the City of Cortez, County of Montezuma, State of Colorado.

B. 2005 Amendments.

A document titled "Covenants of Cedar Mesa Ranches Homeowners Association, Inc." was recorded with the Montezuma County Clerk and Recorder at Reception No. 535880 (the "2005 Amendment") on November 1, 2005. The 2005 Amendment purports to be an amendment of the 1998 Covenants. The 2005 Amendments purport to have been passed by a majority of the lot owners in the Subdivision on or about October 25, 2005. The minutes for a CMRHA meeting held on October 25, 2005 state that 107 members voted on the issue of amending the covenants, but do not contain a tally of the votes for each amendment. The 2005 Amendment was not signed by Redstone Land Company, nor is there any evidence that Redstone approved or initiated the document.

The 2005 Amendments contain the following relevant changes:

Definition:

Commercial – Any venture, which is done for a profit basis.

26. Maintenance of the private access roads within the subdivision shall be the sole responsibility of Cedar Mesa Ranches Homeowner's Association Inc. Each lot owner agrees to keep their section of the road free of debris and all other natural and man-made obstructions. Cedar Mesa Ranches Homeowner's Association Inc will maintain roads in common with others in a suitable condition for two-wheel drive vehicular traffic except for extreme conditions where four-wheel drive may be needed.

29. These covenants, restrictions, and easements may be enforced by the owner(s) of any lot/tract in said subdivision, the Cedar Mesa Homeowner's Association Inc. or Board of County Commissioners (including Grantor) against any person or persons violating or attempting to violate any provision hereof, either to restrain the violation thereof and/or to recover damages caused thereby. The failure to enforce any of these covenants, restrictions or easements shall in no event be deemed a waiver of the right to do so thereafter. Invalidation of any of these covenants, restrictions and easements shall not affect any other of these provisions which shall thereafter remain in full force and effect. The party who loses a legal action in the courts which concerns the covenants, restrictions and/or easements shall be liable for reasonable attorneys' fees and legal expenses of the winning party in the legal action.

30. The Cedar Mesa Homeowner's Association Inc. reserves to itself the right to vary or modify the aforesaid covenants, restrictions and easements, for an individual lot/tract owner in cases of hardship or practical difficulty where the basic intent and purposes of said covenants, restrictions and easements would not be violated, subject to approval first of a majority vote of the board and then a majority vote of the membership of the Cedar Mesa Ranches Homeowner's Association, Inc.

31. These Covenants may be altered or changed or added to by a 2/3 vote of the membership of the Cedar Mesa Homeowner's Association, Inc. The owner(s) of a lot or tract has one vote for each lot or tract owned as shown on the survey map.

The recorded covenants also include the following notation:

> **These Covenants, Easements and Restrictions were modified and changed by a majority vote of the lot/tract owners of the Cedar Mesa Ranches subdivision on October 25, 2005. They were modified and changed from the then enforce [sic] Covenants, Easements and Restrictions as shown on the Plat map of Cedar Mesa Ranches Subdivision as recorded in the office of the County Clerk of Montezuma County, Colorado. Plat book 13 page 138. The Covenants, Easements and Restrictions here listed are the legal and binding Covenants, Easements and Restrictions for the Cedar Mesa Ranches subdivision as of October 25, 2005.**

C. 2008 Amendments.

On or about January 15, 2008, CMRHA again attempted to amend its covenants ("2008 Amendment").The 2008 Amendment were recorded with the Montezuma County Clerk and Recorder on January 23, 2008. The 2008 Amendments purport to have been passed by two-thirds vote of the lot owners in the Subdivision. According to meeting minutes of January 15, 2008, each of the 2008 Amendments that was deemed to have passed received at least 93 votes. The text of the 2008 Amendments will not be recited here as they do not impact the analysis of this memorandum.

D. Assignment of Redstone's Rights.

We have been unable to locate any document that assigned Redstone's rights under the covenants to any other person or entity. This is noteworthy as, generally speaking, a developer of a subdivision assigns any reserved rights to the property owner's association in order to avoid a situation in which the developer no longer own's property in a subdivision, yet, must still enforce the restrictive covenants in the subdivision.

E. Decisions of the Montezuma District Court.

Over the years, CMRHA has taken part in numerous lawsuits related to its covenants and its authority to collect assessments. These lawsuits have resulted in orders that contain rulings that impact the analysis of this memorandum.

In an Order dated April 25, 2012 in Montezuma County District Court Case No 11CV200, the Court determined that the CMRHA was not a "CCIOA Community" and thus was not subject to the statutory governing provisions of the Colorado Common Interest Ownership Act ("CCIOA"). For all intents and purposes, this meant that CMRHA could not avail itself of the statutory provisions of CCIOA that provide structure for the administration and governance of a common interest community in Colorado. In making its ruling, the Court noted the following:

> 1. *Covenants of Cedar Mesa Ranches Homeowners Association, Inc.* filed with the Clerk and Recorder on November 1, 2005 (Exhibit 3). The *Covenants* purport to be amendments of the original covenants on the CMR Plat and were adopted "by a majority vote of the lot/tract owners of Cedar Mesa Ranches subdivision on October 25, 2005." The *Covenants* provide for the maintenance of private access roads in the subdivision by the CMRHA. The *Covenants* are unsigned and the grantor – Redstone Land Company, Inc. did not sign the *Covenants*.
>
> 2. *Amendments to the Protective Covenants of Cedar Mesa Ranches Homeowners Association, Inc.* dated January 12, 2008 and filed with the Clerk and Recorder on January 23, 2008. The *Amendments* are unsigned and the grantor – Redstone Land Company, Inc. did not sign the *Amendments.*

It is important to note that the Court in 11CV200 did not decide whether the 2005 Amendments and 2008 Amendments were valid. Instead, the Court noted that the amendments were not initiated or approved by Redstone. A decision on the validity of the amendments to the covenants was not necessary for the Court to decide the issue before it, however, as the Court recognized in its opinion that CMRHA had already admitted that the "amendments made in 2005 and 2008 did not recognize CCIOA as applicable law or comply with the statutory requirements for a common interest community." Accordingly, the opinion used by the Court in 11CV200 is informative as to the validity of the amendments to the covenants but <u>does not decide the issue</u>.

After receiving the decision in 11CV200, the CMRHA board adopted a "Resolution Regarding Public Notice of Applicability of CCIOA" on March 19, 2014. The Resolution was made with the intention of bringing the association within the scope of CCIOA. Shortly thereafter, a "Resolution Regarding Public Notice of Applicability of CCIOA" was recorded by CMRHA

with the Montezuma County Clerk and Recorder at Reception No. 593995 (the "2014 Resolution").

Relying on the recorded notices, CMRHA filed liens on various properties in the subdivision related to the owners of those lots failure to pay yearly assessments. It appears from various court records, that the liens were subsequently released by CMRHA. However, CMRHA still attempted to collect on the past due assessments through the court system.

In response, to CMRHA'a lawsuit initiated in 16CV18 ("**Lyons Case**") to collect past due assessments, a property owner filed a counterclaim seeking: (1) declaratory judgment to determine if CMRHA had the authority to assess property owners for dues and other charges and (2) a claim for filing a fraudulent lien. The Lyons Case was decided on the basis of motions filed by the parties.

The Court's opinion in the Lyons Case is relevant to the analysis in this memorandum for two reasons. First, in its ruling the Court again called out the fact that the 2005 Covenants were not signed by Redstone and that Redstone did not approve or initiated the document. Later in its opinion, the Court went on to cite Covenant 27 from the 1998 Covenants. By applying 1998 version of Covenant 27, and not the amended version appearing in the 2005 Amendments, the Court implied without directly deciding that the 2005 Amendments were not effective.

Second, the Court in the Lyons Case decided the case in favor of CMRHA by determining that CMRHA was a common interest community by implication and therefore CMRHA had the authority to make and collect assessments **to maintain the common areas of the Subdivision – including the private roads**. The Court, however, refused to allow CMRHA to avail itself of the lien provisions in CCIOA. The Court recognized that without the lien provisions of CCIOA, CMR would have to sue lot owners who fail to pay assessments and that CMR will have to obtain liens through a more time consuming, intensive procedure.

F. Nighteagle Litigation.

A short time after the Court made its determination in the Lyons Case, CMRHA brought a small claims case against an owner for unpaid assessments. The lot owner challenged the validity of the application of the holding in the Lyons Case to the lot owner under a variety of legal theories. Ultimately, the small claims court ruled in CMRHA's favor on the issue of the assessment of dues relying in part on the decision in the Lyons Case. The decision of the small claims court was appealed to the Montezuma County Court which upheld the decision. The case was then appealed to the Montezuma County District Court.

The District Court upheld the County Court decision. In so doing, the District Court once again found that CMRHA is a common interest community by implication and relied on the language of Covenant 27 from the 1998 Covenants to support the assessment of dues for road maintenance. Ultimately, the Colorado Supreme Court refused to review the case leaving the District Court's decisions intact on those issues. The remaining issues were remanded to the County Court for trial.

To our knowledge, the above cases represent the only matters in which the enforcement of any covenants related to the Subdivision have been litigated. In addition, the above information regarding the history of the various covenants is correct to the best of our knowledge based upon the documents and records that we have been provided. If any of the above information is incorrect, please let us know immediately as it could impact our analysis.

IV. Analysis and Authorities

1) *Do the Articles of Incorporation for CMRHA Limit the Organization to only Provide Road Maintenance?*

As stated above, the purpose section contained within the Articles of Incorporation is defined and specifically includes the maintenance of roads, the enforcement of covenants, and the operation of the property owner's association. Accordingly, the Articles of Incorporation do not materially limit the operation of CMRHA to only road maintenance.

2) *Does Covenant 32 require that all amendments to the 1998 plat covenants have the approval of the Redstone Land Company, Inc. ("Redstone")? If so, have there been any changes in the law that modify this requirement?*

The construction of a covenant is a question of law. *Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo. 2003). Covenants are construed as a whole, keeping in mind their underlying purpose. *Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc*., 21 P.3d 860 (Colo.2001); *Quinn v. Castle Park Ranch Prop. Owners Ass'n*, 77 P.3d 823 (Colo.App.2003). A covenant that is clear on its face will be enforced as written. *Double D Manor, Inc. v. Evergreen Meadows Homeowners' Ass'n*, 773 P.2d 1046 (Colo. 1989). Any doubt relative to the meaning and application of the covenant must be resolved in favor of the unrestricted use of property. *Dunne v. Shenandoah Homeowners Ass'n, 12 P.3d 340* (Colo.App.2000).

In this case, Covenant 32 of the 1998 Covenants provides that the Grantor reserves "to itself the right to vary or modify the aforesaid covenants, restrictions and easements in cases of hardship or practical difficulty where the basic intent and purposes of said covenants, restrictions and easements would not be violated, subject to approval by the Cedar Mesa Ranches Homeowner's Association." Admittedly, this language is not a model for clarity. However, the language does reserve the right to modify the covenants to Redstone subject to approval by CMRHA. Under Colorado law, the use of the word "modify" would likely be found to allow amendment of all covenants. *See Evergreen Highlands Ass'n v. West,* 73 P.3d at 2 (modification clause in covenants which stated owners "may change or modify any one or more of said restrictions" was expansive enough to allow adoption of new amendment). Accordingly, based on the plain language of the 1998 Covenants, it is likely that modification of the 1998 Covenants requires some action or consent on the part of Redstone.

We have not located any legal authority or case law that interprets a similar covenant. We would note, however that the Covenant 32, if read to require the Grantor's approval in order to modify the 1998 covenants, would represent a departure from the general rule that common-interest communities have the implied power to amend their declaration on two-thirds vote. *See*

Restatement (Third) of Property (Servitudes) § 6.10 (2000)("an amendment adopted by members holding two-thirds of the voting power is effective for all purposes except as stated in subsections (2) and (3)"). We would also note that, with the adoption of CCIOA in 1992, Colorado has prohibited associations from requiring the affirmative vote of more than sixty-seven percent of the votes in an association in order to amend a declaration. *See* C.R.S. § 38–33.3–217(1)(a)(I). The impact of these two sources of law on CMRHA is unclear, however, as the Montezuma County District Court has twice found that CMRHA is not subject to the statutory provision in CCIOA.

Prior to CCIOA, the Colorado Court of Appeals was asked to interpret an amendment provision in property covenants for a subdivision in El Paso County that prohibited the amendment of the covenants for a twenty-year period. *See Johnson v. Howells*, 682 P.2d 504 (Colo. Ct. App. 1984). After the twenty-year period, the covenants in question allowed the amendment of the covenants with a sixty percent affirmative vote of the association members. In the *Johnson* case, the Court was asked to review a lower court's order that had invalidated an amendment to the protective covenants on the basis that the amendment had not received the affirmative vote of sixty percent of the landowners. The lower court, however, ignored the twenty-year restriction on amendments. The Court of Appeals found that the lower court erred in ignoring the plain language in the covenants that prohibited amendments for a twenty-year period. Specifically, the Court of Appeals stated:

> We hold that, barring unanimous agreement 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.

Id. at 505. Accordingly, the holding in the *Johnson* case stands for the proposition that unanimous consent of all landowners is required to amend covenant in a situation in which the amendment procedure stated in the covenants is not complied with by an association. *Id.*

Likewise, given the language contained in the decisions of the Montezuma District Court, it appears likely that the District Court would find that amendment of the 1998 Covenants requires some action on the part of Redstone. As stated above, the District Court has twice recognized (Lyons Case and Nighteagle Litigation) that CMRHA recorded the 2005 and 2008 covenant amendments in the county property records and that these amendments were not authorized or signed by Redstone. Despite the existence of these two amendments, the District Court has twice chosen to interpret and apply Covenant 27 from the original 1998 Covenants. This, at the very least, implies that the Courts in these two cases did not believe that the 2005 and 2008 Amendments were effective.

It should be noted, however, that we have not located a court decision that definitively ruled that the 2005 and 2008 Amendments are invalid. This means that the validity of the 2005 and 2008 Amendments remains an open question and is subject to further litigation. In reality, CMRHA has essentially two options in order to get a definitive resolution of this issue. First, CMRHA could file a declaratory judgment action in Montezuma County District Court and ask the Court for a determination as to amendment process and the enforcement of the 2005 and 2008 Amendments. This action would likely require that all lot owners be made a party to the lawsuit.

Alternatively, CMRHA could attempt to enforce the 2005 and 2008 Amendments in the event that there is a violation of the covenants by a lot owner. As shown above, this would require CMHRA to bring a court action seeking an injunction and request attorney's fees. In the event that the Court finds that the 2005 or 2008 Amendments are not enforceable, CMRHA would likely be required to pay the attorney's fee for the lot owner.

In sum, in interpreting the plain language of Covenant 32, a Colorado court would likely apply the plain language of the covenant which reserves the right to modify the covenants to Redstone subject to approval by CMRHA. This interpretation is consistent with two previous decisions issued by the Montezuma County District Court and does not appear to have been modified by any binding legal authority. This issue, however, does not appear to have been litigated, and therefore remains an open question.

3) Is it possible for CMRHA to receive an assignment of any right reserved to Redstone?

Generally speaking, a part may assign any legal right it possesses to another person or entity as long as it legal possess the right and assignment has not otherwise been prohibited.

Here, Redstone reserved to itself certain rights under the 1998 Covenants. We have not located any assignment of these rights to any other entity or person. Accordingly, Redstone appears to still have possession of these rights.[1] Under this situation, Redstone would be able to assign any rights it has under the 1998 Covenants to CMRHA. The assignment would then need to be signed and recorded in the County Clerk's office.

