

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 23-0334

Clover Meadows Homeowners Association, Inc., a Montana Non-Profit Corporation,

Petitioner/Appellant, vs.

Courtnee Spear,

Respondent/Appellee.

On appeal from the Eighteenth Judicial District Court, Gallatin County Cause No. DV-20-850A, Hon. Peter Ohman

Appellant's Opening Brief

(Appearances on next page)

APPEARANCES

Alanah Griffith
Griffith & Associates, PC
P.O. Box 160748
Big Sky, MT 59716
Ph: 406-624-3585
Fax: 406-626-3360

Alanah@BigSkyMTLaw.com
Patrick@BigSkyMTLaw.com

*Attorney for Petitioner/Appellant
Clover Meadows Homeowner's
Association, Inc.*

Amy McNulty
Tarlow, Stonecipher, Weamer & Kelly,
PLLC
1705 W. College St.
Bozeman, MT 59715-4913
Ph: (406) 586-9714

amcnulty@lawmt.com

*Attorney for Respondent/Appellee
Courtnee Spear*

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STATEMENT OF ISSUES

1. Did the District Court err when it Ruled that Courtnee Spear's Addition to her Home was not a Second Dwelling Unit Prohibited by the Clover Meadows Homeowners Association's Declaration of Covenants?
2. Did the District Court err when it Awarded Attorney's Fees and Costs to Courtnee Spear?

STATEMENT OF THE CASE

Clover Meadows Homeowners Association, Inc. (Clover Meadows) is a non-profit organization that is tasked with certain duties and responsibilities, including the enforcement of the Clover Meadows's filed Declaration of Covenants. (Covenants, Exhibit 1.) Courtnee Spear (Ms. Spear) is a homeowner living in Clover Meadows and subject to those Covenants. Ms. Spear submitted plans to the Clover Meadows to build a second living area and garage attached to her existing home (Second Dwelling Area). Clover Meadows believed that the Second Dwelling Area violated certain sections of the Covenants, including Article IV, Section 1 "There shall be no more than one single family dwelling on any one lot." (Covenants, Exhibit 1, Article IV(1), page 3)

Clover Meadows filed suit against Ms. Spear on July 31, 2020, prior to Ms. Spear building the addition. (Doc. 1 of the Electronic Case File referred to as "Doc.") Ms. Spear built the addition while this matter was pending. After

completing the addition, Ms. Spear filed a Motion for Summary Judgment on December 3, 2021 (Doc. 33). Ms. Spear requested that the District Court rule that the current use of the Second Dwelling Area did not violate the Covenants. Clover Meadows responded to Ms. Spear's motion on January 3, 2022 (Doc. 36). In the Response, the Clover Meadows cross motioned for Summary Judgment, asking the Court to rule in the Clover Meadow's favor and find that the Second Dwelling Area violated the Covenants. Ms. Spear's replied on February 15, 2022 (Doc 43).

The District Court held a hearing on the Motion for Summary Judgment on May 24, 2022 (Doc 54). On August 10, 2022, the District Court ruled that the current use of the Second Dwelling Area did not violate the Covenants (Doc. 56, attached). The Court granted Ms. Spear her attorney's fees and costs pursuant to Article VII, Section 3 of the Covenants (Doc. 64, attached). Clover Meadows filed this appeal.

STATEMENT OF FACTS

Clover Meadows is a non-profit homeowner's association that was formed to care for the common elements and enforce the Covenants of the Clover Meadows Subdivision. (Exhibit 1) The Original covenants were fully amended and superseded by The Amended and Restated Declaration of Protective

Covenants filed on December 7, 2004, Doc. No. 2172174 at the Gallatin County Clerk and Recorder's Office (Covenants, Exhibit 1, Page 1, 2nd recital.)

The Covenants require all owners of lots within the Clover Meadows Subdivision to be a member of Clover Meadows Homeowners Association. (Exhibit 1, Article V, Page 6) The Covenants run with the land and are binding on all owners. (Exhibit 1, Article X, Page 9)

Ms. Spear is the owner of the property at issue in this matter, legally described as:

Lot 46 of Clover Meadows Subdivision, Gallatin County, Montana, according to the official plat thereof on file and of record in the office of the County Clerk and Recorder, Gallatin County, MT. (Plat Reference: J-38)

(Hereinafter referred to as "Property").

According to the Covenants,

All persons or entities who now or shall hereafter acquire any interest in and to the property described below shall be taken and help to agree and covenants with the owners thereof and with their heirs, personal representatives, successors and assigns, to conform to and observe the following covenants, restriction and conditions as to the use thereof, and as *to the construction of family dwellings* and improvements thereon.

