Advisory Opinion 275

Parties: Aaron Thompson / San Juan County

Issued: September 27, 2023

TOPIC CATEGORIES:

Interpretation of Ordinances

Local governments may regulate the short-term rental of residential structures, but whereas state law requires local governments to apply the plain language of land use regulations, if short-term rental restrictions are not plainly stated, the land use authority must interpret and apply the regulation to favor the use.

County ordinances plainly prohibit commercial uses in Spanish Valley's residential district, and expressly regulate all variations of commercial overnight accommodations through an overlay district that may only be applied to sites in certain commercial areas. However, the County's ordinances anticipate and differentiate overnight accommodations in residential neighborhoods to be a type of residential use. The residential district allows single-family dwellings to be used for residential purposes and occupied without any express form of durational limit. Therefore, as long as single-family dwellings in the residential district are not otherwise used by five or more persons as a prohibited commercial use as a lodging or boarding house, or hotel, as defined, overnight accommodations for up to four persons are permitted because they are not plainly restricted.

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ADVISORY OPINION

Advisory Opinion Requested By:	Aaron Thompson
Local Government Entity:	San Juan County
Applicant for Land Use Approval:	San Juan Rentals LLC
Type of Property:	Residential
Date of this Advisory Opinion:	September 27, 2023
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

Is the short-term rental of a single-family residence a permitted use in the Spanish Valley Residential zone?

SUMMARY OF ADVISORY OPINION

Regulating the short-term rental of residential structures is a land use matter that state law leaves to the discretion of local control, though state law does require local governments to apply the plain language of land use regulations, and if a particular use is not plainly restricted, the land use authority must interpret and apply the regulation to favor the use.

County ordinances plainly prohibit commercial uses in Spanish Valley's residential district, and expressly regulate all variations of commercial overnight accommodations through an overlay district that may only be applied to sites in certain commercial areas. However, the County's ordinances anticipate and differentiate overnight accommodations in residential neighborhoods to be a type of residential use. The residential district allows single-family dwellings to be used for residential purposes and occupied without any express form of durational limit. Therefore, as long as single-family dwellings in the residential district are used by a single family, and not otherwise used by five or more persons as a prohibited commercial use as a lodging or boarding house, or hotel, as defined, residential short-term rentals are permitted because they are not plainly restricted.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Aaron Thompson, received on February 2, 2023.
2. Submission from Mitchell D. Maughan, on behalf of San Juan County, dated May 9, 2023.
3. Submission from Aaron Thompson, received May 12, 2023.

BACKGROUND

Aaron Thompson[1] owns several properties improved with single-family residences in residential neighborhoods in the unincorporated San Juan County area known as Spanish Valley, immediately south of Moab. The properties are in the Spanish Valley Residential (SVR) Zoning District, and subject to the Spanish Valley Development Ordinances, enacted in November of 2019. *See*, Ordinance No. 2019-02 (November 19, 2019) ("Spanish Valley Ordinance"), which the County refers to as a "Sub-Ordinance" to the 2011 San Juan County Zoning Ordinance.

The County notes that prior to adoption of the Spanish Valley Ordinance, San Juan County first adopted the Spanish Valley Area Plan in April of 2018.[2] At that time, the Spanish Valley study area was regulated by two zones under the 2011 County Zoning Ordinance—the Controlled District Highway zone along US-191 that allowed for commercial uses, and the Agricultural (A-1) zone, which comprised the remainder of the private land area, and which permitted "single-family residences, ranches and cabins," while "[t]wo-family residences are permitted as a conditional use."[3] The County notes that the Area Plan was preceded by eight months of public outreach and engagement. Public scoping meetings for the proposed Area Plan reflected that one item of public concern was worry of "the proliferation of overnight-rentals and similar uses," and concerns that "[h]aving the right mix of short-term rentals vs. full-time residential is a huge issue."[4] The Area Plan provided a number of concept plans and alternatives and noted that, once adopted, "new development guidelines and ordinances will be developed to ensure the Area Plan is implemented as envisioned."[5]

In July of 2019, following adoption of the Area Plan but before the County had implemented any new ordinances for the Spanish Valley, San Juan County enacted a temporary land use ordinance to place a 6-month moratorium on new land use applications for commercial uses in the commercial district surrounding US-191, citing that it was in the process of future land use planning that may be significantly different than the uses allowed at that time, referencing as a concern "overnight accommodations," specifically, and also noting that nearby Moab had also

[1] Mr. Thompson owns or uses these residential properties through several business entities, including Energy Testing Services, Kaaron LLC, San Juan Rentals, LLC, and possibly others.
[2] SAN JUAN COUNTY, *Spanish Valley Area Plan*, Adopted April 17, 2018.
[3] *Id*., page 17.
[4] *Id.*, Appendix A.
[5] *Id.*, page 17.

recently enacted a moratorium on new permits for hotels and other overnight accommodations, which may turn these commercial business owners toward the Spanish Valley in the near future.[6]

Before the moratorium expired, San Juan County enacted its Spanish Valley Ordinance in November of 2019. *See*, Ordinance No. 2019-02 (November 19, 2019). The Spanish Valley Ordinance establishes only two conventional zoning districts in the Spanish Valley area—the Spanish Valley Residential (SVR) District, and the Spanish Valley Highway Commercial (HC) District, but also provides several other types of planned community districts, as well as an overlay district for overnight accommodations.

