Supervisor Breeden reported that foster care families have experienced a financial hardship in the past taking in foster children but Mr. Driver has greatly improved that financial gap.

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PUBLIC WORKS DIRECTOR'S STAFF REPORT.

The Board received and reviewed Mr. Heidt's staff report dated February 24, 2010.

In response to a question from Supervisor Breeden, Mr. Heidt stated McGaheysville has been pumping waste water to the Regional Sewer Authority for two months rather than the McGaheysville Wastewater Treatment Plant, which is being aerated and having the sludge digested.

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COMMUNITY DEVELOPMENT DIRECTOR'S STAFF REPORT.

The Board received and reviewed Mr. Vaughn's staff report dated February 24, 2010. He reported that Free Will Baptist Church's street vacation for Leyland Lane has been withdrawn.

On motion by Supervisor Breeden, seconded by Supervisor Kyger and carried by a vote of 5 to 0, voting recorded as follows: BREEDEN - AYE; CUEVAS - AYE; EBERLY – AYE; FLOYD - AYE; KYGER - AYE; the Board removed from the table: OA09-14 and OA09-15, Amendment to Chapter 17, Zoning Ordinance, Article III, Section 17-6, to define short-term rental, and Article VI, Section 17-64(t), to permit short-term rentals in the R-4 (Residential Planned Community) Zoning District.

Supervisor Breeden made the following statement:

Mr. Chairman, fellow Board members, we are back today to address the issue of the rental - on a short-term basis - of residential single family structures in the County, and more specifically - for these ordinances - the R4 zone in the Massanutten community. This is an important matter that has been discussed and deliberated for more than three years. Those involved in the discussions during this time have worked hard to try to find a solution that is reasonable and equitable for all. It goes without saying that such a solution has been elusive. It is

also very important to remember that the practice of renting homes on a short-term basis has existed since Massanutten was first developed.

As we discussed last month, the most often stated concerns of those opposed to the short-term rental of residential property relates to the occupants' conduct. This conduct may include excessive noise at inappropriate times of the day, improper public behavior, improperly-contained or strewn trash, improper parking, and other similar types of behavior. More recently, some have alleged immoral and possibly illegal conduct is occurring from time-to-time within houses rented short-term. These people further argue that all of these situations are made worse as more people are allowed to occupy a home.

I know from talking with each member of this Board that we sympathize with these residents, and any other residents in this County that may live near this type of behavior, because this type of conduct is not limited to areas where there are short-term rentals. It also occurs at owner-occupied homes. It occurs at homes that are occupied by a large group of people, and it occurs at homes that are occupied by smaller groups of people. It is unfortunate that all people are not considerate of their neighbors, be they neighbors for a weekend or for a number of years.

Massanutten is a diverse resort community. It includes property owners with similar but different goals and uses for their residential properties. The County must protect all of these interests and property rights to the best of its ability. That said, Massanutten is a community of private property owners, governed by a property owners association with multiple covenants and rules, in a gated community, with private streets and a police department. This community, through its Board of Directors, has a responsibility to enforce its own rules and regulations. The existing covenants prohibit most of the activity that opponents of short-term rental have complained about, including all "noxious or offensive activities" and "unreasonable annoyance or nuisance to the neighborhood".

Based on the language of the covenants, enforcement options should include a judicial sanction, which means not only the $50 per offense punishment that this Board has heard about, but action by a court as well. Contempt of court is a serious matter and failure to follow the decisions of a court will bring more severe punishment.

This is a difficult matter. It very clearly pits two groups of interested parties that have very different views about the use of their property against each other. However, in the final analysis, I believe

that the members of this community have several options before them – first, the property owners in each neighborhood have the opportunity to amend the covenants which provide guidelines for the permissible activities in that subdivision; next, they must ultimately look to the MPOA Board to represent, and fulfill its legal obligation to manage the properties within Massanutten; and finally, they have the option of the judicial process through the court system to address any illegal activity that may occur.

