

STATE OF COLORADO)
) ss
COUNTY OF OURAY)

Resolution No. 2003-069

At a regular meeting of the Board of County Commissioners ("BOCC") for Ouray County, Colorado, held at the Ouray County Courthouse, on the 15th day of December, 2003, there were present:

Don Batchelder, Chairperson, Bill Ferguson, Commissioner, and Tom Hollenbeck, Commissioner

when the following proceedings, among others, were had and done to-wit:

WHEREAS, the Fairway Pines Home Owners' Association requested a hearing on the issue of whether an extension for the completion of construction of new clubhouse required as part of the approved preliminary development plan/plat for the Fairway Pines Estates PUD should be granted; and

WHEREAS, the Board of County Commissioners has reviewed the request in accordance with the approved preliminary plat/plan and various related resolutions during a public hearing on November 17, 2003 and announced its verbal decision on December 8, 2003.

NOW, THEREFORE, BE IT RESOLVED, that in accordance with the preliminary plan/plat and various related resolutions, the Board of County Commissioners of Ouray County does hereby deny an extension for the completion of construction of the new clubhouse required as part of the approved preliminary plan/plat for the Fairway Pines Estates PUD in accordance with the Findings of Fact and Decision attached hereto.

Introduced, read and passed this 15th day of November, 2003.

Voting in the affirmative: Don Batchelder, Bill Ferguson, and Tom Hollenbeck
Voting in the negative: None
Abstaining: None
Absent: None

THE BOARD OF COUNTY COMMISSIONERS OF
OURAY COUNTY, COLORADO

BY: _____
Don Batchelder
Chairman, Board of County Commissioners

ATTEST: _____

STATE OF COLORADO)
)ss.
COUNTY OF OURAY)

I, Michelle Olin, County Clerk and ex-officio Clerk of the Board of County Commissioners in and for the County and State aforesaid, do hereby certify that the annexed and foregoing Resolution is truly copied from the records of the Proceedings of the Board of County Commissioners for said Ouray County, now in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Ouray, this _____ day of _____, A.D. 2003.

Michelle Olin, County Clerk & Recorder

By: _____
Deputy County Clerk & Recorder

FINDINGS OF FACT AND DECISION

In re Fairway Pines Clubhouse Extension

Applicant's Representative: Jim Willey ("Willey") and John Overholser ("Overholser"), attorney

Background

At issue is the request by the Fairway Pines Home Owners' Association ("HOA") to make a determination regarding the extension of the deadline for completion of the new clubhouse by the Pines Development Group, LLC and Fairway Pines Management Company, Inc. (collectively referred to as "Developer" or "Declarant") beyond November 1, 2003. The HOA requested this determination as part of an overall issue of whether the Preliminary Plat for portions of the Fairway Pines Estates PUD which have not received final PUD approval should be declared void.

Summary of Evidence

At a hearing on November 17, 2003, Jim Willey, a principal in and representative of the Developer, verbally requested a one-year extension to build a permanent golf clubhouse, one of the conditions of final PUD approval. The Developer had not requested an extension either prior to the deadline or prior to the hearing. In support of the request, Willey stated that 110 property owners of non-developer owned lots had voted "FOR" the extension, while 99 had voted "AGAINST" the extension and, therefore, a majority of the property owners who had actually voted, rather than a majority of the non-developer owned lot/unit owners, had approved the extension. John Overholser, the attorney representing Willey, stated that lots owned privately by Willey and Brad Frank, the other principal, constituted non-developer owned lots and, thus, their personal votes

should be counted. All parties concurred that “non-developer owned lots” include those owned personally by the principals in Fairway Pine Development.

Andrew Mueller (“Mueller”), the attorney representing the HOA stated that contrary to Willey’s statement, he was authorized to state on behalf of the HOA that the HOA did not support the extension. In support of the HOA’s position, Mr. Mueller stated that in accordance with Resolution No. 1998-070 dated November 2, 1998 and Resolution No. 2000-051 dated September 18, 2000 the majority of non-developer owned lots must agree to the extension. Mueller points to Condition III. Timing. contained in Resolution No. 1998-070, which provides, in pertinent part: “Developer shall complete construction of the permanent golf clubhouse and make it available for use prior to June 1, 2002, unless a majority of non-developer owned lot and unit owners agree in writing to an extension of said date and the Ouray County Board of County Commissioners approves such extension.” In addition, Section 5 of Resolution No. 2000-051 provides: “Further, FWP hereby reaffirms and agrees that it shall complete construction of the permanent golf clubhouse and make it available for use prior to June 1, 2002, unless a majority of non-FWP owned lot and unit owners agree in writing to an extension of said date and the Board of County Commissioners approves such extension. The parties hereby acknowledge and agree that these dates are absolute, in that they may not be extended further without a clear and convincing showing of good cause therefore, which extension shall be addressed to the sound discretion of the Board of County Commissioners and any criteria for said extension request which may be enacted and in effect in the Ouray County Land Use Code at the time of such request. Failure to meet the time line as set forth herein, or any extension thereof as approved by the Board of County Commissioners, will be subject to the sanctions as set forth in Section 6.12.C. (6) (h) of the Ouray County Land Use Code.” He stated that a

majority of the owners of the non- developer owned lots had voted “AGAINST” the approval of the extension.

