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ALTHOUGH THIS LETTER MAKES REFERENCE TO A SETTLEMENT PROPOSAL AND PART OF THIS LETTER INCLUDES ADVICE GIVEN TO A CLIENT, THE DISCLOSURE OF THAT ADVICE HAS BEEN INCLUDED FOR SETTLEMENT PURPOSES ONLY AND WILL NOT BE A WAIVER OF ANY CONFIDENTIAL COMMUNICATION THAT IS NOT INCLUDED HEREIN

Sent Via First Class Mail and Email: vern5776@gmail.com

April 24, 2020

Harry V. Thomas
24355 Palomino Place
Calhan, CO 80808

Re: Special Use Application to El Paso County

Dear Mr. Thomas:

This office represents Suzanne McNelly, the owner of 24415 Palomino Place, Calhan, Colorado, who opposes your special use application based upon the objections raised in her letter to Ryan Howser of El Paso County Planning (see attached), but also based upon the violations of the Restrictions and Covenants for Equestrian Country, recorded on May 18, 1971, at Book 2409, Page 263. Reception number 801468 of the records of El Paso County, Colorado (the "Covenants"). Reference is made to the enclosure and to those Covenants, and to the proposal my client has authorized me to make (see end of letter). She has also authorized me to share a portion of the advice that I have given her for that reason (see bold print above and the last paragraph of this letter).

The length of this letter is a function of my client's desire to resolve this matter. I have advised my client that if this letter had been sent to you "for settlement purposes only" it could not be used against her unless the two of you reached an agreement (because settlement negotiations are governed by the public policy in favor of settling disputes without litigation). However, the bold wording at the top of this letter shows that she is sending this letter:

(a) in the hopes that you will review this letter with an attorney; but

(b) it is also a demand letter (and will be used for that purpose); but

(c) you may respond with your own proposal, completely off the record, if you send it "for settlement purposes only."

Notwithstanding the above, if any part of this letter sounds like I am giving you advice, then I need to make it very clear that I represent your neighbor, who is making a settlement proposal, and that I do not represent you, and cannot give you advice. Therefore, **please do not rely upon me for advice**. If you need advice, you should get independent legal advice from your own attorney.

If this matter is not resolved, I have advised my client that placing a second home on the property at 24355 Palomino Place would be a violation of paragraph 2 of the Covenants, which provide in relevant part as follows:

> "No structures shall be erected, placed or permitted to remain on any residential lot other than **single** detached dwellings **for one family** . . . and a garage for not more than three automobiles. Stables, barns, gardenhouses or conservatories appurtenant **to the dwelling house**, or adjacent thereto, shall be permitted for the exclusive use of the owner or occupant of the main dwelling house."

(emphasis added).

I have advised my client that this wording clearly provides that only one dwelling for one family is allowed on the property. The covenants do not state that there may be multiple dwellings if everyone is in the same "family", because (a) Covenants are designed to limit visible restrictions; and (b) allowing any relatives to argue that they are one family would require unacceptable intrusions into private lives. This statement applies to outer buildings needed for one family's activities (the family of the main dwelling house) and not another family dwelling.

My client became concerned because your letter and the accompanying materials state that "the property was originally developed for two dwellings" and that there are two existing "legally-built" septic systems and a well to serve both dwellings on the property. My client questions those assertions, especially because you appear to assert that the septic systems, the two driveways and two ruined trailers are some sort of precedent (by using the term "a legally non-conforming property with two dwellings"). She is also concerned about the reference to only one well, because the property at 24355 Palomino Place also had (and still has) two wells.

I have advised my client that isolated violations in the past do not provide a legal foundation to change the Covenants. This property was not developed for two dwellings, as that would violate the Covenants. Likewise, my client is advised and believes the two septic tanks and two ruined trailers (in which marijuana and methamphetamines were grown, made and sold) were never authorized by anyone. She believes the only reason they were never removed is that the neighbors reported the problems to the Sheriff, rather than filing a civil action. My client will not make the same mistake.