(*emphasis added*, Exhibit 1, recitals, Page 1) The purpose of the Covenants is to "ensure the use of the real properties for the development of attractive single

family residences and enjoyable rural living consistent with these covenants...”

(Exhibit 1, Article 11(2), Pages 1-2)

The Covenants, Article IV(1) states “There shall be no more than one single family dwelling on any one lot.” (Exhibit 1, Page 3) Article IV(2) states “No other building other than single family dwelling homes and garages, storage sheds and greenhouses shall be erected upon the properties.” (Exhibit 1, Page 3)

According to Article III(h), “‘Single Family Dwelling’ shall mean a building used for residential occupancy by one family household. No more than four unrelated adults shall occupy a single family residence.” (Exhibit 1, Page 2) “Family Household” and “residential occupancy” are not defined in the Covenants.

The Clover Meadow’s Bylaws are also on file with the Gallatin County Clerk and Recorder’s Office as Film 91, Page 4229 filed on May 1, 1986 (Exhibit 2, Bylaws) The Bylaws establish that the “Design Review Committee” is the Board of Directors. (Exhibit 2, Article II(b), Page 1) Like the Covenants, the Bylaws clearly state that membership in the Association is “appurtenant to the Lot.” (Exhibit 2, Article IV(1)(c) Page 2)

According to the Bylaws, Article VII(5)(m) The Board of Directors shall act as the architecture committee. (Exhibit 2, Page 6) “Any purchaser of a lot must submit the plans to the architecture committee prior to construction of their

residence to confirm that said residence is in compliance with this agreement and the Protective Covenants filed heretofore.” (Exhibit 2, Bylaws, Page 6)

Historically, the Association has defined a Single Dwelling used by one “family household” as an area that has separate facilities for sleeping, eating and cooking in which a person or group of people can live separately from another person or group of people. This definition was derived from another violation in Clover Meadows Subdivision.

In 2017 an issue arose within the subdivision. Clover Meadows received a written complaint from an owner that another owner, Cora Desanti, had converted a small room (approximately 400 square feet) above her garage into an accessory dwelling unit. (Exhibit 3, Desanti Complaint) Ms. Desanti had added a kitchen to the open area above her garage and advertised it as a vacation rental. (Exhibit 3, Desanti Complaint, Exhibit 4, Ms. Desanti’s Affidavit) Clover Meadows filed suit to have Ms. DeSanti remove the dwelling unit.

Clover Meadows found out that not only was Ms. Desanti’s additional dwelling unit a violation of the Covenants, but it was a violation is the DEQ issued Condition of Subdivision Approval, No. 16-78-L5-39 (COSA) (Exhibit 5). The COSA only allows one single family residence per lot. (Exhibit 5) Clover Meadows also contacted the DEQ regarding Ms. DeSanti’s violation of the COSA. (Exhibit 4,

Desanti Aff.) According to A.R.M. 17.36.101(27), “‘Living unit’ means the area under one roof that can be used for one residential unit and that has facilities for sleeping, cooking, and sanitation.”

Furthermore, Clover Meadows was introduced to *State v. Stewart*. In *Stewart*, the Montana Supreme Court defined a family as one or more persons living and cooking together. *State v. Stewart*, 2003 MT 109, ¶9, 315 Mont. 335, 68 P.3d 712. This is important because after Clover Meadows went through the DeSanti case, it consistently used the definitions found in the ARMs and *Stewart*, to define what the Covenants mean when the Covenants uses the term “a building used for residential occupancy by one family household” to define “Single Family dwelling.” (Exhibit 1, Covenants, Article III(h)) Clover Meadows has consistently used this definition to review other complaints and architectural submissions to determine if the building plans violated the Covenants. (Exhibit 6, Letter to Ms. Spear, and Clover Meadows Response MSJ, Doc. 36, Page 12)

This definition has the added bonus of not violating Federal Law. Essentially, HUD prohibits any housing discrimination on the basis of blood relations. 24 C.F.R. § 5.403. HUD specifically defines family so that it is inclusive of actual or perceived sexual orientation, gender identity, or marital status. 24 C.F.R. § 5.403 HUD regularly exercises authority over owners associations. Any Covenant that violates HUD’s rules and regulations is simply not enforceable. Therefore, the

portion of Clover Meadow's Covenants which states that "No more than four unrelated adults shall occupy a single family residence" is not enforceable and cannot be used to help define Single Family Dwelling. (Exhibit 1, Covenants, Article III(h)) This left a gap which the Single Family Dwelling definition in the ARMs and *Stewart* filled.

Based on this understanding, Clover Meadows and Desanti were able to reach a settlement. Ms. Desanti agreed to tear out all parts of the kitchen, including the stove, refrigerator, dishwasher and sink. (Exhibit 4, Desanti Aff.) She also removed all water hook ups and other stubs and dry walled over them, preventing anyone from easily installing a new kitchen in the space. (Exhibit 4, Desanti Aff.)