By enforcing private restrictive covenants and existing state and local laws, the MPOA Board of Directors, through its staff and the MPOA Police Department, has the means and the authority to address the complaints from full-time residents of Massanutten. Under Virginia laws, persons who want to address inappropriate actions by "neighbors" may take legal action. This is true for any two property owners anywhere in the County. Furthermore, and I want to emphasize this, the MPOA Board has the duty and responsibility to address those complaints. As was discussed with Sheriff Farley during the January 27th public hearing, the MPOA Police Department has the same authority, ***and duty,*** *to enforce not only the rules set by the MPOA Board, but the ordinances of this County and the laws of the Commonwealth of Virginia. The MPOA Board has a duty to the property owners of Massanutten to see that its staff and police department do so.*

I will not repeat the comments I made at the earlier meeting regarding the hours of investigation and analysis that County staff conducted to review the issues of the number of persons allowed to occupy a house, and the health and safety provisions in either the Fire Prevention Code or the Uniform Statewide Building Code. There are no issues that we can find. County staff has contacted other jurisdictions with resort areas that have short-term rentals intermingled with owner occupancy, and those localities have come to the same conclusion we reached.

Mr. Chairman and fellow Board members, in the final analysis, it appears that the passage of these ordinances, while having the opportunity to clarify to some degree what constitutes a short-term rental property, I do not think these ordinances add any significant clarity or provide any solution to the "good neighbor" issues raised by those that oppose the short-term rental of single family residences. There are laws, ordinances and covenants already in existence to address those grievances, and I expect that some will take advantage of those options. Mr. Chairman, in light of the findings I have outlined

today, I move that the Board reject the two proposed ordinances recommended by the Planning Commission.

Mr. Chairman, after a second is obtained, I would ask that the County Attorney be given the opportunity to address a number of legal issues that have been raised by others related to this matter. Once he has finished his comments, I will have some further remarks.

Supervisor Kyger seconded the motion. Chairman Cuevas asked County Attorney Miller for his comments.

County Attorney Miller made the following comments:

In the course of the public debate over short-term rentals in Massanutten a number of issues have been raised that need to be clarified.

In June 2007, the Virginia Supreme Court released its decision in the Scott v. Walker case. The Court's decision was announced while Rockingham County was involved in litigation with property owners in Massanutten over the short-term rental of residences.

The Scott case arose in Bedford County, where there are neighborhoods, like Massanutten, that have both owner-occupied homes and non-owner occupied homes. The non-owner occupied homes were sometimes rented for short periods of time.

The Scott case focused on the allegation made by the owners of owner-occupied homes that the restrictive covenants for the subdivision forbid the rental of homes in their neighborhood for short periods of time. They based their case on the language in the covenants that said that homes in the neighborhood could only be used for residential purposes. The covenants provided no further guidance. The covenants did not define what was, and what was not, included in the term "residential". Furthermore, the covenants were completely silent on the question of length of time of renting the homes, and whether the length of time had any bearing on the issue of residential use.

The court case that Rockingham County was party to when Scott v. Walker was reported was virtually identical to Scott in all relevant aspects. The County Code states that the R-4 district is a residential district and that it is restricted to residential uses, with a few exceptions not important to this discussion. But, like the covenants in Scott, the County Code does not specify what is or is not considered a residential use. Furthermore, the Code does not address the length of time a home

may be rented, just as the covenants in Scott did not address the length of time issue.

The only difference between the Rockingham County case and the Bedford County case was that the case in Bedford County involved private restrictive covenants and the Rockingham County case involved a zoning ordinance. This difference is irrelevant in this instance.

The Supreme Court wrote a clear and concise decision, stating that the use of the land in Scott v. Walker was a residential use. The fact that one group of people used a home for residential purposes for a few days, and then another group moved in and used it for residential purposes for a few days, did not change the residential use of the property.

The Court made it clear that the covenants could have forbidden the short-term rental of the property. The point was that, the covenants had not done so.