Mr. Thompson's properties are all within the SVR District. In December of 2020, Mr. Thompson approached the County's planning and zoning department about operating short-term rentals in the SVR district, and was informed by the planning and zoning administrator that all that was needed was a county business license. The County subsequently issued three business licenses for the "business of Nightly rentals" for each of Mr. Thompson's three residential properties within the Crimson Cliffs Subdivision.

However, on March 11, 2021, the San Juan County Planning Commission met to discuss short-term rentals in Spanish Valley residential neighborhoods, and "the need for an interpretation to whether the Spanish Valley Residential District Ordinance allowed nightly rentals as a permitted use or not."[7] At this meeting, a statement from the San Juan County Attorney's Office was provided with the Commission's Staff Report, which stated that the County Attorney's Office had determined that short-term rentals in the SVR zoning district were not permitted uses, and recommended that all applications for short-term rental use in the district should be denied.

On May 7, 2021, the County's Chief Administrative Officer sent a letter to Mr. Thompson stating that the business licenses he previously obtained for short-term rentals were "issued in error," and that nightly rentals were prohibited uses in the zoning district where the properties were located. The letter stated that "[a]ll properties purchased in Spanish Valley will have to comply with existing zoning regulations in that zone which do not allow for nightly rentals. It does however allow you to construct a dwelling unit and allows you to use that unit as a long-term rental."[8]

In July 2021, Mr. Thompson filed a business license application for two additional overnight rental properties in the Crimson Cliffs subdivision, located at 113 and 129 Crimson Cliffs Drive. A year later, in August of 2022, the County contacted Mr. Thompson by phone to renew and consolidate his business licenses into one entity, which covered multiple addresses. Mr. Thompson informed

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[6] The Ordinance states, specifically, that there was a compelling, countervailing public interest to postpone new commercial development "before the land rush from Grand County to Spanish Valley begins," and that "San Juan County needs to evaluate the current economic conditions and opportunities for economic diversity and development in the Spanish Valley Planning Area before it is faced with numerous hotel and nightly rental permit applications that will likely occur as a result of Grand County and the City of Moab temporary moratoriums on new permit applications for this type of development." SAN JUAN COUNTY RESOLUTION NO. 2019-___, *available at* https://www.utah.gov/pmn/files/485835.pdf.

[7] *Minutes of the San Juan County Planning Commission Meeting*, March 11, 2021, item 5, *available at* https://mccmeetings.blob.core.usgovcloudapi.net/sanjuancut-pubu/MEET-Minutes-66377bc731b046a998a4b4363a6e6947.pdf.

[8] Submission from Mitchell D. Maughan, on behalf of San Juan County, dated May 9, 2023.

the County that he wanted to add the two additional homes within the same subdivision that he had applied for in 2021, but which were never issued.

The County responded with a letter from the County Attorney's Office dated December 1, 2022, saying that the County had denied his business license renewal for "Reason(s) Zoning Restrictions." Mr. Thompson was informed that he could not operate nightly rentals in the SVR zone because it was a commercial, and not residential, use.

Following this, Mr. Thompson then applied for a bed and breakfast business license, and was likewise informed that a bed and breakfast was also not allowed in the SVR zone because it was considered commercial.

The County has published a "Draft Land Use, Development, and Management Ordinance (LUDMO)" on the County website for public comment since May 17, 2022.[9] As of the date of this advisory opinion request, however, these ordinances do not appear to have not been adopted.

Mr. Thompson has requested an Advisory Opinion to answer whether the County has properly interpreted the 2019 Spanish Valley Ordinance as not permitting short-term rental use of single-family dwellings in the County's Spanish Valley Residential zone.

ANALYSIS

I. Counties May Regulate Short-term Rentals, But Restrictions Must Be Clear

It is well-established in Utah land use law that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power. *W. Land Equities v. Logan*, 617 P.2d 388, 389 (Utah 1980). Utah's Land Use Development, and Management Act, as applied to counties, UTAH CODE § 17-27a-101 *et seq.*, is the state enabling act that gives counties broad discretion to enact land use ordinances intended to promote the health, safety, and welfare of the public as the county sees fit, except where expressly preempted by, or enacted contrary to, state law. *Id.* § 17-27a-801(3)(a).