Since my client's late mother was the owner and occupant of 24415 Palomino Place when the second trailer was installed, my client believes her mother delayed action based upon

ill health and reliance on the mistaken belief that the Sheriff would stop the covenant violation. However, if she ever went to get advice, I suspect the mother was told:

(a) the Sheriff does not enforce the Covenants (only zoning or criminal violations); and

(b) the extra dwelling had been in place for more than a year, and could not be removed; and

(c) so the only action by the authorities was to make the former owner abandon one of the wells.

If so, the first part of the advice was correct; the second part was not; and the third statement was misleading (see enclosed message to the County as to the third part). As to the second part, the term for the one-year deadline is the "statute of limitations", but the error is the belief that it applied to a mobile home. Although it applies to structures, those structures have to be attached to the land itself, such as on a permanent foundation.

Another typical error is the mistaken belief that the Covenants no longer apply to a neighborhood, when there have been many violations of various covenants. However, I have advised my client that a covenant is not abandoned unless the specific provision has been habitually and substantially violated for so long that the intended character of the neighborhood has changed; and that the person who makes that argument (the "defendant") has the burden to prove that fact (see 25 A.L.R. 5th 125 "Waiver of Right to Enforce Restrictive Covenant by Failure to Objection to Other Violations").

I have also advised my client (1) that paragraph 16 of the Covenants provides that said document has been automatically renewed every ten (10) years since 2001, and (2) so if this matter is not settled, you would have the burden to produce sufficient evidence to show:

(a) many other existing violations (properties with two dwellings); and

(b) that the number of those violations is such a large percentage that it is no longer possible for the neighborhood to realize (to a substantial degree) the benefits intended by the restriction.

By way of example, there is a case from another state that held that a provision that prohibited the operation of a business could be used prevent the operation of a machine shop, even though that the neighborhood now had portable metal outbuildings, four vehicles parked at the back of one lot, a temporary dog pen, and a large barn located on the lot of one of the owners who was complaining (the "Plaintiff").

I have advised my client that paragraph 2 has not been abandoned, because a covenant is not abandoned when it has only been violated a few times, and it is not affected by the violation of other covenants, because violations (such as storing disabled vehicles, campers, boats, and building materials) are not relevant.

In this case my client believes the only house in this neighborhood that has two (2) dwellings is your property. If she is correct, there is Colorado case that is almost exactly on point that was cited in the A.L.R. where only one home was constructed in the neighborhood (in 1981) and that in 1988, when construction began again, the Covenants could still be enforced.

Notwithstanding all the above, if the water issue and the proximity problems described in the enclosed letter from my client can be resolved, she does not wish to prevent your daughter and son-in-law from being able to care for you and your wife. However, in that case, it makes more sense for the two dwellings to be closer to each other, and there needs to be a way to make certain that the property is returned to just one dwelling when the family members are no longer acting as caretakers.

Although you may have the best of intentions, you will eventually sell or convey this property and it is imperative that the property be brought back into compliance with the Covenants at this time, so that no one else will try to make the same "precedent" argument. Further, the history of this property shows that it is very difficult to prevent misuse, as shown by the fact that marijuana and methamphetamines were grown, made, and sold on this property.

As a result, if you can demonstrate (through documents or a feasibility study) that the water discharge of the lower well is plentiful enough to support the proposed two (2) structures and one-quarter ($^1/_4$) acre garden as permitted without a negative impact upon my client's water supply (quantity and quality), the parties will enter into a recorded covenant that binds the property and will provide as follows:

(1) The water well on the east end of the property will be properly abandoned, plugged, and capped, and the covenant will provide that the well will not be reopened or used.

(2) My client will pay for the cost of the proper plugging and capping of this well if it has not already been done.

(3) The modular home where you and your wife plan to live should be moved much further west of the boundary with my client's property (preferably on the lower terrace), so that both your home and the home for your daughter and son -in-law would be closer together (i.e., both homes would be located on the lower terrace on the west side of your property).

