No. DA 24-69

IN THE

Supreme Court of the State of Montana

APRIL MYERS, JAMES MYERS, DARRYL WHITCANACK, PATRICIA MILLER, EVERETT WESTERMAN, PATRICIA WESTERMAN, JAMES STEVENSON, LONNIE BEKEL, and CINDY BEKEL,

Plaintiffs and Appellants,

v.

JOSEPH KLEINHANS and AMANDA KLEINHANS,

Defendants and Appellees,

ON APPEAL FROM THE MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT, CARBON COUNTY, HON. MATTHEW J. WALD
CASE NO. DV-22-81

APPELLEES' BRIEF

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INTRODUCTION

Contrary to Appellants' introduction, this case is not one of first impression, nor does it involve any wide-reaching or ground-breaking legal principles. The issue for this Court to decide is not, as Appellants frame it, whether restrictive covenants in the abstract "***can*** restrict short term rentals." (Appellant's Br. at 1.) Rather, the narrow issue is whether the specific language of these particular Covenants ***actually does restrict*** such rentals.

Decades of precedent require that the Covenants be construed narrowly, in favor of "the free use of property." Properly construed, the Covenants here simply do not restrict rentals. The 2-page Covenants are poorly drafted and include no language about rentals. At best, they are ambiguous, as the District Court concluded. They cannot be enforced according to Appellants' interpretations, as a matter of law.

STATEMENT OF THE ISSUES

1. Whether the District Court erred by concluding that the restrictive covenants do not preclude the Kleinhans from using or renting their property, either on a short-term or long-term basis.

STATEMENT OF THE CASE

I. Nature of the Case

Fundamentally, this is a short-term property rental dispute. The parties are neighbors, whose properties are subject to a 2-page Declaration of Covenants. The sole issue is whether these Covenants preclude Appellees Joe and Mandy Kleinhans (collectively, the "Kleinhans") from renting[1] their remodeled garage, either on a short-term or long-term basis.

II. Course of Proceedings and Disposition Below

This is an appeal of the District Court's order on cross-motions for summary judgment. The District Court ruled that the Covenants do not preclude the Kleinhans' rental of their property. The District Court granted the Kleinhans' motion for summary judgment and denied Appellants' motion for summary judgment. This appeal followed.

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[1] Some Appellants have asserted that the Covenants also prohibit ***any*** use of the Kleinhans' remodeled garage – e.g., using the space as something other than living quarters or allowing overnight guests to stay there without charge. Appellants' Opening Brief seems to have abandoned that argument.

STATEMENT OF THE FACTS

I. The Parties and the Property

The parties are homeowners in the rural "Whitehorse Estates Minor Subdivision," located just south of Laurel. All parties live on the same gravel road. The Kleinhans purchased their property in 2016 and thereafter converted their 600-square-foot garage into living quarters, which includes electrical, plumbing, and heating infrastructure. The Kleinhans originally intended that Joe's mother might live in this remodeled space on a part-time basis. (Appx. 073.)[2] The Kleinhans have since allowed relatives, friends, acquaintances, and members of their church to stay there overnight, on a short-term basis without charge. They have also rented the space on a short-term basis by taking reservations and receiving payment through the "AirBNB" internet platform. (Appx. 088-089.)

Appellants are the Kleinhans' neighbors. They seek to preclude the Kleinhans from using their remodeled garage, either by the Kleinhans' family and friends or paying guests. Appellants allege that

[2]References to "Appx." refer to Appellants' Appendix filed February 28, 2024. References to "Supp. Appx." refer to the Appellees' Supplemental Appendix filed herewith.

the Kleinhans have violated the 2-page covenants dated October 12, 1993 (the "Covenants"). (Appx. 020-021.) Appellants seek declaratory judgment and injunctive relief. Appellants' Complaint alleges that the Kleinhans violated four separate provisions of the Covenants. Only two Covenant provisions remain at issue on this appeal. Both relate to the Kleinhans' use and rental of their remodeled garage.

II. The Covenants

The drafters of the Covenants could have easily included language expressly addressing whether properties could be rented, but they chose not to do so. The Covenants include no language regarding rental of property, either on short-term or long-term basis. (Appx. 020-021.) Nowhere do the words "rent" or "lease" appear. (*Id.*) Thus, Appellants' entire argument requires shoehorning the Kleinhans' use and rental of their remodeled garage into a different, less-specific restriction in the Covenants. Appellants presented the District Court with two theories.

First, Appellants contend the Kleinhans' use of their remodeled garage transforms their home into something other than a "single-family dwelling" in violation of the Covenants. Appellants' Complaint alleges:

> Defendants have converted their garage into a rental property in violation of the Covenants wherein it states that Subdivision property is to be used only for a single-family dwelling.

(Appx. 016-021, ¶ 9.) Appellants' Complaint cites the Covenants, which provide, in relevant part:

> No parcels within Whitehorse Estates Minor Subdivision may be subdivided and only single-family dwellings and their associated outbuildings may be constructed within the boundaries of the subdivision, and only one such dwelling may be constructed on any lot within the subdivision. For the purpose of this restriction "single family dwelling" shall mean a building under one roof designed and intended for use and occupancy as a residence, by a single family.

