

District Court Gunnison County, Colorado  Court Address: 200 E. Virginia Ave. Gunnison, CO 81230	<b>▲ COURT USE ONLY ▲</b>
<b>Plaintiffs:</b> Sopris 715, LLC, a Texas limited liability company; and Christopher Mize  v.  <b>Defendants:</b> Town of Crested Butte, Colorado, a Colorado home rule municipality of the State of Colorado; Town Council of the Town of Crested Butte, Colorado; and Dara MacDonald, in her official capacity as Town Manager for the Town of Crested Butte, Colorado	
<b>Attorneys for Plaintiffs:</b>  Law of the Rockies Marcus J. Lock, Atty. Reg. #: 33048 Jacob A. With, Atty. Reg. #: 40546 525 North Main Street Gunnison, CO 81230 Phone Number: 970-641-1903 Facsimile Number: 970-641-1943 E-mail: <a href="mailto:mlock@lawoftherockies.com">mlock@lawoftherockies.com</a> <a href="mailto:jwith@lawoftherockies.com">jwith@lawoftherockies.com</a>	Case Number: 2016CV30080  Div.:                      Ctrm.:
<b>FIRST AMENDED COMPLAINT</b>	

Sopris 715, LLC and Christopher Mize, through undersigned counsel, and for their first amended complaint, state as follows:

**I. PARTIES, JURISDICTION AND VENUE**

1. Sopris 715, LLC (hereinafter, “Sopris”) is the owner of Lots 23, 24, Block 61 of the Town of Crested Butte, Gunnison County, Colorado (the “Sopris Property”).

2. Christopher Mize (hereinafter, “Mize”) is the owner of Lot 29, Kapushion Subdivision of the Town of Crested Butte, Gunnison County, Colorado (the “Mize Property”, together with the Sopris Property, the “Properties”).

3. The Town of Crested Butte, Colorado is a home rule municipality in the State of Colorado (the “Town”). The Town Council for the Town is the governing body for the Town.

4. Dara MacDonald in her official capacity as the Town Manager for the Town of Crested Butte, Colorado is the Town Manager for the Town of Crested Butte, Colorado.

5. Venue and jurisdiction are proper in this Court because this is an action affecting real property located in Gunnison County, Colorado.

## **II. FACTUAL BACKGROUND**

6. The Town provided a Notice of Violation dated September 15, 2016 to Sopris, a true and accurate copy of which is submitted herewith as **Exhibit A** (Sopris Notice of Violation).

7. The Town provided a Notice of Violation dated September 15, 2016 to Mize, a true and accurate copy of which is submitted herewith as **Exhibit B** (Mize Notice of Violation).

8. The Notices of Violation allege that Sopris and Mize were in violation of their respective deed restrictions, true and accurate copies of which are submitted herewith as **Exhibits C and D** respectively (the “Deed Restrictions”).

9. The Sopris Deed Restriction provides that, “a long-term rental unit as defined by the Crested Butte Municipal Code will be maintained on the property.”

10. The Mize Deed Restriction provides that, “A long term rental unit as defined by the Crested Butte Municipal Code must be maintained on the property.”

11. At the time the Deed Restrictions were executed, the Crested Butte Municipal Code (the “Town Code”) defined “Rental, Long-Term” as “The rental of any residential property for a term of not less than 6 months, which limitation of the term shall be recorded in the real property records of Gunnison County pursuant to Section 15-2-17 of this Article.” (the “Original Code Provision”).

12. In 2015, the Town passed a new ordinance redefining long term rentals, creating a new enforcement scheme for certain deed restrictions with the Town acting as prosecutor, judge and jury, and imposing fines and liens (the “2015 Ordinance”).

