IN THE SUPREME COURT
OF THE STATE OF MONTANA

Supreme Court No. DA 20-0214

CRAIG TRACTS HOMEOWNERS' ASSOCIATION, INC., TARA J. CHAPMAN & MATTHEW B. LOSEY, DONALD C. and BEVERLY A. FRIEND, ROBERT J. & ANDREA E. MARICICH FAMILY TRUST, MICKELSON INVESTMENTS, LLC, SALLIE A. LOSEY, HEMINGWAY PATRICK & CAROL T. REVOCABLE LIVING TRUST,

Plaintiff and Appellants,

v.

BROWN DRAKE, LLC,

Defendant and Appellee,

APPELLEE'S ANSWER BRIEF

On Appeal from the First Judicial District Court, Lewis & Clark County, the Honorable Judge Michael F. McMahon Presiding
State of Montana, District Court Cause No. BDV-2018-1622

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Filed_____, 2020
_____, Clerk

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ISSUES PRESENTED

Was the District Court correct when it held that renting a property to short-term residential tenants who use the property as a dwelling complied with real property covenants which provide that the property "shall be used for residential purposes only"?

STATEMENT OF THE CASE

This case involves the interpretation of real property covenants. The Amended Covenants at issue provide that property may only be "used for residential purposes." *Amend. Covenants, Appendix 1.* Brown Drake LLC's ("Brown Drake") owners use the property in question as their own vacation home for part of the year and lease the property to short-term residential tenants (including friends and family) on and off for the remainder of the year. Both the owners of Brown Drake and the tenants use the property in an identical way, as a residence or dwelling. The use of the house remains the same whether it is one of the families who own Brown Drake using the property or a tenant using the property. Accordingly, the district court correctly held that the *use* is residential and therefore not in violation of the Amended Covenants.

At the district court level, there was no genuine dispute about the actual use Brown Drake is making of the property. There was no genuine dispute over the material facts. Rather, the parties have a different opinion as to how the Amended Covenants should be interpreted. In a nutshell, the Appellants Craig Tracts

Homeowners' Association, Inc. et. al. ("HOA") interpret the Amended Covenants to limit *who* may use the property as a dwelling. *See e.g. Opening Br., p. 6* (stating the HOA has no objection to the LLC's owners using the property, but that they object to the same type of use from short-term tenants). Brown Drake, on the other hand, interprets the Amended Covenants as controlling the character of the actual *use*.

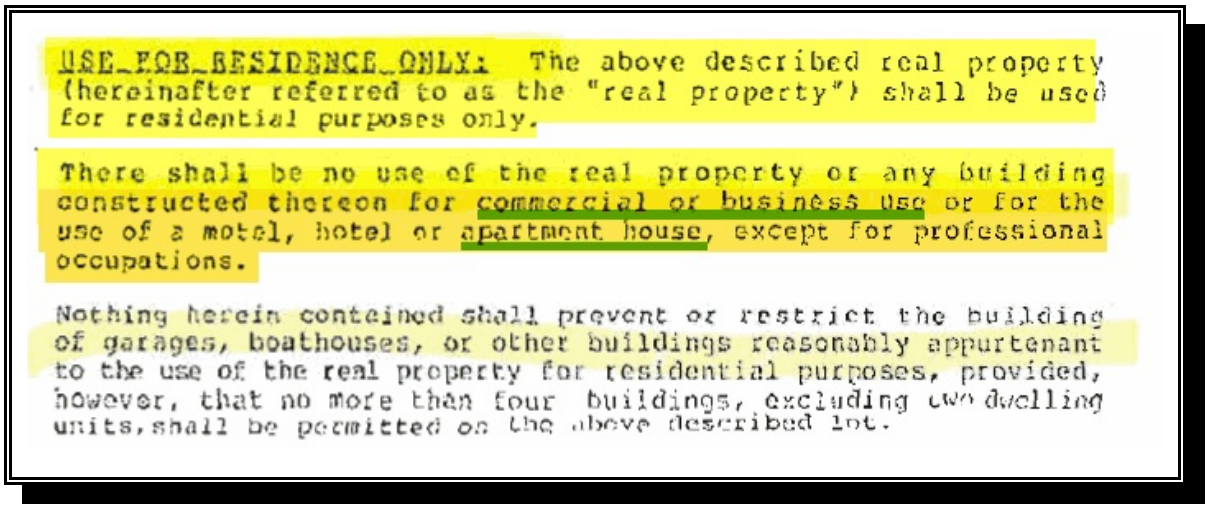
Montana law requires that restrictive covenants be strictly construed to limit any restrictions as much as possible. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91. After the parties filed cross-motions for summary judgment, the District Court weighed the issue in light of the appropriate legal standards. The District Court agreed that renting the property to residential tenants who use the property as a residence is not a violation of the Amended Covenants. The District Court correctly held that "...the restrictive covenant at issue does not prohibit [Brown Drake] from renting the Lodge to guests for residential purposes." *See SJ Order, p. 9, ll. 18-19, Appendix 2.* Through the present appeal, the HOA is now appealing the District Court's decision. The District Court, however, reached the correct conclusion. Granting Brown Drake's summary judgment motion was appropriate. Therefore, the District Court's decision should be affirmed.

FACTUAL BACKGROUND

1. On July 13, 1983, a document titled "Covenants" was recorded with the Clerk and Recorder. *See Original Covenants, p. 1, Appendix 3.* These covenants are referred to in this brief as the "Original Covenants" because these

covenants were eventually amended.

2. In the Original Covenants, there was language specifically precluding "commercial uses," including "apartment house[s]" as follows:



USE FOR RESIDENCE ONLY: The above described real property (hereinafter referred to as the "real property") shall be used for residential purposes only.

There shall be no use of the real property or any building constructed thereon for commercial or business use or for the use of a motel, hotel or apartment house, except for professional occupations.

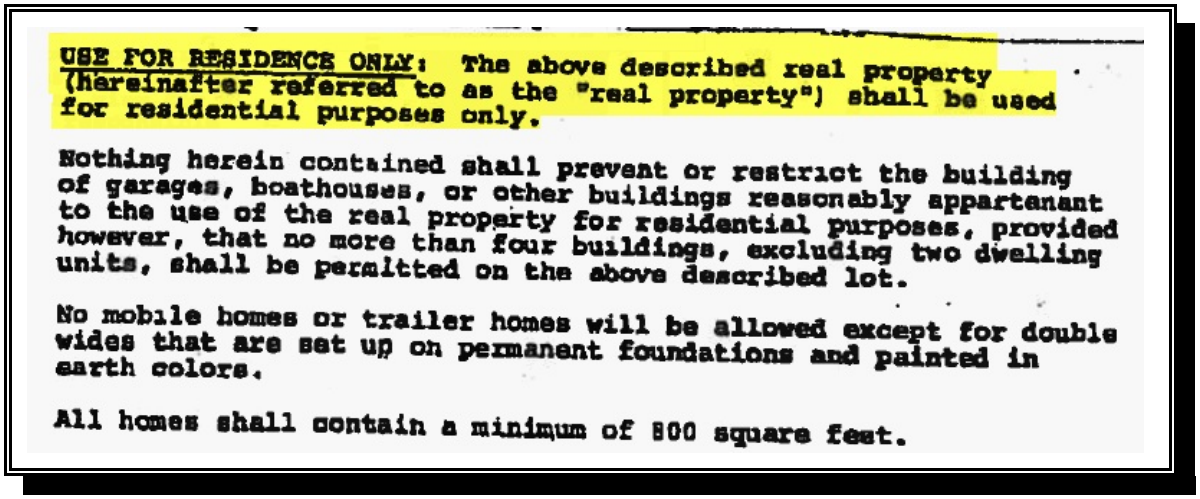
Nothing herein contained shall prevent or restrict the building of garages, boathouses, or other buildings reasonably appurtenant to the use of the real property for residential purposes, provided, however, that no more than four buildings, excluding two dwelling units, shall be permitted on the above described lot.

