IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause 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. MARICHICH FAMILY TRUST, MICHKELSON INVESTMENTS, LLC, SALLIE A. LOSEY, HEMINGWAY PATRICK & CAROL T. REVOCABLE LIVING TRUST,

Plaintiffs/Appellants,

-vs-

BROWN DRAKE, LLC,

Defendant/Appellee.

On Appeal from the Montana First Judicial District Court, Lewis and Clark County, the Honorable Michael F. McMahon, Presiding

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STEVEN AND GAYLE MUGGLI'S *AMICUS CURIAE* BRIEF

APPEARANCES:

Afton E. Ball
Stephanie Baucus
MOULTON BELLINGHAM PC
27 North 27th Street, Suite 1900
P.O. Box 2559
Billings, MT 59103-2559
406-248-7731
Afton.Ball@moultonbellingham.com
Stephanie.Baucus@moultonbellingham.com

Attorneys for Amicus Curiae Muggli

Dave Dalthorp
Scott Svee
JACKSON, MURDO & GRANT, P.C.
203 North Ewing
Helena, MT 59601
(406) 513-1120
dalthorp@jmgm.com
ssvee@jmgm.com

Counsel for Plaintiffs/Appellants

Reid J. Perkins
WORDEN THANE P.C.
P.O. Box 4747
Missoula, MT 59806-4747
(406) 721-3400
rperkins@wordenthane.com

Counsel for Defendant/Appellee

Alanah Griffith
GRIFFITH & CUMMINGS, PLLC
P.O. Box 116748
Big Sky, MT 59716
(406) 624-3585
alanah@bigskymtlaw.com

Counsel for Amicus Curiae CAI

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ISSUES PRESENTED FOR REVIEW

Was the District Court correct in holding that a restrictive covenant limiting properties to residential use only (a "residential use covenant"), which Plaintiffs/Appellants Craig Tracts Homeowners' Association, Inc., et al. ("CT" or "Appellants") was attempting to enforce against Appellee/Defendant Brown Drake, LLC ("BD" or "Appellee"), does not prevent short-term residential rentals ("STRs") and that such covenants cannot be interpreted or enforced in such a way as to prevent STRs?

STATEMENT OF THE CASE AND AMICI'S INTEREST

Amici Steven and Gayle Muggli (the "Mugglis") concur with Appellee's Statement of the Case.

The Mugglis have been sued over the residential rental use of their property in Lewis and Clark County on a short-term basis by the homeowners' association in that subdivision, which has argued that the Mugglis' STRs violate a residential use covenant.[1]

[1] *See TOK Park Subdivision HOA, Inc. v. Steven and Gayle Muggli,* Cause No. DV-19-1320-DK (Hon. Judge McMahon), First Judicial District, Lewis and Clark County (the "*TOK Park* case").

STATEMENT OF FACTS AND STANDARD OF REVIEW

The Mugglis concur with the Appellee's Statement of Facts, which is incorporated here by reference, and with its Statement of the Standard of Review, as *de novo* review of the District Court's grant of summary judgment ("SJ Order").

SUMMARY OF ARGUMENT

First, the District Court correctly found that renting a property for residential use, no matter how long the duration or if income is earned, is not commercial or a violation of residential use covenants.

Second, in keeping with the precedent of strict construction and a myriad of other covenant interpretation cases decided by the Court, the District Court correctly declined to read into the unambiguous operative covenants, a prohibition on rentals not found anywhere in those covenants.

Third, the District Court was correct in prohibiting the association from enforcing its residential use covenant against BD in such a way as to prohibit STRs because such enforcement would violate BD's reasonable expectations for the use of their property when they purchased it in 2014 and would run afoul of Mont. Code Ann. § 70-19-901.

