



We Are Community!

Summit County Planning Commission
Breckenridge, CO 80424

September 17, 2018

RE: Draft Short-Term Vacation Rentals Ordinance

Dear Planning Commissioners,

As the advocate for home and property owners and over 800 REALTORS® and affiliates in Summit, Park and Lake Counties, I am writing to voice the opinion of our Board of Directors on the draft short-term vacation rental (STVR) ordinance as it relates to short term rentals in unincorporated Summit County. Short-term rentals are an important part of our resort community with significant economic impacts. The County should take a cautious and purposeful approach to this, as to not undermine the massive economic impact to the community proposed changes could have.

The Summit Association of REALTORS® (SAR) is a proponent of basic property rights that allow a property owner the ability to enjoy their property as they see appropriate, whether it is to use their home as a primary residence, second home, long-term or short-term rental, as allowed by an individual HOA.

SAR has several concerns with the ordinance:

Key provisions of the proposed STVR Ordinance would impair a fundamental right of private property ownership.

Among the core rights that a property owner has is the right to lease or rent the property on a temporary basis to another party. This right has long been recognized by the courts. For example, the Supreme Court of Connecticut has emphasized that the “right to rent” is one of the “sticks” in the bundle of property rights, stating:

[It] is undisputable that the *right of property owners to rent their real estate* is one of the bundle of rights that, taken together, constitute the essence of ownership of property.... Owners of a single-family residence can do one of three economically productive things with the residence: (1) live in it; (2) *rent it*; or (3) sell it.

Courts in other states have likewise recognized this property right. The Supreme Court of California, for example, has stated that a fee-owner’s power to convey property is an “incident to the ownership of an estate in fee-simple” and includes “the power or *right to dispose of property held in fee ... by lease, mortgage, or other mode of conveyance.*” The inherent nature of the right to rent is echoed by a leading treatise, *Thompson on Real Property*, which observes that “the right to lease property is an incident of ownership.”

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The STVR Ordinance would impair the right to rent private property on a short-term basis by:

- Prohibiting short-term rentals in the BC, BG, CG, CBN, I1, and M1 zoning districts. The STVR Ordinance would infringe upon the right to rent by amending the Land Use Matrix (Figure 3-2 of the Code) to classify short-term rentals as a use that is “not allowed” in the aforementioned zoning districts. By doing so, the STVR Ordinance would deprive the owners of property located in the BC, BG, CG, CBN, I1, and M1 zoning districts of the right to rent their home on a short-term basis.
- Requiring homeowners to obtain an STVR Permit through the Class 1 administrative review process prior to advertising or operating a short-term rental in the A-1, MHP, RU, RE, R1, R2, R3, R4, R5, R6, RC5000 and RC40000 zoning districts. It would also require that such permits be renewed on an annual basis. By requiring that all short-term rentals have an STVR Permit, the STVR Ordinance would, in effect, treat short-term rentals as a “privilege” that requires a permit rather than an inherent right of property ownership. In general, a “permit” or “license” is defined as “permission or privilege to do what otherwise would be unlawful.” In Colorado, the concept that the issuance of a permit or license grants the holder a “privilege” to do something that otherwise would be unlawful, was recognized by the Colorado Supreme Court in *Denver v. Thrailkill*, where the court observed that “[a] license is nothing more nor less than the grant of a privilege to enter upon a business activity which, because of the ordinance, would be unlawful except for the *issuance of the permit.*”
- Imposing maximum occupancy limits on short-term rentals that would not apply when the same home is occupied by the owner or by long-term tenants. By imposing this maximum occupancy limitation on short-term rentals, but not on long-term residential occupancies, the STVR Ordinance is contrary to the principle that the right to rent is a fundamental aspect of private property ownership.
- Imposing minimum parking requirements on short-term rentals that would not apply when the same home is occupied by the owner or by long-term tenants. Imposing a minimum parking requirement on short-term rentals that does not apply to long-term occupancies is contrary to the principle that the right to rent is a fundamental aspect of private property ownership.

The regulation of short-term rentals as a “use” arguably is not within the scope of the County’s zoning authority.

The STVR Ordinance would amend Figure 3-2 of the Code (Land Use Matrix) to permit short-term rentals in the A-1, MHP, RU, RE, R1, R2, R3, R4, R5, R6, RC5000 and RC40000 zoning districts. Short-term rentals would be prohibited in all other zoning districts, except that they would be permitted in PUDs that allow residential uses. This aspect of the proposed STVR Ordinance is problematic because the regulation of short-term rentals arguably is not within the scope of the County’s zoning authority.