Moving forward from 2017, Clover Meadows focused on what facilities the potential dwelling unit could have to determine if a person or persons could live independently of one another rather than the blood relationship of the people within the potential two units. (Exhibit 6, Letter to Ms. Spear.)

After the DeSanti matter, Clover Meadows has diligently done what it could to attempt to enforce the single-family dwelling language in the Covenants. Its ability to enforce this language is hindered by the fact that it does not have any design review language in the Covenants. (Exhibit 1, Covenants, see generally.) The Bylaws do have an architectural review committee, but it is not empowered to

do anything but review and give an opinion when an owner submits plans. (Exhibit 2, Bylaws, Page 6) Therefore, owners must understand the Covenants and must build in a manner that complies with the Covenants. If the owner does not, they are subject to the enforcement section of the Covenants. (Exhibit 1, Covenants, Article VII, Page 8.)

Because it does not have the power to do more than offer their opinion regarding whether they believe a building violates the Covenants, the Clover Meadows Board does what it can to head off issues, to educate new and existing owners and help owners when asked. For example, past and present Board Presidents actively call real estate agents who have properties listed in the Clover Meadows Subdivision to let them know about the single-family restriction and that a second dwelling is not allowed. (Exhibit 7, Miller Depo., P: 134-37) (Mike Miller was the acting Board President at the time of his deposition.) When made aware of a remodel project, Clover Meadows would reach out to the owner to ask for plans, or go over to their home to discuss the remodel with them. (Exhibit 7, Miller Depo, P: 140-143) Clover Meadows also reaches out to new owners to give them a copy of the bylaws and covenants, including a brief summary of the Covenants, including the single family requirement. (Exhibit 7, Miller, P:150, L:17-25, P:151 L:1-6)

Until the Spear addition, Clover Meadows was unaware of any violation of the single-family language, but for Ms. DeSanti's home. To all outside appearances, all of the homes within the Clover Meadows Subdivision are single-family residences. (Exhibit 7, Miller Aff. P:115 L: 8-16) To the best of Clover Meadows' knowledge, when this action was initially filed, no other home had been remodeled in a manner that would violate the covenants. (Exhibit 7, Miller Aff. P:115 L: 8-16,)

Prior to this action being filed, other than Ms. Spears Property and the Desanti property, to the best of Clover Meadows knowledge, there was only one other home that potentially violated the Single-Family language in the Covenants. This is the property adjacent to the Spear's residence, owned by the Edwards. (Exhibit 7 Miller Depo., P:39, L:20-25, P:40, L:1) In this case, a neighbor believed that the Edwards had a separate apartment in their home. As the Association does not have the power to enter a homeowner's property, Clover Meadows did what it could to verify the truth of the complaint. (Exhibit 7, Miller Aff., Page 131, L:8-13.)

Clover Meadows reviewed all of the evidence available, including Montana Cadastral, which shows only one home. Unlike the DeSanti Complaint, which included photographic evidence of a second unit, or the Spear matter, which included clear architectural renderings, the Edward's complaint did not include any evidence other than the complaint's word. (Exhibit 7, Miller Aff., P:39, L:20-25,

P:40, L:1-7; Page 131, L:8-13.) Clover Meadows wrote to the Edwards and asked them if they had a second apartment within their home. (Exhibit 7, Miller Depo., P:40, L:18-19) The Edwards denied the claim. (Exhibit 7, Miller Depo., P:130, L:11-16) Clover Meadows decided that an unsubstantiated complaint is simply not enough evidence with which it could move forward with an enforcement action.

As admitted to in Ms. Spear's Answer, approximately two (2) years ago before the case was filed, Ms. Spear's father Mike Spethman (Mr. Spethman) and Ms. Spear's husband (now deceased) met with then Clover Meadows' President, Ken Bruwelheide. (Exhibit 8, Bruwelheide Aff.) When Mr. Spethman and Ms. Spear's husband met with Ken Bruwelheide, Mr. Spears and Mr. Spethman informed Ken Bruwelheide that the Spears and the Spethmans were interested in building an additional dwelling unit on Ms. Spear's Property in which Mr. and Mrs. Spethman would reside. (Exhibit 8, Bruwelheide Aff.) At the meeting, Mr. Bruwelheide gave Mr. Spethman a copy of the Bylaws and Covenants and specifically informed both that an additional dwelling unit is prohibited. (Exhibit 8, Bruwelheide Aff.)