4) What is the procedure for amending the covenants of CMRHA?

As stated above, it appears that the current procedure for modifying the covenants is for Redstone, or its assignee, to present an amendment to CMRHA for approval. "Approval" is not otherwise defined in the 1998 covenants. In the event that CMRHA were to obtain Redstone's rights, the CMRHA Board would vote to present an amendment of the covenants to the membership for the membership's approval.

Generally, an approval would require an affirmative vote of the membership. As no membership percentage is cited in the covenants, we would recommend that CMRHA use sixty-seven percent of the votes in an association in order to amend. *See* Restatement (Third) of Property (Servitudes) § 6.10 (2000)("an amendment adopted by members holding two-thirds of the voting power is effective for all purposes except as stated in subsections (2) and (3)").

5) What avenues exist for CMRHA to address short term rentals?

Currently, there do not appear to be any restrictive covenants in either the 1998 Covenants, the 2005 Amendments, or the 2008 Amendments that *specifically address* short term rentals.

[1] It should be noted that CCIOA provides that a failure to put a date certain for the termination of declarant rights creates a situation in which the declarant's rights are void. C.R.S. § 38-33.3-205 . As stated above, however, CMRHA is operating under previous Court determinations that found that the provisions of CCIOA are not applicable to CMRHA.

Instead, it appears that the requirement stated in Covenant No. 2 of both the 1998 Covenant and the 2005 Amendments is being relied on in support of a prohibition of short-term rentals for main residence. There is also a prohibition in Covenant No. 3 of the 2005 Amendments that prohibits the rental of accessory dwellings. The 2008 Amendments do not address short term rentals.

The Colorado Court of Appeals has held that a blanket prohibition on commercial uses and a restriction of property for residential purposes does not prohibit short term rentals. *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc*., 360 P.3d 255 (Colo. Ct. App. 2015). In the *Houston* case, the Court stated that "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." *Id*. Further, in the context of "commercial use," the Court found "[w]e…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." *Id.*

Accordingly, and in response to the *Houston* case, should CMRHA wish to act regarding short term rentals for main residences, its first step would likely be to amend its covenants to prohibit the practice more clearly. If CMRHA wishes to take this step, it should also consider instituting a hearing procedure and a fee or fine structure to provide lot owners with due process and an avenue for CMRHA to enforce the covenants without immediately proceeding to court.

Regarding the use accessory dwellings as rentals, the procedure for enforcement would largely be determined by how CMRHA decides to proceed regarding the analysis set forth in response to Question No. 2 above. In the event that CMRHA wishes to seek enforcement of the 2005 Covenants, CMRHA could attempt to enforce the 2005 Amendments by bringing a court action seeking an injunction against a lot owner and request attorney's fees. This would need to occur for each lot owner and each violation. In the event that the Court finds that the 2005 Amendments are not enforceable, CMRHA would likely be required to pay the attorney's fee for the lot owner.

V. Conclusion

As shown above, the Articles of Incorporation do not materially limit the operation of CMRHA to road maintenance, the plain language of Covenant 32, would likely lead a court to determine that modification of the covenants requires action by Redstone, CMRHA may seek an assignment of rights from Redstone, the covenants may likely be amended by complying with the amendment provisions of the original covenants and seeking approval by 67% of the membership, and CMRHA would likely need to amend its covenants in order to address short term rentals.

360 P.3d 255
Colorado Court of Appeals, Division 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.

Court of Appeals No. 14CA1086

Announced August 13, 2015

Synopsis

Background: Property owner brought declaratory-judgment action against homeowners' association, asserting that association could not bar short-term rental of his property based on commercial use prohibition in subdivision's restrictive covenants. Association filed counterclaims for declaratory and injunctive relief. The District Court, San Miguel County, Mary E. Deganhart, J., granted property owner's motion for judgment on the pleadings. Association appealed.

Holdings: The Court of Appeals, Vogt, J., held that:

[1] as an apparent matter of first impression, mere temporary or short-term use of house in subdivision by vacation renters did not preclude that use from being "residential," for purposes of restrictive covenant requiring that subdivision tracts be residential;

[2] as an apparent matter of first impression, short-term vacation rentals of houses in subdivision were not barred by commercial-use prohibition in restrictive covenants; and

[3] amendment that was made to administrative procedures of association's board of trustees and that precluded unapproved short-term rentals and imposed fines for violations of that prohibition was unenforceable.

Affirmed.

West Headnotes (7)

[1] **Declaratory Judgment** Scope and extent of review in general

Appellate court would review de novo judgment in favor of property owner in declaratory-judgment action regarding issue whether short-term rental of property violated subdivision's restrictive covenants, where judgment was a judgment on the pleadings, and trial court construed written instrument. Colo. R. Civ. P. 12(c).

[2] **Covenants** Nature and operation in general

A court construes restrictive covenants according to their plain language, interpreting them as a whole and keeping in mind their underlying purpose.

[3] **Covenants** Nature and operation in general

Restrictive covenant will be enforced as written if it is clear on its face.

[4] **Covenants** Nature and operation in general

If there is any ambiguity or doubt as to the meaning of a restrictive covenant, a court must adopt the construction that favors the unrestricted use of property.

[5] **Covenants** Covenants as to Use of Property

Mere temporary or short-term use of house in subdivision by vacation renters did not preclude that use from being "residential," for purposes of restrictive covenant requiring that subdivision tracts be residential.

7 Cases that cite this headnote

[6] **Covenants** Covenants as to Use of Property

Short-term vacation rentals of houses in subdivision were not barred by commercial-use prohibition in restrictive covenants.

6 Cases that cite this headnote

[7] **Common Interest Communities** Adoption; amendment; repeal

Amendment that was made to administrative procedures of board of trustees of homeowners' association and that precluded unapproved short-term rentals and imposed fines for violations of that prohibition was unenforceable; subdivision's restrictive covenants did not prohibit short-term rentals, covenants had to be amended for short-term rentals to be prohibited, and association could not rely on its authority to enforce covenants to enforce a nonexistent covenant provision.

9 Cases that cite this headnote

***256** San Miguel County District Court No. 13CV30034, Honorable Mary E. Deganhart, Judge.

Attorneys and Law Firms

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.

Opinion

Opinion by JUDGE VOGT*

¶ 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 ***257** 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 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

[1] ¶ 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, 287 P.3d 842, and because the court construed a written instrument. *See In re Estate of Foiles*, 2014 COA 104, ¶ 20, 338 P.3d 1098.

[2] **[3]** **[4]** ¶ 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.

***258** ¶ 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,* 395 Md. 58, 909 A.2d 261, 267 (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,* 325 Or. 358, 937 P.2d 1019, 1021 (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,* 274 Va. 209, 645 S.E.2d 278, 283 (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 ***259** 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,* 138 Idaho 826, 70 P.3d 664, 667–68 (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,* 148 Wash.App. 40, 203 P.3d 383, 388 (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.").

[5] ¶ 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 ***260** 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,* 222 N.C.App. 702, 731 S.E.2d 535, 538–39 (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,* 146 N.M. 199, 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.").

[6] ¶ 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,* 234 Cal.App.3d 1579, 286 Cal.Rptr. 382, 388 (1991), cited by the Association for the proposition that short-term vacation rentals are inconsistent with the residential character of ***261** 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,* 166 Cal.App.4th 789, 83 Cal.Rptr.3d 108, 110–13 (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.[2]

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

C. Validity of Section 11

[7] ¶ 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, 353 P.3d 916 (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 ***262** request for attorney fees under section 38–33.3–123(1)(c), C.R.S. 2014.

III. Conclusion

¶ 34 The judgment is affirmed.

JUDGE LICHTENSTEIN and JUDGE FOX concur.

All Citations

360 P.3d 255, 2015 COA 113

Footnotes

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

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 Schaack 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.

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682 P.2d 504
Colorado Court of Appeals,
Div. II.

Gordon L. JOHNSON, d/b/a Gordon Johnson Construction; Transmountain Financial Corp., a Colorado corporation; A.W. Hulbert; Madeline Hulbert; Allen D. Gordon; Jennifer Gordon; Carl L. Felgenhauer; Tera Diane Felgenhauer; Claudia D. Kotecki; Charles L. Black; Arlene Black, Plaintiffs-Appellants,

v.

Peter C. HOWELLS; Jeri C. Howells; Stephen A. Mosher; Tobias J. Burke; Willibald J. Mayer; Ingeborg M. Mayer; William L. Roberts; Lloyd M. Hendrix; Jerry L. Frazee; Dale E. Horn; Susie E. Hook; William Bryant, Jr.; Patricia A. Thomas; Arden O. Amos, Jr.; Wilma L. Litton; Larry J. Albin; James D. Tyler; George M. Peterson; Kenneth L. Smith; Jimmy David Allen; Mitchell R. Johnson; Bradford Knox; Gertrude Knox; Dorthe G. Hayes; Joseph F. Mazy; Betty V. Frazier; Denise Grochowaski; John's Tailor Shop, Inc., a Colorado corporation, Defendants-Appellees.

No. 83CA0843.
|
May 3, 1984.

Synopsis
In a declaratory judgment action concerning proposed amendment of restrictive covenants, the El Paso County District Court, Hunter D. Hardeman, J., ruled that the proposed amendments were invalid since 60% of the property owners had not agreed to the change, but plaintiffs appealed, contending that the court erred in ruling that the covenants could be amended within their initial 20-year period if the requisite majority so agreed. The Court of Appeals, Sternberg, J., held that where the covenants provided that they were binding on all property owners for a period of 20 years, "after which time" they would be automatically extended for a successive 20-year period unless an instrument signed by 60% of the then owners had been recorded agreeing to change the covenants in whole or in part, the plain meaning of the covenants was that, absent unanimous consent of the property owners, they could not be amended prior to expiration of the initial 20-year period.

Affirmed.

West Headnotes (1)

[1] **Covenants** Amendment or modification of covenants

Where restrictive covenants pertaining to subdivision land provided that they were binding on all property owners for a period of 20 years, "after which time" they would be automatically extended for a successive 20-year period unless an instrument signed by 60% of the then owners had been recorded agreeing to change the covenants in whole or in part, the plain meaning of the covenants was that, absent unanimous consent of the property owners, they could not be amended prior to expiration of the initial 20-year period.

11 Cases that cite this headnote

Attorneys and Law Firms

***504** Makepeace & Winograd, P.C., Daniel M. Winograd, Colorado Springs, for plaintiffs-appellants.

No appearance for defendants-appellees.

Opinion

STERNBERG, Judge.

In a declaratory judgment action, the court entered judgment in favor of the plaintiffs. Plaintiffs nevertheless appeal contending that the judgment should have ***505** been entered on a different basis. We agree and therefore affirm the judgment, but base it on a different reason than did the trial court.

In 1976, the owners of all the property within a subdivision in Fountain, Colorado, created and recorded restrictive covenants pertaining to the property. One provision thereof stated:

> "*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."

In 1981, some, but not all, of the subdivision owners prepared and recorded documents that purported to amend the covenants. Plaintiffs, who also owned lots in the subdivision, filed suit seeking to declare these amendments invalid. Defendants then recorded an addendum to the amended covenants which purported to contain the signatures of additional owners who agreed to the amendments.

The trial court, on cross motions for summary judgment, granted plaintiffs' motion, holding the amendments were not valid because the requisite sixty percent of the owners of the property had not agreed to them. The plaintiffs appeal, however, contending the trial court erred in ruling that the covenants *could* be amended within the initial twenty-year period and in holding that they could be amended by sixty percent of the owners of the property, rather than by owners of sixty percent of the property.

We agree that the trial court erred in holding that the covenants could be amended within the initial twenty-year period by less than unanimous consent of the owners.

Construing the above-quoted provision, the trial court concluded that the clause, "unless an instrument has been recorded agreeing to change said covenants," modifies the first phrase of the paragraph, as well as the subsequent phrase dealing with extensions of the covenants. Hence, it reasoned, the covenants could be changed in whole or in part at any time by agreement of sixty percent of the owners. We disagree.

Because the resolution of this issue is dependent upon an interpretation of a written instrument, the trial court's interpretation is not binding upon us. *Rio Grande Fuel Co. v. Colorado Central Power Co.*, 99 Colo. 395, 63 P.2d 470 (1936).

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. Two courts have interpreted nearly identical covenants in this way. *White v. Lewis*, 253 Ark. 476, 487 S.W.2d 615 (Ark.1972); *Robinson v. Morris*, 272 So.2d 444 (La.App.1973).

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 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.

PIERCE and SMITH, JJ., concur.

All Citations

682 P.2d 504

End of Document

District Court, Montezuma County, Colorado Court Address: 109 West Main St. Room 210 Cortez, Colorado 81321	
Petitioner: THE CEDAR MESA RANCHES HOMEOWNERS ASSOCIATION, INC. a Colorado nonprofit corporation	▲ COURT USE ONLY ▲ Case Number: 11CV200
ORDER	

THIS MATTER comes before the Court after a February 16, 2012 hearing on the petition to amend the declaration of the Cedar Mesa Ranches. Sherry Nighteagle and David Nighteagle, homeowners in the Cedar Mesa Ranches Subdivision filed a motion to dismiss pursuant to C.R.C.P Rule 12(b)(5) on February 27, 2012 by and through its attorney Mr. James E. Preston. The Petitioner filed a response on March 19, 2012 by and through its attorney Ms. Erin J. Johnson. A reply was filed by Mr. and Mrs. Nighteagle by and through Mr. Preston on March 26, 2012. The Court has also considered the closing arguments filed by Mr. Preston and Ms. Johnson on behalf of their respective clients.

The Petitioner, Cedar Mesa Ranches Homeowners Association, Inc. is requesting through its executive board and pursuant to C.R.S. §38-33.3-303(1), that this Court enter an order amending the declaration of the Cedar Mesa Ranches subdivision in Montezuma County pursuant to C.R.S. §38-33.3-217(7)(a).

THE COURT has considered the filings of the parties and the evidence and testimony presented.

I. THRESHOLD ISSUE – IS THE CEDAR MESA RANCHES SUBDIVISION A CCIOA SUBDIVISION AND THEREFORE SUBJECT TO CCIOA LAW?

The Cedar Mesa Ranches subdivision was validly created by the filing of a plat on September 9, 1998 in the office of the Montezuma County Clerk and Recorder. The plat was filed under reception no. 473996 at Plat Book 13, Page 138 (hereinafter "CMR Plat"). The CMR Plat was admitted into evidence at the hearing as Exhibit 2. The CMR Plat contains 32 numbered paragraphs of "Covenants Easements and Restrictions".

In 1992, the Colorado legislature enacted in Article 33.3 of Title 38 in the Colorado Revised Statutes. Article 33.3 is commonly referred to as the "Colorado

Common Interest Ownership Act" or "CCIOA". Hereinafter, the act will be referred to as "CCIOA". The Cedar Mesa Ranches subdivision was created in 1998 while CCIOA was in effect in Colorado.

In paragraph 11 of its *Petition for Amendment of Declaration* the Petitioner averred:

> The Board of Directors of the Cedar Mesa Ranches Homeowners Association, Inc. (The "Board"), initiated an effort in January of 2010 to comprehensively update the governing documents of the Association. A comprehensive update was necessary because the original Declaration and amendments made in 2005 and 2008 did not recognize CCIOA as applicable law or comply with the statutory requirements for a common interest community.