See Original Covenants, p. 1, Appendix 3 (emphasis added).

3. The Original Covenants were amended on September 29, 1984. *See Amended Covenants, Appendix 1.*

4. In the Amended Covenants, the restriction on "commercial or business use" and "apartment house" language found in the first covenants was deleted, leaving only the rule that the property must be "used for residential purposes only":

[Depiction of Amended Covenants on following page]



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No mobile homes or trailer homes will be allowed except for double wides that are set up on permanent foundations and painted in earth colors.

All homes shall contain a minimum of 800 square feet.

See Amended Covenants, p. 2 (emphasis added).

5. At the time Brown Drake purchased its property, Brown Drake was told that at least one other home in the area covered by the Amended Covenants had previously been rented out to residential tenants at various times. *See Aff. of Bratvold ¶ 6, Appendix 4.* Brown Drake purchased its own property with the expectation of using the property in the same manner (as a part-time rental) as previous owners of other properties had. *Id.* Brown Drake expected its right to use its property in that manner to remain in effect during its ownership. *See Aff. of Bratvold, ¶ 7.*

6. The Trout Shop previously acted as the property manager for another property that is also subject to the same Amended Covenants that are at issue in this suit. The property is the property currently owned by Plaintiff Maricich Family Trust. *See Aff. of Bratvold, ¶ 8; Aff. of Lappier, ¶ 4-8, Appendix 5.*

7. The Maricich Family Trust also allows its property to be used for casting clinics put on by Headhunters, a local fly fishing shop. *See Aff. of*

Bratvold, ¶ 9.

8. For the majority of the year (approximately eight or nine months out of the year), the members of Brown Drake stay at the property, on and off, as a vacation home. *See Aff. of Bratvold, ¶ 10.*

9. When Brown Drake's members are not staying at the property, Brown Drake rents the property to tenants, but only on a short term basis. *See Aff. of Bratvold, ¶ 11.* Brown Drake does not enter into long term leases with tenants. *Id.*

10. M.C.A. § 50-51-101 et. seq. requires "private home[s]" that are "rented, leased, or furnished in its entirety to transient guests on a daily or weekly basis" to obtain a license through the state of Montana. Brown Drake's property is a private home that is, during certain times of the year, leased on a short-term basis. Accordingly, Brown Drake has complied with the law and obtained the necessary license, allowing it to legally rent its private residence out to guests on a daily or weekly basis. *See Aff. of Bratvold, ¶ 12.*

11. Brown Drake rents the residence to short-term tenants. *See Aff. of Bratvold, ¶ 13.* A local fly fishing shop advertises the availability of the residence to be rented through its website. *Id.* Brown Drake also has a FaceBook page and website where prospective tenants can see photos of the property and have questions answered. *Id.*

12. Both Brown Drake's owners and Brown Drake's tenants use the residence to do some or all of the following, depending on each persons'

individual needs at the time:

a. bath, shower, and groom;
b. dress;
c. sleep;
d. cook or prepare meals;
e. eat;
f. clean up after meals;
g. talk on the phone;
h. watch television for entertainment;
I. rear children;
j. communicate;
k. enjoying the scenery;
l. play;
m. use the bathroom;
n. maintain hygiene;
o. sit and relax;
p. walk;
q. entertain;
r. browse the internet and social media;
s. read;
t. shelter themselves; and
q. couple.

See Aff. of Bratvold, ¶ 14. Brown Drake's owners use the property themselves as a dwelling. *Id.* The tenants also use the property as a dwelling. *Id.*

13. Everyone who stays at the residence, whether they be tenants, guests, friends, family, or the owners of Brown Drake all use the residence as a dwelling. *See Aff. of Bratvold, ¶ 15.*

14. Brown Drake does not operate a bed and breakfast nor does it provide services (such as guide services, rental equipment, etc.). *See Aff. of Bratvold, ¶ 16.*

STANDARD OF REVIEW

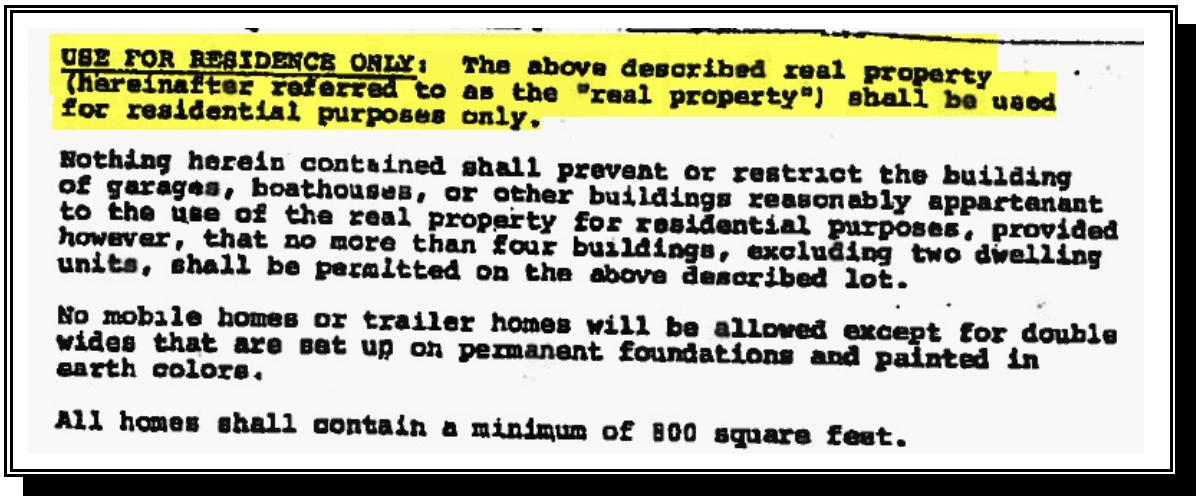
Brown Drake agrees with the HOA's statement of the standard of review. A district court's interpretation of a restrictive covenant is a conclusion of law which the Montana Supreme Court therefore reviews to determine whether the court's conclusion is correct. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91; *Micklon v. Dudley*, 2007 MT 265, ¶11, 339 Mont. 373, 170 P.3d 960. This Court's review of the district court's summary judgment order is *de novo*.

SUMMARY OF ARGUMENT

Brown Drake's use of the property complies with the Amended Covenant's directive that the "property shall be used for residential purposes only." *Amend. Covenants, p. 2, Appendix 2.* The plain language of the Amended Covenants allows the property to be used as a dwelling, whether it be for short-term guests or the owners of the LLC that owns the property. *Id.* There is no explicit restriction against short-term rentals nor rentals of any kind. *Id.* Montana law requires that restrictive covenants be strictly construed to limit any restrictions as much as possible. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91. General rules of contract interpretation apply to restrictive covenants. *Id.* Where a provision is clear and unambiguous, the court must apply the language as written. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91. The language of a covenant is to be understood in its ordinary and popular sense. *Mont. Code Ann. § 28-3-501.* Real property covenants are treated like contracts. It

is well settled that when there is a written contract, it is the duty of the Court to enforce the terms of that written contract and "not to insert what has been omitted or to omit what has been inserted." *See Mont. Code Ann.* § 1-4-101 (2019); *Nordwick v. Berg* (1986), 223 Mont. 337, 342, 725 P.2d 1195, 1199 (citations omitted); *Conagra, Inc. v. Nierenberg* (2000), 301 Mont. 55, ¶ 31, 7 P.3d. 369, ¶ 31; and *Mont. Code Ann.* § 28-3-201 (2019).

In this case, the language of the Amended Covenants plainly allows for use as a residence. The Amended Covenants specify that the property be "used for residential purposes only" as follows:



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Nothing herein contained shall prevent or restrict the building of garages, boathouses, or other buildings reasonably appartenant to the use of the real property for residential purposes, provided however, that no more than four buildings, excluding two dwelling units, shall be permitted on the above described lot.