(Appx. 020.) The Covenants further describe the "Dwelling Type" that is required to be constructed on each lot as follows:

> DWELLING TYPE AND SIZE
>
> Must be a structure intended for the use as a single-family dwelling to be constructed on site, of which the ground floor of the residence, exclusive of open porches, balconies, garages, and carports, shall occupy a floor area of not less than 1300 square feet, and all buildings shall be set back at least 25 feet from any property line. Trailer houses of any "move on" type building shall not be permitted.

(Appx. 021.)

Alternatively, Appellants contend that any rental by the Kleinhans is a prohibited "commercial business" under the Covenants. Appellants' Complaint alleges:

> Defendants are running a commercial business from their property in violation of the Covenants.

(Appx. 016-021, ¶ 12).) The Covenants provide, in relevant part:

> No commercial business, trade, or manufacture of any sort or nature shall be allowed.

(Appx. 021.)

Other neighbors (among the Appellants) have constructed an outbuilding with substantially the same infrastructure and amenities as the Kleinhans' remodeled garage. In 1993 – more than 20 years before the Kleinhans purchased their property – Appellants Lonnie and Cindy Bekel constructed a 3,000-square-foot outbuilding, which they refer to as a "man cave." (Supp. Appx. 119.) The Bekels' "man cave" outbuilding includes not only electrical power and heat, but also a bathroom with plumbing for a functional toilet and sink. (Supp. Appx. 118.) The Bekels' "man cave" is ***more than 5 times larger*** than the size of the Kleinhans' remodeled garage. The only difference between the Bekels' outbuilding and the Kleinhans' outbuilding is their

use. The Kleinhans have occasionally allowed others to stay overnight on their property, either in exchange for money or for free. The Bekels do not charge rent, and their overnight guests sleep in the main house, rather than in the adjacent "man cave." (Supp. Appx. 121-122.)

III. Appellants' Varied Interpretations of the Covenants

Regarding the Kleinhans' remodeled garage, Appellants disagree among themselves, both as to what the Covenants prohibit and what remedies they seek. Some Appellants, such as Everett Westerman, believe the Covenants permit the Kleinhans' remodel, so long as the Kleinhans do not charge their guests money.

> Q. Could they convert [their garage] to a living space as long as they didn't charge people to stay there?
>
> A. Sure.
>
> Q. If they collect one penny, they're in violation of the business provision. If they don't, they're fine. Is that a fair summary?
>
> A. Yeah.

(Supp. Appx. 108.) These Appellants do not believe the Covenants prevent non-paying friends and family from staying overnight in the Kleinhans' remodeled garage. Appellant Patricia Miller agrees.

> Q: Would it be a violation of the covenants, in your mind, if Mandy's mom, for instance, came and stayed in the remodeled garage?
>
> A: No.
>
> Q: Why not?
>
> A: Because she is the family member.

(Supp. Appx. 103.) At times, Appellant James Stevenson agreed with this assessment, i.e., that rent is the only issue, though he did change his interpretation of the Covenants even during the short time of his own deposition. (*Compare* Stevenson depo. tr. 24:20-25:3 *with* Stevenson depo. tr. 27:21-29:8 (Supp. Appx. 114-115).)

Other Appellants believe the Covenants prohibit any sort of outbuilding that has mechanical / electrical infrastructure, such as plumbing. Appellant Lonnie Bekel, for example, believes the Covenants prohibit use of any sort of living area in the Kleinhans' remodeled garage. He believes the District Court should order the Kleinhans to either "[t]urn it back into a two-car garage" or a "[r]ec room." (Supp. Appx. 118-119.) At a minimum, he believes the Covenants require the Kleinhans to "[r]emove the plumbing, remove the kitchen, remove the bedroom." (*Id.*) He makes these demands despite the fact that his own

3,000-square-foot "man cave" outbuilding includes a bathroom with the very toilet, sink, and other plumbing that he demands the Kleinhans remove. (Supp. Appx. 118-119.) No neighbor has ever suggested that the Bekels' "man cave" violates the Covenants, because it does not. (Supp. Appx. 118, 125.)

Appellant Whitcanack demands a draconian result – completely razing the Kleinhans' remodeled garage. (Supp. Appx. 097-098.) He focuses on its detached nature. He acknowledges that the Covenants would permit the Kleinhans to remodel the main residence to include one or more additional bedrooms, bathrooms, showers, kitchen sinks, etc. if the remodel was attached to the same, original roof of the residence. (Supp. Appx. 099.) He further agrees that the Kleinhans could even physically connect the existing remodeled garage to the existing main residence without violating the Covenants (i.e., bringing the residence and the outbuilding under a single roof). He interprets the Covenants as follows:

> Restrictions in our covenants say single-family dwelling shall mean a building under one roof designed and intended for use and occupancy as a residence by a single-family. …

> If they can put that whole place under one roof and live in it themselves, it abides by the covenants.

(*Id.*) He brought this lawsuit, however, because he believes the Covenants prohibit remodeling outbuildings that are not physically attached to the main residence. (*Id.*) Because the Kleinhans remodeled a 600-square-foot detached outbuilding rather than remodeling their main residence, Appellant Whitcanack seeks an order requiring the Kleinhans to raze their remodeled garage entirely.