This admission may be inartful; however, it is very telling that at the initiation of this action, the Petitioner admitted that the original declaration and subsequent amendments creating Cedar Mesa Ranches did not comply with CCIOA. Despite this apparent admission, the Petitioner seeks to use CCIOA to amend the declaration of the subdivision.

The Court has reviewed the 1998 Colorado Revised Statutes to determine if the Cedar Mesa Ranches subdivision was governed by CCIOA at the creation of the subdivision. The relevant 1998 statutes are § 38-33.3-201 and § 38-33.3-205:

> § 38-33.3-201. Creation of common interest communities
> (1) A common interest community may be created pursuant to this article only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association. The declaration must be recorded in every county in which any portion of the common interest community is located and must be indexed in the grantee's index in the name of the common interest community and in the name of the association and in the grantor's index in the name of each person executing the declaration. No common interest community is created until the plat or map for the common interest community is recorded.

(2) In a common interest community with horizontal unit boundaries, a declaration, or an amendment to a declaration, creating or adding units shall include a certificate of completion executed by an independent licensed or registered engineer, surveyor, or architect stating that all structural components of all buildings containing or comprising any units thereby created are substantially completed.

§ 38-33.3-205. Contents of declaration

(1) The declaration must contain:

(a) The names of the common interest community and the association and a statement that the common interest community is a condominium, cooperative, or planned community;

(b) The name of every county in which any part of the common interest community is situated;

(c) A legally sufficient description of the real estate included in the common interest community;

(d) A statement of the maximum number of units that the declarant reserves the right to create;

(e) In a condominium or planned community, a description, which may be by plat or map, of the boundaries of each unit created by the declaration, including the unit's identifying number; or, in a cooperative, a description, which may be by plat or map, of each unit created by the declaration, including the unit's identifying number, its size or number of rooms, and its location within a building if it is within a building containing more than one unit;

(f) A description of any limited common elements, other than those specified in section 38-33.3-202(1)(b) and (1)(d) or shown on the map as provided in section 38-33.3-209(2)(j) and, in a planned community, any real estate that is or must become common elements;

(g) A description of any real estate, except real estate subject to development rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in section 38-33.3-202(1)(b) and (1)(d), together with a statement that they may be so allocated;

(h) A description of any development rights and other special declarant rights reserved by the declarant, together with a description sufficient to identify the real estate to which each of those rights applies and the time limit within which each of those rights must be exercised;

(i) If any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with:

(I) Either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards; and

(II) A statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate.

(j) Any other conditions or limitations under which the rights described in paragraph (h) of this subsection (1) may be exercised or will lapse;

(k) An allocation to each unit of the allocated interests in the manner described in section 38-33.3-207;

(l) Any restrictions on the use, occupancy, and alienation of the units and on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation, or casualty loss to the unit or to the common interest community or on termination of the common interest community;

(m) The recording data for recorded easements and licenses appurtenant to, or included in, the common interest community or to which any portion of the common interest community is or may become subject by virtue of a reservation in the declaration;

(n) All matters required by sections 38-33.3-201, 38-33.3-206 to 38-33.3-209, 38-33.3-215, 38-33.3-216, and 38-33.3-303(4);

(o) Reasonable provisions concerning the manner in which notice of matters affecting the common interest community may be given to unit owners by the association or other unit owners;

(p) A statement, if applicable, that the planned community is a large planned community and is exercising certain exemptions from the "Colorado Common Interest Ownership Act" as such a large planned community;

(q) In a large planned community:

(I) A general description of every common element that the declarant is legally obligated to construct within the large planned community together with the approximate date by which each such common element is to be completed. The declarant shall be required to complete each such common element within a reasonable time after the date specified in the declaration, unless the declarant, due to an act of God, is unable to do so. The declarant shall not be legally obligated with respect to any common element not identified in the declaration.

(II) A general description of the type of any common element that the declarant anticipates may be constructed by, maintained by, or operated by the association. The association shall not assess members for the construction, maintenance, or operation of any common element that is not described pursuant to this subparagraph (II) unless such assessment is approved by the vote of a majority of the votes entitled to be cast in person or by proxy, other than by declarant, at a meeting duly convened as required by law.

(2) The declaration may contain any other matters the declarant considers appropriate.

(3) The plats and maps described in section 38-33.3-209 may contain certain information required to be included in the declaration by this section.

(4) A declarant may amend the declaration, a plat, or a map to correct clerical, typographical, or technical errors.

(5) A declarant may amend the declaration to comply with the requirements, standards, or guidelines of recognized secondary mortgage markets, the department of housing and urban development, the federal housing administration, the veterans administration, the federal home loan mortgage corporation, the government national mortgage association, or the federal national mortgage association.

The 1998 version of § 38-33.3-201 sets forth that a common interest community "may" be created "only by recording a declaration" and the 1998 version of § 38-33.3-205(1)(a)-(q) sets forth the contents that the declaration "must" contain.

The Court has reviewed the CMR plat filed on September 9, 1998 and the Court finds that it fails to meet the requirements of the 1998 version of CRS §38-33.3-201 and § 38-33.3-205(1)(a)-(q) in many respects. The Court will note a few of these deficiencies here:

1. The CMR plat does not convey any real estate as common areas to the Cedar Mesa Ranches Homeowners Association, Inc. (hereinafter CMRHA). This is really the key. The CMR plat does "hereby dedicate to the public all streets and roads, as shown on the accompanying sheets of this plat", but it does not convey anything to the CMRHA. CRS §38-33.3-201(1)(1998).
2. The CMR plat does not contain a statement that the common interest community is a planned community. CRS § 38-33.3-205(1)(a)(1998).
3. The CMR plat does not contain a statement of any real estate that must become common elements. CRS § 38-33-205(1)(f)(1998).
4. The CMR plat does not contain a description of any development rights reserved by the declarant. CRS § 38-33-205(1)(h)(1998).
5. The CMR plat does not contain a statement as to the requirements of CRS § 38-33-205(1)(l)(1998).
6. The CMR plat does not contain provisions concerning the manner in which notice of matters affecting the common interest community may be given by the association or other unit members. CRS § 38-33-205(1)(o)(1998).

Paragraph 27 of the CMR plat states:

> 27. Maintenance of the private access roads within the subdivision shall be the sole responsibility of those lot owners which adjoin said private roads and are members of the Cedar Mesa Ranches Homeowners Association, Inc. Each lot owner agrees to keep their section of the road free of debris and all other natural and man-made obstructions. Lot owners will maintain roads in common with others in a suitable condition for two wheel drive vehicular traffic.

The CMR plat does not dedicate or convey the roads to the CMRHA, it dedicates them to the public with a covenant requiring the lot owners through the CMRHA to maintain the roads "in common". This is insufficient to bring the community under CCIOA. Even if it was, the declaration fails in other ways as set forth above.

Evergreen Highlands v. West, 73 P.3d 1 (Colo. 2003) involved a subdivision created in 1972. The plat in the Evergreen Highlands Subdivision indicated that a park area was to be conveyed to the homeowners association. The homeowners association was incorporated in 1973. The Colorado Supreme Court held that Evergreen Highlands was a common interest community by implication, and that the Association had the implied power to levy assessments against lot owners to provide for maintenance of and improvements to common areas of the subdivision. Evergreen Highlands at 9. Evergreen Highlands involved a subdivision in which the homeowners association owned and maintained a 22.3 acre park. The park was conveyed to the homeowners association by the developer in 1976. The Cedar Mesa Subdivision is a post CCIOA subdivision in which no real estate has been conveyed to the homeowners association.

In Hiwan v. Knotts, 215 P.3d 1271 (Colo. App. 2009) the Colorado Court of Appeals held that a pre CCIOA subdivision was subject to CCIOA and the petition seeking court approval of amendments pursuant to § 38-33.3-217(7) was approved. Hiwan involved a subdivision in which the plat and restrictive covenants were filed in 1963. The covenants specifically provided for a homeowners association and mandatory fees. The homeowners association was unincorporated until 1987. The Court of Appeals held that the subdivision was subject to CCIOA even though there was no common property in the subdivision. The Court of Appeals held that the subdivision was subject to CCIOA because the homeowners in the subdivision were obligated to pay assessments to the homeowners association for maintenance and improvement of real estate throughout the subdivision. Hiwan at 1277.

Evergreen Highlands and Hiwan are not controlling here, because they deal with pre-CCIOA subdivisions. Evergreen Highlands involved a subdivision with common property (a park) and Hiwan involved mandatory fees in the covenants. Cedar Mesa Ranches is a post CCIOA community and Cedar Mesa Ranches does not have community property or a requirement of mandatory fees in the CMR plat.

It is important to note that Cedar Mesa Ranches subdivision was created in 1998 – 6 years after the enactment of CCIOA. The Court could presume that the creator of the Cedar Mesa Ranches subdivision new about CCIOA and did not comply with CCIOA and the requirements of § 38-33.3-205 and § 38-33.3-201. The intent of the original grantor of the subdivision is really not relevant because there is no requirement under Colorado law that developments after 1992 be CCIOA communities nor do all post CCIOA subdivisions automatically become CCIOA communities. Subsequent to the 1998 creation of the Cedar Mesa Ranches subdivision in 1998, two documents pertaining to the Cedar Mesa Ranches subdivision were filed with the Montezuma County Clerk and Recorder:

1. *Covenants of Cedar Mesa Ranches Homeowners Association, Inc.* filed with the Clerk and Recorder on November 1, 2005 (Exhibit 3). The *Covenants* purport to be amendments of the original covenants on the CMR Plat and

were adopted "by a majority vote of the lot/tract owners of Cedar Mesa Ranches subdivision on October 25, 2005." The *Covenants* provide for the maintenance of private access roads in the subdivision by the CMRHA. The *Covenants* are unsigned and the grantor – Redstone Land Company, Inc. did not sign the *Covenants*.

2. *Amendments to the Protective Covenants of Cedar Mesa Ranches Homeowners Association, Inc.* dated January 12, 2008 and filed with the Clerk and Recorder on January 23, 2008. The *Amendments* are unsigned and the grantor – Redstone Land Company, Inc. did not sign the *Amendments.*

Neither Exhibit 3 nor Exhibit 4 served to bring the Cedar Mesa Ranches subdivision under the governance of CCIOA.

Two cases applicable to this matter are Abril Meadows Homeowner's Association v. Castro 211 P.3d 64 (Colo. App. 2009) and Silverview at Overlook, LLC v. Overlook at Mt. Crested Butte Limited Liability Company 97 P.3d 252 (Colo. App. 2004). These cases both involve post-1992 / post-CCIOA communities.

In Abril Meadows, the Court of Appeals found that the creation requirements of CCIOA must be strictly followed and held that the declaration filed without a declarant's signature was invalid because it was not executed in the same manner as a deed as required by the CCIOA creation provision – CRS § 38-33.3-201(1). The Court of Appeals found that a signature on the plat was insufficient and found that the plat was insufficient because it did not include all the information required by the content provision of CCIOA, including the description of any development rights reserved by the declarant and notice procedures required by CRS § 38-33.3-205(1)(h),(o).

Silverview involved a condominium project and the validity of future development rights; however, even though a condominium community was involved, the Court of Appeals interpreted CCIOA instructively by stating:

> A declaration is any recorded instrument that creates a common interest community. See § 38–33.3–103(13), C.R.S.2003. The CCIOA enumerates certain components required in a declaration:
>
> The declaration must contain: ...
>
> A description of any development rights and other special declarant rights reserved by the declarant, together with a description sufficient to identify the real estate to which each of those rights applies and

> the time limit within which each of those rights must be exercised.
>
> Section 38–33.3–205(1)(h), C.R.S.2003 (emphasis added).
>
> Use of the word "must" connotes a requirement that is mandatory and not subject to equivocation. See Reg'l Transp. Dist. v. Outdoor Sys., Inc., 34 P.3d 408 (Colo.2001)(noting the mandatory sense of the word "must," in contrast to "may," which denotes uncertainty). Thus, in using the word "must," the plain language of § 38–33.3–205(1)(h) unambiguously requires any reservation of development rights to include a "time limit within which each of those rights must be exercised." Moreover, the mandatory nature of the requirements set forth in § 38–33.3–205 are underscored by § 38–33.3–104, C.R.S.2003, which prohibits variation by agreement: "Except as expressly provided in this article, provisions of this article may not be varied by agreement, and rights conferred by this article may not be waived."

Silverview at 255.

The Court of Appeals in Silverview also held that it is inappropriate for a court to amend a defective declaration that does not comply with CCIOA except under very limited circumstances:

> This interpretation is consistent with the General Assembly's legislative intent "[t]hat it is the policy of this state to give developers flexible development rights with specific obligations within a uniform structure of development of a common interest community." Section 38–33.3–102(1)(c), C.R.S.2003 (emphasis added).
>
> We cannot assume the General Assembly intended to include provisions that it explicitly did not. If the General Assembly has not authorized a particular remedy in a statute, we cannot furnish one. See State Dep't of Highways v. Mountain States Tele. & Tele. Co., 869 P.2d 1289 (Colo.1994); Bd. of County Comm'rs v. HAD Enters., Inc., 35

> Colo.App. 162, 533 P.2d 45 (1974). Indeed, the supreme court has declined to look to other jurisdictions for guidance where the Colorado statute substantially differs from the statutes of other jurisdictions. See In re Marriage of Cargill, 843 P.2d 1335, 1348 (Colo.1993); see also In re Custody of C.C.R.S., 872 P.2d 1337 (Colo.App.1993), aff'd, 892 P.2d 246 (Colo.1995).
>
> Again, Overlook cites no authority, and we are aware of none other than § 38–33.3–217, C.R.S.2003, that provides a court the power to amend an otherwise defective declaration. Section 38–33.3–217 governs amendments to the declaration and specifically allows them only in limited circumstances enumerated within the CCIOA. The district court is allowed to amend a declaration only in very narrow circumstances not applicable here. See § 38–33.3–217(7)(a), C.R.S.2003.

Silverview at 257.

The Court finds that the Cedar Mesa Ranches subdivision is not a CCIOA community. The original declaration did not comply with CCIOA. The subdivision has not done anything since its creation to bring the subdivision under CCIOA. Accordingly, CRS § 38-33.3-303(1) and CRS § 38-33.3-217(7)(a) are not applicable and cannot be used to amend the declaration. The Court has reviewed the current CCIOA statute and there is nothing in the current CCIOA statute that would make this analysis any different. The *Petition* must be denied because Cedar Mesa Ranches is not a CCIOA community and CRS § 38-33.3-303(1) and CRS § 38-33.3-217(7)(a) are not applicable and cannot be used to amend the declaration. Silverview stands for the proposition that it is improper for this Court to amend a defective declaration.

II. IN THE ALTERNATIVE – OBJECTIONS TO THE AMENDMENTS

Even if this were a CCIOA community, the *Petition* would have to fail because there were 59 valid objections filed with the Court representing 42% of the persons entitled to vote on the amendments to the covenants. The Petitioner suggests that 4 of the votes be eliminated. Even if the 4 votes were eliminated this would still represent objections by 39% of the persons entitled to vote on the amendments to the covenants.

The Petitioner failed to present any credible evidence that the objections were invalid or obtained through fraud or misrepresentation. The Court finds that the

statements do not have to be certified or notarized as nothing in CCIOA required certification or notarization.