ARGUMENT

In examining restrictive covenants, courts look to the specific language of the covenants at issue in each case, as each set of covenants is unique. Because many residential use covenants are similar, however, this Court's decision will be

precedential for lower courts considering similar covenants under similar circumstances. By the same token, the decisions of many other courts construing similar residential use covenants are also useful, although various states have different statutory definitions that affect their courts' analysis.[2]

I. Short-Term Rentals for Residential Purposes Comply with Residential Use Covenants

While the operative covenants in this case do not expressly prohibit commercial use, they do restrict property owners' use to residential use only. The operative covenants, which have been in force since 1984 (the "Covenants"), governing BD's property use contain a residential use covenant: "Use for Residence Only: The above described [real property] shall be used for residential purposes only." Appellee's Brief ("BDB"), pp. 3-4. BD purchased their property approximately three decades after the enactment of this covenant. The Covenants from 1984, unlike the original covenants from 1983, do not contain any restrictions on "commercial or business use," nor restrictions on the properties "for the use of a

[2] For example, the Kentucky Supreme Court's decision in *Hensley v. Gadd*, 560 S.W.3d 516 (Ky. 2018), cited by Appellants, is of limited use because Kentucky's statute defining "hotels" included "tourist homes" in that definition, where Montana's statutes do not. Additionally, the covenants at issue in that case specifically limited "hotels" to only one lot in the subdivision, with a residential use covenant applicable to all other lots, including the one at issue in the case. Notably also regarding the *Hensley* case, *Santa Monica Beach Prop. Owners Assoc. v. Acord*, 219 So. 3d 111, 114 (Fl. App. Ct. 2017), as discussed below, cited to dozens of cases in other states regarding STRs as residential use, only one of which was the lower court decision in *Hensley*, prior to its reversal by the Kentucky Supreme Court.

motel, hotel, or apartment house." *Id.* Those provisions from 1983 were explicitly removed from the Covenants in 1984. *See id.*

A. By Definition, Residential Use, Even By Short-Term Renters, Is Still Residential

The Covenants do not define "residential," but Merriam-Webster defines "residential" as an adjective meaning "containing mostly homes instead of stores, businesses, etc.; used as a place to live; and of or relating to the places where people live," and as "used as a residence or by residents" or as "suitable for or containing residences." *See* "residential," *Merriam-Webster.com*, 2020, https://www.merriam-webster.com (12 Sept. 2020).

In 1989, this Court, relying on a 1989 edition of Webster's dictionary for the definition, defined "residential" as "used as a residence or by residents," and of "residence" 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 (cited and used again by *Tipton v. Bennett*, 281 Mont. 379, 382, 934 P.2d 203, 205 (1997)). Appellants contend, without explanation or support, that these cases "are not helpful in determining whether use of [BD's property] constitutes use for 'residential purposes.'" Appellants' Brief ("CTB"), pp. 10-11. These definitions are helpful, however, to considering whether STRs are residential. Notably, "some time" could be any amount of time. Further, Montana law does differentiate between

"residential" and "commercial" use. *See* Mont. Code Ann. § 15-1-101(1)(d)(2) (tax code excluding "single-family residences" from being considered commercial).

While this Court has not had occasion to address specifically whether STRs are residential or commercial, lower courts in Montana have considered this issue. In addition to this District Court, another district court reached the same conclusions, holding that ***STRs are compliant with residential use covenants*** (that also contain a prohibition against bed and breakfasts). *See* Appendix Ex. A, Order on Summary Judgment Motions, pp. 6-9, *Palisades Properties Prop. Owners Ass'n v. Eric Hogan and Robin Hogan*, Cause No. DV 18-66, Montana Twenty-Second Judicial District Court, Carbon County (entered June 23, 2020, remaining claims dismissed with prejudice, July 20, 2020).

Further, as recognized in the District Court's decision here and in the *Hogan* decision, the large majority of other courts that have addressed the issue have held that STRs are considered residential and/or are not commercial. *See e.g., Santa Monica Beach Prop.* (collecting cases from over a dozen states, with only two holding the opposite, which were distinguishable: "courts in a number of other states have considered the issue and those courts have almost uniformly held that short-term rentals do not violate restrictive covenants nearly identical to those at issue in this case."); *see also In re Toor*, 192 Vt. 259, ¶¶ 18-21, 59 A.3d 722 (2012) (finding

zoning ordinance for residential use did not prohibit STRs); *see also* cases listed below in Sections A.i-iii.