No mobile homes or trailer homes will be allowed except for double wides that are set up on permanent foundations and painted in earth colors.

All homes shall contain a minimum of 800 square feet.

See Amended Covenants, p. 2 (emphasis added). The covenant language specifically references "used" within the provision, thereby clearly indicating that the proper focus is on the actual "use[]" of the property. *Id.* It is the actual "use[]" that the Court must compare to the directive in the covenant.

"Residential" has been defined by the Montana Supreme Court as meaning "used as a residence or by residents." *Tipton v. Bennett*, 281 Mont. 379, 382, 934 P.2d 203, 204. "Residence", in turn, means "the act or fact of dwelling in a place for some time." *Id.*

Properly focusing on the type of use, it is clear that Brown Drake is using its property as a dwelling. The owners of the LLC use the house at issue as a dwelling. *See Facts, ¶¶ 8-14.* The renters use the house as a dwelling. *Id.* The only use of the house is as a dwelling. *Id.* Everyone is using the property in the same way; everyone is using the property as a residence.

The language of the Amended Covenants is simple and clear. The use complies with the Amended Covenants. Based on the plain language alone understood in its popular sense and strictly construing the Amended Covenants in favor of free use, Brown Drake is simply not violating the Amended Covenants. Granting summary judgment in Brown Drake's favor was appropriate. Thus, the District Court made the correct decision and its Summary Judgment Order should be affirmed.

ARGUMENT

The proper focus is on the *use* that is made of the property. The Amended Covenants provide that the property "shall be used for residential purposes only." *Amend. Covenants, Appendix 1.* The Amended Covenants do not specify who must use the property as a residence nor the length of time the use may occur. In this

case, no matter who is using the property and no matter how long the use is for, the use is as a dwelling. The use of the home is as a residence. Accordingly, the District Court correctly held that the residential use complied with the Amended Covenants. Therefore, the District Court's decision should be affirmed.

A. The District Court Was Correct When It Held that the Guests' Use of the Property as a Dwelling Complied With the Amended Covenants' Requirement to Use the Property for Residential Purposes.

Everyone who uses the house in question uses it as a dwelling, which use complies with the Amended Covenants. Where a provision is clear and unambiguous, the court must apply the language as written. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91. When the language of a covenant is clear and explicit, that language will govern the interpretation of the covenants as a whole. *Tipton v. Bennett*, 281 Mont. 379, 381-82 (1997). The language of a covenant is to be understood in its ordinary and popular sense. *Mont. Code Ann. § 28-3-501.*

In this case, the language plainly allows for use as a residence. The Amended Covenants specify that the property be "used for residential purposes only" as follows:

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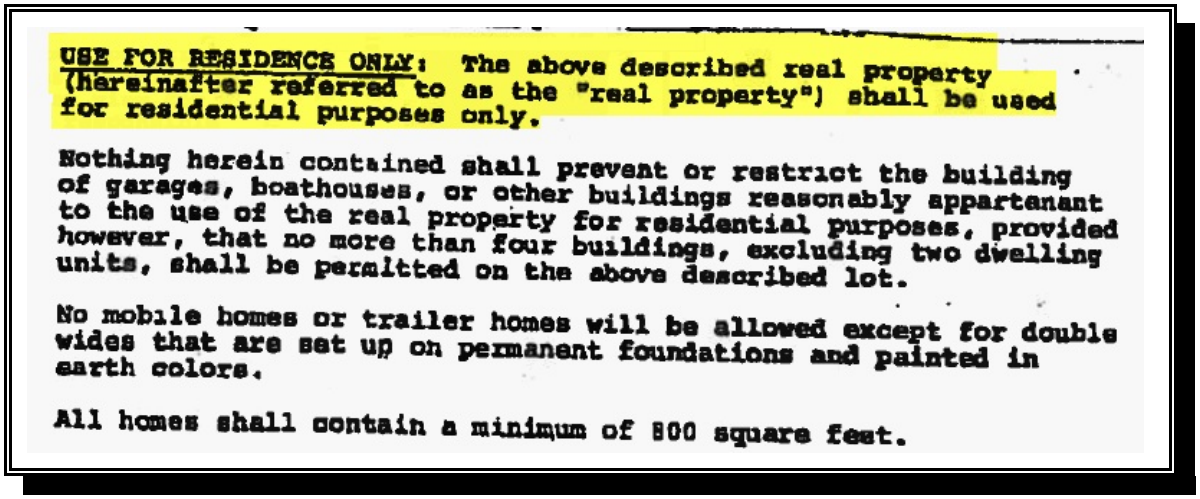

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No mobile homes or trailer homes will be allowed except for double wides that are set up on permanent foundations and painted in earth colors.

All homes shall contain a minimum of 800 square feet.

See Amended Covenants, p. 2 (emphasis added). The language plainly allows for the property to be used as a residence. *Id.*

The language does *not* preclude tenants of any kind. *Id.* The language does *not* specify that tenants must rent for 30 days or more at a time. *Id.* Everyone subject to the covenants may allow friends, family, guests, tenants, etc. to use their property, so long as the use is as a residence. For example, the language does *not* say that the Maricich Family Trust (one of the Plaintiff/Appellants who is a legal entity and therefore cannot use the property itself except through agents, guests, etc.) may not let Mr. Maricich family – or friends of the family – use its property. *Id.* The language does *not* say that only the owner(s) (or principal of an entity owner such as a member of an LLC or a trustee of a trust like the Appellant Maricich Family Trust or the Hemingway Trust) may use the property. *Id.* Anyone may use the properties covered by this covenant so long as the use is residential.

Id. There is simply no restriction on the length of use required nor how the user is named/characterized. *Id.*

Turning to the actual use of the Brown Drake property, the use is residential. Both the owners and tenants are using the property as a residence when they are staying there. "Residential" has been defined by the Montana Supreme Court as meaning "used as a residence or by residents." *Tipton v. Bennett*, 281 Mont. 379, 382, 934 P.2d 203, 204. "Residence", in turn, means "the act or fact of dwelling in a place for some time." *Id.*

Properly focusing on the *type of use*, it is clear that the use of the property is as a dwelling. The LLC owners, friends, family, and guests use the house as a dwelling. *See Facts, ¶¶ 8-14.* The renters similarly use the house as a dwelling. *Id.* The only use of the house is as a dwelling. *Id.* Everyone is using the property as a residence when they are using it because that is the purpose of the home.

The language of the Amended Covenants is simple and clear. The use complies with the Amended Covenants. Based on the plain language alone understood in its popular sense and strictly construing the Amended Covenants in favor of free use, the District Court was correct when it held that Brown Drake's use complied with the Amended Covenants. Brown Drake is simply not violating the Amended Covenants. That alone justifies granting Brown Drake summary judgment in its favor.

1. If the Amended Covenants are ambiguous (which they are not), then the ambiguity would have to be decided in favor of Brown Drake because covenants must be read in favor of the least restrictions possible.

In order for the HOA Appellants to prevail, they must first establish that their interpretation of the Amended Covenants creates an ambiguity, and then establish that their interpretation should be adopted by this Court. The District Court correctly held that there is no ambiguity in the Amended Covenants, but even if there were an ambiguity the end result would necessarily be the same because any ambiguity must be resolved in favor of not restricting use. In other words, even if the Court were to (for the sake of argument) explore what would hypothetically happen if there were an ambiguity, the result would be the same because ambiguities in covenants must be read in favor of free use of the property. Restrictions must be read to be as limited as possible, not read as broadly as possible.