That discretion is exercised by implementing policy as acts of legislation. However, once enacted, counties do not have discretion in how regulations are applied. Counties must apply the plain language of land use regulations to any particular application for land use approval. *Id.* §§ 17-27a-508(2), 17-27a-308. When called upon to interpret the meaning of a zoning ordinance, Utah Courts do not give any deference to the local agency's interpretation; rather, local land use ordinances are subject to ordinary rules of statutory interpretation, which begins with the text, and a presumption that "the legislative body used each word advisedly, and deem all omissions to be purposeful." *Ogden City Plaza Inv'rs Ltd. v. Ogden City Bd. of Zoning Adjustment*, 2022 UT App 74, ¶¶ 7, 18. The primary goal is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the [ordinance] was meant to achieve." *Foutz v. South Jordan*, 2004 UT 75, ¶¶ 11, 13.

[9] SAN JUAN COUNTY, *Draft San Juan County Land Use, Development, and Management Ordinance (2022)*, https://sanjuancounty.org/sites/default/files/fileattachments/planning/page/133/formatted_draft_2022_ludmo_review_draft_with_table_for_consideration.pdf.

In other words, given a county's broad discretion and ability to establish clear land use controls as it sees fit, Utah courts will take the county at its word—that is, the plain language of its ordinances as enacted—in determining legislative intent and effect. And whereas "zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995). The ultimate goal of legislation is to inform the ordinary reader what conduct is prohibited. *See generally, State v. MacGuire*, 2004 UT 4, ¶ 4. Because of this, state statute directs local land use authorities that if a land use regulation does not plainly restrict a particular use, the land use authority must interpret and apply the land use regulation to favor the use. *See,* UTAH CODE § 17-27a-308.

The short-term rental of residential dwellings—a hot topic in land use regulation—is largely a matter left to the discretion of local communities, to regulate, prohibit, or permit as each community deems appropriate.

Mr. Thompson argues that the legislature recently passed legislation[10] defining "short-term rental" as specifically a residential unit, and not commercial as the County has asserted. *See* UTAH CODE § 17-50-338(1) (defining short-term rental to mean "a residential unit or any portion of a residential unit that the owner of record or the lessee of the residential unit offers for occupancy for fewer than 30 consecutive days"). However, this state-provided definition of "short-term rental" applies only to that section, *see id.* ("As used in this section . . ."), which is limited to prohibiting local ordinances that regulate solely the act of online advertisements of short-term rental listings, and does not otherwise preempt or direct the local government's authority to define and regulate the underlying act of short-term renting property itself, as a land use matter.[11]

Nevertheless, as Mr. Thompson has cited to this definition as applicable to his properties, we will assume that this definition adequately describes how Mr. Thompson has used the properties in question, namely, that they are residential units or potions of a residential that have been offered for occupancy for fewer than 30 consecutive days.

Over the years, Utah courts have issued several opinions on whether the short-term rental of a single-family dwelling was permitted by local ordinances. Despite that in each case the use of property was very similar factually, the outcome of whether such use was allowed differs in each case due to the nuanced differences between each local code and its respective adopted definitions. These cases illustrate the very broad discretion each local community enjoys to define particular land uses and establish the circumstances under which they are allowed. Nevertheless, only those local governments that had plain and clear restrictions in their ordinances were ultimately successful in enjoining the use of residential properties as short-term rentals.

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[10] 2017 Utah Laws 335.

[11] The text of the statute expressly anticipates otherwise valid land use ordinances restricting the actual use of short-term rentals, by stating that counties may not "use an ordinance that prohibits *the act of renting* a short-term rental to . . . otherwise punish an individual solely for *the act of listing* or offering a short-term rental on a short-term rental website." UTAH CODE § 17-50-338(2)(b) (emphases added).

Town of Alta v. Ben Hame (1992)

First, in 1992, the Utah Supreme Court decided *Town of Alta v. Ben Hame Corp*, 836 P.2d 797 (Utah 1992). In that case, a business entity registered for the purpose of "operation of hotels and inns" owned a lot in a residential subdivision. Ordinances applicable to the use of the property provided for three permitted uses: (1) agriculture, (2) single-family dwellings, and (3) "accessory uses and structures customarily incidental to a permitted use."[12]

The business claimed that the use for short-term rental was allowed under applicable ordinances as an "accessory use" incidental to the permitted use of single-family dwellings. However, the court noted that excluded from the definition of single-family dwelling were hotels, apartment hotels, boarding houses, lodging houses, mobile homes, tourist courts and apartment courts, which were separately defined under the ordinances. *Id.*, at 799. The Court held that a valid accessory use to a single-family dwelling is one that actually furthers or enhances the *use* of the property *as a residence* and not one which merely helps finance the property. *Id.*, at 801. The Court ultimately concluded that, while the structure was a single-family dwelling, the *use* of the structure in that case met the broad definition of a lodging facility, which was inconsistent with the residential use of a single-family dwelling, and was "not an accessory use customarily incidental to the main use within the meaning of the . . . zoning ordinance." *Id.*, at 802.