1. When Construing a Residential Use Covenant, the Relevant Inquiry is to the Type of Use

These Montana district courts and the majority of courts around the country that have considered whether STRs are residential have found, as Appellee has argued, that the relevant inquiry in considering whether a use is residential or is for a residential purpose is the "type of use" of those staying at the property.

The *Santa Monica* court explained of its decision, and of those of the majority of courts, that STRs comply with residential use covenants:

> [I]n determining whether short-term vacation rentals are residential uses of the property, the critical issue is whether the renters are using the property for ordinary living purposes such as sleeping and eating, not the duration of the rental…. The decisions further explain that the nature of the property's use is not transformed from residential to business simply because the owner earns income from the rentals…. [N]either [the] financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial.

Santa Monica, 219 So. 3d at 114-115 (internal citations omitted); *see e.g.*, *Wilkinson v. Chiwawa Communities Ass'n.*, 180 Wash. 2d 241, 252, 327 P.3d 614, ¶ 17 (2014) ("If a vacation renter uses a home 'for the purposes of eating, sleeping, and other residential purposes,' this use is residential, not commercial, no matter how short the rental duration."); *Mason Family Trust v. DeVaney*, 146 N.M. 199, 201, 207 P.3d 1176, 1178 (2009) ("We think that rental of a house or abode for a short-term use as

a shelter to live in is significantly different from using the property to conduct a business or commercial enterprise on the business."); *Forshee v. Neuschwander*, 914 N.W.2d 643, 647, 381 Wis. 2d 757, 766 (2018) (construing a covenant prohibiting commercial use; finding STRs residential because the renters "use the property in a manner similar to how an owner uses his or her home."); *Mullin v. Silvercreek Condo. Owner's Ass'n, Inc.*, 195 S.W.3d 484, 490 (Mo. App. Ct. 2006); *Applegate v. Colucci*, 908 N.E.2d 1214, 1210 (Ind. App. Ct. 2010); *Scott v. Walker*, 274 Va. 209, 217, 645 S.E.2d 278, 283 (2007); *Slaby v. Mtn. River Estates Residential Ass'n, Inc.*, 100 So. 3d 569, 579 (Ala. App. Ct. 2012).

2. Duration of the Rentals Does Not Transform the Use from Residential

These courts explained that the duration of the rentals did not transform the property's use from residential to commercial or business use. *See Yogman v. Parrott*, 937 P.2d 1019, 1021, 325 Or. 358, 362 (1997) (noting that "the record shows that they eat, sleep, bathe, and watch television there. On the other hand, 'if residential' refers to an intention to live in a home for more than a temporary sojourn or transient visit, even defendants' own use of the property, as well as their rental use, is not 'residential.'");[3] *Tarr v. Timberwood Park Owners Ass'n., Inc.*, 556

[3] Similarly, as the District Court correctly pointed out, the Association has taken the inconsistent position that BD's members using the home for short trips, just as BD's renters do, is somehow still residential, while the renters' use is somehow not. *See* SJ Order, pp. 7-8.

S.W.3d 274, 291, 61 Tex. Sup. Ct. J. 1174 (2018) (concluding that single-family residence used for residential purposes, "no matter how short-lived, neither their on-property use nor Tarr's off-property use violates the restrictive covenants…"); *DeVaney*, 146 N.M. at 201 ("once a proper use has been established, we do not attach any requirement of permanency or length of stay."); *Slaby v. Mtn. River Estates Residential Ass'n, Inc.*, 100 So. 3d 569, 579 (Ala. App. Ct. 2012) ("We read nothing in the restrictive covenants, as written, addressing the acceptable length of a rental or lease of the property."); *Vera Lee Angel Revoc. Trust v. O'Bryant Revoc. Trust*, 2018 Ark. 38, 537 S.W.3d 254, 259; *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 2015 Colo. App. 113, ¶ 19, 360 P.3d 255, 259.