A key characteristic of local zoning power is the well-recognized principle is that “zoning deals with land use, not the owner, operator, or occupant of the land.” Zoning inherently pertains to land rather than to the landowner—it “deals basically with land use and not with the person who owns or occupies it.” The purpose of zoning is to separate incompatible land uses, and to provide for an orderly and comprehensive scheme of land development within the community that facilitates the adequate provision of infrastructure resources and the overall comfort, convenience, and welfare of the community.

Neither the form of one’s interest in property (i.e., owner or renter) nor the duration of the occupancy (e.g., short-term vs. long-term) is relevant to the issue of use. In *Houston v. Wilson Mesa Ranch Homeowners Association*, the Court of Appeals of Colorado addressed the question whether the short-term rental of a home violated a covenant requiring that homes in the subdivision be “developed and maintained as a ... residential

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area” and not be “occupied or used for any commercial or business purpose.” The court first explained the meaning of “residential use” as follows: “Residential use, without more, has been consistently interpreted as meaning that the use of the property is for living purposes, as a dwelling, or as a place of abode.” Then, in ruling that short-term rentals did not violate the covenant, the court declared that the “mere temporary or short-term use of a residence does not preclude that use from being residential.”

SAR questions whether the County has sought and received an opinion from the County Attorney as to whether the regulation of short-term rentals as a use is within the scope of the County’s zoning authority. Regardless of whether a home is occupied by an owner or renter, and regardless of whether the occupancy is long-term or short-term, the use of a dwelling for living purposes is a residential use. Therefore, as a matter of general zoning law, any ordinance that regulates homes differently based solely on the occupant’s interest in property (owner or renter) or the duration of the occupancy (short-term vs. long-term)—as the STVR Ordinance would do—would violate the fundamental principle that zoning deals with land use, not the user of the land.

Some provisions of the STVR Ordinance give the Planning Department broad discretion, without adequate guidance, to administer the STVR Ordinance. The County should more clearly define the Planning Department’s role and administrative powers.

In multiple provisions of the STVR Ordinance, the Planning Department is granted broad discretion to make determinations regarding the administration of the STVR Permit requirements, as applied to individual applicants. Many of these provisions contain little or no meaningful guidance for the exercise of such discretion.

In general, grants of discretionary authority to an administrative official that lack standards potentially violate the constitutional principle known as the *nondelegation doctrine*, which prohibits a local legislative body from delegating its legislative or policy-making power to administrative boards or officials. A local legislative body can, however, delegate to an administrative body the authority to exercise discretion in carrying out public policy, provided that the delegation is accompanied by standards and specific procedural guidelines. The delegation of standardless authority can also result in unfair and arbitrary decision-making, which may expose the City to claims based on the constitutional rights to due process and equal protection. Provisions of the STVR Ordinance that arguably delegate discretionary authority with inadequate standards in violation of the nondelegation doctrine are:

- Section 3821.04(B): “The Review Authority may impose any conditions of approval upon any permit in order to ensure that the criteria set forth herein, and the purpose and intent of this Section 3821, are met and adhered to.”
- Section 3821.16(C): “If there is one or more unresolved substantiated complaints for a short-term vacation rental property, or if upon review at any time, the Planning Department determines that the permit holder has failed to comply with any of the performance standards, conditions or restrictions imposed by this Section 3821, by the short-term vacation rental permit itself, or by the representations and assertions made by the applicant in his or her initial permit application, the Planning Department *may take such action* as is deemed necessary to remedy the noncompliance, *including but not limited to revocation of the permit.*”

Proposed Section 3821.04(B) is particularly concerning in that it would give the Planning Department broad discretion to impose conditions on the issuance of STVR Permit on a case-by-case or *ad hoc* basis. While the wording of this provision suggests that any conditions imposed on an STVR Permit license must be for the purpose of insuring compliance with the STVR Ordinance, the type and scope of conditions that could be imposed are not expressly limited. To the extent that this grant of authority to place conditions on an STVR Permit is driven by a desire to address any perceived negative impacts of short-term rentals on neighboring

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properties, those concerns should be addressed through the enforcement of generally applicable codes and regulations rather than conditions of approval that are imposed upon short-term rentals on an *ad hoc* basis.

Proposed Section 3821.16(C) is problematic in that it appears to give the Planning Department the discretion to decide whether or not to revoke an STVR Permit, or take any other enforcement action, even if it determines that a substantiated complaint remains unresolved. The lack of standards to guide the Planning Department in determining how to address an unresolved substantiated complaint makes the STVR Ordinance susceptible to unfair and arbitrary decision-making.