13. The 2015 Ordinance redefines the Town Code definition of “Rental, long-term” as:

the rental of any residential property by a person to any natural person who resides in Gunnison County as that person's primary residence for a term of not less than six (6) months, which limitation of term of rental shall be recorded in the real property records of the County pursuant to Section 16-9-70 of this Chapter. Where such property is vacant for a period of three (3) month or more during such six-month period, such property shall not constitute a long-term rental under this definition. Such property may not be rented to any person with greater than ten percent (10%) ownership interest in the property or to any person with greater than ten percent (10%) ownership interest in any entity with ownership of the property. For purposes of this definition, natural person is only any individual and shall not include any association, firm, partnership, corporation or other entity. In order to meet the definition of a long-term rental, such rental must be actively offered for rental, as supported by reasonable evidence of such rental.

(the "New Definition Provision")

14. In addition to adopting the New Definition Provision in 2015, the Town also adopted as part of the 2015 Ordinance a new enforcement scheme set forth in Section 16-24-30 of the Town Code, which provides among other things, for enforcement through the notice of violation process used by the Town with respect to the Properties and the imposition of fines for failing to have a long term rental as defined in the New Definition Provision (the "New Enforcement Scheme").

15. A true and accurate copy of Ordinance No. 9, Series 2015, which contains both the New Definition Provision and the New Enforcement Scheme is submitted herewith as **Exhibit E** (the "2015 Ordinance").

16. The Town has taken the position that the Properties are subject to any new or amended definitions of "Long Term Rental" that may appear in the Town Code, including the New Definition Provision.

17. However, the original Deed Restrictions do not state that the code applies "as amended" or otherwise explicitly incorporate by reference future amendments or changes to the Town Code.

18. Where a contract "does not refer to future laws, that clause, taken in its plain, ordinary, and popular sense, incorporates only laws existing at the time of contract formation." *Rutherford Farmers Coop. v. MTD Consumer Grp., Inc.*, 124 F. App'x 918, 920 (6th Cir. 2005)(internal quotations omitted) *citing Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 405, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (contract incorporated future laws by stating "relevant present and future state and federal laws") *and* 11 Richard A. Lord, *Williston on Contracts* § 30:23 (4th ed. 2004) ("[C]hanges in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been intention of parties."); *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus*

*Grp., Inc.*, 251 P.3d 1091, 1095 (Colo. App. 2010)(holding that parties were not bound by future amendments to arbitration act because, in part, “the parties do not expressly agree to be bound by future amendments”); *Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 706 F.3d 733, 738 (6th Cir. 2013) (holding that, “Contracting parties are free to agree that their rights and duties will track the law as it changes, but because the terms of their bargain could be significantly altered, they must make their intent to do so clear” and concluding that a reference to construct new dealers “[a]s permitted by applicable law” does not include changes to applicable law but only the law applicable at the time of contract.)

19. Accordingly, the Properties are not bound by any amendments or modifications to the definitions of “long term rental” in the Town Code or new enforcement schemes, including without limitation the New Definition Provision or the New Enforcement Scheme in the 2015 Ordinance.

20. Mize maintains a separate dwelling area capable of being rented for a period of six months or more as a long term rental unit.

21. Sopris maintains a separate dwelling area capable of being rented for a period of six months or more as a long term rental unit.

22. The Properties are not being rented for a period of less than six months.

23. The definition of “maintain” as provided online by Merriam Webster is, “to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline.”

24. Sopris and Mize have kept their respective long term rental units in a state of repair consistent with or better than when originally constructed.

25. At all times the Properties have been in compliance with their respective Deed Restrictions.

26. To the extent that the Town believes that the deed restrictions are not clear, “Building restrictions and all restrictions as to the use or occupancy of real property shall be strictly construed...” C.R.S. § 38-34-103. “[I]n construing a building restriction, all doubts must be resolved against the restriction and in favor of free and unrestricted use of property.” *Flaks v. Wichman*, 260 P.2d 737, 739 (Colo. 1953).

27. Further, the Town drafted the Deed Restrictions and contracts, such as the Deed Restrictions, are strongly construed against their drafter. *Cheyenne Mountain Sch. Dist. No. 12 v. Thompson*, 861 P.2d 711, 716 (Colo. 1993) (holding that, “In case of doubt, a contract is construed most strongly against the drafter.”)