To be clear, Brown Drake believes the District Court was correct when it held that there is no ambiguity. When the language of a contract is clear, unambiguous and, as a result, susceptible to only one interpretation, the duty of the court is to apply the language as written. *American Music Co. v. Higbee*, 324 Mont. 348, ¶ 17, 103 P.3d 518 (2004); *Mont. Code Ann.* § 28–3–303. When the language of the contract is not ambiguous a resort to parol evidence is not appropriate. *Empire Development Co. v. Johnson*, 236 Mont. 433, 770 P.2d 525

(1998). It is only if the language is subject to two different reasonable interpretations that the Court may look to parol or extrinsic evidence. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91 *citing Kuhr v. City of Billings,* 2007 MT 201, ¶ 18, 338 Mont. 402, ¶ 18, 168 P.3d 615, ¶ 18.

In this case, the Amended Covenants are not ambiguous. "An ambiguity exists where the language of the contract [covenants], as a whole, could reasonably be subject to two different meanings." *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91 *citing Kuhr v. City of Billings,* 2007 MT 201, ¶ 18, 338 Mont. 402, ¶ 18, 168 P.3d 615, ¶ 18; and *Mecca v. Farmers Ins. Exchange*, (2005), 329 Mont. 73, 122 P.3d 1190, ¶ 17 (emphasis added). The determination of whether an ambiguity exists in a restrictive covenant, as in a contract, is a question of law for a court to determine. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91.

The mere fact that the parties disagree as to the meaning of a covenant provision does not necessarily, in and of itself, create an ambiguity. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91 *citing Kuhr v. City of Billings,* 2007 MT 201, ¶ 18, 338 Mont. 402, ¶ 18, 168 P.3d 615, ¶ 18. It is well settled that "a conclusion of ambiguity is not compelled by the fact that the parties to a document, or their attorneys, have or suggest opposing interpretations of a contract, or even disagree as to whether the contract is reasonably open to just one interpretation." *Id.*, citing 11 *Williston on Contracts*, § 30.4, at 51-54 (4th ed.,

West 1999). Mere disagreement between the parties as to the interpretation of a written instrument does not automatically create an ambiguity. *Wurl v. Polson School Dist. No. 23,* 2006 MT 8, ¶ 17, 330 Mont. 282, ¶ 17, 127 P.3d 436, ¶ 17. Rather, the actual language must support two possible meanings.

Brown Drake does not believe there is an actual ambiguity because the language is only subject to one reasonable interpretation. Residential use means the property can be used as a residence. The HOA, however, is arguing that only certain categories of people may use the property as a residence. For example, the first sentence of Appellants' Argument section in its brief states that – under the HOA's interpretation of the Amended Covenants – that Brown Drake's owners (i.e. the members of the LLC) may use the property as a residence, but the second sentence goes on to argue that the same exact residential use[1] by anyone else

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[1] There is no genuine dispute that the renters and Brown Drake's owners both use the property as a residence when they are staying at the property. In its opening summary judgment brief at the district court level, Brown Drake specifically listed how the property was used (i.e. for sleeping, bathing, cooking, etc.) and specifically stated that the owners' use was identical to the renters' use. *See SJ St. of Facts.* The HOA presented no evidence contradicting that both the owners and the renters made the same physical use of the property. Similarly, in its Counterclaim Brown Drake alleged that the renters' use was residential, just as Brown Drake's owners' use was residential. *See Brown Drake, CC, ¶¶ 2-5.* The HOA group answered that they did not have sufficient information to contradict that allegation. *Appellant Answ. to CC, ¶ 5.* It was (and is) undisputed that the owners and other guests/renters all make the same use of the property (i.e. as a dwelling0).

allegedly violates the Amended Covenants. *See Opening Br., p. 6.* The use is the same, but the HOA draws a false distinction between users.

The HOA's attempted distinction between users is not actually found within the Amended Covenants. *See Amend. Covenants, Appendix 1.* The HOA's attempt to create a distinction where none exists does not create an ambiguity because the distinction is not actually found within the language of the document. Put another way, the HOA is reading into the Amended Covenants a restriction on *who* can use the property that is simply not found within the actual language of the Amended Covenants. Accordingly, the HOA is attempting to create the illusion of an ambiguity by reading language into the Amended Covenants that does not exist.

Looking at it from a different angel, the HOA is raising arguments based on *who* is using the property, not the *type of use*. As was discussed in the first section of this brief, the Amended Covenants address the *type of use* but are actually silent on the category of user. The Amended Covenants have no actual restriction on *who* uses the property, nor on the length of use. Put another way, under the language of the Amended Covenants, the focus is on the *nature of the use,* not the category or description of the user. The HOA's focus, however, is on *who* is using the property, not the *type of use*. Thus, the HOA is trying to create a false ambiguity by reading a restriction (i.e. *who* can use the property) into the Amended Covenants that does not actually exist. Accordingly, although Brown

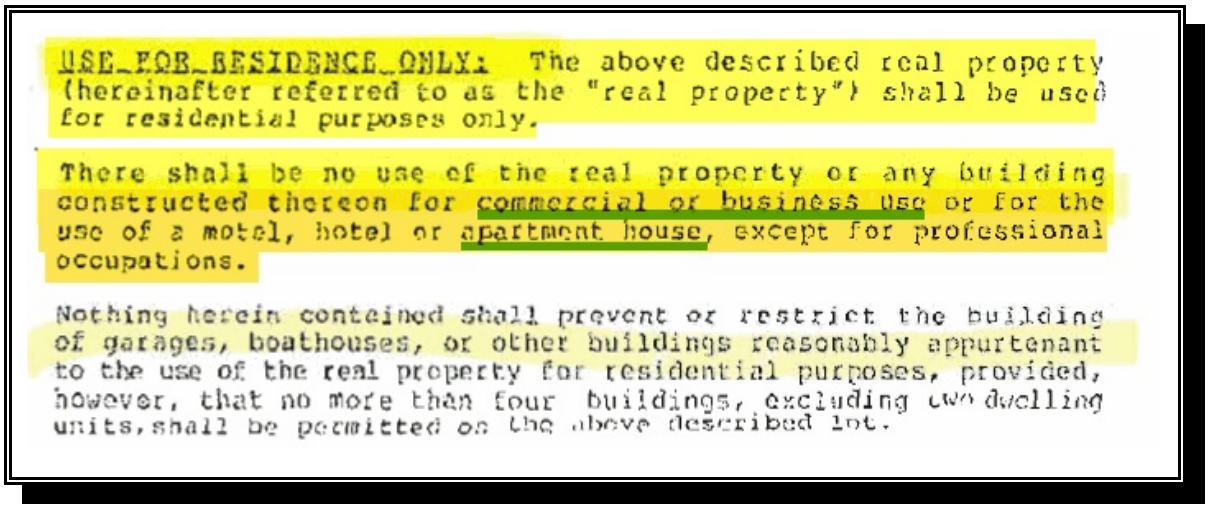
Drake and the HOA have a disagreement, there is no actual ambiguity relative to the language in the Amended Covenants.

For the sake of argument, however, even if there were an ambiguity summary judgment in favor of Brown Drake would have remained appropriate. Brown Drake would prevail either way because ambiguities in covenants are resolved in favor of allowing free use of property. *Czajkowski v. Meyers,* 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 91 *citing Kuhr v. City of Billings,* 2007 MT 201, ¶ 18, 338 Mont. 402, ¶ 18, 168 P.3d 615, ¶ 18. As a result, if there is somehow an ambiguity (which there is not), then the ambiguity must be resolved in favor of the least restrictive interpretation. *Id.*

Brown Drake's interpretation is the least restrictive. Because the least restrictive interpretation must prevail, the HOA group simply contending that they have a different interpretation of the covenants is not good enough for it to prevail in this case. Thus, even if the District Court had incorrectly found there was an ambiguity (which there is not), the end result would have necessarily been the same.

Moreover, even if there is an ambiguity (which there is not) the Court would then have to look to extrinsic evidence of intent. The extrinsic evidence in this case establishes that the covenants were specifically amended to remove the "commercial and business" restriction, implying that commercial and business income is allowed so long as the use is residential. *C.f. Original Covenants with*

Amended Covenants. In the Original Covenants, there was also language specifically precluding "commercial uses," including "apartment houses" as follows:



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Nothing herein contained shall prevent or restrict the building of garages, boathouses, or other buildings reasonably appurtenant to the use of the real property for residential purposes, provided, however, that no more than four buildings, excluding two dwelling units, shall be permitted on the above described lot.

