IN THE SUPREME COURT OF THE STATE OF MONTANA

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, MICHKELSON INVESTMENTS, LLC, SALLIE A. LOSEY, HEMINGWAY PATRICK & CAROL T. REVOCABLE LIVING TRUST,

Plaintiffs and Appellants,

v.

BROWN DRAKE, LLC

Defendant and Appellee

Community Association Institute's *AMICUS CURIAE* BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark County

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M.C.A. § 28-3-303;

Black's Law Dictionary, Sixth Edition

STATEMENT OF INTEREST

Amicus Curiae the Community Associations Institute ("the Community Association") is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals, with the intent of promoting successful communities through effective, responsible governance and management. It has a number of members within the state of Montana, including property management companies, law firms

which specialize in community association law and various owner's associations. Through those members, the Community Association represents thousands of Montana citizens.

Over the last two decades, the issue of whether traditional covenant language restricting the use of a home or condominium unit to "residential use only" bans the use of short-term rentals or tourist homes has come before multiple courts within the United States. This surge of cases followed the short-term leasing popularity wave which was created by the launch of such sites as VRBO, AirBnB and Homeaway. At first, most states found that the traditional "residential use only" and the similar "no commercial use" language did not ban short-term rentals. As the United States has gained a more sophisticated understanding of the difference between short-term transient use and long-term leases these rulings have morphed. Now, some jurisdictions are finding that "residential use only" or "no Commercial use" language does ban short-term rentals. Others include a more case by case approach to each situation, looking extensively into each individual use, instead of a global ruling that "residential use only" and "no commercial use" language would never prevent a short-term rental.

The Community Association urges the Montana Supreme Court to find that "residential use only" and similar language bans short-term rentals within a community. For the reasons clearly set forth in Craig Tracts Homeowner's

Association, Inc, et al.'s brief, including but not limited to the transient nature of the use, the hotel tax, the definition of a tourist house and the fact that the guests have no possessory interest in the property, short-term rentals are clearly not a residential use.

In the alternative, the Community Association urges the Montana Supreme Court to adopt a case by case approach to short-term rentals when faced with the traditional covenant language either restricting use to "residential only" or language that states that there shall be "no commercial use." Short-term use varies property by property and in many cases the actual use (as opposed to looking behind the curtains at the hotel tax, insurance differences and the like) is clearly a commercial and not a residential use. In other words, as Justice Stewart famously opined in when concurring in *Jacobellis v. State of Ohio*, you will know it when you see it, and the citizens of Montana should be able to rely on their covenants when short-term rental use is clearly a commercial and not a residential use. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964).

ARGUMENT

1. **The Montana Supreme Court Should Find that Short-term Rentals are Prohibited by Covenants that have "Residential Use Only" Language.**

Residential use only language is unambiguous, and clearly prohibits short-term rentals. According to Montana law, general rules of contract interpretation apply to restrictive Covenants. *Creveling v. Ingold*, 2006 MT 57, ¶8, 331 Mont. 322, 325, 132 P.3d 531, 533. Any person having an interest under a writing constituting a contract—like a restrictive covenant—may seek declaratory relief concerning any question of construction arising under the instrument. M.C.A. § 27-8-202. Where a contract, and by extension a restrictive covenant, has been reduced to writing, the intention of the parties is to be ascertained, if possible, from the writing alone. M.C.A. § 28-3-303; *Wurl v. Polson School Dist. No. 23,* 2006 MT 8, ¶ 16, 330 Mont. 282, 127 P.3d 436 (citation omitted). 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. *King Resources, Inc. v. Oliver,* 2002 MT 301, ¶ 21, 313 Mont. 17, 59 P.3d 1172. Restrictive Covenants are strictly construed and ambiguities in covenants are resolved to allow free use of property. *Newman v. Wittmer* (1996), 277 Mont. 1, 6, 917 P.2d 926, 929. Mere disagreement between the parties as to the interpretation of a written instrument, however, does not automatically create an ambiguity. *Wurl,* ¶ 17 (citations omitted). Where the language of a covenant is clear and explicit, the Court must apply the language as written. *Wurl,* ¶ 16 (citations omitted).

The Montana Supreme court regularly relies on dictionaries to determine the plain meaning of a term. Relying on Webster's Dictionary, the Montana Supreme court defined "residential" as "used as a residence or by residents." "Residence" is then defined as "the act or fact of dwelling in a place for some time." *Hillcrest Homeowners Ass'n v. Wiley* (1989), 239 Mont. 54, 56, 778 P.2d 421, 423.