28. Sopris filed the timely appeal and supplement thereto submitted herewith as **Exhibit F** (collectively, the “Sopris Appeal”)

29. Mize filed the timely appeal submitted herewith as **Exhibit G** (the “Mize Appeal”).
30. Dara MacDonald in her official capacity as Town Manager scheduled hearings on these appeals for October 13, 2016.
31. At the time scheduled for the hearing, counsel for Sopris and Mize and Mr. Bob Gillie, Building and Zoning Director for the Town of Crested Butte presented proposed settlement agreements for these respective disputes to Ms. MacDonald.
32. The settlement agreements had been negotiated on behalf of the town by Mr. Gillie and the Town’s specially retained municipal counsel Barbara Green.
33. No admissible evidence was introduced at the hearing.
34. Dara MacDonald in her official capacity as Town Manager provided a Notice of Decision with respect to each matter dated November 4, 2016, which notices of decision are incorporated herein as **Exhibits H and I** (the “Notices of Decision”).
35. The only conclusion in the Notices of Decision is that, “While I appreciate the efforts of both parties to reach a settlement, I will not accept the proposed Settlement Agreement. It is hereby determined that the Notice of Violation is affirmed.”
36. The Notices of Decision contain no findings of fact.
37. The Notices of Decision contain no conclusions of law.
38. The Notices of Decision state no basis for the affirmation of the respective Notices of Violation.
39. The Notices of Decision contain no references or citation to the record.
40. The Notices of Violation did not constitute evidence at the hearing and could not serve as the singular basis for the Notices of Decision.
41. There is no record other than the written appeals provided by counsel for Mize and Sopris and the Notices of Violation.
42. The Deed Restrictions provide for enforcement by action in a Court.
43. The Deed Restrictions do not provide that they are enforceable pursuant to the Town Code’s New Enforcement Scheme or other subsequently adopted enforcement schemes unilaterally implemented by the Town.

44. The owners of the Properties have a right to maintain the accessory dwelling, which is a vested contract right, subject only to the provisions of the Deed Restrictions, which Deed Restrictions did not incorporate by reference the 2015 Ordinance.

45. In light of the Notices of Decision, Plaintiffs entered into leases that are one year leases. Plaintiffs provided those leases to the Town for approval, but the Town failed to respond. These leases were legally sufficient pursuant to the Deed Restrictions, and Plaintiffs were entitled to enter into these leases pursuant to the Deed Restrictions. Upon information and belief, the Town rejected the leases and intends to pursue enforcement under the 2015 Ordinance.

### III. CLAIMS

#### **A. FIRST CLAIM: DECLARATORY JUDGMENT THAT THE 2015 ORDINANCE DOES NOT APPLY TO THE DEED RESTRICTIONS ON THE PROPERTIES**

46. Plaintiffs incorporate herein by this reference paragraphs 1 through 45 above.

47. Colorado's Uniform Declaratory Judgments Law and Rules of Civil Procedure provide that:

Courts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder

C.R.S. § 13-51-101 et seq.; accord C.R.C.P. 57.

48. An actual and justiciable controversy presently exists between Plaintiffs and the Town concerning their rights and legal relations under the Deed Restrictions, which are a contract or other writing.

49. The Sopris Deed Restriction provides that, "a long-term rental unit as defined by the Crested Butte Municipal Code will be maintained on the property."

50. The Mize Deed Restriction provides that, “A long term rental unit as defined by the Crested Butte Municipal Code must be maintained on the property.”

51. With respect to remedies, both Deed Restrictions provide:

3. Remedies. In addition to any other remedy provided by law for the enforcement of this Agreement creating Restrictive Covenants, the Town shall be entitled to the remedies of specific enforcement and/or injunctive relief, and further, the Town shall be entitled to an award of reasonable attorney’s fees in the successful prosecution or defense of any action to enforce this Agreement.

52. “The law at the time the contract was entered into governs a contract with a municipality.” *Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438, 442–43 (Colo. App. 1994).