> Q. What in your mind would be sufficient changes to make this comply with [the Covenants]?
>
> A. Tear it down.
>
> Q. So to be clear, you're asking the jury to force my clients to rip down the remodeled garage?
>
> A. Should have never been built in the first place.

(Supp. Appx.097-098.)

Other Appellants interpret the Covenants to prohibit use of any outbuilding that is not connected to the main residence, under the same roof. Patricia Westerman, for example, understands that the Covenants allow residents to have guests visit their homes, but only "[i]n their homes, yes."

> Q. But they can't stay in an auxiliary building outside of the main residence?

A. No. It's single-family dwelling only.

Q. Okay. In other words, it needs to be under one roof?

A. Correct.

Q. So if the Kleinhans were to extend the roof of their home over the top of the garage, like a lot of houses have a garage that's actually attached to the house, that wouldn't bother you, would it?

A. As long as it wasn't being rented out.

(Supp. Appx. 111.) Even a camper would be prohibited under her interpretation of the Covenants, if the camper were used by someone other than the Kleinhans. She interprets the Covenants to prohibit guests from staying in a camper on the property but to allow the owners to stay in that same camper on the property.

Q. Could they put any sort of a temporary structure on, like an RV in the backyard, would that work?

A. As long as you use it for camping out of your backyard.

Q. Why couldn't you camp in the backyard of your own property in an RV?

A. I guess your, yourselves, could camp out there.

Q. What if you had friends over and they wanted to stay there?

A. No, they need to stay in the house.

(Supp. Appx. 111.)

Appellant Stevenson, at times, construes the Covenants similarly – i.e., to allow the Joe and Mandy Kleinhans to stay in "a trailer or a motor home" on their own property, but to prohibit the Kleinhans' college-aged children from doing the same, "[e]ven though they literally grew up in that house." (Supp. Appx. 115.) This, of course, contradicts his earlier testimony that the Covenants only prohibit the charging of rent and that he had no "complaints about family members [or friends] staying" in the Kleinhans' remodeled garage, assuming they have the proper septic system permit issued by the Montana DEQ, which is not at issue in this litigation. (Supp. Appx. 114-115.)

Appellant Cindy Bekel has an even more restrictive interpretation of the Covenants that focuses on plumbing fixtures, regardless of location. She disagrees with Appellants Whitcanack and Patricia Westerman, in that she interprets the Covenants to prohibit the Kleinhans from undertaking any remodel their home – even under a single roof of the residence – if that remodel adds living spaces such as "a kitchen, bathrooms, bedrooms, [or a] living room." (Supp. Appx. 126.) Like her husband, Lonnie, she believes the Covenants restrict the amount and location of plumbing and other mechanical infrastructure

allowed even in the main residence, notwithstanding her own "man cave" outbuilding that includes the very plumbing she wants removed from the Kleinhans' remodeled garage. (Supp. Appx. 118-119.) Under her interpretation, the Covenants would prohibit any remodel or addition by the Kleinhans that "makes it an apartment in the house." (Supp. Appx. 126.)

In sum, Appellants cannot agree among themselves what the Covenants require, but much like Justice Stewart, they profess to know a Covenant violation when they see it.

IV. The District Court's Summary Judgment Order

The parties agreed that the material facts are undisputed and filed cross-motions for summary judgment. The District Court granted the Kleinhans' motion and denied Appellants' motion.

Specifically, the District Court concluded that the "single family residence" language "is not ambiguous." (Appx. 007.) That language "is a structural restriction, not a use restriction" and accordingly does not limit the Kleinhans' rental of the remodeled garage. (*Id.*) The District Court further concluded that the "Kleinhans' garage is an 'associated outbuilding,'" as the Covenants expressly contemplate. (Appx. 008.)

The District Court concluded that the "commercial business" restriction is ambiguous, because the Covenants fail to define either "commercial" or "commercial business." (Appx. 014-015.) The District Court noted that any reasonable interpretation of this term would necessarily exempt "a *de minimus* level of economic activity" because it would be absurd to apply this prohibition to, for example, "holding a garage sale, or even working from home occasionally." (Appx. 014.) The Covenants simply do not define that threshold level of economic activity. If the Covenants intended to "prohibit these hybrid uses" such as short-term rentals, "more specificity is required." (Appx. 015.)

Appellants now appeal the District Court's summary judgment ruling.

STANDARD OF REVIEW

The District Court's grant of summary judgment is reviewed *de novo*. *Craig Tracts HOA, Inc. v. Brown Drake, LLC*, 2020 MT 305, ¶7 (affirming summary judgment that short-term rental did not violate the "residential purposes only" restrictive covenant). The District Court's "interpretation of a restrictive covenant is a conclusion of law which [this Court] reviews for correctness." *Id.*

SUMMARY OF THE ARGUMENT

The District Court correctly concluded that the Covenants do not prevent the Kleinhans from using or renting their remodeled garage. *First*, the Covenants' "single family dwelling" language is a ***structural*** restriction and not a ***use*** restriction. It imposes no limitation on how the Kleinhans use their property, including as overnight accommodations with or without payment. *Second*, the Covenants' prohibition on undefined "commercial business" does not preclude renting the property to others who use it for residential purposes. At the very least, the Covenants are ambiguous and cannot be enforced to prohibit the Kleinhans' use and rental of the remodeled garage.