Brown v. Sandy City (1998)

Next, in 1998, the Utah Court of Appeals decided *Brown v. Sandy City Bd. Of Adjustment*, 957 P.2d 207 (Utah Ct. App. 1998) wherein the court concluded that, in absence of any plain restriction on duration of use, the city's zoning ordinance did not prohibit the leasing of property for less than thirty days. In that case, the owners owned single-family dwellings in residential zoning districts, which they leased for periods of several days to several months. Sandy City's ordinance permitted use of a single-family dwelling, defined as allowing for occupancy by one family, and defining family as "an individual or two or more persons related by blood, marriage or adoption, or a group not to exceed four unrelated persons living together as a single housekeeping unit." *Id.*, at 208. The ordinance prohibited a building from being used for any purpose or manner other than is included among the uses listed as permitted or conditional uses.

Sandy City began interpreting its code to prohibit rental of any single-family dwelling for fewer than 30 days, and the owners appealed the city's interpretation. The city argued that, "given the express purpose of the residential zones, to establish a 'residential environment' and 'quiet residential neighborhoods favorable for family life,' . . . short-term property rental was prohibited by the ordinance." 957 P.2d at 211. However, the court rejected this argument. The court found that "[t]hrough the purpose declaration, Sandy explained what its goal was in establishing the residential zones. It then enumerated specific regulations to meet that goal. By satisfying the *actual* regulations enumerated . . . the use of the properties has met the legal requirements . . . and, thus, met the general purpose of the statute." *Id.* at 212. (emphasis in original) (internal quotations omitted).

[12] *Ben Hame*, 836 P.2d at 799.

The court held that the code specifically permitted use of a dwelling for occupancy by a single family, without any express durational limit. *Id*. at 211. "Thus, if a single family occupies a home, the structure is being used as permitted." *Id*. The Court noted that despite the city's ability to pass an ordinance restricting short-term leasing, like the one in *Ben Hame*, it had not done so; therefore, being required to construe the existing ordinance strictly against the city, the court determined that the ordinance, as it reads, did not prohibit such a practice. *Id*. at 211-12.

South Weber v. Cobblestone (2022)

Most recently, the Utah Court of Appeals decided *South Weber City v. Cobblestone Resort LLC*, 2022 UT App 63. In that case, Cobblestone Resort bought a residence in the agricultural zone with the intention of expanding the property to operate as an Airbnb business, and began renting it as a short-term rental.

The agricultural zone listed as a permitted use, "dwellings, one-family." The property owner argued that use of the property for short-term rental was permitted as fitting into the definition of "dwelling," which it argued was merely "a building designed and used for residential purposes." However, the court rejected this argument, finding it ignored the rest of the definition of dwelling, which expressly excluded "apartments, boarding houses, hotels, *lodging houses* or tourist courts." *Id.* at ¶ 19 (emphasis added). South Weber Code, however, did not define *lodging house,* and the owner argued that the reviewing court construed terms too restrictively and failed to adhere the presumption that would prefer permission to the property owner unless required otherwise. However, the Court of Appeals concluded that while "lodging house" was not defined in South Weber Code, the usual meaning of that term included the type of short-term rentals for which the property has been used, and was therefore properly excepted from being classified as a "dwelling." *Id.* at ¶ 23.

These three Utah cases on the short-term rental of single-family dwellings provide several applicable land use concepts pertaining to short-term rentals that guide our opinion and lead to the conclusion that San Juan County Ordinances have not plainly restricted short-term rental use of single-family dwellings in the SVR District. They are:

(1) Local governments have the opportunity to enact plain restrictions on short-term rental uses, and if they have not done so, existing ordinances must be strictly construed against the government, as written (*See, Brown*);
(2) In absence of explicit prohibitions on the short-term rental of single-family dwellings, courts will not find a zoning violation simply because the short-term use may appear inconsistent with the general intent statement of the zone when the use complies with the substantive provisions of the ordinance (*See, Brown*).
(3) Courts look to defined terms first in interpreting a land use code, and where terms are undefined, courts look to dictionaries to ascertain the term's "usual meaning" (*See, Cobblestone*);
(4) Courts must not focus on a permitted building solely as a structure, but must discern the structure's allowed use, as defined, including applicable restrictions (*See, Cobblestone*);
(5) If the applicability of defined terms to a short-term rental use is clear, short-term rentals should not otherwise be discerned under more broad or vague uses that would be inconsistent with the applicable, defined terms (*See, Ben Hame*);

II. Despite County's Ability to Plainly Regulate Overnight Rentals in Residential Neighborhoods, the Spanish Valley Ordinance Did Not Do So, and Any Restrictions are Therefore Strictly Construed Against the County, and in Favor of the Property Owner

The facts at hand are similar to the *Brown* case, wherein San Juan County, just like Sandy City, has looked at its existing code and, in absence of any express reference to the particular use, proclaimed an interpretation that the existing ordinances prohibit the undefined use.