Neither does Rockingham County's Code.

Because of the holding in Scott v. Walker, the previous County Attorney advised the Board of Supervisors to withdraw from the pending case in 2007. Mr. Brown consulted with me when making this recommendation because he had announced he was leaving his position and I had been appointed to replace him. I reviewed the Scott case and concurred with his recommendation to the Board. There was a clear correlation between Scott v. Walker and the County's pending case.

Since June 2007, some have claimed that Scott v. Walker has no bearing on the County's situation because Scott was about restrictive covenants and the County's case is about zoning ordinances. This contention is simply wrong.

Scott v. Walker is concerned with the Virginia Supreme Court's definition of residential land use. It is immaterial whether the use is regulated in one case by private agreement and in another case by government ordinance.

Another misconception involving Scott v. Walker is that the County interpreted it to mean that the County was forbidden to prohibit short-term rentals. This is simply not true. Neither county attorney ever advised the Board, publicly or privately, that this case prohibited such action.

In fact, County staff, including the Attorney, along with members of the Board of Supervisors, worked very hard looking at ways to regulate, and potentially prohibit, short-term renting in different zoning districts since the reporting of Scott v. Walker. Staff and the Board would not have wasted time on this matter if the County believed the Supreme Court had prohibited such action.

Some explanation is appropriate regarding the regulating of short-term renting as opposed to prohibiting it.

Many different approaches to regulation were studied. All were found to lead to results that would be difficult, if not impossible, to enforce and which would be unnecessarily intrusive on private property rights.

In addition to the County's efforts, the MPOA Board and a private citizen offered different draft ordinances for the County's consideration. The County reviewed each of those drafts and found them to be replete with issues too numerous to address at this time. The point here is, even those having the greatest interest in the County regulating short-term rentals were unable to come up with regulations that the County could enforce.

One of the difficulties a governmental body faces when attempting to regulate the short-term rental of residences is the equal protection clause of the federal Constitution. This clause has been interpreted by the U.S. Supreme Court to protect two substantially similar people, or groups of people, from differing governmental treatment, unless the government treating those two groups differently can articulate a sufficiently compelling governmental interest to do so.

The local government's interest in public health, safety and welfare could well provide such a justification for the regulation of short-term rentals, but any attempt at regulation must be crafted carefully and be minimally intrusive. After much study, the County determined that the minimal regulation that would pass constitutional scrutiny would have little practical effect on the short-term rental situation in Massanutten.

As an aside, the constitutional concerns raised by regulating homes lived in short-term versus homes lived in long-term had nothing to do with Scott v. Walker, as some apparently have imagined.

It is critically important to note that the Massanutten neighborhoods have the benefit of the foresight exhibited by their

developers. Those developers crafted restrictive covenants that cover many pertinent issues, and provided a mechanism for additions and amendments to the covenants.

County officials have been told repeatedly by those with concerns over short-term rentals that most of the houses rented short-term are located in the Greenview Hills area, the area which, according to the interpretation of the MPOA Board, has the least ability under the original restrictive covenants to regulate short-term renting.

This may well have been by design, rather than oversight.

On the master plan of the Massanutten development, Greenview Hills is the area of single family dwellings most closely associated with the "resort area". Greenview Hills lies adjacent to the golf course. On the opposite side of the narrow golf course are located time share units. Time share units and small commercial areas bookend Greenview Hills. Anyone buying in such an area should have been aware of these immediately adjacent land uses.

By way of contrast, the other areas of single family dwellings in the development are separated from Greenview Hills and the resort activities by both a significant distance over road, and by many feet of elevation. The impression from the master plan of the difference in the two areas is quite striking.

Significantly, though, the restrictive covenants of the Greenview Hills area have a very liberal amendment policy, as do the covenants for the immediately adjacent areas called Unit 9 and Unit 10.

The amendment policy requires only a simple majority of properties to implement a change in the covenants. Not the super majority one might expect; only 50% of the properties, plus one.