ARGUMENT

I. Restrictive covenants are narrowly construed in favor of the "unencumbered use of property."

"Restrictive covenants, like contracts, are interpreted to ascertain the intention of the parties." *Craig Tracts*, ¶ 9 (affirming summary judgment); *see also Creveling v. Ingold*, 2006 MT 57, ¶¶ 8, 10. "Where [a covenant's] language is clear and explicit, the Court will apply the language as written," and that "language should be interpreted according to its ordinary and popular meaning." *Id.* "In the construction

of an instrument, the 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." Mont. Code Ann. § 1-4-101.

Where a covenant's language is ambiguous, however, this Court must "construe restrictive covenants strictly and resolve ambiguities in favor of free use of property." *Craig Tracts*, ¶ 9; *see also Creveling*, ¶ 8. This Court may "consider evidence extrinsic to the language of the restrictive covenant itself if an ambiguity is found." *Id.* "Ambiguity is a question of law for the Court to determine and exists where the language, as a whole, is subject to two different reasonable interpretations." *Id.*; *see also Czajkowski v. Meyers*, 2007 MT 292, ¶ 21.

II. The Covenants do not prohibit rentals.

A. The Kleinhans' remodeled garage does not violate the "single-family dwelling" restriction.

1. The Kleinhans' use of the remodeled garage is irrelevant.

As a threshold matter, the Covenants' "single-family dwelling" restriction is a ***structural*** restriction and not a ***use*** restriction. Appellants repeatedly conflate the two. Beginning with their

Complaint, Appellants have inaccurately alleged that the Kleinhans' "property is to be ***used*** only for a single-family dwelling." (Appx. 017 (emphasis added).) Appellants compound this mischaracterization in their current argument. (*E.g.*, Appellants' Br. at 3 ("The Covenants say the same thing regarding the ***use*** of the Defendants' property as a single-family residence ….") (emphasis added); Appellants' Br. at 10 ("First, they restrict ***usage*** of properties to single family dwellings.") (emphasis added).) This is simply not how the Covenants read, as the District Court properly concluded.

Like other states, Montana has long distinguished "use" restrictions from "building" or "structural" restrictions.

> Restrictions limiting the right of the owner to deal with his land as he may desire fall naturally into ***two distinct classes***, the one consisting of restrictions on the ***type and number*** of buildings to be erected thereon, and the other on the subsequent ***use*** of such buildings. The restrictions in the former class are concerned with the physical aspect or external appearance of the buildings, those in the latter class with the purposes for which the buildings are used, the nature of their occupancy, and the operations conducted therein as affecting the health, welfare and comfort of the neighbors. A building restriction and a use restriction are ***wholly independent of one another***, and, in view of the legal principles above stated, the one is not to be extended so as to include

> the other unless the intention so to do is expressly and plainly stated; to doubt is to deny enforcement.

Patton v. Madison County, 265 Mont. 362, 372, 877 P.2d 993, 998-99 (1994) (emphasis added) (*quoting Jones v. Park Lane for Convalescents*, 120 A.2d 535 (Pa. 1956)). In *Patton*, for example, this Court considered whether the operation of a bed and breakfast violated a "single family dwelling" covenant that provided:

> No structure shall be allowed on any tract except one single family dwelling with a two car garage and one guest house.

Id., 265 Mont. at 371, 877 P.2d at 998. This Court found this to be a structural restriction that "limits the type and number of buildings on the property; it does not place restrictions on the use of the property." *Id.*, 265 Mont. at 372, 877 P.2d at 999.

> We hold that the operation of the bed and breakfast does not violate the restrictive covenant, for the reason that the covenant does not restrict the ***use*** of structures on the property. The covenant merely states that no structures shall be allowed on any tract except one single family dwelling, a two-car garage and one guest house. This is a restriction based on the types and number of buildings allowed on the property.

Id. (emphasis original). *See also Double D Manor, Inc. v. Evergreen Meadows HOA*, 773 P.2d 1046, 1048-49 (Colo. 1989) (*en banc*) (collecting

cases from across the country "which have addressed similar questions have concluded that the phrase 'single-family dwelling' is merely a structural restriction," and rejecting the argument "that the phrase 'single-family dwelling' restricts the use of the properties to single families only").

Likewise, the Covenants in this case specify only the types of structures that may be ***constructed*** in the subdivision. (Appx. 020) ("… only single-family dwellings and their associated outbuildings ***may be constructed***….") (emphasis added).) Nothing in this restriction limits how the Kleinhans may ***use*** their property once the proper building is "constructed." (*Id.*)

The Covenants' description of the "single-family dwellings" being "intended for use and occupancy as a residence by a single family" again relates only to the type of building to be constructed, and not how it must be actually used. As other courts have explained, actual use of properties and their improvements change with time, and a construction requirement relating to the "intended use" of a structure does not preclude changes in that use. *See Double D Manor,* 773 P.2d at 1048-49.