Namely, "short-term rentals" are not defined by County Ordinances, but the County began prohibiting short-term rentals in the SVR District after the County Attorney's Office concluded that the use was not permitted because it is a commercial use, whereas the primary purpose of the SVR District is to accommodate residential uses. The County also urges us to consider the policy and legislative intent of the Spanish Valley Area Plan, which it argues included the following guidelines relevant to the location of short-term/overnight rentals in Spanish Valley residential neighborhoods:

> "- A guiding principle should be to create a non-tourism centered community that is distinctly different than Moab, yet still maintains its current close ties.
> - A guiding principle should be to encourage and support business development through the location of well-situated business development zones adjacent to the highway."[13]

As alluded to by the County, the County's legislative body appears to have been fully aware of the concept of residential short-term rentals when the Spanish Valley Ordinance was adopted, as the Spanish Valley Ordinance was preceded by both the San Juan County Spanish Valley Area Plan, as well as the moratorium on commercial uses, both of which reference short-term rental use, and concerns over adjacent commercial uses and residential areas.[14] However, despite this awareness, and San Juan County's "ability to pass an ordinance to restrict short-term leasing . . . we must construe existing zoning ordinances strictly against the [County]." *See, Brown*, 957 P.2d at 211.

The Spanish Valley Ordinance provides that the purpose of the SVR District is "primarily to accommodate residential uses," Ordinance No. 2019-02, Ch. 1, while alternatively, the HC District "provide[s] a district where highway commercial uses along U.S. Highway 191 are permitted." *Id.* at Ch. 6. Other than these two conventional zoning districts, the Spanish Valley Ordinance provides for several types of planned community districts,[15] and finally, the Spanish Valley Overnight Accommodations Overlay District. *See, id*. at Ch. 10.

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[13] Submission from San Juan County, dated May 9, 2023, referencing two items listed as "Spanish Valley Area Plan Guiding Principles" found at page 27 of the Spanish Valley Area Plan. *See* footnote 2, *supra*.
[14] *See*, footnotes 4, 5, and 6, supra.
[15] Namely, the Spanish Valley Planned Community (PC) District, the Spanish Valley Residential Flex Planned Community (RF) District, the Spanish Valley Business Flex Planned Community (BF) District, and the Spanish Valley Highway Flex Planned Community (HF) District. *See*, Ordinance No. 2019-02, Chapters 2-6.

The purpose of the overlay zone states that "[o]vernight accommodations have the potential to be an important part of the Spanish Valley and San Juan County economy," and that "[i]n order to support regional efforts to control the imbalance between such uses and other desired community uses as has taken place in Moab and Grand County, a clear policy is required to ensure the number of hotels and motels, commercial condominiums, bed & breakfasts (B&Bs), lodges and commercial campgrounds are aligned with other essential and desirable uses in the San Juan Spanish Valley and region." *Id.*

The Utah Supreme Court has held that legislative purpose statements, while useful in "provid[ing] guidance to the reader as to how the act should be enforced and interpreted," are not a substantive part of the statute, and "do not create rights that are not found within the statute, nor do they limit those actually given by the legislation." *Price Development Co. v. Orem City*, 2000 UT 26.

In *Brown*, Sandy City had advanced a similar argument that, "given the express purpose of the residential zones, to establish a 'residential environment' and 'quiet residential neighborhoods favorable for family life,' . . . short-term property rental was prohibited by the ordinance." 957 P.2d at 211. However, the court rejected this argument and differentiated the facts before it from the earlier *Ben Hame* case, wherein it noted that the Town of Alta's ordinances explicitly prohibited short-term leasing, and found that despite Sandy City's ability to pass a similar ordinance, it had not done so. The court found that "[t]hrough the purpose declaration, Sandy explained what its goal was in establishing the residential zones. It then enumerated specific regulations to meet that goal. By satisfying the *actual* regulations enumerated . . . the use of the properties has met the legal requirements . . . and, thus, met the general purpose of the statute." *Id.* at 212. (emphasis in original) (internal quotations omitted). The Court concluded that "we will not find a violation of law simply because the permitted use may appear inconsistent with the general intent statement when the use is in compliance with the substantive provisions of the ordinance." *Id.* (cleaned up).

What matters here, then, is not what San Juan County Area plan may have envisioned, or even what the stated purposes of the enacted Spanish Valley districts say, but rather, what the Spanish Valley Ordinance's operative, substantive provisions prohibit, or allow, as pertaining to any particular land use.