On July 3, 2020, Ms. Spears submitted plans for the Board to review regarding an addition to her already existing home. (Exhibit 9 Initial Plans) The existing home consists of a 4-bedroom house with an attached garage. These plans show that the addition would include the following:

1. A separate two car garage built next to the existing garage.

2. A separate mechanical room.
3. A kitchen, living room and dining room.
4. A master bedroom and bathroom.
5. A mudroom and laundry.
6. An additional bathroom and office.
7. Its own deck, porch and hot tub.
8. Its own front entry door.

Clover Meadows received the plans on July 3, 2020 (Exhibit 9, Initial Plans).

The Board immediately contacted their attorney, who drafted the attached letter which was sent to Ms. Spear and her Architect, Cassandra Elwell. (Exhibit 6, Letter) While the date says May, the letter was emailed on July 7, 2020. (Exhibit 10)

Ms. Elwell then sent another set of plans to the Board. The plans were essentially the same. However, she took out the pictures of the kitchen and laundry and relabeled all of the rooms. (Exhibit 11, Amended Plans). Clover Meadow responded that this was still a separate dwelling and that they could simply add in the kitchen, laundry and the like after the fact. Therefore, it would have the facilities for a person to live separately from people living in the original home.

Ms. Spear elected to build the addition. At this time, it is her intent that her parents, the Spethmans, reside in the addition when they are in Bozeman for the summers. The addition was substantially completed this summer.

Clover Meadows asked Mr. Spethman about the addition and what it contained.

Afterwards, Clover Meadow's expert, Randall Johnson, walked through the addition. Clover Meadows was able to confirm the following:

1. The Second Dwelling Area is completely wired and plumbed separately from the original unit. It shares a well and meter.
2. The Second Dwelling Area has its own separate electrical panel and its own heating and mechanical facilities.
3. The Second Dwelling area shares no living space with the original home. It can only be accessed by the original home through the garages, and those three doors may be locked and must have a key to open.
4. All of the infrastructure for a full kitchen and laundry room was installed and stubbed in, including gas for the stove, the necessary water hook ups and outlets for the laundry and the water for the refrigerator, dish washer and kitchen sinks.
5. All of the kitchen cabinetry was in the Second Dwelling Area ready to be installed or already installed.
6. There was a regular sized refrigerator in the addition.
7. There was an eating area.
8. The "office" in the Second Dwelling Area has a permanent "wardrobe" installed which serves as a closet. Therefore, it is a second bedroom as shown on the Initial Plans.
9. There is a separate front door for the addition with access to the main throughfare, as shown on the Initial Plans.

(Exhibit 12, Photos, Exhibit 13, Randy Johnson Aff., Exhibit 14, Mr. Spethman Aff. P.58, P. 61, L:9-13, P. 64: all, P. 65.1-15) Furthermore, Mr. Spethman testified that he may put in a sink in the former kitchen area in the future. (Exhibit 14, P.61; L:16-19.) Furthermore, Mr. Spethman testified that he does not believe that there is anything that would prohibit him from installing a kitchen in the Second Dwelling Area in the future. (Exhibit 14, Spethman Aff., P:59, L:2-13) In fact, Mr. Spethman believes that because they are all blood related, that the Second Dwelling Area can never be considered a separate dwelling. (Exhibit 14,

Spethman Aff., P.70, L:3-12.)

Last, the Department of Revenue recently reviewed the Second Dwelling Area for tax purposes.

Montana Cadastral | svc.mt.gov/msl/mtcadastral

Use Parcel Search Criteria: **Property Record Card** Tax Year: 2021 [Print](#)

Owner

County: **LLATIN**

Owner Name:

Address:

SEARCH

Proposed Owner Name...

- ANDERBURK ROBERT & S
- EAR JOSEPH & COURTNEE P
- EAR KARYN M REVOCABLE TRUST P
- EAR KARYN M REVOCABLE TRUST P
- EAR KARYN M REVOCABLE TRUST P
- EARMAN FRALEY TRUST DTD 8/1/14 P
- EARMAN JOSHUA B P
- EARNS JIMMY D & LINDA S P
- EARSON ELIZABETH P

Summary

Owners

Appraisals

Market Land Info

Dwellings

Existing Dwellings

Dwelling Type	Style	Year Built	
SFR	03 - Ranch	2020	View
SFR	01 - Bi-Level	1978	View

Dwelling Information

Residential Type: SFR Style: 03 - Ranch
 Year Built: 2020 Roof Material: 10 - Asphalt Shingle
 Effective Year: 0 Roof Type: 3 - Gable
 Story Height: 1.0 Attic Type: 0
 Grade: 5 Exterior Walls: 1 - Frame
 Class Code: 3301 Exterior Wall Finish: 3 - Masonite
 Year Remodeled: 0 Degree Remodeled:

Mobile Home Details

Manufacturer: Serial #: Width: 0
 Model: Length: 0

Basement Information

Foundation: 2 - Concrete Finished Area: 0 Daylight:
 Basement Type: 0 - None Quality:

Heating/Cooling Information

Type: Central/AC System Type: 5 - Forced Air
 Fuel Type: 3 - Gas Heated Area: 0

Living Accommodations

Bedrooms: 1 Full Baths: 1 Addl Fixtures: 3
 Family Rooms: 0 Half Baths: 0

Additional Information

Fireplaces: Stacks: 0 Stories:
 Openings: 0 Prefab/Stove: 1
 Garage Capacity: 0 Cost & Design: 0 Flat Add: 0
 % Complete: 0 Description: Description:

Dwelling Amenities

View: Access:

Area Used In Cost

Basement: 0 Additional Floors: 0 Attic: 0
 First Floor: 1668 Half Story: 0 Unfinished Area: 0
 Second Floor: 0 SFLA: 1668

Depreciation Information

CDU: Physical Condition: Good (8) Utility: Average (7)
 Desirability: Property: Average (7)
 Location: Good (8)

Depreciation Calculation

Age: 0 Pct Good: 0.98 RCNLD: 189880

Additions / Other Features

Additions

Lower	First	Second	Third	Area	Year	Cost
	21 - Porch, Masonry, Open			70	0	2098
	19 - Garage, Frame, Finished			616	0	29812

There are no other features for this dwelling

2 S 6 E 16

They have determined that it is a separate unit (See Existing Dwellings tab).

Therefore, Ms. Spear's Property is being listed for Department of Revenue purposes as having two separate dwelling units.

STANDARD OF REVIEW

The Court will review a district court's ruling on motions for summary judgment de novo, using the same M.R. Civ. P. 56 (Rule 56) criteria used by the district court. *Chapman v. Maxwell*, 2014 MT 35, ¶ 7, 374 Mont. 12, 14, 322 P.3d 1029, 1031.

Additionally, “[w]hether or not a party is entitled to recover attorney fees is ‘strictly a question of law.’ Thus, “[w]e review a district court’s conclusions of law pertaining to the recovery of attorney’s fees to determine whether those conclusions are correct.”” *Havre Daily News, LLC v. City of Havre*, at ¶ 11 (quoting *Chase v. Bearpaw Ranch Ass’n*, 2006 MT 67, ¶ 14, 331 Mont. 421, ¶ 14, 133 P.3d 190, ¶ 14 (Mont. 2006). (quoting *Transaction Network v. Wellington Tech.*, 2000 MT 223, ¶ 17, 301 Mont. 212, ¶ 17, 7 P.3d 409, ¶ 17 (Mont. 2000). (citation omitted; modification in original))). Therefore, there must be a finding that the District Court reached incorrect conclusions of law in both determining the matter moot and also in refusing to reward either party their costs associated with resolving this matter.

SUMMARY OF ARGUMENT

ARGUMENT I: The plain language of the Covenants clearly limits each Lot to One single family dwelling. The Second Dwelling Area is clearly a separate, second dwelling that has the facilities to house a separate person or persons in the dwelling. It has two bedrooms, two bathrooms, a laundry area with the appropriate fixtures, a separate front entry from the original home, a living area, a dining area and a kitchen with gas stubbed in for the stove/oven and water stubbed in for the kitchen sink, dishwasher and refrigerator. The kitchen cabinets and a full-size refrigerator were already installed. While the stove/oven is not yet installed, it simply needs to be wheeled into the home through the enclosed garage. The Second Dwelling Area shares no space with the original home and there are three locked doors between the two homes through the garages.

In the alternative, if the Court finds that the language in the Covenants is ambiguous, the Court can review the past actions of Clover Meadows, including how it has consistently interpreted the Covenants with regards to other owners, and find that the Second Dwelling Area violates the Covenants.

The Court should find that the District Court erred when it found that the Second Dwelling Area did not violate the Covenants. In addition, the Court should find that the Second Dwelling Area violates the Covenants. Therefore, this matter should be remanded back to the District Court to determine if the Second Dwelling Area should either be modified similarly to the Desanti property so that it cannot

ever have the facilities for cooking in the Second Dwelling Area, or torn down. Or, in the alternative, this Court may make a ruling on what must be done with the Second Dwelling Area,

ARGUMENT II: Clover Meadows, not Ms. Spear, is entitled to its attorney's fees and costs as it is the prevailing party to this matter.

ARGUMENT

A. The Undisputed Material Facts Show that Ms. Spear has Two Single Family Residences on her Property in Violation of the Covenants.