3. Owners Receiving Rental Income Does Not Transform the Use from Residential

Other courts that have considered whether STRs are residential have also concluded that property owners' directly or indirectly receiving money or income from rentals does not transform the use into business, commercial, or anything other than residential. *See Lowden v. Bosley*, 295 Md. 58, 68, 909 A.2d 261, 267 (2006) (emphasis in original) ("While the owner may be receiving rental income, the use of the property is unquestionably 'residential.' The fact that the owner receives rental income is not, in any way, inconsistent with the property being *used* as a residence."); *Catawba Orchard Beach Ass'n, Inc. v. Basinger*, 115 Ohio App. 3d 402, 409, 685 N.E.2d 584, 589 (1996) ("While the rental of the homes did earn

appellees an income, no business was being conducted on the property… Rather, the rental properties in the case at bar were being used as single residences by one family each.").

Considering that BD's renters have used the property in precisely the same way that BD's members have – as a residence, BD's short-term rentals should be considered residential, not commercial use.

B. The Appellants' Statutory Classification Arguments Are Red Herrings and Ignore Clear Statutory Language and Distinctions

Appellants make several arguments based on the overlapping structure of and definitions in Montana's laws as support for its argument that BD's use of their property is no longer residential. It has not cited to any other cases employing this type of reasoning when considering whether STRs are residential. Being subjected to various statutory schemes cannot transform the character of use from residential to commercial.

First, Appellants argue that Montana's Residential Landlord and Tenant Act, Mont. Code Ann. § 70-24-101, *et seq*. (the "Act"), categorically does not apply to STRs. *See* CTB, pp. 5-6, 11-16. There is no legal authority for this argument, other than Appellants' own interpretations. Appellants argue the property as used by BD's renters cannot qualify as a "dwelling unit," which is defined as a structure or part of a structure "that is used as a home, residence, or sleeping place by a person who maintains a household or by two or more persons who maintain a common

household." Mont. Code Ann. § 70-24-103(4); *see* CTB, p. 11. Many courts that have considered STRs, however, have rejected Appellants' argument in holding that short-term renters do use properties as homes, residences, sleeping places, or for maintaining households. *See supra* Sect. I.A.

Further, in considering the types of occupancy excluded from the Act, while "occupancy in a hotel or motel" is excluded, occupancy in "tourist homes" is not. Mont. Code Ann. § 70-24-104(4). Additionally, Mont. Code Ann. § 70-24-103(16) defines a "tenant" as "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others" or who has a sublease agreement. Indeed, all of BD's renters are tenants, having signed rental lease agreements to occupy exclusively the dwelling unit that they rent. Moreover, the Act is to be "liberally construed and applied" in order to achieve the Act's purposes – essentially protecting tenants' rights and maintaining quality housing. *See* Mont. Code Ann. § 70-24-102.

Second, Appellants argue that the Act does not apply to STRs because STRs may be taxed as, and the properties licensed as, "tourist homes." Other states' courts considering whether STRs are residential, however, have held that the "remittance of a lodging tax [does not transform] the nature of the use of the property from residential to commercial." *Santa Monica*, 219 So. 3d at 115. BD agrees that it has licensed and advertised its property as a "tourist home," which is defined by statute as "a private home or condominium that is not occupied by an owner or manager

and that is rented, leased, or furnished in its entirety to transient guests on a daily or weekly basis." Mont. Code Ann. § 50-51-102(12). Again, as noted above, however, "tourist homes" are not specifically excluded from the Act.