The Overnight Accommodations Overlay chapter provides that the overlay district is only available to be applied to sites within the Highway Commercial (HC) and Highway Flex (HF) districts, Ordinance No. 2019-02, Ch. 10; however, all zoning districts—with the exception of the SVR district[16]—contain a section entitled "Uses Subject to the Spanish Valley Overnight Accommodations Overlay," which list as follows:

- Hotels and Motels
- Commercial Condominiums for short-term rentals
- Bed and Breakfasts (B&Bs), lodges and resorts
- Commercial campgrounds for motorized and/or non-motorized users

[16] At least, explicitly, the Residential Flex (RF), Business Flex (BF), Highway Flex (HF), and Highway Commercial (HC) districts. This paragraph is not found in the Planned Community (PC) district chapter, though the PC district itself is described as being divided into areas of flex districts (RF), (BF), and (HF). *See,* Ordinance No. 2019-02, Chapter 2.

• *All other variations of overnight accommodations intended for nightly rentals*

Id. at Chapters 3, 4, 5, and 6 (emphasis added).

This final item on this list, namely "all other variations of overnight accommodations intended for nightly rentals," is accompanied by a footnote which reads: "*Overnight rentals in residential neighborhoods* and other zones of the Spanish Valley Zoning Map are addressed in separate San Juan County ordinances." Ordinance No. 2019-02, Chapter 4, footnote 2 (emphasis added).[17]

Again, in interpreting local ordinances, courts are to presume that "the legislative body used each word advisedly, and [to] deem all omissions to be purposeful." *Ogden City Plaza Inv'rs*, 2022 UT App 74, at ¶ 7. The SVR district excludes this explicit reference—found in all other Spanish Valley zoning districts—that "all other variations of overnight accommodations intended for nightly rentals" is a use subject to the commercial-only Overnight Accommodations Overlay District. This exclusion, together with the footnote reference to "overnight rentals in residential neighborhoods," evidences the County's legislative body intent to regulate the nightly rental use of properties in residential neighborhoods as a residential—and not a commercial—use, through other ordinances apart from the commercial Overnight Accommodations overlay.

However, we are left without knowing what these "separate San Juan County ordinances" regarding overnight rentals in residential neighborhoods are. Mr. Thompson alleges that these separate ordinances were never enacted, which may likely be a reference to the "Draft Land Use, Development, and Management Ordinance (LUDMO)" that has been published for public comment on the County's website since May of 2022, but not yet enacted.[18] Or, it may simply be a reference to the SVR District itself, as the only zoning district not to include this list of uses subject to the Overnight Accommodations Overlay. In either case, despite San Juan County's ability to pass an ordinance to restrict short-term leasing we must construe existing zoning ordinances strictly against the County. As such, as will be discussed below, the substantive provisions of the ordinance are what will control. We next turn to the SVR District itself.

III. The SVR District Plainly Prohibits Only the Lodging of Five or More Persons; Otherwise, Lodging Fewer Persons is a Permitted Use of Single-Family Dwellings.

The Spanish Valley Ordinance provides, specifically, that "[u]ses are allowed in the SVR District in accordance with Table 1-1," which, under "Use Category" lists several uses under the headers, "Residential Uses," "Civic and Institutional Uses," and "Parks, Open Space and Agricultural Uses." Ordinance No. 2019-02, Ch. 1.

[17] While this text is found in footnote 2, specifically, the other instances of footnotes that accompany the section heading "Uses Subject to the Spanish Valley Overnight Accommodations Overlay" found in Chapters 3, 5, and 6, all contain the text *"Ibid.*," which is used to refer to a source mentioned in the previous footnote. As there are no other footnotes in the SV ordinance document, it is assumed that footnote 1's "*Ibid"* reference actually refers to this same textual statement in footnote 2, even though it comes after. The copy of the SV Ordinance provided to the Ombudsman's Office is labeled as "Draft" in red text in the document footer, though it is our understanding that this document reflects the ordinance as actually adopted into law. We nevertheless will assume that this out-of-turn footnote referencing in the document is a result of its draft status.

[18] *See* footnote 9, *supra*.

The allowed residential uses, designated in Table 1-1 as either permitted or conditional, are as follows:

- Dwelling, single-family;
- Dwelling, two-family (duplex);
- Dwelling, Manufactured;
- Accessory Buildings and Uses; and
- All other household living uses (5th wheels, trailers, etc.)

Id.

Mr. Thompson argues, generally, that because short-term rentals are not mentioned in the SVR District, they must be allowed. Utah courts are likely to reject such a categorical argument,[19] as we note that in contrast to the SVR District, the HC District, as well as the planned community districts, have expressly open-ended lists of allowed uses.[20] It is clear, then, upon reading the Spanish Valley Ordinance as a whole so as to render all parts relevant and meaningful, *See, Foutz*, 2004 UT 75 at ¶¶ 11-13, that the *only* uses allowed in the SVR District are those listed in Table 1-1 ("uses are allowed . . . *in accordance with* Table 1-1 . . ." Ordinance No. 2019-02, Ch. 1)(emphasis added), unlike the other districts. The Spanish Valley Ordinance has therefore plainly restricted all relevant land uses in the SVR District except for those expressly listed in Table 1-1.