53. The 2015 Ordinance did not exist at the time the Deed Restrictions were entered.

54. Where a contract “does not refer to future laws, that clause, taken in its plain, ordinary, and popular sense, incorporates only laws existing at the time of contract formation.” *See supra*, ¶ 18 (setting for numerous cases in support of this legal axiom).

55. The only definition of “long term rental” relevant to the Deed Restrictions was the definition in the Town Code at the time the Deed Restrictions were executed.

56. The Deed Restrictions do not, as a matter of contract, obligate the owners of the Properties to comply with the 2015 Ordinance, including the New Definition Provision or the New Enforcement Scheme.

57. Application of the 2015 Ordinance to the Properties is invalid and improper.

58. Because the 2015 Ordinance does not apply to the Deed Restrictions as a matter of contract law, imposition of the 2015 Ordinance on the Properties and the Deed Restrictions, thereby requiring the Plaintiffs to rent out the units and otherwise comply with the 2015 Ordinance, would be unconstitutional as it would impair existing contracts, would be impermissibly retroactive, would violate Colorado’s rent control statute, and would otherwise deprive them of their legal nonconforming uses. *See* Colo. Const. art. II, § 11 *and* U.S. Const. art. 1 § 10, cl. 1 (prohibiting impairment of contracts and retroactive application of the law); *see City of Golden v. Parker*, 138 P.3d 285, 289 (Colo. 2006)(holding that local government ordinances are prohibited from violating these constitutional provisions); *see* C.R.S. § 38-12-301 (prohibiting certain rent control).

59. Plaintiffs hereby seek a judicial determination and declaration pursuant to C.R.S. § 13-51-101 et seq. and C.R.C.P. 57 that: (a) the Town is bound by the terms of the Deed

Restrictions, (b) the 2015 Ordinance does not apply to the Properties or the Deed Restrictions, (c) Plaintiffs are in compliance with the Deed Restrictions because they have maintained units that are able to be rented for a period of six months or longer and are not, in fact, being rented for less than six months, and (d) the proceedings pursuant to the 2015 Ordinance were invalid, the Notices of Decision are invalid, and the fines and liens imposed are invalid.

**B. SECOND CLAIM: DECLARATORY JUDGMENT THAT THE DEED RESTRICTIONS ARE NOT SUBJECT TO THE NEW DEFINITION PROVISION IN THE 2015 ORDINANCE (IN THE ALTERNATIVE TO THE FIRST CLAIM)**

60. Plaintiffs incorporate herein by this reference paragraphs 1 through 59.

61. Because the 2015 Ordinance contains a severability provision, Plaintiffs plead this claim in the alternative to the first claim to account for the possibility that the Court may conclude under the first claim that the Enforcement Scheme under the 2015 Ordinance is applicable if severed from the New Definition Provision and may, under this second claim, conclude that the Definition Provision of the 2015 Ordinance is not enforceable against the Properties.

62. Colorado's Uniform Declaratory Judgments Law and Rules of Civil Procedure provide that:

Courts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder

C.R.S. § 13-51-101 et seq.; accord C.R.C.P. 57.

63. An actual and justiciable controversy presently exists between Plaintiffs and the Town concerning their rights and legal relations under the Deed Restrictions, which are a contract or other writing.



64. The Sopris Deed Restriction provides that, “a long-term rental unit as defined by the Crested Butte Municipal Code will be maintained on the property.”

65. The Mize Deed Restriction provides that, “A long term rental unit as defined by the Crested Butte Municipal Code must be maintained on the property.”

66. “The law at the time the contract was entered into governs a contract with a municipality.” *Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438, 442–43 (Colo. App. 1994).

67. Where a contract “does not refer to future laws, that clause, taken in its plain, ordinary, and popular sense, incorporates only laws existing at the time of contract formation.” *See supra*, ¶ 18 (setting for numerous cases in support of this legal axiom).

68. The language in the Deed Restrictions does not require that the Properties are constantly rented or that they otherwise comply with the New Definition Provision in the 2015 Ordinance but rather that they are maintained in such a manner that they could be rented for a period of 6 months or more and that they are not rented, in fact, for a period of less than six months.