Additionally, it is important to note that "hotels" and "motels," as well as "bed and breakfasts," [4] are defined separately and do not include "tourist homes." Mont. Code Ann. § 50-51-102(1) and (8). In the definition of "facility" found in Mont. Code Ann. § 15-65-101(4)(a), it lists various types of entities that provide "overnight lodging facilities for periods of less than 30 days," including and separating hotels and bed and breakfasts. Here again, Montana's legislature has recognized some of the various types of distinct legal structures through which rooms may be rented.

At its core, Appellants' position depends upon the premise that if a property is regulated by one set of laws, such as Chapter 51 of Title 50 (re: lodging facilities), it may not be regulated by others, such as Chapter 24 of Title 70 (the Act). A person or entity can be subject to various statutory schemes found in different chapters and titles, however. Regulating properties for health and human services reasons does not mean that the State no longer has an interest in protecting tenants' rights.

[4] Courts around the country have also found bed and breakfasts to be distinct from STRs. *See Reihner v. City of Scranton Zoning Hearing Bd.*, 176 A.3d 396, 402-403 (Pa. Cmwlth. 2017); *Fruchter v. Zoning Bd. of Appeals of the Town of Hurley*, 133 A.D.3d 1174, 1176 (N.Y. App. Div. 3d Dept. 2015); *Santa Monica Beach Prop. Owners Assoc. v. Acord*, 219 So. 3d 111, 114 (2017); *Estates at Desert Ridge Trails Homeowners Ass'n. v. Vazquez*, 300 P.3d 736 (N.M. App. Ct. 2013).

Appellants' arguments on these points are red herrings, unrelated to the nature and type of residential use being made of BD's property.

Third, Appellants argue that short-term renters are mere licensees, without a possessory interest, like longer-term renters. To begin, even if this were correct, it is a distinction without a difference, as it is the *type of use*, not the duration of use, that is significant to determining if owners are complying with residential use covenants. *See supra* Sect. I.A.i-ii. Appellants have no support for this assertion, except for two cases considering tax and income from other states. Appellants cite a 1941 California case, *Edwards v. Los Angeles*, 119 P.2d 370 (Cal. App. 1941), which notes, under California law in the context of whether taxes should have been paid, how "guests in a hotel, boarders in a boarding house, and roomers or lodgers" have a mere license, unlike tenants. They also cite a Colorado bankruptcy court case that required an owner to prove that "the legal relationship between Debtor and its Hotel guests was other than that of licensor and licensee," but which even noted that hotel guests, "may, under certain circumstances of the case, be a tenant and not a guest." *In re Sacremento Mansion, Ltd.*, 117 B.R. 592, 606-607 (Bankr. D. Colo. 1990). These cases are neither controlling nor persuasive. The courts were considering what is taxable income, which is unrelated to residential use. Further, *Sacremento Mansion* helps Appellee, as it notes that even hotel guests may be tenants.

II. In Following Standard Rules of Contract Interpretation, Residential Use Covenants, Without More, Must Be Construed to Allow Short-Term Rentals

In keeping with the precedent of strict construction, courts decline to read into the Covenants what they do not expressly state and will construe ambiguities in favor of the free use of property. *See* BDB, pp. 13-20.

As the District Court correctly reasoned, restrictive covenants must be construed as contracts and read as a whole to ascertain their meaning. *See* SJ Order, p. 6. Also, as the District Court pointed out and as has long been a maxim of this Court and other state supreme courts when construing restrictive covenants: "Restrictive covenants should be strictly construed and ambiguities resolved to allow free use of the property." *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 492, 740 P.2d 668, 671 (1987); *Grassy Mountain Ranch Owners Assoc. v. Gagnon*, 2004 MT 245, ¶ 10, 323 Mont. 19, 98 P.3d 307; *Creveling v. Ingold*, 2006 MT 57, ¶ 8, 331 Mont. 322, 325, 132 P.3d 531, 533-534; *Vera Lee Angel*, 537 S.W.3d at 257.