A discussion of whether the vested right in the Planned Unit Development (PUD) Plan had expired as a result of the failure to timely complete the clubhouse, as well as the failure to complete conditions 1, 2 and 3 of Resolution No. 1998-070 ensued. Further, in response to questioning by the BOCC, Willey did not provide a timeframe in which the clubhouse would be completed. Willey stated that an extension would provide more time for the properties to be sold along with the possibility of a new clubhouse at that time.

Analysis

The Developer’s failure to ask for an extension prior to the deadline for completion of the clubhouse is a primary issue in this matter. Although the BOCC has previously granted extensions for clubhouse completion, it has always been in the sound discretion of the BOCC to grant such extensions. In this instance, the Developer’s failure to make a timely request for an extension establishes sufficient grounds, alone, to deny the extension request.

In addition to the Developer’s failure to timely request an extension as grounds for denial, the BOCC considers whether the Developer has established good cause for an extension, as outlined in Resolution No. 2000-051. In considering the extension request, the Amendment to the Fairway Pines Clubhouse Extension Resolution and Agreement dated September 5, 2002 (2002 HOA Agreement) is pertinent. The 2002 HOA Agreement extended the timing from June 1, 2002 to April 1, 2004 conditioned upon the timeframes within section 1, 2, 3, and 4 of the 2002 HOA Agreement. It provides several conditions all of which must be met in order to effectuate approval by the HOA. Specifically, paragraph 4 provides:

This Amended Agreement and Resolution shall not be effective unless the following occur:

- a. This Amended Agreement and Resolution is approved, properly executed by Declarant and the original document delivered to the non Declarant representatives on the Association Board on or before November 1, 2003; and
- b. This Amended Agreement and Resolution is approved by a majority of the property owners whose votes are received by the Association on or before November 1, 2003 and
- c. This Amended Agreement and Resolution is approved by the Ouray County Board of County Commissioners on or before November 17, 2003.

Paragraph 3 of the 2002 HOA Agreement also provides that “[t]he suspension contained herein is provided by the Association only to give the Declarant additional time to consummate a sale of Declarant’s interest to a qualified purchaser and/or assemble the financing and/or capital necessary for Developer to meet its obligations under the Agreement.”

While the BOCC is not bound by the 2002 HOA Agreement, it provides evidence of the intent of the HOA and Developer regarding the conditions under which extensions would be granted. In making a determination in this matter, the Board reiterates its position as stated during its September 23, 2002 hearing on a previous extension that it will not take the position of middleman between the Developer and the HOA regarding the enforcement of the Developer’s requirements within the Agreement dated September 5, 2002. The extension granted by the BOCC pursuant to Resolution No. 2002-024 on May 20, 2002 granted an extension until October 1, 2002 for completion of the clubhouse, based upon a mutually agreed upon proposal between the Developer and the HOA for phasing future development, including the clubhouse completion and the Core Area of the PUD. Next, an extension granted on September 23, 2002 was conditioned upon the timeframes contained in Sections 1, 2, 3, and 4 of the 2002 HOA Agreement and, at that time, the BOCC stated that it would not consider approval on

issues contained within Resolution No. 1998-070 if the Developer was in default of the 2002 HOA Agreement. It is clear from the evidence presented at the November 17, 2003 hearing that the Developer has not met the conditions within the 2002 HOA Agreement and that the Developer and the HOA have not reached an agreement to extend the deadline for completion of the clubhouse.

Furthermore, the BOCC's previous position is that additional extensions of the deadline for completion of the clubhouse would not be viewed with favor, unless efforts were made toward construction. The Developer's sole reason for requesting an extension during the November 17, 2003 hearing was to provide additional time to consummate a sale along with only the prospect of, but no commitment to, building a new clubhouse. The Developer did not commit to any specific deadline for completion of the clubhouse. Willey did not present any testimony to indicate that construction would even begin within a certain time if an extension were granted. To date, no building permit has been obtained to begin construction.

Conclusion

Based upon the foregoing, the BOCC rejects the Developer's request for the extension, which was primarily to accommodate the sale of the Developer's properties, rather than to complete the clubhouse. The rejection is particularly based upon the Developer's failure to timely request an extension along with the lack of any assurances from the Developer regarding the completion of the clubhouse. Furthermore, while it is not necessary in reaching a decision on this matter, the BOCC's position is that clearly no agreement between the Developer and the HOA was reached as contemplated in previous BOCC resolutions. As a secondary issue, the evidence on the record demonstrates that an extension is not supported by the HOA as stated by the HOA's attorney during the hearing and has not been approved by a majority of the total number

of non-developer owned platted lots counted on a per lot and unit basis as required by the previous BOCC resolutions. (143 votes in support of the proposed extension would be required to constitute a majority of the 285 platted non-developer owned lots/units.) The BOCC believes this is a reasonable interpretation of the requirement that “a majority of non-developer owned lot and unit owners [must] agree in writing to an extension”. None of the resolutions approved by the BOCC state that the vote count would be limited to only those property owners who actually voted nor did the resolutions specify that the vote would be on a per-owner basis. Thus, an extension would be inconsistent with the provisions of the resolutions related to this matter.

As to the HOA’s request to set a hearing regarding the validity of the preliminary development plan approved on December 2, 1991, a hearing will be set on a date after February 10, 2004, but at a time after which the County Land Use Department has had sufficient time to review the matter to determine if the Developer is in material default of timelines set forth in Resolution No. 2000-051, which are conditions precedent for the final plan/plat approval required before December 31, 2004. All parties will be notified of the public hearing date upon the initiation of this process.