69. Plaintiffs hereby seek a judicial determination and declaration pursuant to C.R.S. § 13-51-101 *et seq.* and C.R.C.P. 57 that: (a) the New Definition Provision does not apply, (b) Plaintiffs are in compliance with the Deed Restrictions because they have maintained units able to be rented for a period of six months or longer and are not, in fact, renting the Properties for a period of less than six months, and (c) the Notices of Decision are invalid and any lien and fine imposed by the Town on the Properties pursuant to the 2015 Ordinance is invalid.

**C. THIRD CLAIM: C.R.C.P. 106(a)(4) (IN THE ALTERNATIVE TO THE FIRST CLAIM FOR RELIEF)**

70. Plaintiffs incorporate herein by this reference paragraphs 1 through 69.

71. C.R.C.P. 106(a)(4) provides for judicial review “Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law.”

72. The Notices of Decision constitute an exercise of judicial or quasi-judicial functions by a governmental body or officer or lower judicial body.

73. Through the Notices of Decision and related proceedings, Dara MacDonald as Town Manager for the Town acted as an officer exercising judicial or quasi-judicial functions.

74. Through the Notices of Decision and related proceedings, the Town, through its town manager, was a governmental body exercising judicial or quasi-judicial functions.

75. The Town had no authority to enforce the Deed Restrictions through the 2015 Ordinance scheme because, among other things, the Deed Restrictions limited enforcement to judicial proceedings in Court and the 2015 Ordinance does not apply to the Properties.

76. The Notices of Decision apply the New Definition Provision contained in the 2015 Ordinance to the Properties, which is contrary to the terms of the Deed Restrictions.

77. Application of the New Definition Provision in the 2015 Ordinance is unconstitutional as it impairs existing contracts, is impermissibly retroactive, and would violate Colorado's rent control statute. *See* Colo. Const. art. II, § 11 *and* U.S. Const. art. 1 § 10, cl. 1 (prohibiting impairment of contracts and retroactive application of the law); *see City of Golden v. Parker*, 138 P.3d 285, 289 (Colo. 2006)(holding that local government ordinances are prohibited from violating these constitutional provisions); *see* C.R.S. § 38-12-301 (prohibiting certain rent control)

78. The Notices of Decision and, in particular, application of the New Definition Provision to the Properties, are an abuse of discretion because, among other reasons, the decisions were not based on the record, the Town created no record that would support the decisions, the decisions were a rejection of the settlement agreements and were not a finding based on the merits, there are no findings of fact or conclusions of law in the decisions, the Deed Restrictions may not be enforced under the 2015 Ordinance, and it would be an abuse of discretion to find that the Deed Restrictions adopt the New Definition Provision, the New Enforcement Scheme or any other provision of the new 2015 Ordinance.

79. There is no plain, speed or adequate remedy otherwise provided by law.

80. Plaintiffs have exhausted all remedies with the Town.

81. A remand is not appropriate relief because the Town does not have jurisdiction over enforcement of the Deed Restrictions.

82. Plaintiffs request an Order of the Court finding, ordering and declaring that: (a) this matter falls within the purview of C.R.C.P. 106(a)(4), (b) the Notices of Decision constitute an abuse of discretion, (c) the Town does not have the authority to enforce the Deed Restrictions through its enforcement scheme under the 2015 Ordinance; (d) the Deed Restrictions only require that Plaintiffs maintain a housing unit able to be rented for a period of six months or more that are not, in fact, being rented for a period of less than six months, (e) the New Definition Provision or any future amendments to the Town Code regarding "long term rentals" will not apply to the Properties, (f) Plaintiffs are in compliance with the Deed Restrictions because they have maintained units able to be rented for a period of six months or more and are

not, in fact, renting the Properties for a period of less than six months, and (g) the fine and lien imposed by the Town in this matter is invalid.