That said, Mr. Thompson argues, more specifically, that short-term rentals are allowed in accordance with Table 1-1 as either a permitted use of a "single-family dwelling," or otherwise allowable as included in "all other household living uses (5th wheels, trailers, etc.)."

The County's zoning ordinance provides the following definition:

> Dwelling, Single-family. A building arranged or designed to be occupied by one (1) family, the structure having only one (1) dwelling unit.

SAN JUAN COUNTY ZONING ORDINANCE ("SJCZO") 1-5(25) (2011). While Mr. Thompson argues that this definition does not contain any limiting language as to the length of occupation, and therefore does not restrict short-term rentals, the County instead turns to the broader definition of "dwelling," which is provided as:

[19] This was, in fact, the analysis preferred in Judge Bench's concurring opinion, wherein he argued that the majority of the court should have held that "short-term rentals are permitted in Sandy unless the city passes an ordinance to specifically prohibit them." *Brown*, 957 P.2d 207, at 217. This approach, however, was not adopted by the majority, which, as has been discussed, looked to the plain language of the ordinance, construed strictly against the city, to determine that the use was not prohibited by the language's substantive provisions.

[20] For example, the HC District provides that "the following is a list of typical permitted uses. The list is not exclusive. Any use not specifically listed but determined by the Planning Commission to be similar in purpose, intent or use shall be permitted." Ordinance No. 2019-02, Ch. 6. Similarly, the Highway Flex (HF) District states that the "wide range of commercial uses detailed in the Highway Commercial Zone shall apply," while adding that a "wide-range of residential uses" may also be included as part of a development.

> Dwelling. Any building, or portion thereof, which is designed for use for residential purposes, *except hotels, apartment hotels, bed & breakfast/boarding houses, lodging houses, tourist courts and apartment courts*.

Id. at (22) (emphasis added). The County argues that Mr. Thompson's short-term rental use does not qualify as a permitted "dwelling," because the structures are being used as "lodging houses" or "tourist courts" excepted from the definition of dwelling, above. The County also advances the same argument by asserting that the properties are not being used by "families," for which the definition under the Ordinance, in turn, is "[o]ne or more persons occupying a dwelling unit and living as a single housekeeping unit, *as distinguished from a group occupying a boarding house, lodging house or hotel, as herein defined*." SJCZO 1-5(29) (emphasis added).

The ordinance explicitly defines "lodging house" as "a building where lodging only is provided for compensation to *five (5) or more*, but not to exceed fifteen (15) persons." *Id.* at (49) (emphasis added). And while the definition of tourist court does not expressly mention the number of individuals accommodated,[21] the County appears to view this term interchangeably with "hotel" as "[A]nything designed for larger occupancy" (meaning 16 persons or more).[22]

We believe it is undisputed that Mr. Thompson uses his short-term rental properties to accommodate persons for compensation, but we are not provided with any information as to how many persons are typically accommodated, though the County asserts—and Mr. Thompson did not rebut—that both of the properties at 113 and 129 Crimson Cliffs Drive can accommodate up to 12 individuals.[23]

Based on the plain language of the above definitions, a single-family dwelling may not be used to lodge more than five persons for compensation, as that would otherwise amount to use as a Lodging House, as the term is defined in the Spanish Valley Ordinances. So, to the extent that Mr. Thompson's short-term rentals properties are used to lodge five or more persons for compensation, that particular use of the property is plainly restricted and prohibited in the SVR District.

However, we assume there are certainly situations in which Mr. Thompson's short-term rentals accommodate less than five persons. Assuming, then, that Mr. Thompson's proposed short-term rental of his properties are not a use where "lodging only is provided for compensation to *five (5) or more* . . . persons," SJCZO 1-5(49), but instead are used to accommodate some number less than this, they are not considered "lodging houses" that are explicitly excepted from the definition of "dwelling."

Having, then, eliminated the defined exceptions and exemptions from the definition of dwelling, what we are left with is the fact that each of Mr. Thompson's properties are being used within the operative provisions of a single-family dwelling, ultimately defined by ordinance as a "building .

[21] Defined as "Any building or group of buildings containing sleeping rooms, with or without fixed cooking facilities designed for temporary use by automobile tourists or transients, with a garage attached or parking space conveniently located to each unit, including auto courts, motels, or motor lodges." SJCZO 1-5(87).
[22] Hotel is defined as "A building designed for or occupied as the temporary abiding place of sixteen (16) or more individuals who are, for compensation, lodged." SJCZO 1-5(38).
[23] Assuming this is true, the County's understanding of "tourist court" does not appear to be applicable, and instead only "lodging house" applies to the uses in question, as the most that can be accommodated is twelve.