1. The Plain Language of the Covenants Prohibits the Second Dwelling Area.

Ms. Spear has built a building that if physically divided in two, would be two stand-alone dwellings. The plain language of the Covenants restrict each Lot to one Single Family Dwelling. Therefore, this Court should find that Ms. Spear's Additional Dwelling Area violates the Covenants either find that it must be remodeled in a manner that is consistent with the Covenants (similar to Ms. Desanti's, all water and gas connections removed and drywalled over and all kitchen appliances removed) or that she must tear down the Second Dwelling Area or remand this matter back to the District Court for such a ruling.

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 typically resolved to allow free use of property. *Newman v. Wittmer* (1996), 277 Mont. 1, 6, 917 P.2d 926, 929. However, the Montana Supreme Court recently carved out an exception to this rule. When there is a history of use and/or interpretation within an Association, the Court can look at that history to determine the meaning of the ambiguous covenant. *Craig Tracts Homeowners' Ass'n v. Brown Drake, LLC*, 2020 MT 305, ¶16, 402 Mont. 223, 477 P.3d 28. 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).

In determining whether language is ambiguous or not, a court may use a dictionary or statutory definitions to determine the plain meaning of a word or phrase. See, for example, *Craig Tracts Homeowners' Ass'n v. Brown Drake, LLC*, 2020 MT 305, ¶16, 402 Mont. 223, 477 P.3d 28, *Brewer v. Hawkinson*, 2009 MT 346, ¶26, 353 Mont. 154, 221 P.3d 643, *Czajkowski v. Meyers*, 2007 MT 292, ¶24, 339 Mont. 503, 172 P.3d 94, *Tipton v. Bennett*, (1997) 281 Mont. 379, 382, 934 P.2d 203, 206, *Hillcrest Homeowners Ass'n v. Wiley*, (1989) 239 Mont. 54, 56 778 P.2d 421, 422 and *Newman v. Wittmer* (1996), 277 Mont. 1, 7, 917 P.2d 926, 929.

According to the Covenants, Article IV, Section 1 “There shall be no more than one single family dwelling on any one lot.” (Exhibit 1, Article IV, Section 1, Covenants,). Additionally, Article IV, Section 2 of the Covenants states “No building other than single family dwelling homes and garages, storage sheds and greenhouses shall be erected upon the properties.” (Exhibit 1, Page 2) Single Family Dwelling is defined in Article II, Section (h), “shall mean a building used for residential occupancy by one family household.” (Exhibit 1, page 2) “Family Household” and “residential occupancy” are not defined in the Covenants.

Therefore, it would seem that the issue is, what is a building used for residential occupancy by one family household? And, is the Second Dwelling Area such a building? Put another way, because Ms. Spear built a building that has the facilities that can easily accommodate a kitchen (with the water and gas lines stubbed out of the walls for the kitchen appliances), and has two bedrooms, two bathrooms, laundry, a living room, kitchen cabinets, full refrigerator, separate entrance, separate electrical panel, separate mechanical room with hot water and heating equipment, separate garage and shares no living space with the other home on the property, is it a separate dwelling pursuant to the Covenants? Yes, it is.

We can turn to the DEQ for help. The DEQ has defined living unit in the ARMs. According to A.R.M. 17.36.101(27), “Living unit’ means the area under one roof that can be used for one residential unit and that has *facilities* for sleeping, cooking, and sanitation.” (Emphasis added) According to the Merriam Webster On-line dictionary, facility means “something, (such as a hospital) that is built, installed, or established to serve a particular purpose.” <https://www.merriam-webster.com/dictionary/facility> In this case, a unit simply needs the *facility* for sleeping, cooking and sanitation, the unit does not need to actually have the appliances installed, just the ability to hook them up, hence the facility for those items.

In addition, M.C.A. §70-24-103(5) defines Dwelling Unit as “a structure or the 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.” M.C.A. §70-24-103(17) defines Single Family Residence as “a structure maintained and used as a single dwelling unit. A dwelling unit that shares one or more walls with another dwelling unit is a single-family residence if it has direct access to a street or thoroughfare and does not share heating facilities, hot water equipment, or any other essential facility or service with another dwelling unit.” It is important to note that Montana law does not define a single family dwelling by the fact that it has a kitchen, but whether it shares common essential facilities like hot water and heat with another unit.

The key to both of these definitions is that a dwelling is more than one unit if it provides separate living spaces and facilities for the family units. The actual use of the units or the relationship of the people is not part either of these definitions Montana definition. A dwelling is simply a place where separate units of people can live. You can certainly have two separate family units, completely related by blood, living in two different, attached Dwellings. In other words, the fact that everyone is related by blood in this case does not turn two Dwelling Units into a Single-Family Dwelling. It is still two Dwellings if it does not share essential services or the two units each have the ability to have separate sleeping, cooking and sanitation.