**D. FOURTH CLAIM: DECLARATORY JUDGMENT THAT APPLICATION OF NEW DEFINITION PROVISION VIOLATES C.R.S. § 38-12-301 (IN THE ALTERNATIVE TO THE FIRST, SECOND AND THIRD CLAIM FOR RELIEF)**

83. Plaintiffs incorporate herein by this reference paragraphs 1 through 82.

84. Colorado's Uniform Declaratory Judgments Law and Rules of Civil Procedure provide that:

Courts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder

C.R.S. § 13-51-101 et seq.; accord C.R.C.P. 57.

85. C.R.S. § 38-12-301 provides that, "no county or municipality may enact any ordinance or resolution that would control rent on either private residential property or a private residential housing unit."

86. The Town is a "municipality" within the meaning of C.R.S. § 38-12-301. C.R.S. § 38-12-302.

87. The New Definition Provision provides, in part, that a long term rental unit must be rented and must be actually occupied by a local.

88. Requiring that the unit is rented and is rented to a person that occupies the unit effectively controls the rental value for the properties by limiting the market for the unit to rental rates that can be afforded by locals. To avoid noncompliance, the rent will need to be continuously lowered to a point where someone will rent it, even if that falls to zero. This is rent control.

89. The New Definition Provision operates, “to suppress rental values below their market values.” *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000), *as modified on denial of reh'g* (Feb. 26, 2000).

90. The restrictions set out in the New Definition Provision operate to reduce the number of options available to Plaintiffs in the use of their properties from what they had agreed to under the Deed Restrictions. *See Lot Thirty-Four Venture, L.L.C. v. Town of Telluride*, 976 P.2d 303, 307 (Colo. App. 1998), *aff'd*, 3 P.3d 30 (Colo. 2000), *as modified on denial of reh'g* (Feb. 26, 2000)(holding that an ordinance that reduced the number of options from what was contractually agreed was a rent control measure).

91. Because the Deed Restrictions did not contractually subject the properties to the New Definition Provision, the application of the New Definition Provision to the Properties violates C.R.S. § 38-12-301.

92. Nevertheless, the Town, through the Notices of Decision issued by Dara MacDonald as town manager, seek to impose a fine for failing to comply with the New Definition Provision.

93. The Notices of Decision impose, for the first time, the New Definition Provision on the Properties.

94. In view of the foregoing allegations, an actual and justiciable controversy presently exists between Plaintiffs and the Town and Dara MacDonald as town manager concerning the application of the New Definition Provision to the Properties in contravention of C.R.S. § 38-12-301.

95. Plaintiffs seek a judicial determination and declaration pursuant to C.R.S. § 13-51-101 *et seq.* and C.R.C.P. 57 that the application of the New Definition Provision to the Properties violates C.R.S. § 38-12-301 and is invalid if so applied.

96. A declaratory judgment is appropriate and will terminate this controversy.

**E. FIFTH CLAIM: INVERSE CONDEMNATION (IN THE ALTERNATIVE TO THE FIRST THROUGH FOURTH CLAIM FOR RELIEF)**

97. Plaintiffs incorporate herein by this reference paragraphs 1 through 96.

98. Pursuant to their respective Deed Restrictions, the Properties were not subject to the most current versions of the Town Code relating to long term rentals. Plaintiffs first became subject to the New Definition Provision when they received their respective Notice of Decision.

99. Plaintiffs have a vested interest in the use of their Properties for long term rentals on all terms that are not contrary to the Deed Restrictions. Plaintiffs have a vested right to maintain an accessory dwelling unit consistent with the Deed Restrictions. Plaintiffs have a vested right in the use of their Properties as they see fit under the federal and state constitution. Under the Deed Restrictions, Plaintiffs have a right to choose the rental value regardless of its relation to market value or the market value for locals.

100. The Town has taken or damaged the property interest of Mize and Sopris by, among other things, imposing the requirements of the New Definition Provision and other provisions of the 2015 Ordinance, which include, among other things:

- a. Certain obligations to keep their long term rental units rented at all times that did not exist under their respective deed restrictions;
- b. Certain obligations to keep their long term rental units occupied and to keep them occupied by locals; and
- c. Limitations on who Mize and Sopris may rent to, which limitations did not exist under their respective deed restrictions, and which limitations substantially reduce the value of their Property and rental values.