. . designed for use for residential purposes, [and] arranged or designed to be occupied by . . . one or more persons . . . living as a single housekeeping unit, as distinguished from a group [of] . . . five (5) or more . . . persons occupying a boarding house, lodging house or hotel." *See id.* at (22), (25), (29), and (49).

Other than the operative parameters of these defined terms, just as in *Brown*, San Juan County ordinances do not provide any other substantive restrictions on the above-referenced, non-commercial occupation of single-family dwellings by fewer than five people, by for example, distinguishing or restricting the duration of occupation. In fact, the County's May 7, 2021 letter informing Mr. Thompson that his previously obtained business licenses were issued in error reflects an irony on this point, in that the County asserted that while the code did not allow Mr. Thompson to operate nightly rentals, the code nevertheless "allow you to construct a dwelling unit and allows you to use that unit as a long-term rental."[24] The County appears to concede, then, that the "long-term" accommodation of single-family dwellings for compensation is a residential, and not a commercial, use. However, there is no basis in San Juan County ordinances to distinguish what might be "short" or "long" term, other than the common meaning of the word "lodging" found in the defined term of lodging house, *see Cobblestone*, 2022 UT App at ¶ 23 (looking to dictionaries in absence of defined terms for the usual meaning of "lodging" as a "temporary" place to live or stay),[25] but which hinges on the explicit threshold of five persons. As such, where the "Code never places an express durational limit on the use of any property" *other than* for groups of five or more persons, specifically, Utah courts will not "import such a restriction." *See, Brown,* 957 P.2d 207, at 211.

Having determined that "single-family dwelling" does not prohibit occupation by four or fewer persons as a short-term rental, we do not intend to spend much time on Mr. Thompson's alternative argument that residential short-term rentals are otherwise allowable as included in what Mr. Thompson refers to as the "broad, catch-all category of 'all other household living uses.'"[26] Mr. Thompson has not fully briefed this point, other than to allege that the term "household living use" is "broad enough to encompass an overnight rental."[27]

In matters of statutory interpretation, "[e]ven broad catch-all terms are limited by context. *See* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012) (noting that the *ejusdem generis* canon suggests that a general catch-all term at the end of a list should be interpreted in light of the characteristics of the specific terms in the list)." *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 2019 UT 7, ¶ 82 (citation and parenthetical in original).

We note that this provision follows a defined list of permitted "dwellings" and "accessory buildings and uses," and is also accompanied by an explanatory parenthetical, which adds "(5th wheels, trailers, etc.)." While we form no opinion on what "other . . . uses" this provision might introduce

[24] Submission from Mitchell D. Maughan, on behalf of San Juan County, dated May 9, 2023.
[25] "The first dictionary the court looked to defines 'lodging' as '[a] place in which someone lives or stays temporarily.'. . . . The second similarly defines 'lodging' as including 'sleeping accommodations' and 'a temporary place to stay.'" *S. Weber City v. Cobblestone Resort Llc*, 2022 UT App 63, ¶ 23 (citations omitted).
[26] Submission from Brent N. Bateman and Justin T. Rich, Attorneys for Aaron Thompson, received May 12, 2023.
[27] Request for an Advisory Opinion, submitted by Aaron Thompson, received on February 2, 2023.

into the SVR District beyond the expressly referenced 5th wheels and trailers, if any, we will at least opine that in regards to short-term rentals, this "catch-all" provision does not override or contradict the defined use of single-family dwellings as already discussed, as it is generally accepted that a "[legislative body] does not alter the fundamentals of a statutory scheme in vague terms or ancillary provisions . . . [nor] do so in parentheticals either." *Becerra v. Empire Health Found.*, 142 S. Ct. 2354, 2365 (2022) (internal quotations omitted).

CONCLUSION

The County has broad legislative discretion to prohibit or otherwise restrict the short-term rental use of properties in residential neighborhoods. Spanish Valley Ordinances have plainly restricted the commercial use of single-family dwellings by groups of five or persons occupying them as a boarding house, lodging house or hotel, which are uses only allowed in certain commercial sites through the Overnight Accommodations Overlay Zone.

However, the ordinance anticipates nightly rentals in residential neighborhoods to be a residential use that is not included in the commercial use restrictions of the Overnight Accommodations Overlay, and the ordinance does not otherwise plainly restrict the occupation of a single-family dwelling by fewer than five persons in the SVR District. The County must therefore interpret its ordinances to favor Mr. Thompson's proposed use of single-family dwellings as short-term rentals in residential neighborhoods of the SVR District for up to four persons as compliant with the operative provisions of the Ordinance.

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Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Section 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in Section 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.