See Original Covenants, Appendix 3, p. 1 (emphasis added). This "commercial or business use" and "apartment house" language, however, was specifically and intentionally removed in the current version of the Amended Covenants. *C.f. Id. and Amended Covenants, Appendix 1.*

The removal of this "commercial or business use" language, (along with the "residential use" language surviving the amendment), can only support the conclusion that the intent of the amendment was that commercial or business income from rentals being allowed so long as the *use* of the property remains as a residence. The owners at the time of the amendment would not have removed "commercial or business use" restrictions as well as the "apartment house" restriction if they intended to preclude all residential rentals. Because the

amendment did not insert a time limit on the rentals, the extrinsic evidence also supports that short-term rentals were contemplated as being allowed (or at least not contemplated as being restricted).

In addition, prior property owners in this subdivision actually rented their properties on a short-term basis. Attached to Brown Drake's Brief in Support of its Motion for Summary Judgment as Exhibits C and D were affidavits from Cindi Bratvold and Gerald Lappier. *See Aff. of Bratvold, Appendix 4; and Aff. of Lappier, Appendix 5.* Ms. Bratvold testified that the Marcich Family Trust property was previously owned by the former President of the Craig Tracts Homeowners Association, Inc. That property was rented out by the former President of the HOA. *See Aff. of Bratvold, ¶¶ 6-8, Brown Drake SJ Br., Exhibit C.* Gerry Lappier, the owner of the company that acted as the booking agent for those rentals, similarly confirmed that the Maricich property was rented to short term tenants for years. Specifically, Mr. Lappier testified that for approximately eight (8) years, the former owner of the Maricich Family Trust property rented the property to short-term tenants (usually 3-5 days, according to Mr. Lappier). *See Aff. of Lappier, ¶¶ 2-8.*

Reading everything together and not adding words that are not actually found within the Amended Covenants, renting to short-term tenants is allowed, so long as the tenants' use of the property remains as a residence or dwelling. Not only does the current language not restrict residential rental use, the only rational

interpretation is that rental use is allowed so long as the use of the property remains as a residential rental. The extrinsic evidence also supports Brown Drake's interpretation of the Amended Covenants. Thus, even if there were an ambiguity (which there is not), the fact would remain that Brown Drake would still be entitled to summary judgment in its favor. The District Court's decision should be affirmed.

2. *Cases from other jurisdictions are in accord with the District Court's holding that short-term rentals do not violate the Amended Covenants.*

As an initial matter, Brown Drake recognizes that every covenant case is somewhat unique because every set of covenants are unique. Because the interpretation of covenants depends on the specific language found in those specific covenants, holdings in other cases that interpret language found in other covenants with different language may not be particularly useful. As such, prior cases often only have persuasive value and, even then, only where the language is identical (or nearly identical). Any case without similar "residential purposes" language and that does not have the same history of commercial restrictions being removed may not be persuasive. As a result, Brown Drake is primarily relying on the language in these Amended Covenants, interpreted under Montana law.

Having said that, it is worth noting that other courts that have looked at the broad underlying issue have held in Brown Drake's favor. For example, in *Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord*, a district court of appeals for

Florida relatively recently held that short term rentals comply with a "residential use" covenant when renters are using the property for ordinary living purposes such as sleeping and eating, regardless of the duration of rental period. 219 So.3d 111, 114 (Fla. Dist. Ct. App. 2017), *Appendix 6.* In *Acord*, just as in the present case, a property owners association brought suit against three property owners alleging that the three owners were in violation of restrictive covenants by using their properties as short-term vacation rentals while advertising on a website. *Id.* In the *Acord* case, the covenants not only restricted the use of the properties to "residential purposes", the covenants also specifically precluded "business purposes" as follows:

[Depiction on following page]

219 So.3d 111
District Court of Appeal of Florida, First District.

SANTA MONICA BEACH PROPERTY OWNERS ASSOCIATION, INCORPORATED, Joe Bailey, Lew James, Cindy Dood, Janet Dick–Grace, Adrian Holman, Joyce Hoskins, John Hunter, Mark Jamison, Barbara Ramlow, Gary Salter, Steve Sanders, and Bob Whitson, Appellants,

v.

David ACORD and Wife, Virginia Acord, and William C. Alford, Appellees.

CASE NO. 1D16–4782
Opinion filed April 28, 2017

...

Factual and Procedural Background

Appellees own two properties[1] in the Santa Monica Beach subdivision in Bay County. The properties are subject to restrictive covenants which provide in pertinent part:

> ***113** Said land shall be used only for residential purposes, and not more than one detached single family dwelling house and the usual outhouses thereof, such as garage, servants' house and the like, shall be allowed to occupy any residential lot as platted at any one time; nor shall any building on said land be used as a hospital, tenement house, sanitarium, charitable institution, or for business or manufacturing purposes nor as a dance hall or other place of public assemblage.

(emphasis added).

Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord, 219 So.3d 111, 113 (Fla. Dist. Ct. App. 2017), *Appendix 6.* Thus, the covenants in the *Acord* case provided

even stronger language against short-term rentals than the Amended Covenants provide in the present case.

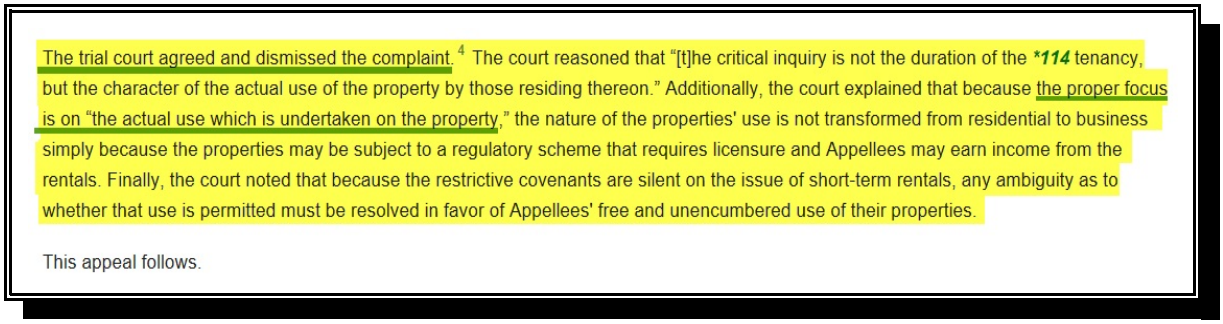
In the *Acord* case, just as the HOA did in the present case, the property owners' association sent a demand letter arguing that the rental of the properties as vacation rentals by owner (VRBO) violated the restrictive covenants. *Id.* Just as in the present case, in *Acord* the association cited to the advertisement of the properties on a website, argued that the owners had to pay sales and local bed taxes on the rentals, and that the Acords had obtained a license to operate the property as a transient public lodging establishment under the name "Acord Rental." *Id.* Just as in the present case, in *Acord* the association contended the short-term rental use was business use. *Id.*

The Acords argued that "the short-term vacation rentals were residential uses–and not business uses–because the renters were using the properties for residential purposes." *Id.* In *Acord*, the Acords argued that the focus should be on the use, not whether the Acords complied with required licensing to allow for the use:

> uses—because the renters were using the properties for residential purposes: "Critically, the [Association] ha[s] not alleged that the properties are being rented for any purpose other than residential use by residential tenants. ... [T]he fact that this use is residential in character, and not a commercial or 'business' use, is conclusively established by the fact that [the Association] repeatedly refer[s] to Florida's statute concerning 'public lodging,' lodging being an inherently residential use of a dwelling" (emphasis in original).

Id. In a nutshell, the arguments in *Acord* and the arguments being made in the present lawsuit are very similar.