Short-term rentals long predated the Covenants, and yet no such rental restrictions were included. Instead, the drafters of the Covenants chose to define structural limitations "intended for" particular uses but chose not to limit the actual use of the property. Any other interpretation would improperly rewrite the Covenants.

2. The Covenants expressly permit "associated outbuildings," such as the Kleinhans' garage.

Read in its entirety, the same sentence of the Covenants that mentions a "single-family dwelling" expressly contemplates other structures, such as the Kleinhans' remodeled garage. The Covenants permit the construction of not only "single family dwellings" but also "their associated outbuildings." (Appx. 020.) Further, the Covenants define the "single family dwelling" to mean "a building under one roof designed and intended for use and occupancy as a residence by a single family" and require the dwelling to have at least "1300 square feet" in size. (*Id.*) The Kleinhans' main house indisputably meets these requirements. It is the only "single-family dwelling" on the property. In contrast, under no circumstances would the Kleinhans' 600-square-foot remodeled garage meet the Covenants' definition of a second "dwelling"

because it has less than half the minimum required square footage. The Kleinhans have not constructed a duplex or fourplex or any other type of multifamily structure. Rather, the remodeled garage is an "associated outbuilding," as the Covenants expressly contemplate.

Appellants improperly ignore the "associated outbuildings" language in the Covenants. Consistent with the most fundamental law of contract interpretation, the Court must "read the [covenants] as a whole in order to ascertain its meaning, rather than reading any one part in isolation." *Milltown Addition HOA v. Geery*, 2000 MT 341 ¶ 11 (citing Mont. Code Ann. § 28–3–202). The Covenants make no effort to define the specifically allowed "outbuildings," but its most reasonable meaning is any structure that is separate and detached from the Kleinhans' main dwelling. In other contexts, this Court has routinely acknowledged that a person may reside in and/or rent space in a residential "outbuilding." *See*, *e.g.*, *State v. Thomas*, 2020 MT 222, ¶ 16 (extending Constitutional search-and-seizure protections to an "outbuilding where [the defendant] resided"). Construing a different, more restrictive covenant, this Court concluded that a "necessary outbuilding" was any structure that was "convenient to the house."

Higdem v. Whitham, 167 Mont. 201, 207, 536 P. 2d 1185, 1189 (1978) (finding no covenant violation and reversing trial court's order to raze residential outbuilding). By any ordinary meaning, the Kleinhans' remodeled garage is an "outbuilding" associated with the main residence and is expressly permitted by the Covenants. The Covenants allowed this building when it was originally constructed as a garage,[3] and the Covenants still allow it after its remodel.

Moreover, extrinsic evidence demonstrates that Appellants do not even follow the very interpretation they ask this Court to adopt. The Bekel Appellants have a 3,000-square-foot "man cave" that also has plumbing, heating, electricity, etc. (Supp. Appx. 118-122.) Structurally, the Kleinhans' remodeled garage is substantially the same as the Bekels' "man cave," built in 1993. (*Id.*) Both are detached from the main residence. (*Id.*) Both have electrical and plumbing infrastructure. (*Id.*) Both have flushing toilets and working sinks. (*Id.*) Both are heated. (*Id.*) Bekel's outbuilding is 3,000 square feet – 5 times larger than the

[3] Appellant Whitcanack testified that the Kleinhans' outbuilding was "Just fine" under the Covenants, when it was used as a garage. (Supp. Appx. 097-098.)

Kleinhans' remodeled garage. (*Id.*) Appellants ask this Court to order the Kleinhans to remove the plumbing and/or entirely raze their remodeled garage, yet these same Appellants uniformly deny that the Bekels' outbuilding with these same amenities violates the Covenants. They do not seek to remove the Bekel's plumbing. They do not seek to raze the Bekels' outbuilding.

The only difference is the parties' respective uses of their outbuildings. Whereas the Bekels use their outbuilding as a "man cave;" the Kleinhans have furnished their outbuilding with a couch, bed, and chairs, and they allow family, friends, and short-term rental guests to stay overnight. Structurally, the Kleinhans' remodeled garage undeniably complies with the Covenants. Many, if not most, Appellants even agree that the Covenants allow the Kleinhans' remodeled garage to exist; they simply disagree with how it is used.

This dichotomy demonstrates that Appellants' true complaint is not that the Kleinhans ***remodeled*** their garage to include plumbing, heating, etc., but rather that the Kleinhans' guests occasionally ***pay money*** to stay in this living space. But, the Covenants simply do not

include such a ***use*** restriction relating to the "single-family dwelling" language.

Transforming the "single-family dwelling" language into a use restriction would improperly rewrite the Covenants, in violation of the most fundamental rules of covenant interpretation. *See* Mont. Code Ann. § 1-4-101. That is not the Court's role, and the District Court properly declined Appellants' invitation to commit this error. *See also King Resources, Inc. v. Oliver*, 2002 MT 301 ("A court has no authority to insert or delete provisions of a contract where the contract's provisions are unambiguous."). When the language of a restrictive covenant is clear and unambiguous, the language alone controls and there is nothing for the court to construe or interpret. *Hanson v. Water Ski Estates*, 2005 MT 47, ¶ 15.