The pertinent portion of the relevant statute – CRS § 38-33.3-217(7)(e) states:

> (e) The district court shall grant the petition after hearing if it finds that:
>
> (I) The association has complied with all requirements of this subsection (7);
>
> (II) No more than thirty-three percent of the unit owners entitled by the declaration to vote on the proposed amendment have filed written objections to the proposed amendment with the court prior to the hearing;

The Petitioner argues incorrectly that the district court could still grant the petition even if more than 33% file written objections. This reasoning would defeat the purpose of the statute, override the intent of the legislature, and it would represent inappropriate judicial activism. The Petitioner completely ignores the language in the statutory required notification to the members contained in CRS § 38-33.3-217(7)(d)(I)(C). The statute requires that the notice sent to the members contain:

> (C) A statement that the court may grant the petition and order the proposed amendment to the declaration unless any declarant entitled by the declaration to vote on the proposed amendment, the federal housing administration, the veterans administration, more than thirty-three percent of the unit owners entitled by the declaration to vote on the proposed amendment, or more than thirty-three percent of the lenders that hold a security interest in one or more units and are entitled by the declaration to vote on the proposed amendment file written objections to the proposed amendment with the court prior to the hearing;

The plain meaning of the words "may" and "unless" in the required notification would be defeated if courts could simply decide to do whatever was appropriate despite the written objections. The *Petition* would have to fail even if Cedar Mesa Ranches were a CCIOA community for the reasons set forth in this paragraph II.

III. REQUEST FOR LEAVE TO AMEND TO AN ACTION FOR DECLARATORY JUDGMENT

The Court has considered the request of the Petitioner that the Court amend the *Petition* to an action for a declaratory judgment. The Court finds that this would be inappropriate. This action is limited to a request for adjudication under the CCIOA statute. An action for declaratory judgment would have to be filed as a separate and distinct action. This would require among other formalities appropriate service on affected and interested parties.

IV. LIMITED SCOPE OF ORDER

The Court is concerned that this order may be misinterpreted because of assertions made by the opponents to the amended declaration. To avoid misinterpretation the Court finds it appropriate to offer the following guidance. This order should be construed in the narrowest sense. The Court is denying the request of the Petitioner to amend the declaration of the Cedar Mesa Ranches subdivision pursuant to C.R.S. §38-33.3-217(7)(a) and that is the extent of the order.

IT IS HEREBY ORDERED that the request of the Petitioner to amend the declaration of the Cedar Mesa Ranches subdivision pursuant to C.R.S. §38-33.3-217(7)(a) is denied for the reasons set forth above. The parties shall bear their own costs and attorney fees.

DONE AND SIGNED this April 25, 2012.

/s/ Todd Jay Plewe "original"

District Court Judge
Todd Jay Plewe

DISTRICT COURT MONTEZUMA COUNTY, COLORADO Court Address: 109 West Main, Room 210, Cortez, CO, 81321-3190 Phone Number: (970) 565-1111	DATE FILED: May 25, 2017 2:49 PM CASE NUMBER: 2016CV18
Plaintiff: **Cedar Mesa Ranches Homeowners Association** v. Defendant: **Craig D. Lyons**	**COURT USE ONLY**
	Case No.: 2016CV18

SUMMARY JUDGMENT ORDER

Plaintiff Cedar Mesa Ranches Homeowners Association, Inc. ("CMR" or "Plaintiff") brought suit against defendant Craig D. Lyons ("Lyons" or "Defendant") in the Small Claims Division of the Montezuma County Court in Docket No. 2016S16. CMR sought $799.00 in "unpaid dues, late payment fees, interest and court fees" because CMR's "by-laws and covenants provide for a yearly fee assessed equally to all property owners." (Notice, Claim and Summons at p. 1).

Lyons has filed counterclaims against CMR for: (1) declaratory judgment to determine if CMR has the authority to assess property owners for dues and other charges as alleged in the Notice, Claim and Summons, and (2) a claim of violation of the fraudulent document statute, C.R.S. § 38-33.5-109(3), based on the recording of an

earlier lien on Lyons's property.

Defendant's counterclaims resulted in the removal of this matter from the Small Claims Division of the Montezuma County Court to the Montezuma County District Court and this action.

The parties agreed to resolve this matter by cross motions for summary judgment and submitted a Joint Notice of Stipulated facts with accompanying exhibits on December 29, 2016 (a corrected Exhibit 3 was submitted on January 3, 2017).

Plaintiff filed its Plaintiff's Cross-Motion for Summary Judgment on January 3, 2017. Defendant filed his Defendant's Motion and Brief in Support of Summary Judgment on January 3, 2017. Each party filed a Response on January 24, 2017 and a Reply on February 7, 2017.

The Court set this matter for a hearing and heard argument on March 4, 2017.

The Court has reviewed this matter carefully and with great consideration. The attorneys for the parties have presented their positions skillfully and effectively.

STIPULATED FACTS

The Joint Notice of Stipulated Facts filed by the parties on December 29, 2016 has been accepted by the Court as findings of fact. The Joint Notice of Stipulated Facts stipulated to by the parties reads in the following paragraphs 1-13 as follows (paragraphs 1-13 are copied into this pleading verbatim from the Joint Notice of Stipulated Facts) (the exhibits are attached to the December 29, 2016 pleading and are incorporated into this Order by reference):

1. Defendant Craig D. Lyons is the record title owner of that property legally described as: "Lot 99, Cedar Mesa Ranches Subdivision, according to the Plat thereof filed for record Sept 9, 1998 in Book 13 at Page 138," and known as 10755 Road 35.6, Mancos CO (the "Property.")

2. The Property is located within the boundaries of the Cedar Mesa Ranches Subdivision,

(the "Subdivision"), such subdivision having been formed with the recording of a plat by the original declarant, the Redstone Land Company, on September 9, 1998 with the Montezuma County Clerk and Recorder at Reception No. 473996 (the "Plat.") A copy of the Plat is attached hereto as Exhibit 1.

3. The Plat contains 32 covenants and property restrictions under the heading "Covenants, Easements and Restrictions" and the Property is subject to and governed by those Covenants, Easements and Restrictions. A copy of those Covenants, Easements and Restrictions taken directly from the plat is attached hereto as Exhibit 2.

4. Articles of Incorporation for Plaintiff, Cedar Mesa Ranches Homeowners Association, Inc. (the "HOA") were filed with the Colorado Secretary of State's office on August 3, 1998, thus creating the HOA. That document is not recorded with the Montezuma Clerk and Recorder. Nothing on the Plat makes specific reference to the Articles of Incorporation, but the Plat makes reference to the existence of the HOA. A copy of the Articles is attached hereto as Exhibit 3. No separate declaration of covenants for the subdivision was recorded by the original declarant when the Plat was recorded.

5. The covenants contained on the Plat do not specifically mention the assessment of dues.

6. On or about November 1, 2005, a document entitled "Covenants of Cedar Mesa Ranches Homeowners Association, Inc." was recorded with the Montezuma County Clerk and Recorder at Reception No. 535880 (the "2005 Amendment"). The 2005 Amendment was not signed by Redstone Land Company, nor is there any evidence that Redstone Land Company approved or initiated the document. A copy of the 2005 Amendment is attached hereto as Exhibit 4.

7. In an Order dated April 25, 2012 in Montezuma County District Court Case No 11CV200, this Court determined that the HOA was not a "CCIOA Community" and thus was not

subject to the statutory governing provisions of the Colorado Common Interest Ownership Act ("CCIOA"). Neither party is challenging this determination in the current action. A copy of the Order setting forth that determination is attached hereto as Exhibit 5.

8. On March 19, 2014, the Board of the HOA, adopted a "Resolution Regarding Public Notice of Applicability of CCIOA" that was drafted by the HOA's then attorney, Erin J. Johnson, with the intention of bringing the HOA within the scope of CCIOA.

9. On or about April 14, 2014, the "Resolution Regarding Public Notice of Applicability of CCIOA" was recorded by the HOA with the Montezuma County Clerk and Recorder at Reception No. 593995 (the "2014 Resolution"). A copy of the 2014 Resolution is attached hereto as Exhibit 6.

10. On or about May 22, 2015, Gregory Kemp, president of the HOA, recorded a "Notice of Statutory Lien," which purported to be in conformity with CCIOA, with the Montezuma County Clerk and Recorder at Reception # 600157 (the "2015 Lien Notice.") The 2015 Lien Notice was recorded against the Property and claimed to provide notice of an HOA lien on the Property for "dues owed Feb. 15, 2015 in the amount of $550.00, late charges of $50.00, and filing costs of $22.00, with interest accruing at 9% annually thereon until paid." A copy of the Notice is attached hereto as Exhibit 7.

11. On or about September 9, 2015, the HOA received notice from an attorney for two other owners of property in the Subdivision alleging that liens filed on those properties at the same time and under the same basis as the lien on the Property were invalid. That caused the HOA to retain new counsel to evaluate the status of those liens.

12. After consulting with new counsel, the HOA released the 2015 Lien Notice and all other similarly situated liens.

13. There is a current and actual dispute between the HOA, the Defendant and other property owners within the Cedar Mesa Ranches Subdivision as to the authority of the HOA and the obligations of the property owners under the governing documents of the HOA.

ADDITIONAL FACTS

The Court makes the following additional findings of fact in accordance with the Exhibits filed by the parties:

A. The roads in the Subdivision are private roads.

B. The private roads in the Subdivision were not dedicated to Montezuma County or any other government or private entity.

C. The ownership of the private roads in the Subdivision is undetermined.

D. Use of the private roads in the Subdivision is necessary for access to the lots and homes in the Subdivision.

E. The private roads in the Subdivision are the common property of the Subdivision – despite the undetermined ownership. It is obvious that the roads were intended by the developer to be common property.

F. Plat covenant number 27 of the "Covenants, Easements and Restrictions" (referenced in paragraph 2 of the stipulated facts hereinabove) reads as follows:

> Maintenance of the private access roads in the subdivision shall be the sole responsibility of those lot owners which adjoin said private roads and are members of the Cedar Mesa Ranches Homeowners Association, Inc. Each lot owner agrees to keep their section of the road free of debris and all other natural and man-made obstructions. Lot owners will maintenance roads in common with others in a suitable condition for two wheel drive vehicular traffic.

POSITIONS OF THE PARTIES

Plaintiff argues that CMR has the authority to assess property owners for dues and other

charges and that CMR did not violate C.R.S. § 38-33.5-109(3) with the earlier lien recording. Plaintiff requests that the Court enter declaratory judgment stating that CMR has the authority to assess owners for dues and other charges.

Defendant argues that the Court should enter a declaratory judgment stating that CMR lacks the authority to assess property owners for dues and other charges and Defendant requests that an injunction be entered by the Court enjoining CMR from assessing property owners for dues and other charges. Defendant also demands a judgment for Defendant and against the HOA of no less than $1,000.00 in statutory damages for the filing of a spurious lien against Defendant's property by CMR.

The allocation of CMR dues is unclear to the Court. However, it is evident that road maintenance is a primary use for the CMR dues and a dispute over road maintenance is at the heart of this matter.

Lyons asserts that the "documents that govern the Subdivision and that have been properly recorded with the Montezuma County Clerk and Recorder, thereby giving proper notice of such to Defendant, do not provide the HOA with the power to assess property owners any kind of fee and no other document or authority provides the HOA with any such power or right." (See p.4 *Defendant's Motion and Brief in Support of Summary Judgment).* At oral argument, Defendant made his position evident – to maintain the roads of the subdivision:

1. The residents may negotiate agreements to maintain the roads on their own; and/or
2. Pursuant to Plat Covenant 27, each lot owner must maintain the private access road adjacent to their individual lot. Presumably, other lot owners could sue a neighbor who failed to maintain the private access road adjacent to their individual lot – requesting specific performance and/or damages.

APPLICABLE LAW

Summary judgment is proper pursuant to C.R.C.P. Rule 56(c), "when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to summary judgment as a matter of law." Franklin Bank, N.A. v.Bowling, 74 P.3d 308, 311 (Colo. 2003); Thorpe v. State, 107 P.3d 1064, 1068 (Colo. App. 2004). "The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail." Luttgen v. Fischer, 107 P.3d 1152, 1154 (Colo. App. 2005)(citing Peterson v. Halsted, 829 P.2d 373, 375 (Colo. 1992).

The seminal Colorado case applicable to this matter is Evergreen Highlands Ass'n v. West, 73 P.3d 1 (Colo. 2003). In Evergreen Highlands, the Colorado Supreme Court, in an opinion authored by current Chief Justice Rice, held that a homeowners association, as a common interest community by implication, had power to collect assessments.

The subdivision in Evergreen Highlands was created and its plat filed in 1972. The 63 lot subdivision had a 22.3 acre park owned by the homeowners association of the subdivision. Between 1976 and 1995 the association relied on voluntary assessments to maintain the park area. In 1995, the Evergreen Highlands association amended the covenants to require the payment of assessments and to impose liens on the property of any owners who failed to pay their assessment. The Evergreen Highlands opinion relies extensively on the Restatement (Third) of Property: Servitudes in reaching its conclusion. Justice Rice wrote:

> Although many subdivisions have covenants which mandate the payment of assessments for this purpose, others, such as Evergreen Highlands, do not. Without the implied authority to levy assessments, these latter communities are placed in the untenable

> position of being obligated to maintain facilities and infrastructure without any viable economic means by which to do so. In order to avoid the grave public policy concerns this outcome would create, we today adopt the approach taken by many other states as well as the Restatement of Property, which provides that "the power to raise funds reasonably necessary to carry out the functions of a common interest community will be implied if not expressly granted by the declaration." Restatement (Third) of Property: Servitudes § 6.5 cmt. b (2000). We therefore hold that, even in the absence of an express covenant mandating the payment of assessments, the Association has the implied power to levy assessments against lot owners in order to raise the necessary funds to maintain the common areas of the subdivision.

Evergreen Highlands at 4.

Relying on the Restatement, the Colorado Supreme Court held that the subdivision in Evergreen Highlands was a common interest community by implication:

> We accordingly adopt the position taken by the Restatement and many other states, and hold that the declarations for Evergreen Highlands were sufficient to create a common interest community by implication. The Association therefore has the implicit power to levy assessments against lot owners for the purpose of maintaining the common area of the subdivision. Respondent, as a lot owner, has an implied duty to pay his proportionate share of the cost of maintaining and operating the common area.

Evergreen Highlands at 9.

The Evergreen Highlands Court took a proactive judicial approach to protecting property owners in subdivisions when developers failed to adequately provide for the maintenance of common areas. This is an acknowledgement of the realities of our modern "subdivision society".

CONCLUSION

The private access roads within the Cedar Mesa Ranches Subdivision are private roads. Although ownership of the roads was not conveyed to the Subdivision, the Court finds that they are common areas within the Cedar Mesa Ranches Subdivision. Well maintained roads are necessary for access to property within the Subdivision and the health, safety, and welfare of the

residents of the Subdivision. If the Colorado Supreme Court deemed the inability of a subdivision to maintain a park to be a "grave public policy concern" - then certainly the inability to maintain private access roads within the Subdivision meets the "grave public policy concern" standard. Without well maintained private access roads, the lots in the Subdivision could become inaccessible and property values would be adversely affected. The safety of residents could be jeopardized.

Defendant's position - that residents could negotiate to maintain the roads on their own and that a lot owner could be sued for failure to maintain their section of private road – is completely untenable in a modern society. The only beneficiaries of Defendant's position would be the attorneys retained to litigate and the local automotive repair establishments specializing in alignment, shocks, and struts.