Just as the District Court in the present case held in Brown Drake's favor, the district court in *Acord* held in favor of Acord, dismissing the case on a Rule 12(b)(6) motion standard, reasoning that the critical inquiry was the character of the actual use, not the duration of the tenancy:



The trial court agreed and dismissed the complaint.[4] The court reasoned that "[t]he critical inquiry is not the duration of the ***114** tenancy, but the character of the actual use of the property by those residing thereon." Additionally, the court explained that because the proper focus is on "the actual use which is undertaken on the property," the nature of the properties' use is not transformed from residential to business simply because the properties may be subject to a regulatory scheme that requires licensure and Appellees may earn income from the rentals. Finally, the court noted that because the restrictive covenants are silent on the issue of short-term rentals, any ambiguity as to whether that use is permitted must be resolved in favor of Appellees' free and unencumbered use of their properties.

This appeal follows.

Id. (emphasis added). In other words, under a nearly identical case with covenants that have very similar "residential use" language and applying the same laws as those found in Montana, the district court in *Acord* held in favor of Brown Drake's position. *Id.*

On appeal, just as Brown Drake is asking this Court to affirm the District Court, the appellate court in *Acord* affirmed the district court's holding. *Id.* In making its holding, the appellate court recognized that although this was an issue of first impression in Florida (in 2017), nearly every other court that had addressed the issue had "almost uniformly" agreed with Brown Drake's legal analysis:

> The specific issue in this appeal—whether short-term vacation rentals violate restrictive covenants requiring property to be used only for residential purposes and prohibiting its use for business purposes—appears to be a matter of first impression in Florida. See generally William P. Sklar & Jerry C. Edwards, Florida Community Associations Versus Airbnb and VRBO in Florida, Fla. Bar. J., Feb. 2017, at 16. However, courts in a number of other states have considered the issue and those courts have almost uniformly held that short-term vacation rentals do not violate restrictive covenants nearly identical to those at issue in this case. See Gadd v. Hensley, —— S.W.3d ——, 2017 WL 1102982 (Ky. Ct. App. Mar. 24, 2017) (unpublished opinion); Houston v. Wilson Mesa Ranch Homeowners Ass'n, 360 P.3d 255 (Col. App. 2015); Wilkinson v. Chiwawa Communities Ass'n, 180 Wash.2d 241, 327 P.3d 614 (2014) (en banc); Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez, 300 P.3d 736 (N.M. Ct. App. 2013); Russell v. Donaldson, 222 N.C.App. 702, 731 S.E.2d 535 (2012); Slaby v. Mountain River Estates Residential Ass'n, 100 So.3d 569 (Ala. Civ. App. 2012); Applegate v. Colucci, 908 N.E.2d 1214 (Ind. Ct. App. 2009); Mason Family Trust v. DeVaney, 146 N.M. 199, 207 P.3d 1176 (N.M. Ct. App. 2009); Ross v. Bennett, 148 Wash.App. 40, 203 P.3d 383 (2008); Scott v. Walker, 274 Va. 209, 645 S.E.2d 278 (2007); Lowden v. Bosley, 395 Md. 58, 909 A.2d 261 (2006); Mullin v. Silvercreek Condo. Owner's Ass'n, 195 S.W.3d 484 (Mo. Ct. App. 2006); Pinehaven Planning Bd. v. Brooks, 138 Idaho 826, 70 P.3d 664 (2003); Yogman v. Parrott, 325 Or. 358, 937 P.2d 1019 (1997) (en banc); Catawba Orchard Beach Ass'n v. Basinger, 115 Ohio App.3d 402, 685 N.E.2d 584 (1996); but see Shields Mountain Property Owners Ass'n v. Teffeteller, 2006 WL 408050 (Tenn. Ct. App. Feb. 22, 2006) (unpublished opinion); Benard v. Humble, 990 S.W.2d 929 (Tex. App.– Beaumont 1999).

Id. (emphasis added). The appellate court agreed with the district court's analysis that licensing and advertising changed nothing because the actual use was "residential." *Id.* The appellate court in *Acord* affirmed the dismissal. The case was not appealed further. Although this is an issue of first impression in Montana, the same reasoning as was found in the *Acord* case holds true in this case. Dismissing the present case is just as appropriate as it was in the *Acord* case. Affirming the District Court's decision is also just as appropriate. The courts in the *Acord* case got it correct as did the District Court in this case.

3. The Montana Legislature specifically contemplated that short-term rentals like is found here could be residential use.

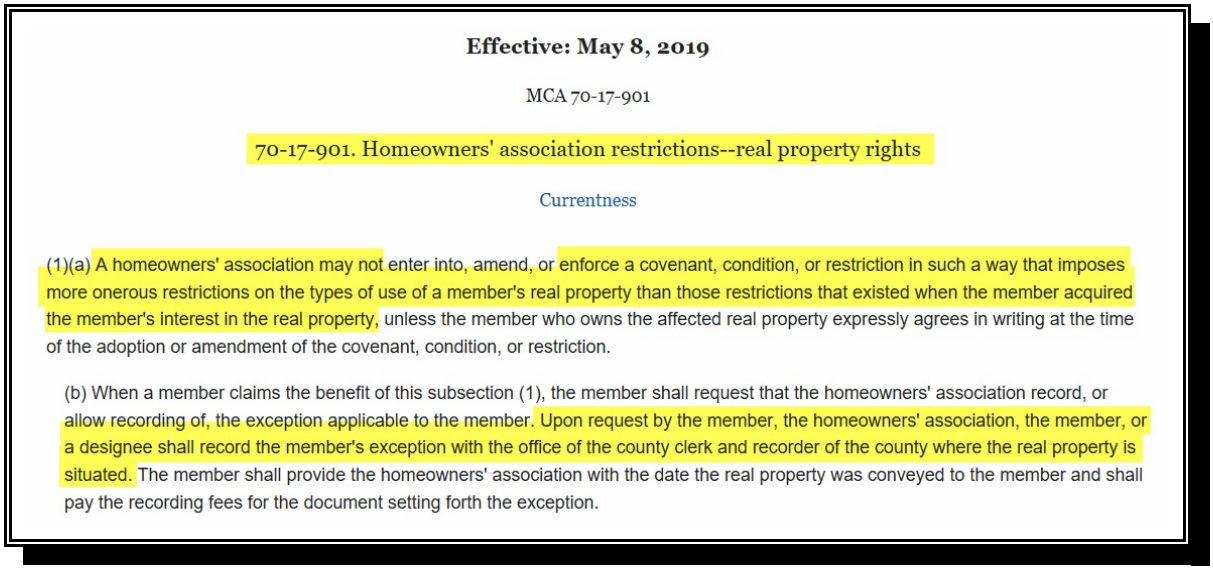
The HOA's premise – that because short-term rentals are regulated under a different law than the Landlord-Tenant Act the use cannot be residential – is flawed. The HOA seems to be arguing that because M.C.A. § 50-51-101 et. seq. requires "private home[s]" that are "rented, leased, or furnished in its entirety to

transient guests on a daily or weekly basis" to obtain a license through the state of Montana, then the use cannot be residential because the Montana Residential Landlord-Tenant Act does not apply. *Opening Br., §C.* The fact is, however, the determinative factor in whether M.C.A. § 50-51-101 et. seq. or the Landlord-Tenant Act regulates a particular transaction is the length of the tenancy, not the character of the use. As such, which regulatory scheme applies is not determinative of whether the character of the use is residential or not residential. Residential use of a private home may be regulated under M.C.A. § 50-51-101 et. seq. if the rentals are by the day or week, or the Landlord-Tenant Act if the rentals are 30 days or more. In either case, the regulatory scheme does not change the character of the use.