Requiring a local agent to respond *on-site* to an initial complaint regarding a short-term rental property: (1) inappropriately imposes a public policing function on private citizens; (2) would unreasonably place local agents at risk of physical harm; and (3) could result in higher insurance premiums for property owners.

To the extent that it requires local agents to respond on-site to initial complaints regarding a short-term rental property, Section 3821.15 arguably “deputizes” local contact persons to carry out the County’s law enforcement and code enforcement duties. Local law enforcement and code enforcement personnel should be the ones responding to complaints and enforcing the requirements of the STVR Ordinance—not local agents. In addition, Section 3821.15 would unreasonably place local agents at risk of physical harm or potential liability by requiring that they respond in person to complaints about a short-term rental. For these reasons, Section 3821.15 should be revised to eliminate the in-person response requirement.

The STVR Ordinance would unfairly impose more demanding occupancy and off-street parking standards on short-term rentals than on homes that are not used as short-term rentals. There is no valid reason for imposing different occupancy and off-street parking standards on short-term rentals than on homes that are occupied by owners or long-term renters. The proposed standards are simply arbitrary.

Section 3821.08(F) of the STVR Ordinance would impose a *maximum occupancy limit* of two persons per bedroom, plus two additional occupants. The example given in the STVR Ordinance is that a short-term rental with three bedrooms would have a maximum occupancy of eight persons. For properties that are served by a septic system, however, the maximum occupancy would be limited to the capacity established by the On-Site Wastewater Treatment System (OWTS) permit, which typically limits occupancy to two persons per bedroom.

While occupancy limits created by an OWTS permit would appear to apply to a home regardless of the type (i.e., owner vs. tenant) or duration of its occupancy (i.e., long-term vs. short-term), the occupancy limits that would be established by Section 3821.08(F) apparently would not apply to homes that are owner-occupied or are rented on a long-term basis (i.e., for 30 or more consecutive nights).

In addition to establishing a more demanding occupancy standard, the STVR Ordinance would require impose a greater off-street parking requirement on short-term rentals than on homes that are not used for short-term rentals. Specifically, Section 3821.09(A) would impose a *minimum off-street parking requirement* of one space per bedroom, with an absolute minimum requirement of two parking spaces per unit. The STVR Ordinance would also prohibit on-street parking for short-term rentals. By contrast, under Figure 3-7 of the Zoning Code, the minimum parking requirement is set at 2.0 spaces per unit for a single-family home, a duplex dwelling unit, or a multifamily dwelling with two or more bedrooms, or 1.5 spaces per unit for multifamily dwellings with 1.5 or fewer bedrooms.

There is no rational basis for imposing more demanding occupancy and off-street parking standards on a home that is occupied by short-term renters than on homes that are owner-occupied or are rented on a long-term basis. The Court of Appeals of Colorado has ruled that the temporary or short-term use of a residence for living purposes is still a residential use—it is fundamentally the same as a long-term occupancy. Moreover, as a practical matter, the impact of a gathering of people at a home or the parking of cars on a public road does not

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differ based on whether a home is occupied by a property owner or a long-term tenant, or by vacation renters.

The non-transferability of STVR Permits could have a negative impact on the second home market in unincorporated areas of the County.

Section 3821.04(A) states, in relevant part: "The [STVR Permit] shall be issued in the name of the owner and *shall not be transferable*. All short-term vacation rental properties shall receive a permit prior to advertising or operation." By prohibiting STVR Permits from transferring with title to the purchaser of a home, Section 3821.04(A) could have a negative impact on the market for second home and rental properties in unincorporated areas of the County. Prospective purchasers who want to buy a vacation home and rent it out from time to time may be unwilling to purchase a home in unincorporated Summit County without a guarantee that it can be used as a rental.

Making STVR Permits nontransferable could also have a detrimental effect on home prices in the County. Market demand might decrease because buyers, particularly purchasers of second homes, will be uncertain about whether they will be allowed to rent a home in the County to vacationers in order to offset the purchase price and operation and maintenance costs. The result could be that houses in the County will decrease in value because they will appeal only to the limited market of buyers who have no interest in ever making the property available to vacation renters. The lack of certainty as to whether a home could be used a short-term rental might also make it more difficult for buyers to secure financing for a second home in the County, because the potential purchaser will not be able to give the lender assurances that there will be a contingent stream of income to offset the carrying costs of the property, if necessary.

We hope you will be thoughtful on this policy and its impact to all property owners and their rights. We will keep a close eye on this new policy as it is implemented.

If you have any questions regarding our thoughts, please contact me, or Sarah Thorsteinson, our Executive Director.

Sincerely,

Jason Smith

Jason Smith
2018 President

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