In this case, the relevant portion of the Covenants states only: "Use for Residence Only: The [real property] shall be used for residential purposes only." BDB, pp. 3-4. They also provide that "no more than four buildings, excluding two dwelling units, shall be permitted on" the property. BDB, p. 4. The Covenants do not contain any prohibition against or even any mention of rentals. *See id.*

Following these principles, the District Court did not read into the Covenants language that was not there. Had CT wanted to prevent rentals (as they had in 1983, but removed in 1984), or had they wanted to add restrictions on rental duration, they could have easily done so. There is simply an absence of any explicit restrictions on rentals, and this Court should not add into the Covenants what is not written there. *See Creveling v. Ingold*, 2006 MT 57, ¶ 11-12 (quoting *Wurl v. Polson School Dist. No. 23*, 2006 MT 8, 330 Mont. 282, 127 P.3d 436) ("'[T]he office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.' Section 1-4-101, MCA"); *see also In re Toor*, 192 Vt. 259, ¶ 21, 59 A.3d 722 (2012) (explaining the court was "particularly affected by the requirement of narrow construction and the need for landowners to be able to ascertain the line between proper use of their property and illegal use.").

Further, reading the Covenants as a whole in order to determine their meaning, the Covenants do expressly allow two dwelling units, which could include any kind of dwelling units, like guest houses or vacation homes, which are used only for short periods of time and intermittently – just like the use CT has complained of by BD's tenants.

The Covenants are not ambiguous as they do not provide any restrictions on rentals. *See Lowden v. Bosley*, 295 Md. 58, 68, 909 A.2d 261, 267 (2006) (finding

that the covenant at issue restricting property to "single family residential purposes only" was not ambiguous and that it "on its face does not prohibit the short-term rental of a defendant's home to a single family which resides in the home."). If the Court were to allow CT to use a new interpretation of its residential use covenant to prohibit STRs now, it could simply change its interpretation later, depending on whose property rights it wanted to curtail at any given time.

Even if the covenant were ambiguous, the covenant should be construed in favor of BD to allow for its short-term residential rental use. *See Grassy Mountain*, 2004 MT 245, at ¶ 10, *Town & Country*, 227 Mont. at 492; *Creveling*, 2006 MT 57, ¶ 8; *Armstrong v. Ledges Homeowners Ass'n. Inc.*, 360 N.C. 547, 633 S.E.2d 78 (N.C. 2006) (internal citations omitted) ("When a covenant infringes on common law property rights, any doubt or ambiguity will be resolved against the validity of the restriction"). Additionally, ambiguities are also resolved against the contract drafter – in this case, CT. *See Riehl v. Cambridge Court GF, LLC*, 2010 MT 28, ¶ 26, 2010 MT 28, 226 P.3d 581.

In this case, if the Court were to consider the Covenants to be ambiguous, it could examine extrinsic evidence to determine the meaning of the residential use covenant. As BD has pointed out, CT explicitly removed a prohibition against "commercial or business use or for the use of a motel, hotel, or apartment house,"

and previous owners had operated STRs, making clear that CT had never interpreted the residential use covenant to prohibit STRs or rentals. *See* BDB, pp. 17-20.

Indeed, some courts have found residential use covenants to be ambiguous insofar as STRs are concerned, but those courts have concluded that the covenants must be strictly construed in favor of short-term rental use. *See Scott v. Walker*, 274 Va. 209, 218, 645 S.E.2d 278, 283 (2007) ("[I]f the phrase 'residential purposes' carries with it a 'duration of use' component, it is ambiguous as to when a rental of the property moves from short-term to long-term."); *Applegate v. Colucci*, 908 N.E.2d 1214, 1210 (Ind. App. Ct. 2010) ("If the term 'residential use' as used in the covenant language was meant to only apply to permanent and not temporary rental of property, then it would have been easy to explicitly state this and make the covenant unambiguous."); *Houston*, 2015 Colo. App. 113, ¶¶ 17-19.