A private home can be leased out for residential use and still fall under the statutory scheme set forth in M.C.A. § 50-51-101 et. seq. In fact, M.C.A. § 50-51-101 et. seq. clearly contemplates that the use may fall under this statutory scheme and still be "residential." For example, a "Bed and breakfast" (which is not what is being run in this case, but which is covered by the statutory scheme that the HOA objects to) is defined in relevant part as "a private, owner- or manager-occupied *residence* that is used as a *private residence* but in which…." *Mont. Code Ann. § 50-51-102(1)(emphasis added).* The code sections set forth in M.C.A. § 50-51-101 et. seq. apply to private "residence[s]" on their face. Whether the Brown Drake property is regulated under M.C.A. § 50-51-101 et. seq. or the

Landlord-Tenant Act does not change the fact that the actual use is residential.

The Montana Legislature also recently passed a bill that refers to short-term rentals like those in the present case as including "residential" rentals, indicating a legislative intent that short-term rentals of homes be considered residential. In the last legislative session, the Montana Legislature passed a law preventing a Homeowners' Association from enforcing covenants to restrict short-term rentals as follows:



Effective: May 8, 2019

MCA 70-17-901

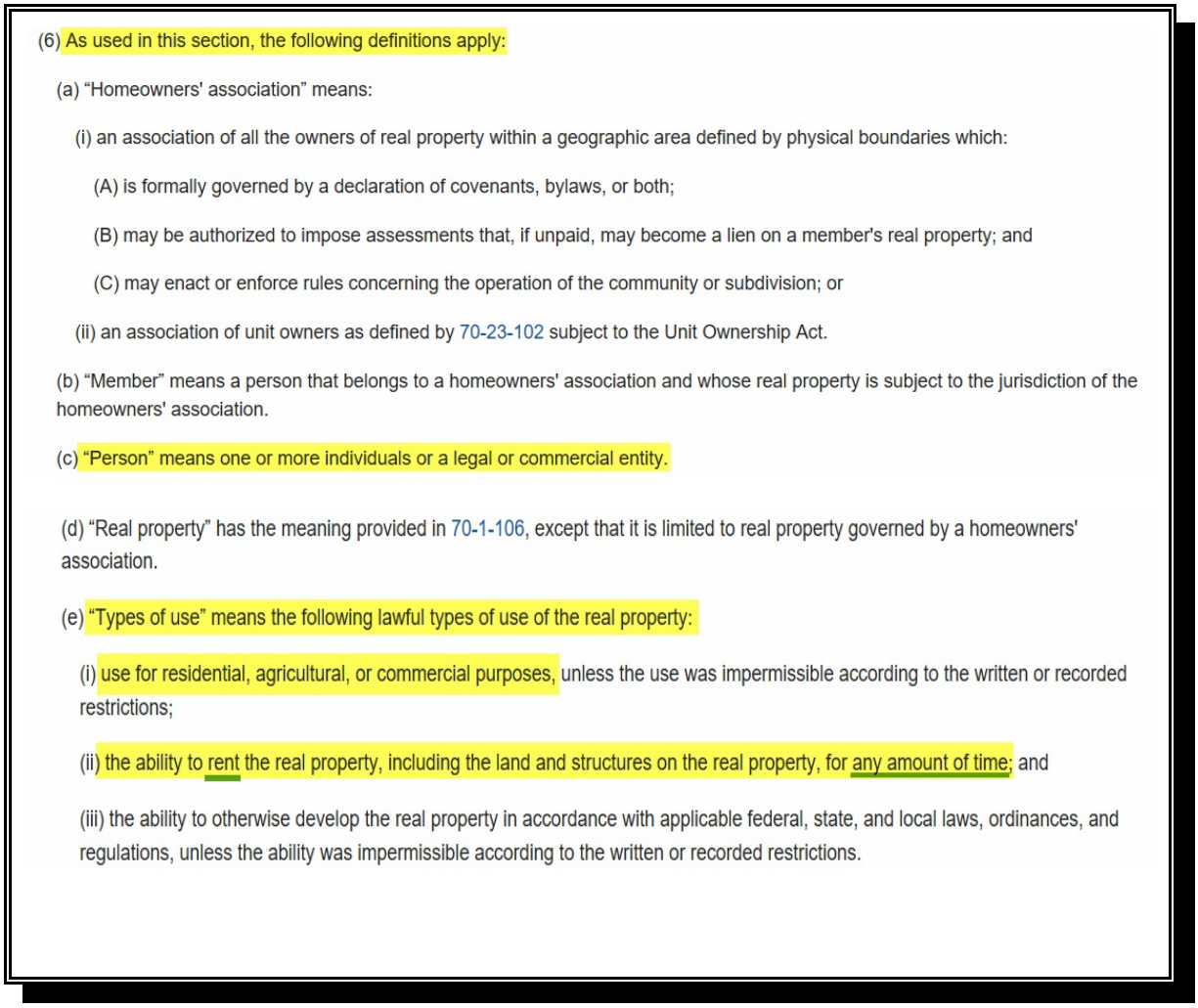
70-17-901. Homeowners' association restrictions--real property rights

Currentness

(1)(a) A homeowners' association may not enter into, amend, or enforce a covenant, condition, or restriction in such a way that imposes more onerous restrictions on the types of use of a member's real property than those restrictions that existed when the member acquired the member's interest in the real property, unless the member who owns the affected real property expressly agrees in writing at the time of the adoption or amendment of the covenant, condition, or restriction.

(b) When a member claims the benefit of this subsection (1), the member shall request that the homeowners' association record, or allow recording of, the exception applicable to the member. Upon request by the member, the homeowners' association, the member, or a designee shall record the member's exception with the office of the county clerk and recorder of the county where the real property is situated. The member shall provide the homeowners' association with the date the real property was conveyed to the member and shall pay the recording fees for the document setting forth the exception.

Mont. Code Ann. § 70-17-901(1) (emphasis added). This new statute specifically contemplates that the "types of use" may include renting the property for any length of time and contemplates that the use may be "residential" use, which is the exact use that Brown Drake is making of its property:



(6) As used in this section, the following definitions apply:

(a) "Homeowners' association" means:

(i) an association of all the owners of real property within a geographic area defined by physical boundaries which:

(A) is formally governed by a declaration of covenants, bylaws, or both;

(B) may be authorized to impose assessments that, if unpaid, may become a lien on a member's real property; and

(C) may enact or enforce rules concerning the operation of the community or subdivision; or

(ii) an association of unit owners as defined by 70-23-102 subject to the Unit Ownership Act.

(b) "Member" means a person that belongs to a homeowners' association and whose real property is subject to the jurisdiction of the homeowners' association.

(c) "Person" means one or more individuals or a legal or commercial entity.

(d) "Real property" has the meaning provided in 70-1-106, except that it is limited to real property governed by a homeowners' association.

(e) "Types of use" means the following lawful types of use of the real property:

(i) use for residential, agricultural, or commercial purposes, unless the use was impermissible according to the written or recorded restrictions;

(ii) the ability to rent the real property, including the land and structures on the real property, for any amount of time; and

(iii) the ability to otherwise develop the real property in accordance with applicable federal, state, and local laws, ordinances, and regulations, unless the ability was impermissible according to the written or recorded restrictions.

Id. (emphasis added). Labeling use for "any amount of time" as including potential "residential...use" indicates a legislative recognition that short-term rentals are potentially "residential."

Notably, this new law also specifically states that a homeowners association may not enforce a covenant in such a way that it restricts a type of use that was allowed at the time the member acquired the property:

> (5) Nothing in this section invalidates existing covenants of a homeowners' association or creates a private right of action for actions or omissions occurring before May 8, 2019. However, after May 8, 2019, unless the member has consented as provided by subsection (1), a homeowners' association may not enforce a covenant, condition, or restriction in such a way that limits the types of use of a member's real property that were allowed when the member acquired the affected real property.

Id. at (5) (emphasis added). At the District Court level, Brown Drake raised this new statute as potentially prohibiting the HOA from enforcing the Amended Covenants in this new way. Because the Amended Covenants do not prevent the use in this case, the argument need not be addressed further here. It is worth noting, however, that the bill was introduced because of short-term rentals and covers "residential" use.