Here, the language is both clear and unambiguous – the Covenants expressly permit the construction of "single family dwellings ***and*** their associated outbuildings" and are silent as to any use restriction upon the associated outbuilding. The Covenants are clear – the Kleinhans' use of their garage is irrelevant.

3. Alternatively, any "use" limitation implied by the Covenants' "single-family dwelling" language would be ambiguous.

Even if the Court were to conclude that one or more of Appellants' various and varying interpretations of the Covenants were reasonable (they are not), the District Court's grant of summary judgment for the Kleinhans is still proper because the Kleinhans' interpretation is also reasonable. Any ambiguity must be construed strictly "in favor of free use of property." *Craig Tracts*, ¶ 9.

Appellants' own disagreements among themselves as to what the Covenants require regarding the construction and remodeling of outbuildings only demonstrate the Covenants' ambiguity and unenforceability. Because the Covenants' "single family dwelling" limitation does not include any prohibition on how property is used, the Kleinhans' interpretation (and their use of the remodeled garage as a short-term rental) is at least reasonable. Any contrary interpretation of the Covenants cannot, therefore, be enforced. *Craig Tracts*, ¶ 9.

B. The "commercial business" restriction does not prohibit short-term rentals.

1. The Kleinhans' remodeled garage is not used as a "commercial business," as a matter of law.

Alternatively, Plaintiffs assert that the Kleinhans' occasional rental of the remodeled garage constitutes a "commercial business." The Covenants provide, in relevant part:

> No commercial business, trade, or manufacture of any sort or nature shall be allowed.

(Appx. 021.) Under Appellants' interpretation, the "commercial business" prohibition of the Covenants would permit the Kleinhans to have guests stay in the remodeled garage – but only if those guests do not pay the Kleinhans money.

Craig Tracts considered and rejected this exact argument in in the context of an even more restrictive "use" covenant. There, this Court considered whether short-term rentals at a fishing lodge violated a covenant that restricted use as follows:

> USE FOR RESIDENCE ONLY: The above-described real property… shall be used for residential purposes only.

Craig Tracts, at ¶ 4. This Court concluded that this restriction permitted short-term rentals by fishing tourists because the covenant was ambiguous as to the term "residential."

Specifically, *Craig Tracts* noted two common schools of judicial analysis on the term "residential" – one in which court "decisions focus on ***what*** is being done at a particular premises" and the other focusing on "***how long*** any particular individual is doing the activity." *Id.*, ¶ 10 (emphasis original). As to the first aspect, a "majority of other jurisdictions to have considered this issue have found that 'residential purposes' provisions do not prohibit short term rentals." *Id.* (collecting cases).[4] These courts note that short-term rentals do not alter the

[4] *Citing Santa Monica Beach POA v. Acord*, 219 So.3d 111, 114 (Fla. Ct. App. 2017); *Houston v. Wilson Mesa Ranch HOA*, 360 P.3d 255 (Colo. Ct. App. 2015); *Wilkinson v. Chiwawa Communities Ass'n*, 327 P.3d 614 (Wash. 2014) (*en banc*); *Estates at Desert Ridge Trails HOA v. Vazquez*, 300 P.3d 736 (N.M. Ct. App. 2013); *Slaby v. Mountain River Estates Residential Ass'n*, 100 So. 3d 569 (Ala. Civ. App. 2012); *Russell v. Donaldson*, S.E.2d 535 (N.C. App. 2012); *Applegate v. Colucci*, 908 N.E.2d 1214 (Ind. Ct. App. 2009); *Mason Family Trust v. DeVaney*, 207 P.3d 1176 (N.M. Ct. App. 2009); *Ross v. Bennett*, 203 P.3d 383 (Wash. App. 2008); *Scott v. Walker*, 645 S.E.2d 278 (Va. 2007); *Lowden v. Bosley*, 909 A.2d 261 (Md. 2006); *Mullin v. Silvercreek COA*, 195 S.W.3d 484 (Mo. Ct. App. 2006); *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664 (Idaho 2003); *Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997) (*en banc*);

residential nature of the property if the "renters are using the property for ordinary living purposes such as sleeping and eating." *Id.* (citations omitted). Under this interpretation, short-term rentals did not violate the *Craig Tracts* covenants because the activities of the short-term renters were residential and not commercial in nature. *Id. See also Wilson v. Maynard*, 961 N.W.2d 596 (S.D. 2021) (holding that short-term rentals do not violate "residential purposes" restriction).

Considering the second aspect, the *Craig Tracts* Court concluded that the covenants' failure to define a duration of residency created the ambiguity. One interpretation of the term "residential" implies a duration that "often goes beyond the mere existence of an activity at a fleeting instant in time." *Id.*, ¶ 13. The *Craig Tracts* covenants did "not explicitly say how long—if at all—a given person or their belongings must remain within a particular property in order for the property to serve a residential purpose," and that failure gave rise to the covenants' ambiguity. *Id.*, ¶ 15.

Catawba Orchard Beach Ass'n v. Basinger, 685 N.E.2d 584 (Ohio App. 1996).

> Since there are multiple reasonable interpretations of this language, we join with those courts to have found such language ambiguous in this context.