This Court chooses to follow the precedent established by Evergreen Highlands. The Cedar Mesa Ranches Homeowners Association is a common interest community by implication. The declarations of CMR are sufficient to establish a common interest community by implication. In 2012, this Court determined that the Subdivision was not a "CCIOA Community" and thus was not subject to the statutory governing provisions of the Colorado Common Interest Ownership Act ("CCIOA") (Montezuma County District Court case 11CV200) . A finding that the Subdivision is a common interest community by implication is not incompatible with the holding in 11CV200. A finding that the Subdivision is a common interest community by implication does not make the statutory provisions of CCIOA applicable to CMR or the Cedar Mesa Ranches Subdivision.

CMR has the authority to make and collect assessments **to maintain the common areas of the Subdivision – including the private roads**.

Because the Subdivision is not and was not a "CCIOA Community", the lien provision relied on by CMR in CRS 38-33.3-316 to file a lien against Defendant's property is not applicable. Accordingly, the lien filed against Defendant was spurious. Judgment is entered against Plaintiff and for Defendant in the amount of $1,000. The Court deems Plaintiff to be the prevailing party in this litigation because the primary issue in this case was the dispute over the ability of Plaintiff to make and collect assessments. Accordingly, an award of attorney fees against Plaintiff based on the lien filing would in inequitable – especially when the lien was released.

It is equitable to require each party to bear their own attorney fees and costs.

The Court recognizes that without the lien provisions of CCIOA, CMR will likely have to sue lot owners who fail to pay assessments and that CMR will have to obtain liens through a more time consuming, intensive procedure; however, this is an acceptable result under the circumstances.

Done and Signed this May 25, 2017.

/s/ Todd Jay Plewe

District Court Judge
Todd Jay Plewe

DISTRICT COURT, MONTEZUMA COUNTY, COLORADO 865 North Park Avenue Cortez, Colorado 81321/(970) 565-1111	DATE FILED: May 29, 2019 CASE NUMBER: 2018CV8
Plaintiff/Appellee: CEDAR MESA RANCHES HOMEOWNERS ASSOCIATION, INC. v. Defendant/Appellant: SHERRY NIGHTEAGLE	COURT USE ONLY
	Case Number: 2018CV8

ORDER ON REHEARING RE: APPEAL OF SMALL CLAIMS JUDGMENT

INTRODUCTION

This matter comes for consideration on Defendant/Appellant, Sherry Nighteagle's, Petition for Reconsideration and/or Rehearing in regard to the Court's Order Re: Appeal of Small Claims Judgment entered November 7, 2018. That order addressed Nighteagle's appeal of the judgment in the Montezuma County Small Claims Court in favor of Plaintiff/Appellee, Cedar Mesa Ranches Homeowners Association, Inc., (CMR) for unpaid dues and dismissing Nighteagle's counterclaims.

PROCEDURAL BACKGROUND

CMR commenced an action in the small claims court (trial court) to recover $2300 for unpaid dues, late payment fees, interest, and court fees related to assessments against Nighteagle for 2015, 2016, and 2017. At trial,

CMR additionally requested $625 for 2018 dues. Nighteagle filed ten counterclaims challenging CMR's ability to assess dues and seeking damages arising from CMR filing liens against her property and other damages.

At the outset of the trial, the trial court dismissed Nighteagle's first, second, sixth, eighth, ninth, and tenth counterclaims for lack of jurisdiction. Those counterclaims specifically sought monetary damages for liens filed against Nighteagle's property. After considering the evidence, the trial court granted judgment in favor of CMR and against Nightengale in the amount of $2,425.00 plus $145.00 in court costs and dismissed Nightengale's remaining counter claims. In doing so, the trial court relied on Judge Plewe's ruling in Cedar Mesa Homeowners Association v. Lyons, No. 2016CV18 (Montezuma County Dist. Ct. May 25, 2017), in which the district court upheld CMR's right to assess dues for the purpose of maintaining common areas.

Nighteagle appealed to this Court. On November 7, 2018, this Court entered an order affirming the judgment in favor of CMR and against Nighteagle and reversing the judgment dismissing Nighteagle's first, second, sixth, eighth, ninth and tenth counterclaims and ordering trial on those counterclaims.

Nighteagle requested a rehearing. The Court granted that motion on December 26, 2018, and vacated the November 7, 2018, order. The Court has now considered the additional briefs filed by the parties.

FACUTAL BACKGROUND

Redstone Land Company recorded the subdivision plat for Cedar Mesa

Ranches Subdivision on September 9, 1998. There are 138 residential lots in the subdivision. The plat includes a dedication of all public streets and roads shown on the plat to the public forever. The plat, however, does not provide access to all the subdivision lots by a platted public street or road. Those lots designated on the plat with a number, all of which are less than thirty-five acres in size, are adjacent to a street or road clearly designated as such. Those lots designated on the plat with a letter (A to S), all of which are more than thirty-five acres in size, are not all adjacent to a street or road clearly designated as such.

The plat also provides the following notice:

> The covenants for this subdivision requires (sic) compliance with the Montezuma County Land Use Code Chapter 5, Section 1, which are enforceable by the County. Additional Covenants, (sic) are enforceable by the Developer/Landowner and or the Homeowner's Association, and are on file with this Plat, and shall be provided to any purchaser of a tract or lot within this subdivision.

The plat also includes thirty-two numbered provisions under the heading "Covenants, Easements and Restrictions 'CEDAR MESA RANCHES.'" Covenant 27 provides "[m]aintenance of the private access roads within the subdivision shall be the sole responsibility of those lot owners which adjoin said private roads and are members of the Cedar Mesa Ranches Homeowners Association, Inc. Each lot owner agrees to keep their section of the road free of debris and all other natural and man-made obstructions. Lot owners will maintain roads in common with others in a suitable condition for two wheel drive vehicular traffic."

Additional covenants also reference CMR. Covenant 2 authorizes CMR to allow otherwise prohibited uses. Covenant 18 requires CMR to resolve disputes, at an owner's request, regarding nuisances. Covenant 28 provides "[a]ll lot owners will agree as members of Cedar Mesa Ranches Homeowners Association to form a forestry and fire protection committee within the Homeowners Association . . . ." Finally, covenant 32 allows CMR to approve certain grantor proposed changes to the covenants.

On August 3, 1998, articles of incorporation were filed with the Colorado Secretary of State for Cedar Mesa Ranches Homeowners Association, Inc., a non-profit corporation. Article III, section 1 of the articles of incorporation defines the purpose of the corporation.

> The purpose for which the Corporation is organized is to provide an entity for the maintenance of roads and enforcement of covenants and operation of the property owners association which is part of Cedar Mesa Ranches Subdivision development, according to the Protective Covenants now or hereafter recorded in the public records of Montezuma County, Colorado, located in the City of Cortez, County of Montezuma, State of Colorado.

As to membership, Article VIII, section 1 provides:

> Every person or entity who is a record owner of real property in Cedar Mesa Ranches Subdivision is subject by the Protective Covenants of record to assessment by the Association, including contract sellers, and shall be a member of said Association. . . . Membership shall be appurtenant to and may not be separated from ownership from any lot which is subject to assessment by the Association. (emphasis added).

Nighteagle owns a lot in Cedar Mesa Ranches Subdivision. The trial court found that there are 138 homeowners in Cedar Mesa Ranches Subdivision who are also members of CMR. Additionally, the trial court found that dues are

assessed to maintain the common area for items such as road maintenance, weed control, fire mitigation, insurance, legal fees, and signage. CMR assessed homeowners in the amount of $550.00 for 2015, 2016, and 2017 and $625.00 for 2018.

ANALYSIS

A. The authority of CMR to assess dues against homeowners.

Nighteagle first contends that CMR does not have authority to assess dues against subdivision homeowners because the recorded subdivision documents do not grant that authority. Rather, she asserts the recorded documents provide "the maintenance obligation for any 'private access roads' falls directly on the property owners and not on the HOA . . . ." A similar argument was made, and rejected, in Lyons, a case on which the trial court relied. Nighteagle argues that Lyons is not binding here either under the doctrine of issue or preclusion or as binding precedent.

The facts in Lyons are almost identical to the facts in this case. Lyons was an owner of property within Cedar Mesa Ranches Subdivision. The suit, commenced by CMR, addressed "a current and actual dispute between [CMR], the Defendant and other property owners within the Cedar Mesa Ranches Subdivision as to the authority of [CMR] and the obligations of the property owners under the governing documents of [CMR]." The court in Lyons found that the roads within the subdivision are private roads not dedicated to Montezuma County or any other government or private entity. Relying on Evergreen Highlands Association v. West, 73 P.3d 1 (Colo. 2003), the court held

that the roads were common areas within the subdivision and that CMR had the authority to assess dues against homeowners for maintenance purposes.

The doctrine of issue preclusion bars relitigating an issue already litigated and decided in a previous proceeding. The elements are:

1. the issue precluded is identical to an issue actually litigated and necessarily adjudicated in a prior proceeding;

2. the party against whom preclusion is sought was a party or in privity with a party to the prior proceeding;

3. there was a final judgment on the merits in the prior proceeding; and

4. the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Goldsworthy v. American Family Mutual Insurance Co., 209 P.3d 1108, 1113-14 (Colo. App. 2008).

There is no question that the first and third elements have been met here. Lyons addressed and resolved the issue of CMR's authority to assess dues against homeowners for road maintenance and resulted in a final judgment on the merits.

Nighteagle asserts that Lyons is not binding on her because she was not a party, thus implicating the second and fourth elements. Privity exists when there is a substantial identity of interests between the parties such that the interests of the non-party are protected by a party in the prior litigation. Id. at 1115. A similar analysis applies to the opportunity to litigate.

> In determining whether there was a full and fair opportunity to litigate the issue, we consider whether the remedies and

> procedures in the first proceeding or the proceeding itself is substantially different from the proceeding in which issue preclusion is asserted; whether the party in privity in the first proceeding had sufficient incentive to vigorously assert or defend the position of the party against whom issue preclusion is asserted; and the extent to which the issues are identical.

Id. at 1118 (citations omitted).

The second and fourth elements have been established here. Lyons was a homeowner in the subdivision, as is Nighteagle. Lyons filed a counterclaim against CMR asking for a declaratory judgment determining that CMR did not have authority to assess homeowners for dues and other charges, exactly the claim made by Nighteagle in this case. Lyons was represented by counsel and filed a motion for summary judgment on his claims, as well as defending CMR's motion for summary judgment, certainly a vigorous defense of the position Nigtheagle asserts here. Moreover, the purpose of the proceeding in Lyons is similar to the purpose of this proceeding: to determine CMR's authority to assess homeowners for dues.

For the foregoing reasons, the trial court properly held that Nighteagle was barred by the doctrine of issue preclusion from challenging CMR's authority to assess homeowners for dues.

As well, the trial court properly relied on Lyons as binding precedent. Trial courts are required to follow precedent as established by appellate courts. Berry v. Richardson, 160 Colo. 538, 418 P.2d 523 (1966). The district courts have appellate jurisdiction over small claims courts. See C.R.C.P. 411 and 519. Thus, the trial court was required to follow the holding in Lyons as binding precedent.

Next, Nighteagle contends that McMullin v. Hauer, 420 P.3d 271 (Colo. 2018), limits and distinguishes the holding in Evergreen Highlands, which was the basis for the holding in Lyons. The crux of Nighteagle's argument is that Lyons, which relied on Evergreen Highlands, is no longer viable after the supreme court's decision in McMullin. An analysis of the two cases is necessary to address Nighteagle's contention.

In Evergreen Highlands, the Evergreen Highlands Subdivision plat was filed in 1972. The plat indicated a park area that was to be conveyed to a homeowners' association. Protective covenants for the subdivision were also filed in 1972 but did not require lot owners to be members of or pay dues to the association. Evergreen Highlands Association was incorporated in 1973 for multiple purposes, including maintaining the common areas. The developer conveyed the park area to the association in 1976. Id. at 2.

The supreme court rejected a lot owner's challenge to the authority of the association to levy assessments. Relying on case law from other states, the Restatement of Property (Servitudes), and the declarations of Evergreen Highlands in effect when West purchased his property, as supported by the supreme court's understanding of the purpose of the Colorado Common Interest Ownership Act ("CCIOA"), the court held "that the declarations of Evergreen Highlands in effect when Respondent purchased his property in 1986 were sufficient to create a common interest community by implication with the concomitant power to impose assessments or dues against individual lot owners." Id. at 9.

In reaching this holding, the supreme court specifically rejected the lot owner's assertion that a homeowners' association may only impose assessments in the original covenants. Rather, the court recognized that, for purposes of the CCIOA, declarations included any recorded documents, however denominated, and included the articles of incorporation of the association.

> At the time Respondent purchased his lot in 1986, the Evergreen Highlands' declarations made clear that a homeowners association existed, it owned and maintained the park area, and it had the power to impose annual membership or use fees on lot owners. These declarations were sufficient to create a common interest community by implication. As explained by the Restatement:
>
> > An implied obligation may ... be found where the declaration expressly creates an association for the purpose of managing common property or enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds necessary to carry out its functions. When such an implied obligation is established, the lots are a common-interest community within the meaning of this Chapter.
>
> Restatement (Third) of Property: Servitudes § 6.2 cmt. a (2000); see also id. at illus. 2 (citing an example virtually identical to that of Evergreen Highlands and finding it a common interest community by judicial decree).

Id. at 8-9.

In McMullin, the McMullins acquired thirty acres of land in Rio Blanco County. They recorded a final plat creating seven lots and seventeen acres of common open space, known as Two Rivers Estates, and entered into a subdivision agreement with the County. The subdivision plat included a map of the seventeen acres of common open space, which remained undivided, and

notices that provided a "private access road," domestic wells to service the subdivision, and "common ownership and maintenance" would be the responsibility of the "Home Owner's Association." No homeowners' association was ever created. The subdivision plat also included a reference to covenants filed with the Rio Blanco County Clerk and Recorder, but none were filed.

For eight years after creating the subdivision, the McMullins were unable to sell any of the lots. They did mortgage six of the seven lots to finance the construction of a family lodge on one of the lots. They did not mortgage or encumber the common open space. Ultimately, third parties acquired all seven lots.

The Hauers and Lincoln Trust Company, owners of six of the seven lots, filed a suit, on their behalf and on behalf of "the homeowners' association of Two Rivers Estates," to quiet title to their respective lots and the common open space through an unincorporated homeowners' association. They asserted that Two Rivers Estates was a CCIOA common-interest community.

After a bench trial, the trial court found that the recorded final plat, certain deeds, and the subdivision agreement created both an implied common-interest community and an unincorporated homeowner's association that held equitable title in the open space. The trial court also held that each lot owner had a duty to contribute 1/7th of the common expenses to the homeowners' association and that the homeowners' association had the power to levy assessments to collect those expenses. The court of appeals affirmed in a split decision. Id. at 272-73.

The supreme court rejected the court of appeals conclusion that the recorded final plat, the individual deeds to lot owners, and the subdivision agreement, taken together, constituted a declaration sufficient to establish both an implied common-interest community and an unincorporated homeowners' association under the CCIOA and the supreme court's decision in Evergreen Highlands. McMullin, 420 P.3d at 275. In support of its holding, the court said "[c]ritically, these documents, even taken together, do not expressly obligate the lot owners to pay for expenses associated with the common property, let alone attach that obligation to individually owned property." Id.

The supreme court, however, distinguished Evergreen Highlands.