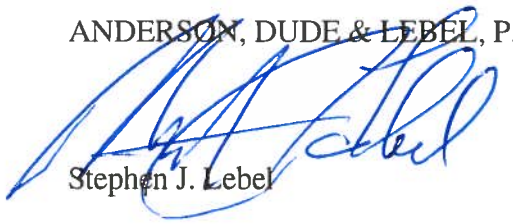
(4) If it was moved to the lower terrace, my client would be willing to share the cost with you of moving the present septic system from the east end of the property to the lower terrace on the west side of the property.

(5) When there is no longer a need for caretakers for you and your wife, the accessory living quarters would be removed from your property.

My client would appreciate your thoughtful consideration of the above, because she really wishes to resolve this matter as neighbors in a manner that protects both properties.

Sincerely,

ANDERSON, DUDE & LEBEL, P.C.



Stephen J. Lebel

SJL:LP

Enclosures

Suzanne McNelly
651 Valle Vista
Billings, Montana 59105

Owner: 24415 Palomino Place
Calhan Colorado 80808

4/22/2020

BY FAX: 719-520-6695

RE: Special Use Request for 24355 Palomino Place Accessory Living Quarters

File: AL2010
Parcel ID No: 2207001005

Ryan Howser, AICP

I am the owner of 24415 Palomino Place, and I am sending this letter to explain why I am against the special use application submitted by Seth Blacksten to allow an additional home on the adjacent property at 24355 Palomino Place on land owned by Harry Thomas.

I have listed several concerns below about the request to allow any additional living quarters (an 858 sq. ft. single wide manufactured home) in addition to the 1680sq ft. modular home, the detached 2 car garage and the 30x50 agricultural building proposed for that property. I have also enclosed a copy of my attorney's letter to the owner that relates to the clear violations of the recorded covenants on this property, as it describes the concerns listed at the end of this letter.

My major concern is about potential water use, because the application does not mention the fact that that there are two wells on the property. I do not want to have a repeat of the problems that my late mother had when she was the owner and occupant of 24415 Palomino Place in the last years of her life.

As you know, the land in Eastern El Paso County is dry and even in a normal hot summer, wells go dry because there is not enough water. This is one reason the covenants state one well per parcel of land. However, although one well would provide for one family dwelling and their activities, such as a horse or small garden, a second well and a second home invites overuse.

In paragraph 5 of the letter to neighbors sent by certified mail, Mr. Thomas states, "that there is a well which supplies water to both dwellings. This well was permitted to support two dwellings and to irrigate "1/4-acre garden".

In paragraph 5 Mr. Thomas states, "Should this special use be approved, the overall impact will not overburden or exceed the capacity of public facilities and services". However, just because the letter states "there will be no burden and the well will support two dwellings", there is no guarantee that the second well nearest the McNelly property was properly plugged, capped, and abandoned preventing surface water contaminating the aquifer and the well could easily be reopened. The increase in the number of people residing on the property and the increase in well use for two homes instead of one will put pressure on what little water is available. I am especially concerned because the currently unused well is not far from my well at 24415 Palomino Place. I am also concerned about the past history as to the lack of water supply enforcement.

The fact that the property at 24355 Palomino Place has two wells is itself a problem, because I believe the second well was never allowed. Although the application tries to use the two driveways and two ruined trailers as precedent and describes that use as "a legally non-conforming property with two dwellings", I believe there was nothing legal about the prior misuse of the property at 24355 Palomino Place. According to neighbor's statements county authorities did come and make the "Owners" abandon one well. We would ask that Mr. Thomas provide us with evidence that the second well nearest the McNelly property was properly plugged, capped, and abandoned.

As you may be aware, my mother and her neighbors made numerous complaints about the two dwellings, the two wells and the illegal activities done in the past, including methamphetamine being manufactured on this location and the fact that chemical by-products were dumped into the toilet, through the septic system, and deposited in the drain field . This action was evidenced by the pink/purple, stains on the toilet and pipes in the old trailer on the lower end of the property. These chemicals may still be in the soil and therefore should be investigated for health concerns.