This bill was drafted by a homeowner in Red Lodge who purchased a house to use, in part, as a Vacation Rental by Owner ("VRBO"). The homeowner's association in the drafter's case subsequently voted in favor of an amendment to the covenants to clarify the covenants in a way that resulted in a complete ban on short term rentals. The drafter wrote the bill to prevent associations from changing the rules and/or re-interpreting rules after someone buys a property. Proponents of the bill argued the importance of knowing what rights a homeowner has when purchasing a home and having a guarantee that those rights remain in effect during the entirety of their ownership. Sudden restrictions in the type of use could force a homeowner to sell their home or prevent them from using the property as intended. Further, changes in restrictions on types of use after purchase may force a homeowner to use the residence in a manner inconsistent with the use reported on

loan applications, tax documents, etc. The Montana Legislature agreed with the policy reasons behind the bill, adopted the bill, and made it effective as of May 8, 2019. The point for the present brief, however, is that the Montana Legislature referring to short-term rentals as potentially "residential" in this statute contradicts the HOA's contention that short-term rentals can never be considered "residential."

The fact remains that whether the use is by owners, friends, family, the principals of a legal entity, or whether the use would be regulated under the Residential Landlord and Tenant Act, under M.C.A. § 50-51-103 et. seq., or under any other law or no law, if the home is used as a residence or dwelling then the use is allowed under these Amended Covenants.

CONCLUSION

The focus of the covenant language is on the type of "use[]", not *who* uses the property. *See Amend. Covenants.* Looking at the plain language of the Amended Covenants and strictly construing the language, the language does not specify *who* must use the property as a residence. *Id.* The language does not say residential tenants may not use the property. *Id.* The language does not say the LLC's members' families cannot use the property. *Id.* Rather, the Amended Covenants focus solely on the *type* of "use" (i.e. what people, no matter who they are, may actually be doing at the property). In other words, the distinction between the owners using the property as a residence and renters using the property as a residence is simply non-existent within the actual language at issue. The Amended

Covenants do not restrict *who* may use the property nor do they restrict the length of use; the Amended Covenants only restrict the *type* of use. The Amended Covenants only specify that the property itself must be used as a residence. In this case, the property is being used as a residence no matter who is using it.

Residential use is commonly understood as using the property as a dwelling. As the Montana Supreme Court said almost two decades ago, "...if it looks like a duck, walks like a duck and quacks like a duck, it must be a duck. We would only add that it must be a duck even if it is holding a piece of paper that says it is a chicken." *Wild v. Fregein Construction* (2003), 315 Mont. 425, 63 P.3d 855, ¶31. No matter how the Plaintiffs try to characterize the use, the fact is Brown Drake's home is used as a dwelling by everyone who uses it. There is no difference between a family of four renting the property for a week to fish and Cindi Bratvold's knitting group using the property for a week. The essential nature of the use remains the same. The semantics of how the persons may be labeled by others (i.e. "tenant" or "friend") do not change the character of the use. A rose by any other name is still a rose. Residential use by a friend or residential use by a short-term tenant is still residential use. The use is allowed in either case.

Interpreting the Amended Covenants to now preclude short-term rentals would effectively deprive Brown Drake of much of the value of its property, could potentially impact its financing, and would be inconsistent with how other properties have been treated. At the time Brown Drake purchased its property, it

was told that at least one other home in the same Amended Covenant area had been rented out at various times of year without any objections, which was true. *See Aff. of Bratvold, ¶ 6; and Aff. of Lappier ¶¶ 4-8.* The property currently owned by Plaintiff Maricich Family Trust was also rented as a residential rental at one time. *Id. at ¶ 8; and Id.* Brown Drake purchased the property with the expectation of using the property in the same manner as other owners (as a part-time rental) and expected its right to use the property in that manner remain in effect during its ownership. *See Aff. of Bratvold, ¶ 7.*

The Amended Covenants were not previously interpreted as precluding rentals. This Court, as well as other courts around the country, have previously avoided depriving owners of the reasonable expectations that existed when they purchased their properties. *See e.g. Houden v. Todd*, 2009 WL 10243654 (Mont. Dist., Aug. 12, 2009), *6 (aff'd in relevant part by 2014 MT 113, 375 Mont. 1, 324 P.3d 1157); *Wilkinson v. Chiwawa Communities Ass'n.*, 180 Wash. 2d 241, 257, 327, P.3d 614, 622-23 (2014) (invalidating an amendment adding a short-term rental prohibition); and *Estates at Desert Ridge Trails Homeowners' Ass'n.*, 300 P.3d 736, 744 (N.M. App. Ct. 2013) (concluding that prohibiting short-term rentals was an "unreasonable restriction on Defendant's use of his lot."). At the time Brown Drake purchased its property, the Amended Covenants were not

enforced[2] as preventing the short-term rental use that the HOA now complains of. Brown Drake's expectation that it could rent the property is reasonable. The HOA should not be permitted to interpret the Amended Covenants differently now to limit Brown Drake's use of its property.

If the Court affirms the District Court, its holding will be consistent with Montana's existing covenant laws. Brown Drake, its owners, and its guests will continue to use the home as a dwelling (sleeping, cooking, eating, bathing, and communicating with each other – including siting out by the fire pit just like the neighbors do at their own fire pit). The use will remain as a dwelling and will be no more than would be expected of any dwelling.

To the extent the HOA is attempting to make their lawsuit against Brown Drake appear more reasonable by complaining about a hypothetical hotel in the future, that hypothetical is not only not at issue before the Court, the hypothetical is silly. Brown Drake constructed its building after buying the lot. Brown Drake did not build a hotel. Brown Drake has no intention of building a hotel, nor would that even be financially viable. The town of Craig does not even have enough

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[2] As Brown Drake argued in its summary judgment brief, M.C.A. § 70-17-901 arguably prohibits any enforcement of the Amended Covenants at this time in the present case. Under this new law, after May 8, 2019 the Appellants cannot "enforce" more onerous restrictions than those enforced at the time Brown Drake purchased the property. Because the District Court correctly interpreted the Amended Covenants, however, it is not necessary to address that argument on appeal.

business to support a gas station. No hotel could survive only renting rooms for a few months out of the year. A hotel has not been threatened nor is it reasonably a risk.

At any rate, whether a hypothetical future hotel (built by someone other than Brown Drake) is allowed or not is not before this Court in this litigation. Generally speaking, "Courts can only decide justiciable controversies – those that are 'definite and concrete, touching legal relations of parties having adverse legal interests and admitting of specific relief through decree of conclusive character.'" *City of Deer Lodge v. Fox*, 2017 MT 129, ¶ 8, 387 Mont. 478, 395 P.3d 506. Moot, hypothetical, or abstract questions are not something the Court has the authority to decide. *Id.* The issue in the present case is limited to Brown Drake's use and whether that use is residential. The hotel hypothetical will have to wait until there is an actual controversy over that hypothetical.

The issue before the Court is whether Brown Drake's current use is residential or not. The District Court reached the correct conclusion when it held that Brown Drake's use is residential. No matter what label the HOA is trying to pin on the users (i.e. friend, owner, tenant, guest, etc.), the fact remains the *use* is residential. There can be no genuine dispute that the *use* is residential because there is no genuine dispute over the fact that the home is used as a dwelling. Accordingly, Brown Drake's use complies with the Amended Covenants. The District Court did not make a mistake by enforcing the Amended Covenants as

written. The District Court's grant of Brown Drake's motion for summary judgment was appropriate. Thus, Brown Drake is respectfully requesting that this Court affirm the District Court's March 10, 2020 Summary Judgment Order.

Respectfully submitted this 26th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 11.0 for Windows plus counting the words in the screen shot depictions of documents is 9,616 words, not averaging more than 280 words per page, excluding the certificate of service and certificate of compliance.

Dated this 26th day of August, 2020.

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