Id., ¶ 15. The Court then considered extrinsic evidence and concluded that the short-term rental of the property "is not inconsistent with that of a residential location." *Id.*, ¶ 18. *Craig Tracts* ultimately concluded that the covenants were ambiguous as to the duration of the stay required to be "residential" and therefore concluded that the covenants could not be construed to prohibit short-term rentals. *Id.*

Craig Tracts compels the same outcome here. The "commercial business" prohibition in the Covenants here is substantially the same as "residential use" requirement of *Craig Tracts*. The cases compiled and relied upon in *Craig Tracts* note that these terms were used interchangeably – "commercial" and "residential" are "two sides of the same coin," in this context. *See*, *e.g.*, *Wilkinson v. Chiwawa Communities Ass'n*, 327 P.3d 614, 620 (Wash. 2014) (*en banc*) (finding vacation rentals to be "residential, not commercial [use], no matter how short the rental duration"); *Pinehaven Planning Bd.*, 70 P.3d 664 (covenants prohibiting "commercial or industrial ventures or business" still considered residential use); *Mason Family Trust*, 207 P.3d 1176

(short-term rental did not violate "business or commercial purposes" prohibition); *Mullin*, 195 S.W.3d 484 ("business use"); *Catawba Orchard*, 685 N.E.2d 584 ("commercial purposes"). Any distinction between a "residential use" requirement and a "commercial business" prohibition is academic and clearly did not concern the *Craig Tracts* Court.

As with the first issue in *Craig Tracts*, the use of the property by the Kleinhans' guests is undeniably residential and not commercial in nature. This is true regardless of whether the Kleinhans' guests are (i) family or friends who stay without charge or (ii) paying renters. The property is advertised on the AirBNB internet site as a residential rental. (Appx. 088-089.) The guests use the remodeled garage as advertised – i.e., to eat, sleep, relax, watch television, prepare food, use the bathroom, browse the internet, play games, etc. (*Id.*) Appellants presented the District Court with no evidence that any of the Kleinhans' guests have ever used the remodeled garage to operate any "commercial business, trade, or manufacture." *See Craig Tracts*, ¶ 5. The activities of the Kleinhans' guests are residential – not commercial activities – by any definition.

The second issue addressed in *Craig Tracts* – the duration required for "residential" use – is not at issue here. The Covenants do not include this term, and Appellants do not argue that the length of a guest's stay bears on whether or not the Kleinhans are operating a "commercial business."[5] The sole issue raised by Appellants is whether the mere receipt of money from overnight guests transforms the Kleinhans' property into a "commercial business."

On this issue, the vast majority of other jurisdictions have held that the "owners' receipt of rental income in no way detracts from the use of the properties as residences by tenants." *Houston*, 360 P.3d 255, ¶ 23; *see also Mason Family Trust*, 207 P.3d at 1178 ("While [the owner's] renting of the property as a dwelling on a short-term basis may have constituted an economic endeavor on [his] part, to construe that activity as one forbidden by the language of the deed restrictions [prohibiting use for "commercial purposes"] is unreasonable and

[5] Any asserted distinction between long-term and short-term rentals being a "commercial use" would fail for ambiguity for the same reasons articulated in *Craig Tracts*. The Covenants do not define "rental" let alone specify a duration that distinguishes long-term rentals from short-term rentals.

strained. Strictly and reasonably construed, the deed restrictions do not forbid short-term rental for dwelling purposes"); *Slaby*, 100 So.3d at 580 ("The fact that the Slaby's receive rental income does not transform the character of the surrounding subdivision like the maintenance of a mobile-home park or hotel would."). Further, "when property is used as a residence, there is simply no tension between such use and a commercial benefit accruing to someone else." *Lowden*, 909 A.2d at 267-68. As in these cases, the nature of the Kleinhans' use of their property is not transformed from residential to a commercial business simply because the Kleinhans earn income from their occasional rental. *See Santa Monica Beach POA*, 219 So. 3d at 114-15.

This Court should conclude as a matter of law that the "commercial business" prohibition of the Covenants unambiguously fails to prohibit short-term rentals.

2. The non-Montana cases relied upon by Appellants represent the minority view and are generally distinguishable on their facts.

As noted above, the majority of jurisdictions considering general covenant language prohibiting "commercial" use or requiring "residential" use have concluded that short-term rentals are residential

and not commercial use. The non-Montana cases relied upon by Appellants represent a minority view, as those cases admit. *See*, *e.g.*, *O'Connor v. Resort Custom Builders, Inc.*, 591 N.W.2d 216 (Mich. 1999); Ald*rich v. Sugar Springs POA*, 2023 WL 174556 (Mich. Ct. App. 2023); *Morgan v. Townsend*, 302 A.3d 30 (Maine 2023). Further, a closer examination of those non-Montana cases reveal that many arrive at their minority viewpoint based upon unique facts and law that are not present here. As such, these cases are not even helpful in interpreting the Covenants in this case.