101. The right to rent pursuant to the Deed Restrictions is unique or special and the 2015 Ordinance does not apply to the general public but specifically targets a select group of individuals with deed restriction agreements with the town. For example, the Plaintiffs were contractually entitled to enter into the leases, such as the current leases, under the Deed Restrictions.

102. The Town enacted the New Definition Provision for a public purpose, including without limitation such reasons as enunciated by the Town and also for the purpose of providing affordable housing to locals.

103. Plaintiffs did not receive just compensation for the imposition of the 2015 Ordinance. Specifically, but without limitation, a fine was imposed upon Plaintiffs at the same time that the Town imposed such requirements.

104. The Town has the power of eminent domain.

105. The Town has not exercised the power of eminent domain with respect to the Mize Property or the Sopris Property.

106. Article II, Section 15 of the Colorado Constitution provides, in part, that, "Private property shall not be taken or damaged, for public or private use, without just compensation." Defendants have violated this provision by taking and damaging Plaintiffs' property for public purpose without paying just compensation.

107. The imposition of the 2015 Ordinance on the Properties constitutes a physical entry and invasion by the Town of the Properties because Plaintiffs are required under the 2015 Ordinance to keep the units permanently rented to individuals that meet specifications set by the Town, which is contrary to Plaintiffs' obligation in their Deed Restrictions.

108. The imposition of the 2015 Ordinance constitutes a physical invasion of the Properties because the Town is mandating that individuals are in such units when they would not otherwise be. The entries by these long term renters constitutes a physical entry by the Town, who is obligating Plaintiffs to place such persons in such units.

109. The imposition of the 2015 Ordinance on the Properties constitutes a physical ouster of Plaintiffs and physical intrusion on Plaintiffs' Property because Plaintiffs are now required to keep the units permanently rented to individuals they were not required to rent to under their Deed Restrictions.

110. The imposition of the 2015 Ordinance constitutes a legal interference with the physical use, possession, or enjoyment of the Plaintiffs' Properties because Plaintiffs are now required to rent the properties on a long term basis to individuals to whom they were not previously required to rent and when they were not previously required to rent to anyone.

111. The imposition of the 2015 Ordinance constitutes an interference with Plaintiffs' power of disposition of their respective Properties because the 2015 Ordinance contains provisions dictating who may be a lessee or renter that do not exist under Plaintiffs' deed restrictions.

112. The Town has substantially deprived Plaintiffs of the use and enjoyment of their long term rental units.

113. This condemnation occurred with the imposition of the Notices of Decision and shall continue unless and until the Court grants the relief requested in the first four claims for relief.

114. These actions by the Town caused damages to Plaintiffs in an amount to be determined at trial.

**F. SIXTH CLAIM: SUBSTANTIVE DUE PROCESS VIOLATION UNDER 42 U.S.C. 1983 (IN THE ALTERNATIVE TO FIFTH CLAIM)**

115. Plaintiffs incorporate herein by this reference paragraphs 1 through 114.

116. "[T]he right to use one's own real property as one sees fit is a property right fully protected by the due process clause of the federal and state constitutions." Sundheim v. Bd. of Cty. Comm'rs of Douglas Cty., 904 P.2d 1337, 1346 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996)

117. Plaintiffs had the right to use their Properties, as protected by the due process clause of the federal and state constitutions, subject to the terms of the Deed Restriction, which only incorporated by reference the Original Code Provision.

118. Specifically, but without limitation, Plaintiffs are entitled to maintain a long term rental unit as defined by the Original Code Provision and to rent to individuals that are prohibited renters by the New Definition Provision.

119. Plaintiffs were legitimately entitled to residential uses consistent with the Deed Restrictions. The Deed Restrictions create a legitimate claim of entitlement to such uses.