> In that case, we held that the declarations for the Evergreen Highlands Subdivision were sufficient to create a common-interest community by implication with the concomitant power to impose mandatory dues on lot owners to pay for the maintenance of common areas of the subdivision. See Evergreen Highlands, 73 P.3d at 2, 9. But, unlike here, the declarations in that case included recorded covenants; a plat noting that a park area would be conveyed to the homeowners' association; articles of incorporation for the homeowners' association; and a deed by which the developer quitclaimed his ownership in the park area to the homeowners' association. Id. at 9. Thus, quite unlike the situation in this case, the declarations in Evergreen Highlands "made clear that a homeowners' association existed, it owned and maintained the park area, and it had the power to impose annual membership or use fees on lot owners." Id. Indeed, the homeowners' association had been operating for several decades, had been incorporated, and was required by its articles of incorporation to " 'own, acquire, build, operate, and maintain' the common area," "to pay taxes on same," and to "determine annual membership or use fees." Id. at 2, 9.
>
> Although the Evergreen Highlands declaration "expressly create[d] an association for the purpose of managing common property," it failed to provide the homeowners' association with an adequate funding mechanism. See id. at 9 (quoting Restatement (Third) of Property: Servitudes § 6.2 cmt. a). Consequently, after

> several decades of relying on voluntarily paid dues, the homeowners' association was unable to continue to maintain the common areas. The homeowners' association in that case was thus "placed in the untenable position of being obligated to maintain facilities and infrastructure without any viable economic means by which to do so." Id. at 4. So, "to avoid the grave public policy concerns this outcome would create," this court relied on the Restatement (Third) of Property: Servitudes to conclude that "[a]n implied obligation [to pay assessments] may be found" when a "declaration expressly creates an association ... but fails to include [an adequate] mechanism for providing the funds necessary to carry out its functions." See id. at 4, 9 (emphasis added) (internal quotation marks and ellipses omitted) (quoting Restatement (Third) of Property: Servitudes § 6.2 cmt. a).

McMullin v. Hauer, 420 P.3d at 276.

The supreme court further distinguished Evergreen Highlands from the facts before it in McMullin. "Moreover, the primary concern animating our decision in Evergreen Highlands – i.e., saving a homeowner's association from the 'untenable position of being obligated to maintain facilities and infrastructure without any viable economic means to do so' – is not present here." Id. at 277.

The task for this Court is to construe the documents forming CMR considering Evergreen Highlands and McMullin. Familiar rules of construction apply to covenants and other recorded instruments. A court must give words and phrases their common meaning and enforce the documents as written if their meaning is clear. Like contracts, they are to be construed as a whole, harmonizing and giving effect to all provisions so that none will be rendered meaningless. Pulte Home Corporation, Inc. v. Countryside Community Association, Inc., 382 P.3d 821, 826 (Colo. 2016).

The Cedar Mesa Ranches Subdivision plat designates numbered lots

adjacent to and with access from clearly delineated and named roads. There are also nineteen lots more than thirty-five acres in size, some of which, and some of which do not, have access from a clearly delineated and named road. The covenants refer to CMR and empower CMR to enforce the covenants. Additionally, covenant 27 requires the lot owners to maintain roads in common with others in a suitable condition for two-wheel drive vehicular traffic, and the covenants place additional responsibilities on CMR.

CMR was formed prior to the filing of the plat. Its articles of incorporation specifically provide that its purpose is to maintain the subdivision roads and enforce the subdivision covenants. The articles of incorporation also provide that homeowners shall be members of CMR, with voting rights, and subject to assessment by CMR.

The documents forming Cedar Mesa Ranches Subdivision, when read together, form a common interest community by implication consistent with Evergreen Highlands. Indeed, CMR's articles of incorporation clearly empower CMR to maintain the subdivision roads. Moreover, subdivision homeowners are required to be members of and subject to assessment by CMR. Thus, a person purchasing a lot in the subdivision would be clearly apprised by the subdivision documents of the obligation to pay assessments to CMR for purposes including road maintenance.

This conclusion is also warranted by the necessities in this case. While the plat dedicates all subdivision street and roads to the public, Montezuma County, the governmental entity with jurisdiction, has not maintained the

subdivision roads, contending that the dedication to the public confers County control but not ownership. See Exhibit Four. Thus, CMR has been forced to maintain the roads for the benefit of 138 homeowners, and CMR must assess the homeowners to pay for road maintenance as well as its other obligations under the covenants. Moreover, well maintained roads enhance the property values in the subdivision. See Evergreen Highlands, 73 P.3d at 7(existence of a well-maintained park immediately adjacent to Respondent's lot undoubtedly enhances Respondent's property value). Thus, the primary concern animating the decision in Evergreen Highlands – saving a homeowner's association from the untenable position of being obligated to maintain infrastructure without any viable economic means to do so - is present here. See McMullin, 420 P.3d at 277(noting that that concern was not present).

Nighteagle also contends that the covenant 27 requires the homeowners individually, and not CMR, to maintain the roads. This contention fails for several reasons.

First, covenant 27 provides "[m]aintenance of the private access roads within the subdivision shall be the responsibility of those lot owners which adjoin such private roads and are members of [CMR]." The plat, however, dedicates the roads to the public. The developer most likely included this provision to address the larger lots designated my letter which may not have access to a platted road.

Next, that same covenant provides that "[l]ot owners will maintain roads in common with others . . . ." This provision must be given effect and clearly

states an intention that homeowners share jointly the cost of road maintenance, and joint obligation is the very essence of a common interest community. Nighteagle's construction of this covenant ignores this provision. Moreover, the fact that this provision is not limited to private roads indicates an intention by the developer to recognize two classes of roads with different maintenance obligations for each.

Finally, and perhaps most importantly, CMR's articles of incorporation, which preceded the covenants, require both that CMR maintain the roads and have the power to assess homeowners. These provisions indicate that CMR was the vehicle intended by the developer to provide the common road maintenance required by the covenants. Nighteagle gives no credence to CMR's articles of incorporation.

This case is distinguishable from McMullin. In McMullin, the supreme court held "the recorded plat, the deeds, and the subdivision agreement, taken together, do not amount to a declaration sufficient under CCIOA to establish a common-interest community." McMullin, 420 P.2d at 277. The supreme court rejected the creation of a homeowners' association by implication because no homeowners' association had been created by the subdivision documents. Nor did the documents require the homeowners to pay expenses associated with common property. Indeed, the McMullins, rather than an association, had continuously paid taxes on the common property.

Here, the obligation of CMR to maintain the subdivision roads and assess homeowners for those costs is clearly stated in the subdivision documents, and

CMR has in fact maintained the subdivision roads in years past.

Additionally, Nighteagle contends in her Amended Opening Brief that a homeowner's association may not assess homeowners absent compliance with the CCIOA. She relies on Pulte Home Corporation, Inc. v. Countryside Community Corporation, 382 P.3d 821 (Colo. 2016), and Ryan Ranch Community Association, Inc. v. Kelley, 380 P.3d 137 (Colo. 2016). Both cases address when a common interest community is created and how and when property may be added to it. Ryan Ranch, 380 P.3d at 148 (Coats, J., concurring). Additionally, Pulte Home addressed the liability of a developer for assessments under both the Covenants, Conditions and Restrictions of Countryside Community Association and the CCIOA, finding liability under neither.

Neither Pulte Home nor Ryan Ranch addresses the issue here: the liability of a homeowner for assessments for maintenance of roads serving the homeowners in a subdivision. Accordingly, Nighteagle's reliance on Pulte Home and Ryan Ranch is misplaced.

Nor is Nighteagle's claim that only a homeowners' association in a common interest community in compliance with the CCIOA may assess homeowners supported by any authority. The supreme court in Evergreen Highlands relied on the Restatement (Third) of Property: Servitudes, not the CCIOA, to support its holding that the Evergreen Highlands declarations were sufficient to create a common interest community by implication with the power to impose assessments or dues against individual homeowners.

Evergreen Highlands, 73 P.3d at 9. That holding has never been disavowed or limited by our supreme court.

Contrary to Nighteagle's contention, one commentator questions whether a flawed declaration negates the formation of a common interest community and suggests that any deficiencies constitute a mistake in the transaction, which make the declarations subject to reformation in equity. See Douglas Scott MacGregor, Colorado Community Association Law: Condominiums, Cooperatives, and Homeowners Associations § 2.1.2 (2d ed. 2019).

Moreover, the CCIOA does not address Nighteagle's primary objection: that no document empowers CMR to impose assessments, dues, fines, or other charges against subdivision residents for road maintenance. The designation of such a power is not a required element of a declaration. See § 38-33.3-205, C.R.S. (2018). Indeed, a homeowners' association has the authority to collect assessments from homeowners for common expenses without specific authorization in the declaration. See § 38-33.3-302(1)(b), C.R.S. (2018). See also Douglas Scott MacGregor, Colorado Community Association Law: Condominiums, Cooperatives, and Homeowners Associations § 9.4.1 (2d ed. 2019). Thus, while the declarations in this case may be technically flawed, they are not defective in a way that adversely affects those acquiring a lot in the subdivision.

B. Nighteagle's Counterclaims

In her amended answer and counterclaims, Nighteagle asserted claims predicated on CMR filing liens against her property (first, second, sixth, eighth,

ninth, and tenth counterclaims). The trial court dismissed those counterclaims on the basis that they affected title to real property, claims over which the district court had exclusive jurisdiction.

Nighteagle clearly alleged only claims for money damages, and she limited her claims to the jurisdictional limit for the small claims court. She did not ask the trial court to set aside an existing lien. Accordingly, the foregoing counterclaims do not affect title to real property, and the small claims court does have jurisdiction to enter judgment on claims for monetary damages within its jurisdictional limits.

C. Unpreserved Claims

In her brief, Nighteagle contends that requiring her to pay dues for road maintenance denies her equal protection of the laws under the United States Constitution and that CMR had unclean hands because it has not sought re-designation of the roads as county roads. These issues were not raised in the trial court and will not be considered on appeal. See Valentine v. Mountain States Mutual Casualty Company, 252 P.3d 1182 (Colo. App. 2011).

CONCLUSION

For the foregoing reasons, the judgment in favor of CMR and against Nighteagle is affirmed. The judgment dismissing Nighteagle's first, second, sixth, eighth, ninth, and tenth counterclaims is reversed, and this case is remanded to the trial court for trial on those counterclaims.

Dated May 28, 2019.

BY THE COURT:

Charles R. Greenacre
District Court Judge

xc: Parties of record.

Covenants, Easements and Restrictions
"CEDAR MESA RANCHES"
Montezuma County, Colorado

It is the intent of these covenants to protect and enhance the value, desirability and attractiveness of said property, and to prevent the construction of improper or unsuitable improvements. Restrictions are kept to a minimum while keeping in constant focus the right of property owners to enjoy their property in attractive surroundings free of nuisance, undue noise, and danger. Further, it is intended that the natural environment be disturbed as little as possible.

Said lot and all lots in the subdivision described on said survey map shall be subject to the following covenants and restrictions:

1. No lot owner within the Cedar Mesa Ranches subdivision shall have the right to convey easements, partial interests and/or access rights-of-way to lands adjoining said subdivision. Lot owners shall have the right to convey easements, partial interests and/or access right-of-ways to other lot owners within the subdivision with prior approval from the Cedar Mesa Ranches Homeowner's Association and all applicable government agencies.

2. Lots shall be used only for residential, recreational, agricultural and ranching purposes. Industrial and/or commercial uses are prohibited unless agreed to by the Cedar Mesa Ranches Homeowner's Association.

3. There shall be only one single family dwelling on each lot. Two family and/or multi-family dwellings are prohibited. No building or structure will be more than 30 feet in height at its highest point from grade including chimneys, antennas, etc.

4. Views and Sunlight. Buildings and structures constructed in a subdivision shall be placed, so as to minimize undue obstruction of views and sunlight to existing dwellings on adjacent properties.

5. Residences will be located wherever possible in treed or vegetated areas so as to provide for adequate screening of new buildings and development.

6. Vegetative cutting is restricted to the following: on any given lot no more than 35 percent of the trees greater than 6 inches DBH (diameter at breast height) shall be removed.

The following are exceptions to the above cutting restriction:
a. those trees and/or vegetation within 100 feet from the edge of a residence
b. those trees and/or vegetation within 25 feet from the edge of any accessory structure
c. those trees and/or vegetation within a power line right-of-way, road right-of-way or driveway less than 25 feet in width
d. those trees and/or vegetation within 25 feet from the edge of a sewage disposal system
e. excluding any dead, diseased, dying trees or trees that present a health or safety hazard

7. Vegetative cutting requirements for fire prevention (safety zones) are as follows:

a. Within 100' of a home site trees must be cut and/or trimmed so that 12' of open space exists between crowns. Occasional clumps of two to three trees may be retained for natural landscape effects. Pruning when necessary should be done to a height of 10'.

b. All dead wood must be removed from the ground within 100' of the home site and small patches of scrub and brush directly adjacent to a homesite must be separated at least 10' by irrigated grass or non-combustible material.

c. If the home site is within 50' of the crest of a steep hill, trees should be thinned at least 100' below following the same guidelines for thinning set forth in Item" a.

d. Irrigated grass and/or other non-combustible material is required for landscape use immediately around the home site. The use of bark or wood chips is prohibited.

8. All buildings, accessory structures, temporary cabins and sewage disposal systems shall adhere to the following setbacks:

a. 100' from the edge of any pond
b. 100' from the boundary of any designated wetland
c. 25' from the side and rear lot lines of each lot
d. 100' from any stream, brook or intermittent water course
e. 100' from the centerline of any Town, County or private road (placement of sewage disposal is exempt from this setback)
f. 50' from the edge of any slope greater than [illegible]

9. All septic systems are required to be designed and approved by an engineer licensed in the state of Colorado.

10. Further subdivision of any lot in the Cedar Mesa Ranches subdivision is prohibited.

11. No structure of temporary character, recreational vehicle, camper unit, trailer, mobile home, basement, tent, shack, garage, accessory building or other out-building shall be used on any parcel as a residence. A temporary camp, tent or camper unit may be used for recreational purposes but such structures may not be allowed to remain or be stored on any lot for a period of more than 9 months in a given year. Recreational vehicles may be stored longer than the 9 months per year, provided they are stored in a storage facility, i.e., barn or garage, which meets all the requirements set forth herein.

12. Whenever possible building material and roofing must be non-combustible and fire-resistant.

13. No motorized vehicle which is either non-operational or non-licensed shall be kept or stored on any parcel, unless said vehicle is kept or stored in a fully enclosed building meeting standards set forth in the covenants for the Cedar Mesa Ranches subdivision.

14. The outside finish of all buildings must be completed within nine months after construction has started. No building paper, insulation board, sheathing or similar non-exterior materials shall be used for the exterior finish of any building. The exterior finish of all buildings shall be composed of earth tone colors harmonious with the existing environment. Individual lot numbers at least 4" in size must be mounted on each house and/or entrance to each driveway so as to be clearly seen from the adjoining road.

driveway so as to be clearly seen from the adjoining road.

15. Lighting. All outdoor lighting should be low sodium lighting affixed to a building and designed to illuminate only the premises and to minimize nuisance to adjoining landowners. Overhead lighting is prohibited. Non-intrusive lamp posts are allowed at the edge of a driveway and lower level lighting (less than 30 inches) will be permitted along walkways.