Greenview Hills has 195 lots platted within it. Half is 97.5; rounding up to the nearest whole lot, 98. A simple majority would then be 99. (As opposed to 51%, which would require 100 lots.)

The opponents to short-term rentals have informed the Board that there currently are 58 short-term rentals in all of Massanutten. If all were in Greenview Hills, which is not the case, that would mean that there are 137 lots not being rented short-term in Greenview Hills. Out of that 137 lots, those with concerns about short-term rentals need only to gain approval from 99 property owners to completely rewrite the restrictive covenants.

And that is assuming they would want to rewrite the covenants in such a way that they would have unanimous opposition from short-term renters. Short-term renters have, in fact, shown a willingness to agree to reasonable regulations.

Yet, to the knowledge of County staff, there has been no attempt to amend the covenants.

The covenants in Greenview Hills may not be amended at any random time. They were first recorded in February of 1975, and by their terms would automatically renew 25 years later unless amended by a recorded instrument signed by this simple majority that we just talked about.

They then automatically renew every ten years, again unless amended as noted above. Coincidentally, the most recent automatic renewal date or opportunity for amendment passed just barely two weeks ago.

In summary: because of a very clearly worded Supreme Court decision, the County had no choice but to withdraw from the case in 2007 where it was trying to prohibit short-term rentals under the current wording of its zoning ordinance.

Though the County has spent countless hours analyzing and evaluating possible options for amending its ordinances to prohibit short-term rentals, or to allow them with regulations, the legislative determination that is being proposed tonight has been made that doing either is not in the best interests of the County at this time.

Meanwhile, that area that is the special focus of the short-term rental debate, the Massanutten single family dwelling neighborhoods, and most particularly the Greenview Hills area, does have many tools readily available to it to address the concerns of its property owners. In addition to the tools already in the hands of the MPOA, and its staff and private police force, is the option to amend the covenants.

Supervisor Breeden followed up with the following statement:

Gentlemen, you may recall that at the January meeting, I requested that staff develop an ordinance that provided for the permitting of short-term rentals. The delay in action on this matter has given me an opportunity to consider further this matter and the goal behind the proposal, which was to protect the safety of those using these

homes and the surrounding properties. In my discussions with staff, I have determined that current building and fire prevention codes address these issues for the newer homes in the development. It is difficult to see how implementing the ordinance will accomplish the stated goal of improving the safety; therefore, I ask that no further work be done on that ordinance. I want to thank staff for its work in trying to find a mechanism to get some degree of control on this matter. We've spent hours and hours and hours trying to find a way to find some agreement here. It is my belief that the short-term rental of single-family residences is much bigger than Rockingham County. It may be that some future General Assembly will want to address the property rights issues that arise from this matter.

Thank you, Mr. Chairman.

Chairman Cuevas then noted that it appeared the Board was ready to vote on the motion by Supervisor Breeden. The motion to reject the ordinance amendments carried by a vote of 5 to 0, voting recorded as follows: BREEDEN - AYE; CUEVAS - AYE; EBERLY – AYE; FLOYD - AYE; KYGER – AYE. The Board rejected ordinance amendments OA09-14 and OA09-15, Amendment to Chapter 17, Zoning Ordinance, Article III, Section 17-6, to define short-term rental, and Article VI, Section 17-64(t), to permit short-term rentals in the R-4 (Residential Planned Community) Zoning District.

Chairman Cuevas expressed appreciation to Supervisor Breeden and staff for their work on the short-term rental issue. Supervisor Kyger expressed gratitude to the Planning Commission for their efforts and time spent in public hearings regarding this issue.

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ADDITIONAL COMMITTEE REPORTS.

Chamber of Commerce

Chairman Cuevas noted that a business forum was held to inform the community of local economic conditions with Mr. Vaughn providing a report on behalf of the County.

Virginia Association of Counties (VACo)

Supervisor Kyger requested that Board members read the daily VACo alerts and contact local legislators or offer VACo assistance as requested.