Furthermore, Black's Law Dictionary defines "residence" as "place where one actually lives or has his home." *Black's Law Dictionary*, (6th Ed. 1990). It further defines "residence" as "personal presence at some place of adobe with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently." *Black's Law Dictionary*, (6th Ed. 1990).

Thus, a residential use would be a use consistent with using the residence as a permanent adobe, for some time and with no present intention of early removal. Short-term leasing violates the core definition of "residential use" in that it is inherently not permanent. Instead of knowing who your neighbors are, their quirks and their customs, all of which go to making a residential area a community, short-term leasing brings strangers in and out of a community, daily or weekly, all of whom have no ties to the community. This bring inherent conflict, which is exactly what the "residential use only" language was meant to prohibit.

Such conflicts in use are why these cases have landed in Courts across the United States. While the language prohibiting short-term leasing may vary, the underlying facts and reasoning are similar to this matter.

In *Eager v. Peasley*, the Michigan Court of Appeals ruled that short-term leasing of a vacation home violated a covenant that limited the use to "private occupancy." *Eager v. Peasley*, 322 Mich. App. 174, 189, 911 N.W.2d 470, 478 (2017). Furthermore, the use also clearly violated the covenant prohibiting "commercial use." *Eagar*, 322 Mich. App. at 191, 911 N.W.2d at 479. While the language is different, the sentiment throughout the ruling was not. This was about whether short-term transient leasing is residential or commercial in nature. In *Eager,* the Court found that because of the transient nature of the length of stay, it was a commercial business. *Eagar*, 322 Mich. App. at 191, 911 N.W.2d at 479.

In coming to this conclusion, the Court relied heavily on its past decisions. Unlike Montana, Michigan has a long appellate history regarding "residential use only" and defining its meaning. In, *O'Connor v. Resort Custom Builders, Inc.* the Michigan Court ruled that interval ownership violated the "residential use only" language in their Covenants. *Eager*, 322 Mich. App. at 184, 911 N.W.2d at 475 *citing O'Connor v. Resort Custom Builders, Inc.,* 459 Mich. 335, 591 N.W.2d 216 (1999). The Court had previously adopted the concept " 'that the usual, ordinary and incidental use of property as a place of abode does not violate the covenant

restricting such use to "residential purposes only," but that an unusual and extraordinary use may constitute a violation ....' " *Eager*, 322 Mich. App. at 185, 911 N.W.2d at 476 *citing O'Connor*, 459 Mich. at 345, 591 N.W.2d 216, which *cited Wood v. Blancke, 304 Mich. 283, 8 N.W.2d 67 (1943).*

The Court then turned to the definition of "residential purpose." Once again citing *Wood,* the court explained:

> [A] residence most narrowly defined can be a place which would be one place where a person lives as their permanent home, and by that standard people could have only one residence, or the summer cottage could not be a residence, the summer home at Shanty Creek could not be a residence if the principal residence, the place where they permanently reside, their domicile is in some other location, but I think residential purposes for these uses is a little broader than that. It is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It is another residence for them, and it has a permanence to it, and a continuity of presence, if you will, that makes it a residence. [*O'Connor*, 459 Mich. at 345, 591 N.W.2d 216 (quotation marks omitted).]

Eager v. Peasley, 322 Mich. App. 174, 185, 911 N.W.2d 470, 476 (2017). In other words, just as *Black's Law Dictionary* defines residence, it is much more permanent than a short-term rental. Thus, interval ownership violated the "residential use only" language as the use was too temporary to truly be a residential use. *Eager*, 322 Mich. App. at 185-6, 911 N.W.2d at 476-7 *citing O'Connor*, 459 Mich. at 346, 591 N.W.2d 216.

Similar, the Kentucky Supreme Court also found that "residential use only" language in a community's covenants prohibited short-term rentals. *Hensley v. Gadd*, 560 S.W.3d 516, 525 (Ky. 2018) In a case very like this matter, the Court looked at the plain meaning of the terms "residential" and "reside." The Court found that:

> The common meaning of the word "reside" is "to dwell permanently or continuously: [to] occupy a place as one's legal domicile." Merriam-Webster Dictionary, https://www.merriamwebster.com/dictionary/reside (last visited October 9, 2018). Similarly, and as noted by the trial court, Black's Law Dictionary defines "residence" as "personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently." *Residence,* Black's Law Dictionary (5th ed. 1979).

Hensley v. Gadd, 560 S.W.3d 516, 523–24 (Ky. 2018).