16. Drainage. All open areas of any site, lot, tract or parcel should be graded and planted as appropriate to provide proper drainage and minimize flooding, erosion and pollution.

17. Noxious Weed Control. Any subdivision will require inspections for noxious weed infestation under provisions of the Colorado Weed Management Act, the Montezuma County Comprehensive Weed Management Act, the Montezuma County Comprehensive Weed Management Plan Resolution 4-93 and development and submittal of an approved weed management plan.

18. No owner shall cause or allow the origination of excessive odors or sounds from his parcel. No owner shall cause or allow any other nuisances of any kind whatsoever to exist on his or her parcel. In case of a dispute, at the request of an owner, the Cedar Mesa Ranches Homeowners Association, Inc. board shall make the final determination of what constitutes a nuisance.

19. In an effort to protect and preserve native wildlife and birds, no dogs, cats or other comestic pets shall be allowed to roam free within the Cedar Mesa Ranches project. All pets must be kept on a leash, in a kennel, or under voice control at all times. Pets should always be kept under the immediate supervision of their owners.

20. All fencing shall be set back 30 feet from the edge of all private and county roads excluding driveways and shall be 48 inches, four strand or less, with a 12 inch kickspace between the top two strands. Any rail fencing shall be the round type, three rail or less with at least 18 inches between two of the rails, excluding corrals and loading pens/sheep pens.

21. In the event an item of potential archaeological and/or native American historical significance such as native American artifacts is found on a lot within the subdivision the find should be reported to a non-profit organization that is dedicated to archeological preservation, research and education. Items of significance should not be disturbed or removed from the site except by a qualified archaeologist and only for necessary historical preservation and educational purposes.

22. The burying or dumping of garbage, junk, trash, oil, petroleum or other liquid or solid waste or littering of any kind on any lot is strictly prohibited.

23. Commercial wood harvesting, mining and/or oil or gas production is prohibited.

24. Grantor hereby grants to each lot owner, and each lot owner grants to all other lot owners, easement for utilities along boundary lines and access to rights-of-way through the subdivision as shown on said survey map, such utilities are to be located as close as practicable to existing roads within the property.

25. All new utilities must be constructed underground except when extreme conditions such as ledge or wetlands will cause undue economic hardship for the lot owner.

26. An easement providing ingress and egress to each lot is granted over all existing roads within the subdivision for the Grantor and all County officials for purposes of monitoring and enforcing these covenants, easements and restrictions and/or County zoning regulations.

27. Maintenance of the private access roads within the subdivision shall be the sole responsibility of those lot owners which adjoin said private roads and are members of the Cedar Mesa Ranches Homeowners Association, Inc. Each lot owner agrees to keep their section of the road free of debris and all other natural and man-made obstructions. Lot owners will maintain roads in common with others in a suitable condition for two wheel drive vehicular traffic.

28. All lot owners will agree as members of the Cedar Mesa Ranches Homeowners Association to form a forestry and fire prevention committee within the Homeowners Association to suggest and oversee fire mitigation activities. In addition, said committee will be responsible for keeping a fire danger sign at the entrance to the subdivisions, kept current on a daily basis.

29. The Grantor and Grantees, herein covenant and agree that said lot shall be subject to these covenants, restrictions and easements. These covenants, restrictions and easements shall be included in all deeds and shall bind all lots in the subdivision of property presently owned by Redstone Land Company, Inc. of which this lot is a part. These covenants, restrictions and easements shall inure to the benefit of the Grantees herein, their heirs, legal representatives, successors and assignees.

30. These covenants, restrictions and easements may be enforced by the owner(s) of any lot in said subdivision (including Grantor) against any person or persons violating or attempting to violate any provision hereof, either to restrain the violation thereof or to recover damages caused, thereby. The failure to enforce any of these covenants, restrictions or easements shall in no event be deemed a waiver of the right to do so thereafter. Invalidation of any of these covenants, restrictions and easements shall not affect any other of these provisions which shall thereafter remain in full force and effect. Any lot owner who violates any of these covenants, restrictions and easements shall be liable for the reasonable attorneys' fees and legal expenses of any other lot owner who is successful in a legal action to enforce such covenant, restriction or easement.

31. These covenants, restrictions and easements may also be enforced by the Board of County Commissioners. The County shall likewise be entitled to recover the reasonable attorney's fees and legal expenses of enforcement in a successful legal action.

32. The Grantor reserves to itself the right to vary or modify the aforesaid covenants, restrictions and easements, in cases of hardship or practical difficulty where the basic intent and purposes of said covenants, restrictions and easements would not be violated, subject to approval by the Cedar Mesa Ranches Homeowner's Association.

Covenants, Easements and Restrictions
"CEDAR MESA RANCHES"
Montezuma County, Colorado

It is the intent of these covenants to protect and enhance the value, desirability and attractiveness of said property, and to prevent the construction of improper and unstable improvements. Restrictions are kept to a minimum while keeping in constant focus the right of property owners to enjoy their property and attractive surroundings free of nuisance, undue noise, and danger. Further, it is intended that the natural environment be disturbed as little as possible

Said lots and all lots in the subdivision described on said survey map shell be subject to the following covenants and restrictions:

Definitions:

Survey Map -- The Plat map of Cedar Mesa Subdivision as recorded in the office of the county clerk of Montezuma county Colorado, Plat book 13 page 138

Agricultural – The farming of the soil for the purpose of growing plants

Ranching -- The use of land for the purpose of keeping or raising livestock.

Commercial – Any venture, which is done for a profit basis.

Grantor -- Redstone Land Company, Inc.

Grantee – The lot/tract owner(s)

Private Roads – All roads as shown on the Survey Map

Cedar Mesa Ranches Subdivision --All lots/tracts, roads and easements as shown on the Survey Map.

Cedar Mesa Ranches Homeowner's Association, Inc. --A Non-Profit Corporation as recorded in the Articles of incorporation for Cedar Mesa Ranches Homeowner's Association, Inc. with the State of Colorado.

Average Grade – The average elevation (height) from the lowest to the highest point on the foundation ground grade. (where the foundation meets the ground)

Shack – A building with no electricity or proper sewage removal or piped in water. For a building to not be classified as a shack it must have all of the above items.

Covenants, Easements and Restrictions "CEDAR MESA RANCHES" Montezuma County, Colorado

1. No lot owner within the Cedar Mesa Ranches Subdivision shall have the right to convey easements; partial interests and/or access rights-of-way to lands adjoining said subdivision. Lot owners shall have the right to convey easements, partial interests and/or access right-of-ways to other lot owners within the subdivision with prior approval from the Cedar Mesa Ranches Homeowner's Association and all applicable government agencies.

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2. Lots shall be used only for residential, recreation, agricultural and ranching purposes. Industrial and/or commercial uses are prohibited unless agreed to by the Cedar Mesa Ranches Homeowner's Association

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3. There shall be only one single family dwelling on each lot. Two family and/or multi-family dwellings are prohibited. No building or structure will be more than 30 feet in height at its highest point from the average grade including chimneys, antennas, etc. A guest house is permitted, but only for the expressed use of guests, and not for a resident or for rental..

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4. Views and Sunlight. Buildings and structures constructed in a subdivision shall be placed, so as to minimize undue obstruction of views and sunlight to existing dwellings on adjacent properties.

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5. Vegetative cutting is restricted to the following: on any given lot no more than 35 percent of the trees greater than 6 inches DBH (diameter at breast height) shall be removed.

The following are exceptions to the above cutting restriction:

a. those trees and/or vegetation within 100 feet from the edge of a residence
b. those trees and/or vegetation within 25 feet from the edge of any accessory structure
c those trees and/or vegetation within a power line right-of-way, road right-of-way or driveway less than 25 feet in width
d. those trees and/or vegetation within 25 feet from the edge of a sewage disposal system
e. excluding any dead, diseased, dying trees or trees that present a health or safety hazard

6. Vegetative cutting requirements for fire prevention (safety zones) are as follows:

a. Within 100' of a home site, trees must be cut and/or trimmed so that 12' of open space exists between crowns. Occasional clumps of two to three trees may be retained for natural landscape effects. Pruning when necessary should be done to a height of 10'.

b. All dead wood must be removed from the ground within 100' of the home site and small patches of scrub and brush directly adjacent to a home site must be separated at least 10' by irrigated grass or non-combustible material.

c. If the home site is within 50' of the crest of a steep hill, trees should be thinned at least 100' below following the same guidelines for thinning set forth in item a.

d. Irrigated grass and/or other non-combustible material is required for landscape use immediately around the home site. The use of bark or wood chips is prohibited.

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7. All buildings, accessory structures, temporary storage and sewage disposal systems shall adhere to the following setbacks:

a. 100' from the edge of any pond
b. 100' from the boundary of any designated wetland
c. 25' from the side and rear lot lines of each lot
d. 100' from any stream, brook or intermittent water course
e. 120' from the centerline of any Town, County or private road (placement of sewage drain fields are to be 55' from the center line)
f. 50' from the edge of any slope greater than 5 0%

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8. All septic systems are required to be designed and approved by an engineer licensed in the state of Colorado.

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9. Further subdivision of any lot in Cedar Mesa Ranches subdivision is prohibited.

10. No structure of temporary character, recreational vehicle, camper unit, trailer, mobile home, basement, tent, shack, garage, accessory building or other out-building shall be used on any parcel as a residence. A temporary camp, tent or camper unit may be used for recreational purposes but such structures may not be allowed to remain or be stored on any lot for a period of more than 9 months in a given year. Recreational vehicles may be stored longer than the 9 months per year, provided they are stored in a storage facility, i.e. barn or garage, which meets all the requirements set forth herein

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11. Whenever possible, building material and roofing must be non-combustible and fire-resistant

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12. No garbage, junk offensive to the neighbors or motorized vehicle which is either non-operational or non-licensed shall be kept or stored on any parcel, unless said vehicle is stored in a fully enclosed building meeting standards set forth in the covenants for the Cedar Mesa Ranches subdivision

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13. The outside finish of all buildings must be completed within nine months after construction has started. No building paper, insulation board, sheathing or similar non-exterior materials shall be used for the exterior finish of any building. Individual lot numbers must be mounted on each house and/or entrance to each driveway or lot/tract so as to be clearly seen from the adjoining road. If the lot has a residence on it, the address of the residence must also be placed in the aforesaid manner. A recreational vehicle, camper unit, trailer, or temporary facility may be used as living quarters for the duration of the 9 months of house construction.

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14. Lighting. All outdoor lighting should be low sodium lighting affixed to a building and designed to illuminate only the premises and to minimize nuisance to adjoining landowners. Overhead lighting is prohibited. Non-intrusive lampposts are allowed at the edge of a driveway and lower level lighting (less than 30 inches) will be permitted along walkways

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15. Drainage. All open areas of any site, lot, tract or parcel should be graded and planted as appropriate to provide proper drainage and minimize flooding, erosion and pollution.

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16. Noxious Weed Control. Any subdivision will require inspections for noxious weed infestation under provisions of the Colorado Weed Management Act, the Montezuma County Comprehensive Weed Management Act, the Montezuma County Comprehensive Weed Management Plan Resolution 4-93 and development and submittal of an approved weed management plan.

17, No owner shall cause or allow the origination of excessive odors or sounds from his parcel. No owner shall cause or allow any other nuisances of any kind whatsoever to exist on his or her parcel. In case of a dispute, at the request of an owner, the Cedar Mesa Ranches Homeowner's Association, Inc. board shall make the final determination of what constitutes a nuisance.

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18. In an effort to protect and preserve native wildlife and birds, no dogs, cats or other domestic pets shall be allowed to roam free within the Cedar Mesa Ranches project. All pets must be kept on a leash, in a kennel, or under voice control at all times. Pets should always be kept under the immediate supervision of their owners.

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19. All fencing shall be set back at least 30 feet from the center of all private and county roads excluding driveways. A perimeter fence around the edge of the lot cannot be more than 52" high

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20. In the event an item of potential archaeological and/or native American historical significance such as native American artifacts is found on a lot within the subdivision, the find should be reported to a non-profit organization that is dedicated to archaeological preservation, research and education. Items of significance should not be disturbed or removed from the site except by a qualified archaeologist and only for necessary historical preservation and educational purposes

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21. The burying or dumping of garbage, junk, trash, oil petroleum, or other liquid or solid waste or littering of any kind on any lot is strictly prohibited.

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22. Commercial wood harvesting, mining and/or oil or gas production is prohibited.

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23. Grantor hereby grants to each lot owner, and each lot owner grants to all other lot owners, easement for utilities along boundary lines and access to rights-of-way through the subdivision as shown on said survey map, such utilities are to be located as close as practicable to existing roads within the property

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24. All new utilities must be constructed underground except when extreme conditions such as ledge or wetlands will cause undue economic hardship for the lot owner.

25. An easement providing ingress and egress to each lot is granted over all existing roads within the subdivision for the Grantor and all County officials for purposes of monitoring and enforcing these covenants, easements and restrictions and/or County zoning regulations.

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26. Maintenance of the private access roads within the subdivision shall be the sole responsibility of Cedar Mesa Ranches Homeowner's Association Inc. Each lot owner agrees to keep their section of the road free of debris and all other natural and man-made obstructions. Cedar Mesa Ranches Homeowner's Association Inc will maintain roads in common with others in a suitable condition for two wheel drive vehicular traffic except for extreme conditions where four-wheel drive may be needed.

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27. All lot owners will agree as members of the Cedar Mesa Ranches Homeowner's Association to form a forestry and fire prevention committee within the Homeowner's Association to suggest and oversee fire mitigation activities. In addition, said committee will be responsible for keeping a fire danger sign at the entrance to the subdivision, kept current on a daily basis

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28. The Grantees herein covenant and agree that said lot and tracts shall be subject to these covenants, restrictions and easements. These covenants, restrictions and easements shall be included in all deeds now and in the future of all lots/tracts in the subdivision as shown on the survey map. These covenants, restrictions and easements shall inure to the benefit of the Grantees herein, their heirs, legal representatives, successors and assignees

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29. These covenants, restrictions, and easements may be enforced by the owner(s) of any lot/tract in said subdivision, the Cedar Mesa Homeowner's Association Inc. or Board of County Commissioners (including Grantor) against any person or persons violating or attempting to violate any provision hereof, either to restrain the violation thereof and/or to recover damages caused thereby. The failure to enforce any of these covenants, restrictions or easements shall in no event be deemed a waiver of the right to do so thereafter. Invalidation of any of these covenants, restrictions and easements shall not affect any other of these provisions which shall thereafter remain in full force and effect. The party who loses a legal action in the courts which concerns the covenants, restrictions and/or easements shall be liable for the reasonable attorneys' fees and legal expenses of the winning party in the legal action.

30. The Cedar Mesa Homeowner's Association Inc. reserves to itself the right to vary or modify the aforesaid covenants, restrictions and easements, for an individual lot/tract owner in cases of hardship or practical difficulty where the basic intent and purposes of said covenants, restrictions and easements would not be violated, subject to approval first of a majority vote of the board and then a majority vote of the membership of the Cedar Mesa Ranches Homeowner's Association, Inc.

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31. The lot or tract owner(s) in the Cedar Mesa Ranches Subdivision as shown on the survey map are required to be members of the Cedar Mesa Homeowner's Association, Inc. and cannot be removed from membership by any party. As a member of Cedar Mesa Homeowner's Association, Inc., the lot or tract owner(s) are responsible for their equal and fair share of the expenses and benefits of the Cedar Mesa Homeowner's Association, Inc.