I am advised that numerous complaints were made to the authorities about the two (2) trailers, but very little was ever done. The most that was ever done was to force the "abandonment" of one of the wells. However, as best we can determine:

(a) the standpipe on the well that was nearest to our home was merely bent (making it temporarily unavailable); that was not really an abandoned well, because
(b) an abandoned well would be enclosed in concrete; and
(c) I have received pictures showing that the pipe may have been repaired and a new shut-off valve may have been installed; and
(d) this makes no sense if this well has been truly abandoned.

I reviewed all documents associated with the permit application and found no information that the output of the existing well will provide the water necessary for the two residences and ¼-acre garden. I further ask that Mr. Thomas provide me with information about the depth of the aquifer the well is drawing from.

My other concerns relate to the harm to my quality of life and to the zoning and covenant violations. Since my attorney advises me that the County does not involve itself with covenant violations, I have attached a copy of my attorney's letter to the owner, because:

(a) it lists the covenant violations;
(b) it explains that the owner is incorrect if he believes that the property is somehow "grandfathered" (or allowed to have) two dwellings; and
(c) it makes a proposal to resolve this dispute; but
(d) if this is not settled between the owners, approval by the County will only result in unnecessary litigation, because the violations of the A-5 zoning should be sufficient to resolve this problem.

In Mr. Thomas's documents on file with the El Paso Planning and Development department, in the paragraph titled Owner/Applicant Authorization, it is stated: "I acknowledge that I understand the implications of use or development restrictions that are a result of subdivision plat notes, deed restrictions, or restrictive covenants. I agree that if a conflict should result from the request, I am submitting to El Paso County due to subdivision plat notes, deed restrictions, or restrictive covenants, it will be my responsibility to resolve any conflict."

Since the owner states that he agrees to restrictive covenants, and that he has a responsibility to help resolve the conflict, I strongly ask that Mr. Thomas read and consider the attached letter sent by my lawyer.

Most people live in this area because they resist the crowded residential neighborhoods of town. With five acres there is enough space where houses do not have to be close together. Privacy, space, and the enjoyment of being in the country are way of life.

Allowing two living units on 24355 Palomino Place increases the building density and the population density. It also violates the zoning, because the property is zoned for <u>one</u> single family dwelling only. The language is clear the term is dwelling (singular) not dwellings (plural). The zoning and the covenants do not state that there may be multiple living dwellings in two locations on the same parcel as long as everyone is in the same family.

If an owner needed caregivers, and placed a mobile home nearer to the modular home on the lower terrace, and not on the upper terrace within 200 feet of our dwelling, which has been in place since 1984, I would not object, as long as I was assured it would be removed when the need ended. However, once it is permitted, it in essence permanently subdivides the property allowing for two families (related or not) and two dwellings in two different locations. This places a financial burden on me for the cost of moving my home, utilities, well, and septic farther into my property to ensure privacy, space, and enjoyment of being in the country.

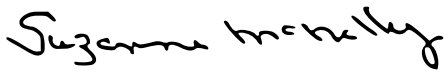
What is to stop the next 5 acres from constructing a second home or moving on a second mobile home? What reassurances are in place preventing the next parcel of land, and the

next parcel of land from adding to their living quarters until the quality of life credited to country living is eroded?

If the County permits the adjacent property owner, Mr. Thomas, to misuse the property, that will only strengthen the argument of any other owner who wants to circumvent the covenant of one single family dwelling.

Without the addition of a mobile home used as accessory living quarters, Mr. Thomas has over 5 acres in which to place his modular home. With five acres there is enough space where houses do not have to be close together and potentially impede our view of the mountains.

I ask that the property at 24355 be denied a second dwelling and be made to conform to the original covenants of the properties when they were divided and sold.



Suzanne McNelly
Owner, 24415 Palomino Place
Calhan, Colorado 80808