That is exactly what is happening in this case. Ms. Spears and her parents are living to two separate dwellings. They claim that because they have not installed the kitchen appliances, the Second Dwelling Area is not a second dwelling unit. While they claim that they are never going to put in a kitchen, that fact that they stubbed out the entire kitchen for a gas stove, sink, dishwasher *after* this lawsuit was filed clearly shows that they intend to fully use the Second Dwelling Area as a separate dwelling. At the very least, Ms. Spear provided the facilities to have a kitchen easily installed. Therefore, it is a dwelling. (Keep in mind that Mr. Spethman, who will be residing in the Second Dwelling Area, stated in his deposition, that he does not see any prohibition on having a full kitchen in the Second Dwelling Area.) (Exhibit 14, Spethman Aff., P:59, L:2-13)

Defining Single Family Dwelling to mean that it is a dwelling with the facilities for eating, sleeping and is also consistent with the language in the covenants. Using Montana law gives us the common, plain meaning of what the Covenants mean when they state that a “Single Family Dwelling shall mean a building used for residential occupancy by one family household.” (Exhibit 1, Page 2) It does not change the plain meaning but simply helps us understand what is meant by “one family household.”

The Court should find that the Second Dwelling Area as it currently exists, violates the plain language of the Covenants in that it is a Second Single Family

Dwelling. Only one Single Family Dwelling is allowed on the Property pursuant to the Covenants. Therefore, this Court should either find that Ms. Spear must modify the Second Dwelling Area in a manner that would prohibit it from being used as a second dwelling (i.e. rule that it may not have a kitchen, all appliances must be removed and all water and gas lines in the kitchen area must be removed and drywalled over) or it must be torn down. In the alternative, the Court should remand this matter back to the District Court for a final ruling consistent with the Court's holding.

2. In the Alternative, if the Language in the Covenants is Ambiguous, then the Court should find that Based on the Historical Enforcement, the Second Dwelling Area Violates the Covenants.

Clover Meadows has consistently enforced the Single Family Dwelling language in its Covenants to mean that a dwelling is one where the area under one roof that can be used for one residential unit and that has *facilities* for sleeping, cooking, and sanitation. (Please note that this is an argument in the alternative. Clover Meadows believes, fully, that the plain language of the Covenants is unambiguous. However, it would be remiss not to make this argument in case the Montana Supreme Court sees otherwise.)

Restrictive Covenants are strictly construed and ambiguities in covenants are typically resolved to allow free use of property. *Newman v. Wittmer* (1996), 277 Mont. 1, 6, 917 P.2d 926, 929. However, the Montana Supreme Court recently carved out an exception to this rule. When there is a history of use and/or interpretation within an Association, the Court can look at that history to determine the meaning of the ambiguous covenant. *Craig Tracts Homeowners' Ass'n v. Brown Drake, LLC*, 2020 MT 305, ¶16, 402 Mont. 223, 477 P.3d 28. 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).

This is important because as stated above, after Clover Meadows went through the Desanti case, it consistently used the definitions found in the ARMs and *Stewart*, to define what the Covenants mean when the Covenants uses the term “a building used for residential occupancy by one family household” to define “Single Family dwelling.” (Exhibit 1, Covenants, Article III(h)) Clover Meadows has consistently used this definition to review other complaints and architectural submissions to determine if the building plans violated the Covenants. (Exhibit 6, Letter to Ms. Spear, and Clover Meadows Response MSJ, Doc. 36, Page 12)

After the DeSanti matter, Clover Meadows has diligently done what it could to attempt to enforce the single-family dwelling language in the Covenants.

Because it does not have the power to do more than offer their opinion regarding whether they believe a building violates the Covenants, the Clover Meadows Board does what it can to head off issues, to educate new and existing owners and help owners when asked. For example, past and present Board Presidents actively call real estate agents who have properties listed in the Clover Meadows Subdivision to let them know about the single-family restriction and that a second dwelling is not allowed. (Exhibit 7, Miller Depo., P: 134-37) When made aware of a remodel project, Clover Meadows would reach out to the owner to ask for plans, or go over to their home to discuss the remodel with them. (Exhibit 7, Miller Depo, P: 140-143) Clover Meadows also reaches out to new owners to give them a copy of the bylaws and covenants, including a brief summary of the Covenants, including the single family requirement. (Exhibit 7, Miller, P:150, L:17-25, P:151 L:1-6)

Until the Spear addition, Clover Meadows was unaware of any violation of the single-family language, but for Ms. DeSanti's home. To all outside appearances, all of the homes within the Clover Meadows Subdivision are single-family residences. (Exhibit 7, Miller Aff. P:115 L: 8-16) To the best of Clover Meadows' knowledge, when this action was initially filed, no other home had been

remodeled in a manner that would violate the covenants. (Exhibit 7, Miller Aff. P:115 L: 8-16,)

Prior to this action being filed, other than Ms. Spears Property and the Desanti property, to the best of Clover Meadows knowledge, there was only one other home that potentially violated the Single Family language in the Covenants. This is the property adjacent to the Spear's residence, owned by the Edwards. (Exhibit 7, Miller Depo., P:39, L:20-25, P:40, L:1) In this case, a neighbor believed that the Edwards had a separate apartment in their home. As the Association does not have the power to enter a homeowner's property, Clover Meadows did what it could to verify the truth of the complaint. (Exhibit 7, Miller Aff., Page 131, L:8-13.)