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32. These Covenants may be altered or changed or added to by a 2/3 vote of the membership of the Cedar Mesa Homeowner's Association, Inc. The owner(s) of a lot or tract has one vote for each lot or tract owned as shown on the survey map.

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33. All double-wide mobile homes that are currently on lots or tracts in the Cedar Mesa Ranches Homeowner's Subdivision that were there before January 1, 2003 are grand fathered in and are exempt from the no double-wide part of these covenants. This does not preclude the enforcement of the no double-wide part of these covenants in the future.

These Covenants, Easements and Restrictions were modified and changed by a majority vote of the lot/tract owners of Cedar Mesa Ranches subdivision on October 25, 2005. They were modified and changed from the then enforce Covenants, Easements and Restrictions as shown on the Plat map of Cedar Mesa Ranches Subdivision as recorded in the office of the County Clerk of Montezuma County, Colorado, Plat book 13 page 138. The Covenants, Easements and Restrictions here listed are the legal and binding Covenants, Easements and Restrictions for the Cedar Mesa Ranches subdivision as of October 25, 2005.

AMENDMENTS TO THE PROTECTIVE COVENANTS OF CEDAR MESA RANCHES HOMEOWNERS ASSOCIATION, INC

January 12, 2008

COVENANT #7

7. All buildings, accessory structures, temporary storage and sewage disposal systems shall adhere to the following setbacks:

a. 100' from the edge of any pond
b. 100' from the boundary of any designated wetland
c. 25' from the side and rear lot lines of each lot except for the primary dwelling which, shall be 50'
d. 100' from any stream, brook or intermittent water course
e. 120' from the centerline of any Town, County or private road (placement of sewage drain fields are to be 55' from the center line)
f. 50' from the edge of any slope greater than 5 0%

DEFINITION ADDED:

Mobile Home – A mobile home means a single family dwelling built on a permanent designed for long-term residential occupancy and containing complete electrical, plumbing, and sanitary facilities and designed to be installed in a permanent or semi-permanent manner with or without a permanent foundation, which is capable of being drawn over public highways as a unit, or in sections by special permit.

COVENANT #10

No structure of temporary character, recreational vehicle, camper unit, trailer, mobile home, basement, tent, shack, garage, accessory building or other out-building shall be used on any parcel as a residence. A temporary camp, tent or camper unit may be used for recreational purposes but such structures may not be allowed to remain or be stored on any lot for a period of more than 9 months in a given year. Recreational vehicles may be stored longer than the 9 months per year, provided they are stored in a storage facility, i.e. barn or garage, which meets all the requirements set forth herein.
An RV parked on a lot with a permanent inhabited dwelling, and parked in such a manner as to be unobtrusive and inconspicuous, and not used as a residence or dwelling, shall be excluded from the storage facility/barn/garage requirement.

The above amendments to the Covenants, Easements and Restrictions were modified and changed by a 2/3's vote of the lot/tract owners of Cedar Mesa Ranches subdivision on January 12, 2008. They were modified and changed from the then enforced Covenants, Easements and Restrictions as shown on the Plat map of Cedar Mesa Ranches Subdivision as recorded in the office of the County Clerk of Montezuma County, Colorado, Plat book 13 page 138, and the amended covenants of October 25, 2005, document #535880. The Covenants, Easements and Restrictions here listed are the legal and binding Covenants, Easements and Restrictions for the Cedar Mesa Ranches subdivision as of January 12, 2008.

COVENANTS OF CEDAR MESA RANCHES HOMEOWNERS ASSOCIATION, INC.

These are the amended Covenants which were amended by a majority vote of the Cedar Mesa Ranches Homeowners Association, Inc. membership and Board of Directors on October 25, 2005

Covenants, Easements and Restrictions
"CEDAR MESA RANCHES"
Montezuma County, Colorado

It is the intent of these covenants to protect and enhance the value, desirability and attractiveness of said property, and to prevent the construction of improper and unstable improvements. Restrictions are kept to a minimum while keeping in constant focus the right of property owners to enjoy their property and attractive surroundings free of nuisance, undue noise, and danger. Further, it is intended that the natural environment be disturbed as little as possible

Said lots and all lots in the subdivision described on said survey map shall be subject to the following covenants and restrictions:

Definitions:

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Agricultural – The farming of the soil for the purpose of growing plants

Ranching -- The use of land for the purpose of keeping or raising livestock.

Commercial – Any venture, which is done for a profit basis.

Grantor -- Redstone Land Company, Inc.

Grantee – The lot/tract owner(s)

Private Roads – All roads as shown on the Survey Map

Cedar Mesa Ranches Subdivision --All lots/tracts, roads and easements as shown on the Survey Map.

Cedar Mesa Ranches Homeowner's Association, Inc. --A Non-Profit Corporation as recorded in the Articles of incorporation for Cedar Mesa Ranches Homeowner's Association, Inc. with the State of Colorado.

Average Grade – The average elevation (height) from the lowest to the highest point on the foundation ground grade. (where the foundation meets the ground)

Shack – A building with no electricity or proper sewage removal or piped in water. For a building to not be classified as a shack it must have all of the above items.

Covenants, Easements and Restrictions "CEDAR MESA RANCHES" Montezuma County, Colorado

1. No lot owner within the Cedar Mesa Ranches Subdivision shall have the right to convey easements; partial interests and/or access rights-of-way to lands adjoining said subdivision. Lot owners shall have the right to convey easements, partial interests and/or access right-of-ways to other lot owners within the subdivision with prior approval from the Cedar Mesa Ranches Homeowner's Association and all applicable government agencies.

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2. Lots shall be used only for residential, recreation, agricultural and ranching purposes. Industrial and/or commercial uses are prohibited unless agreed to by the Cedar Mesa Ranches Homeowner's Association

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3. There shall be only one single family dwelling on each lot. Two family and/or multi-family dwellings are prohibited. No building or structure will be more than 30 feet in height at its highest point from the average grade including chimneys, antennas, etc. A guest house is permitted, but only for the expressed use of guests, and not for a resident or for rental..

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4. Views and Sunlight. Buildings and structures constructed in a subdivision shall be placed, so as to minimize undue obstruction of views and sunlight to existing dwellings on adjacent properties.

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5. Vegetative cutting is restricted to the following: on any given lot no more than 35 percent of the trees greater than 6 inches DBH (diameter at breast height) shall be removed.

The following are exceptions to the above cutting restriction:

a. those trees and/or vegetation within 100 feet from the edge of a residence
b. those trees and/or vegetation within 25 feet from the edge of any accessory structure
c those trees and/or vegetation within a power line right-of-way, road right-of-way or driveway less than 25 feet in width
d. those trees and/or vegetation within 25 feet from the edge of a sewage disposal system
e. excluding any dead, diseased, dying trees or trees that present a health or safety hazard

6. Vegetative cutting requirements for fire prevention (safety zones) are as follows:

a. Within 100' of a home site, trees must be cut and/or trimmed so that 12' of open space exists between crowns. Occasional clumps of two to three trees may be retained for natural landscape effects. Pruning when necessary should be done to a height of 10'.

b. All dead wood must be removed from the ground within 100' of the home site and small patches of scrub and brush directly adjacent to a home site must be separated at least 10' by irrigated grass or non-combustible material.

c. If the home site is within 50' of the crest of a steep hill, trees should be thinned at least 100' below following the same guidelines for thinning set forth in item a.

d. Irrigated grass and/or other non-combustible material is required for landscape use immediately around the home site. The use of bark or wood chips is prohibited.

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7. All buildings, accessory structures, temporary storage and sewage disposal systems shall adhere to the following setbacks:

a. 100' from the edge of any pond
b. 100' from the boundary of any designated wetland
c. 25' from the side and rear lot lines of each lot
d. 100' from any stream, brook or intermittent water course
e. 120' from the centerline of any Town, County or private road (placement of sewage drain fields are to be 55' from the center line)
f. 50' from the edge of any slope greater than 5 0%

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8. All septic systems are required to be designed and approved by an engineer licensed in the state of Colorado.

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9. Further subdivision of any lot in Cedar Mesa Ranches subdivision is prohibited.

10. No structure of temporary character, recreational vehicle, camper unit, trailer, mobile home, basement, tent, shack, garage, accessory building or other out-building shall be used on any parcel as a residence. A temporary camp, tent or camper unit may be used for recreational purposes but such structures may not be allowed to remain or be stored on any lot for a period of more than 9 months in a given year. Recreational vehicles may be stored longer than the 9 months per year, provided they are stored in a storage facility, i.e. barn or garage, which meets all the requirements set forth herein

11. Whenever possible, building material and roofing must be non-combustible and fire-resistant

12. No garbage, junk offensive to the neighbors or motorized vehicle which is either non-operational or non-licensed shall be kept or stored on any parcel, unless said vehicle is stored in a fully enclosed building meeting standards set forth in the covenants for the Cedar Mesa Ranches subdivision

13. The outside finish of all buildings must be completed within nine months after construction has started. No building paper, insulation board, sheathing or similar non-exterior materials shall be used for the exterior finish of any building. Individual lot numbers must be mounted on each house and/or entrance to each driveway or lot/tract so as to be clearly seen from the adjoining road. If the lot has a residence on it, the address of the residence must also be placed in the aforesaid manner. A recreational vehicle, camper unit, trailer, or temporary facility may be used as living quarters for the duration of the 9 months of house construction.

14. Lighting. All outdoor lighting should be low sodium lighting affixed to a building and designed to illuminate only the premises and to minimize nuisance to adjoining landowners. Overhead lighting is prohibited. Non-intrusive lampposts are allowed at the edge of a driveway and lower level lighting (less than 30 inches) will be permitted along walkways

15. Drainage. All open areas of any site, lot, tract or parcel should be graded and planted as appropriate to provide proper drainage and minimize flooding, erosion and pollution.

16. Noxious Weed Control. Any subdivision will require inspections for noxious weed infestation under provisions of the Colorado Weed Management Act, the Montezuma County Comprehensive Weed Management Act, the Montezuma County Comprehensive Weed Management Plan Resolution 4-93 and development and submittal of an approved weed management plan.

17, No owner shall cause or allow the origination of excessive odors or sounds from his parcel. No owner shall cause or allow any other nuisances of any kind whatsoever to exist on his or her parcel. In case of a dispute, at the request of an owner, the Cedar Mesa Ranches Homeowner's Association, Inc. board shall make the final determination of what constitutes a nuisance.

18. In an effort to protect and preserve native wildlife and birds, no dogs, cats or other domestic pets shall be allowed to roam free within the Cedar Mesa Ranches project. All pets must be kept on a leash, in a kennel, or under voice control at all times. Pets should always be kept under the immediate supervision of their owners.

19. All fencing shall be set back at least 30 feet from the center of all private and county roads excluding driveways. A perimeter fence around the edge of the lot cannot be more than 52" high

20. In the event an item of potential archaeological and/or native American historical significance such as native American artifacts is found on a lot within the subdivision, the find should be reported to a non-profit organization that is dedicated to archaeological preservation, research and education. Items of significance should not be disturbed or removed from the site except by a qualified archaeologist and only for necessary historical preservation and educational purposes

21. The burying or dumping of garbage, junk, trash, oil petroleum, or other liquid or solid waste or littering of any kind on any lot is strictly prohibited.

22. Commercial wood harvesting, mining and/or oil or gas production is prohibited.

23. Grantor hereby grants to each lot owner, and each lot owner grants to all other lot owners, easement for utilities along boundary lines and access to rights-of-way through the subdivision as shown on said survey map, such utilities are to be located as close as practicable to existing roads within the property

24. All new utilities must be constructed underground except when extreme conditions such as ledge or wetlands will cause undue economic hardship for the lot owner.

25. An easement providing ingress and egress to each lot is granted over all existing roads within the subdivision for the Grantor and all County officials for purposes of monitoring and enforcing these covenants, easements and restrictions and/or County zoning regulations.

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26. Maintenance of the private access roads within the subdivision shall be the sole responsibility of Cedar Mesa Ranches Homeowner's Association Inc. Each lot owner agrees to keep their section of the road free of debris and all other natural and man-made obstructions. Cedar Mesa Ranches Homeowner's Association Inc will maintain roads in common with others in a suitable condition for two wheel drive vehicular traffic except for extreme conditions where four-wheel drive may be needed.

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27. All lot owners will agree as members of the Cedar Mesa Ranches Homeowner's Association to form a forestry and fire prevention committee within the Homeowner's Association to suggest and oversee fire mitigation activities. In addition, said committee will be responsible for keeping a fire danger sign at the entrance to the subdivision, kept current on a daily basis

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28. The Grantees herein covenant and agree that said lot and tracts shall be subject to these covenants, restrictions and easements. These covenants, restrictions and easements shall be included in all deeds now and in the future of all lots/tracts in the subdivision as shown on the survey map. These covenants, restrictions and easements shall inure to the benefit of the Grantees herein, their heirs, legal representatives, successors and assignees

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29. These covenants, restrictions, and easements may be enforced by the owner(s) of any lot/tract in said subdivision, the Cedar Mesa Homeowner's Association Inc. or Board of County Commissioners (including Grantor) against any person or persons violating or attempting to violate any provision hereof, either to restrain the violation thereof and/or to recover damages caused thereby. The failure to enforce any of these covenants, restrictions or easements shall in no event be deemed a waiver of the right to do so thereafter. Invalidation of any of these covenants, restrictions and easements shall not affect any other of these provisions which shall thereafter remain in full force and effect. The party who loses a legal action in the courts which concerns the covenants, restrictions and/or easements shall be liable for the reasonable attorneys' fees and legal expenses of the winning party in the legal action.

30. The Cedar Mesa Homeowner's Association Inc. reserves to itself the right to vary or modify the aforesaid covenants, restrictions and easements, for an individual lot/tract owner in cases of hardship or practical difficulty where the basic intent and purposes of said covenants, restrictions and easements would not be violated, subject to approval first of a majority vote of the board and then a majority vote of the membership of the Cedar Mesa Ranches Homeowner's Association, Inc.

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31. The lot or tract owner(s) in the Cedar Mesa Ranches Subdivision as shown on the survey map are required to be members of the Cedar Mesa Homeowner's Association, Inc. and cannot be removed from membership by any party. As a member of Cedar Mesa Homeowner's Association, Inc., the lot or tract owner(s) are responsible for their equal and fair share of the expenses and benefits of the Cedar Mesa Homeowner's Association, Inc.

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32. These Covenants may be altered or changed or added to by a 2/3 vote of the membership of the Cedar Mesa Homeowner's Association, Inc. The owner(s) of a lot or tract has one vote for each lot or tract owned as shown on the survey map.

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33. All double-wide mobile homes that are currently on lots or tracts in the Cedar Mesa Ranches Homeowner's Subdivision that were there before January 1, 2003 are grand fathered in and are exempt from the no double-wide part of these covenants. This does not preclude the enforcement of the no double-wide part of these covenants in the future.

These Covenants, Easements and Restrictions were modified and changed by a majority vote of the lot/tract owners of Cedar Mesa Ranches subdivision on October 25, 2005. They were modified and changed from the then enforce Covenants, Easements and Restrictions as shown on the Plat map of Cedar Mesa Ranches Subdivision as recorded in the office of the County Clerk of Montezuma County, Colorado, Plat book 13 page 138. The Covenants, Easements and Restrictions here listed are the legal and binding Covenants, Easements and Restrictions for the Cedar Mesa Ranches subdivision as of October 25, 2005.