III. As in Similar Cases, the Association May Not Enforce Its Residential Use Covenant Against BD so as to Prohibit Short-Term Rentals

A. Any Enforcement of the Residential Use Covenant Against BD to Prohibit Its Short-Term Rentals Would Violate the Reasonable Expectations that BD Had When It Purchased the Property

As BD argues, *see* BDB, pp. 31-33, when it purchased its property in 2014, it had a reasonable expectation that it could rent the property on a short-term basis. This expectation came from two sources: (1) the Covenants themselves and (2) its knowledge about prior STRs by other owners in the subdivision. *See id.*, p. 19. BD then relied on these reasonable expectations in buying and renting its property.

Montana district courts, as well as courts around the country,[5] have prohibited enforcement of covenants and found amendments to be invalid that have deprived owners of their reasonable expectations. *See Houden v. Todd,* Twenty-Second Judicial District, 2009 WL 10243660, Dec. 14, 2009, Order Adopting Findings and Recommendations of Special Master set out in 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) (holding amended covenant at issue was "not reasonable as applied to Houdens and therefore [was] invalid and unenforceable."); *see also Hogan*, pp. 9-12 (Ex. A); *Graziano v. Stock Farm Homeowners Ass'n*., 2011 MT 194, 361 Mont. 332, 258 P.3d 999 (applying reasonable expectations test in determining that arbitration clause in covenants was enforceable against owners); *Wilkinson,* 180 Wash. 2d at 257 (invalidating STR prohibition in part because owners "were not on notice" and in "protecting the reasonable and settled expectation of landowners in their property"); *see also Goeres v. Lindey's Inc.*, 190 Mont. 172, 619 P.2d 1194

[5] *See e.g., Armstrong*, 633 S.E.2d at 89; *Wright v. Cypress Shores Dev. Co.*, 413 So.2d 1115, 1124 (Ala. 1982); *Boyles v. Hausmann*, 517 N.W.2d 610 (Neb. 1994); *Hutchens v. Bella Vista Vill. Prop. Owners' Ass'n*, 82 Ark. App. 28, 37, 110 S.W.3d 325, 330 (2003); *Holiday Pines Prop. Owners Ass'n v. Wetherington*, 596 So.2d 84, 87 (Fla. Dist. Ct. App. 1992); *Buckingham v. Weston Vill. Homeowners Ass'n.*, 1997 ND 237, ¶ 10, 571 N.W.2d 842, 844; *Worthinglen Condo. Unit Owners' Ass'n v. Brown*, 57 Ohio App.3d 73, 75-76, 566 N.E.2d 1275, 1277 (1989); *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash. App. 267, 273-74, 883 P.2d 1387, 1392 (1994), *disc. rev. denied*, 127 Wash.2d 1003, 898 P.2d 308 (1995).

(1980) (not enforcing implied restriction as inequitable, considering owner's knowledge when purchasing their property); *Bordas v. Virginia City Ranches Ass'n.*, 2004 MT 342, ¶ 21, 324 Mont. 263, 102 P.3d 1219 (finding "the crucial covenants were those which were in place and of record at the time [the owners] purchased their property."); *Vasquez*, 300 P.3d at 744.

Here, the Covenants gave BD a reasonable expectation that they could rent their property for any period of time. Indeed, restricting the right to rent should be subject to higher scrutiny because the right to rent is within the fundamental right of disposition. *See Breene v. Plaza Tower Ass'n.*, 310 N.W.2d 730, 734 (N.D. 1981) (finding association's prohibition on leasing, which the Association tried to change "retroactively by adopting an amendment," was an unreasonable deprivation of statutory rights); *see also Town & Country*, 227 Mont. at 492 ("We will closely review any enlargement of restrictions which conflict with reasonable land use, and which hinder substantive due process."). By now claiming the authority to make sweeping restrictions on rentals, which were permitted when BD purchased its property, CT has subjected BD to unexpected and unreasonable restrictions that would effectively deprive them of the value of their property. *See Rancho Santa Paula Mobilehome Park, Ltd v. Evans*, 26 Cal. App. 4th 1139, 1147, 32 Cal. Rptr. 2d 464 (holding rule prohibiting subleasing, "when applied retroactively-that is, against a homeowner whose lease contains no such restriction and who has not

agreed to the restriction-is contrary to the stated purpose of the MRL and is therefore unreasonable."). Accordingly, this Court should affirm the District Court's decision to prohibit Appellants from enforcing the Covenants in such a way as to restrict STRs.