120. The Deed Restrictions were created as part of the building permit process.

121. The right to use the Properties consistent with the Deed Restrictions is a vested property right owned by Plaintiffs. *Cf. Eason v. Bd. of Cty. Comm'rs of Cty. of Boulder*, 70 P.3d 600, 605 (Colo. App. 2003) (holding that a building permit is a vested property right protected by 42 U.S.C. 1983)

122. The 2015 Ordinance is not applied to the Properties as a matter of local police powers.

123. The 2015 Ordinance is not a zoning ordinance.

124. The 2015 Ordinance would not apply to the Properties as a matter of zoning alone.

125. The application of the New Definition Provision deprives Plaintiffs of their free and protected use of their real property and also deprives Plaintiffs of the uses to which they are entitled under the Deed Restrictions.

126. The application of the New Enforcement Scheme as set forth in the 2015 Ordinance also violates Plaintiffs' contracted limitation on enforcement rights as set forth in the Deed Restrictions.

127. The Notices of Decision apply the 2015 Ordinance without any legal or factual basis.

128. There is nothing in the record that supports the application of the 2015 Ordinance.

129. The Notices of Decision contain no articulated basis for the decisions and, therefore, the decisions are without any rational relationship to a legitimate government interest.

130. The Notices of Decision constitute arbitrary, irrational and wrongful government action.

131. The appeals could not have been denied on non-arbitrary grounds.

132. Plaintiffs have been deprived of their right to use their Properties pursuant to their Deed Restrictions and building approvals.

133. Plaintiffs have incurred fines pursuant to the Notices of Decision.

134. Plaintiffs have been damaged by the Notices of Decision and the application of the 2015 Ordinance in an amount to be proven at trial.

#### **IV. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for an Order:

- A. Setting forth a judicial determination and declaration pursuant to C.R.S. § 13-51-101 et seq. and C.R.C.P. 57 that: (a) the Town is bound by the terms of the Deed Restrictions, (b) the 2015 Ordinance does not apply to the Properties or the Deed Restrictions, (c) Plaintiffs are in compliance with the Deed Restrictions because they have maintained units able to be rented for a period of six months or longer and are not, in fact, renting the Properties for a period of less than six months, and (d) the proceedings pursuant to the 2015 Ordinance were invalid, the Notices of Decision are invalid, and the fines and liens imposed are invalid.
- B. Finding, ordering and declaring in a C.R.C.P. 106(a)(4) review that: (a) this matter falls within the purview of C.R.C.P. 106(a)(4), (b) the Notices of Decision constitute an abuse of discretion, (c) the Town does not have the authority to enforce the Deed Restrictions through its enforcement scheme under the 2015 Ordinance; (d) the Deed Restrictions only require that Plaintiffs maintain a housing unit capable of being rented for a period of six months or more and that the Properties are not, in fact, rented for periods of less than six months, (e) the New Definition Provision or any future amendments to the Town Code regarding “long term rentals” will not apply to the Properties, (f) Plaintiffs are in compliance with the Deed Restrictions because they have maintained units able to be rented for a period of six months or more and are not renting the Properties for a period of less than six months, and (g) the fine and lien imposed by the Town in this matter is invalid.
- C. Setting forth a judicial determination and declaration pursuant to C.R.S. § 13-51-101 et seq. and C.R.C.P. 57 that the application of the New Definition Provision to the Properties violates C.R.S. § 38-12-301 and is invalid if so applied.



- D. Holding that the Town inversely condemned Plaintiffs' Property and awarding damages and costs for the same;
- E. Holding that Defendants, or any of them, violated Plaintiffs' substantive due process rights under 42 U.S.C. 1983 and awarding Plaintiffs damages and attorney's fees, including attorney's fees pursuant to 42 U.S.C. 1988; and
- F. For such other and further damages, attorney's fees, costs and other relief as this Court may deem appropriate.

Dated this 14<sup>th</sup> day of December, 2016.

LAW OF THE ROCKIES

By: *S/ Marcus J. Lock*

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