Relying on this language, the Court found that that "one-night, two-night, weekend, weekly inhabitants cannot be considered 'residents' within the commonly understood meaning of that word, or the use by such persons as constituting 'residential.'" *Hensley*, 560 S.W.3d at 524.

Likewise, this Court should find that short-term leasing of a transient nature is not a residential use. It is clearly a commercial use that is at odds with the plain meaning of the term "residential use." Because short-term leasing is a transient use, and "residential use" by its plain meaning is permanent in nature, the Court

should find that short-term leasing violates the plain meaning of the term "residential use only."

2. In the Alternative, the Montana Supreme Court Should Adopt a Case By Case Analysis Whereby the District Courts Must Look Into the Actual Use of a Property When Determining Whether a Short-Term Rental Use Violates Standard "Residential Use Only" or "No Commercial Use" Covenant Restrictions.

While the Community Association believes that the Court should simply find that all short-term rentals violate "residential use only" language, as no other party pointed out that some states narrowly decide these matters on a case by case basis, it would be remiss if it did not argue for such an approach, in the alternative.

When short-term rental cases first were heard by Courts, most Courts simply found that the "residential use only" language did not prohibit short-term rentals because short-term rentals are simply a residential use. However, as we all have seen in the last decade, communities, from private associations to cities, have begun to attempt to regulate short-terms rental because of the inherent issues that arise with their use. This understanding of these differences has led to more states using a case by case approach.

For example, in *Santa Monica Beach Property Owners Association, Inc. v. Acord*, the District Court of Appeal of Florida, First District used a case by case approach. *Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord*, 219 So. 3d 111, 115 (Fla. Dist. Ct. App. 2017). While the Court found that in this case, the short-

term vacation use was consistent with residential use (to which the Association has a number of good arguments in their brief regarding why the Court should not follow this opinion), the Court clearly stated that there was nothing in the record showing that the actual short-term residential uses complained of was any different than regular residential use. *Santa Monica Beach Prop. Owners Ass'n, Inc.* , 219 So. 3d at 115. Specifically, the Court pointed out that facts like having separate entrances to bedrooms, having a manager to control guests, signs advertising it as an "Inn", and other indicia of business use were not present in their case. *Id.* The Court went on to state that the actual use, including frequency of the use or intensity of the use could rise to the level of a commercial use. *Id.* However, in *Santa Monica,* there was nothing to indicate anything different than what you would typically see for normal residential use.

The type of approach taken by the Florida Appeals Court allows for the actual use of the property to be taken into consideration. There are many short-term rentals that hold themselves out as more than a place to reside. They pack the rentals with more than one bed in a bedroom (like a hotel), they advertise as Lodges and work with outfitters to bring in commercial business, they attract more than a single family's amount of vehicles to the home or even tour buses, and they have large events like weddings, reunions and (I'm not kidding) motorcycle rallies. All of these facts are present in active Montana district court cases, including this

one. *Palisades Properties Property Owners Asso. v. Eric and Robin Hogan*, Cause No. DV-18-66 in the Twenty-Second Judicial District Court, Carbon County. Another is *TOK Park Subdivision HOA, Inc. v. Steven and Gayle Muggli*, Cause No. DV-19-1320-DK (Hon. Michael McMahon) in the First District Court, Lewis and Clark County. In fact, there are web sites dedicated to the trials of having vacation rentals in your neighborhood.

This is a real issue for a number of citizens in Montana, an issue they never thought they would have to address because they believed, rightfully, that their "residential use only" language in their covenants would prohibit obviously transient short-term rentals. At the very least, the Montana Supreme Court should adopt a case by case analysis to determine if the actual use of a short-term rental use violates the plain meaning of "residential use." If the Court does so in this case, it should remand this case to the District Court for further finding consistent with the order.

CONCLUSION

The Community Association thanks the Court for allowing it to file this brief. Based on Montana law and the plain meaning of the term "residential use" the Court should find that short-term rentals violate "residential use only" language. In the alternative, the Court should adopt a case by case approach to

short-term rentals, requiring the District Courts to inquire into the actual use of the property to determine if the use is outside of the scope of usual residential use.

Respectfully Submitted this 14th day of September, 2020.

Alanah Griffith

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I certify that the *Amicus Curiae*'s Brief is printed with a proportionately spaced Times New Roman text typeface of 14 point; is doubled spaced; and the word count calculated by Word for Office 365 is 2564, excluding the table of contents, table of authorities, certificate of compliance and certificate of service.

CERTIFICATE OF SERVICE

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