B. Mont. Code Ann. § 70-17-901 Would Prevent CT from Enforcing the Residential Use Covenant Now, Differently, to Prohibit BD's Short-Term Rentals

As BD has argued, *see* BDB, pp. 27-30, even if the residential use covenant could be interpreted to prohibit STRs, which is disputed, such enforcement would not be allowed under Mont. Code Ann. § 70-17-901. Section 901(1)(a) provides that an association "may not enter into, amend, ***or enforce*** a covenant… 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***…" *Id*. (emphasis added). While the most obvious applications of Mont. Code Ann. § 70-17-901 involve new or amended covenants, since CT had never attempted to interpret the residential use covenant to prohibit STRs before BD bought its property, such enforcement now is a "more onerous restriction" on the types of use that existed when BD bought its property. Because the Covenants make no mention of rentals at all, any new prohibitions against rentals and/or STRs would clearly be more onerous. *See Creveling*, 2006 MT 57, ¶ 8; *Town & Country*, 227 Mont. at 492.

The protections of Mont. Code Ann. § 70-17-901 are available to BD, since associations are now prohibited from "enforc[ing] 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 an owner purchased its property. Mont. Code Ann. § 70-17-901(5).

The statute specifically includes "the ability to rent the real property… for any amount of time" in its definition of "types of use." Mont. Code Ann. § 70-17-901(6)(e). As such, any enforcement of a residential use covenant to prohibit STRs would improperly "limit" a "type of use" that was allowed when BD bought its property.

CONCLUSION

For these reasons, the Court should affirm the District Court's decision and hold that residential use covenants, alone, are insufficient to prohibit short-term rentals and that the enforcement of such covenants under the circumstances of this case would also be improper.

DATED this 14th day of September, 2020.

MOULTON BELLINGHAM PC

By _/s/ _Afton E. Ball_____
AFTON E. BALL
STEPHANIE BAUCUS
27 North 27th Street, Suite 1900
P.O. Box 2559
Billings, Montana 59103-2559
ATTORNEYS FOR *AMICUS CURIAE* MUGGLIS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Word is 4968 words, excluding caption, table of contents, table of authorities, signature block, certificate of service, and certificate of compliance.

_/s/ Afton E. Ball_____
Afton E. Ball or Stephanie Baucus

CERTIFICATE OF SERVICE

I, Afton Eva Ball, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 09-14-2020:

Reid J. Perkins (Attorney)
321 W. Broadway St., Ste. 300
Missoula MT 59802
Representing: Brown Drake, LLC
Service Method: eService

David C. Dalthorp (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Tara J. Chapman, Craig Tracts Homeowners' Association, Beverly A. Friend, Donald C. Friend, Hemingway Patrick & Carol T. Revocable Living Trust, Matthew B. Losey, Sallie A. Losey, Mickelson Investments, LLC, Robert J. & Andrea E. Maricich Family Trust
Service Method: eService

Scott Michael Svee (Attorney)
203 N Ewing
Helena MT 59601
Representing: Tara J. Chapman, Craig Tracts Homeowners' Association, Beverly A. Friend, Donald C. Friend, Hemingway Patrick & Carol T. Revocable Living Trust, Matthew B. Losey, Sallie A. Losey, Mickelson Investments, LLC, Robert J. & Andrea E. Maricich Family Trust
Service Method: eService

Alanah Noel Griffith (Attorney)
P.O. Box 160748
Big Sky MT 59716
Representing: Community Association Institute
Service Method: eService

Electronically Signed By: Afton Eva Ball
Dated: 09-14-2020