Clover Meadows reviewed all of the evidence available, including Montana Cadastral, which shows only one home. Unlike the DeSanti Complaint, which included photographic evidence, or the Spear matter, which included clear architectural renderings, the Edward's complaint did not include any evidence other than the complaint's word. (Exhibit 7, Miller Aff., P:39, L:20-25, P:40, L:1-7; Page 131, L:8-13.) Clover Meadows wrote to the Edwards and asked them if they had a second apartment within their home. (Exhibit 7, Miller Depo., P:40, L:18-19) The Edwards denied the claim. (Exhibit 7, Miller Depo., P:130, L:11-16)

This same notice was provided to Ms. Spear, with the same definition of Single Family Dwelling that was used to review Ms. Desanti, was given to the realtors, new owners and that was given to the Edwards. (Exhibit 6, Letter.) Because Clover Meadows has consistently defined Single Family Dwelling to mean a dwelling is one where the area under one roof that can be used for one residential unit and that has *facilities* for sleeping, cooking, and sanitation the Court should find that this is the meaning of a Single Family Dwelling in the Covenants. Therefore, for the same reasons discussed above, the Second Dwelling Area is in violation of the Covenants.

Therefore, this Court should either find that Ms. Spear must modify the Second Dwelling Area in a manner that would prohibit it from being used as a second dwelling (i.e. rule that it may not have a kitchen, all appliances must be removed and all water and gas lines in the kitchen area must be removed and drywalled over) or it must be torn down. In the alternative, the Court should remand this matter back to the District Court for a final ruling consistent with the Court's holding.

B. Clover Meadows should be Awarded its Attorney's Fees and Costs

Pursuant to the Covenants.

Pursuant to Article VIII, Section 3 of the Covenants, the Court should award Clover Meadows its attorney fees and court costs should it show that Ms. Spear is in violation of the Covenants. "It is expressly understood and agreed by any person

purchasing any or all of the property, that if an action is successfully brought against him for violation of these covenants, that reasonable attorneys' fees shall be assessed against him in addition to any damage incurred therein." (Exhibit 1, Covenants, Page 8)

Therefore, the Court should award the Association its attorney's fees and costs incurred in this matter.

CONCLUSION

The Court should find that the Second Dwelling Area as it currently exists, violates the plain language of the Covenants in that it is a Second Single Family Dwelling and only one Single Family Dwelling is allowed on the Property pursuant to the Covenants. Therefore, this Court should either find that Ms. Spear must modify the Second Dwelling Area in a manner that would prohibit it from being used as a second dwelling (i.e. rule that it may not have a kitchen, all appliances must be removed and all water and gas lines in the kitchen area must be removed and drywalled over) or it must be torn down. In the alternative, the Court should remand this matter back to the District Court for a final ruling consistent with the Court's holding.

In the alternative, if the language is ambiguous, because Clover Meadows has consistently defined Single Family Dwelling to mean a dwelling is

one where the area under one roof that can be used for one residential unit and that has *facilities* for sleeping, cooking, and sanitation the Court should find that historically, this is the meaning of a Single Family Dwelling in the Covenants. Therefore, this Court should either find that Ms. Spear must modify the Second Dwelling Area in a manner that would prohibit it from being used as a second dwelling (i.e. rule that it may not have a kitchen, all appliances must be removed and all water and gas lines in the kitchen area must be removed and drywalled over) or it must be torn down. In the alternative, the Court should remand this matter back to the District Court for a final ruling consistent with the Court's holding.

Last, the Court should find that Clover Meadows is the prevailing party and pursuant to the Covenants, award Clover Meadows attorney's fees and costs.

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 (except that quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

Dated this 7th day of November, 2023.

A handwritten signature in blue ink, appearing to read "Alanah Griffith".

Alanah Griffith, Attorney for
Defendants/Appellees

CERTIFICATE OF SERVICE

I, Alanah Noel Griffith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-07-2023:

Amy Claire McNulty (Attorney)
1705 West College Street
Bozeman MT 59715
Representing: Cortnee Spear
Service Method: eService

Electronically Signed By: Alanah Noel Griffith
Dated: 11-07-2023