***a. Bostick v. Desoto County* (Mississippi)**

Bostick involved extraordinary facts and is no longer controlling law, even in Mississippi. *Bostick v. Desoto County*, 225 So.3d 20 (Miss. Ct. App. 2017). *Bostick* interpreted a county zoning ordinance defining the use of "single family dwellings" – not a covenant related to "commercial" versus "residential" use. *Id.*, ¶ 1. The County presented the trial court with substantial evidence showing that the rental use was materially different than a normal, "single family dwelling." For example, witnesses testified that during "a recent weekend, 15 to 20 motorcycles were parked in the driveway of one of the houses and loud

music was playing. 'All weekend,' 'all you heard was the motorcycles rip-roaring through the neighborhood.'" *Id.*, ¶ 7. The homeowner owned multiple rentals and advertised them as weekend party houses, good for "'guys' and 'girls' weekends," "bachelorette gathering[s]" and the like. *Id.*, ¶¶ 2-3. Another weekend, "[the homeowner] rented a house to University of Memphis students for a party," ***knowing*** that the "students had a stripper at the party." *Id.*, ¶ 7. These nuisance circumstances stand in sharp contrast to the mundane activities that the Kleinhans' renters use the property for – sleeping, eating, bathing, watching television, etc. Appellants offered the District Court no evidence to the contrary.

Moreover, *Bostick* has been supplanted *Lake Serene POA v. Esplin*, 334 So.3d 1139, 1142 (Miss. 2022). There, the covenants restricted property to "residential purposes only" and prohibited the use of property "for trade or business of any kind," the latter restriction being similar to the "commercial business" restriction at issue here. The Mississippi Supreme Court distinguished those covenants from zoning ordinances (such as those at issue in *Bostick*), and ultimately concluded that short-term rentals constitute residential – not commercial – use, as

a matter of law. *Id.*, ¶¶ 7, 12. The court focused on the nature of the activities and the fact that the payment occurred entirely online, where it had no impact on the neighbors.

> Here, … the property was being used as a place of abode. [The tenants] were using the property to sleep, eat, and bathe. Further, … all commercial activity and exchange of funds occurred online and not on the property.

Id., 334 So.3d at 1142 (citing Sla*by*, 100 So. 3d at 579 (short-term rental did not violate either "residential purposes" or "commercial use" restrictions); *Lowden*, 909 A.2d 261 (Md. 2006); *Mullin*, 195 S.W.3d 484; *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 289-90 (Tex. 2018); *Schack v. Prop. Owners Ass'n of Sunset Bay*, 555 S.W. 3d 339, 353 (Tex. Ct. App. 2018)).

In sum, if this Court is to resort to the law of Mississippi to interpret these Covenants, then *Lake Serene* – not *Bostick* – is the controlling law of that state. Also, the Covenants at issue here are more similar to the covenants in *Lake Serene* than to the zoning ordinance in *Bostick*.

b. Siwinksi v. Town of Ogden Dunes (Indiana)

Siwinski likewise involved a specific municipal zoning ordinance and not a restrictive covenant. *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825 (Ind. 2011). More importantly, the *Siwinski* ordinance did not even include "commercial business" or "commercial use" language that is at issue in this case. Rather, *Siwinski* involved specific language that required the subject property to be "used" only as a "single-family dwelling," which the zoning ordinance expressly defined as "[a] separate detached building designed for and occupied exclusively as a residence by one family." *Id.*, 949 N.E.2d at 828 (quoting the Town Code of the Town of Odgen Dunes, Indiana § 152.032(B)).

Prior to *Siwinski*, the Indiana case law expressly considered and rejected Appellants' argument. *See*, *e.g.*, *Applegate*, 908 N.E.2d 1214 (cited by *Craig Tracts*, ¶ 10). *Applegate* involved covenants that required the property to "be used only for residential purposes." *Id.*, 908 N.E.2d at 1217. The covenants expressly prohibited "commercial business" on the property but did permit "renting of the property for residential use." *Id.* The *Applegate* Court rejected the argument that short-term rentals were "commercial business" and concluded the

owner's "short-term rental of its cabins does not run afoul of the covenants." *Id.*, 908 N.E.2d at 1220. If this Court considers Indiana law to be helpful on this issue, then *Applegate* is the controlling case law – not *Siwinski*.

c. *Hensley v. Gadd* (Kentucky)

Hensley applied a legal standard contrary to Montana law. *Hensley v. Gadd*, 560 S.W.3d 516 (Ky. 2018). Whereas, Montana construes restrictive covenants "strictly," "in favor of the unencumbered use of property" (*Craig Tracts*, ¶19); the law of Kentucky does not. As the *Hensley* Court explained, Kentucky has rejected Montana's doctrine of strict construction and instead favors restrictive covenants.

> Stated another way, restrictions are regarded more as a protection to the property owner and the public rather than as a restriction on the use of property, and the old-time doctrine of strict construction no longer applies.

Hensley, 560 S.W.3d at 521 (citations omitted).

The *Hensley* Court applied this more covenant-favorable interpretation standard to a unique set of facts. *Hensley* involved a planned, mixed-use development with different restrictions applying to different portions of the development. Some parcels allowed

"commercial use," which the developer expressly contemplated would include "hotels, restaurants and similar retail…." *Id.*, 560 S.W.3d at 519. Other parcels were restricted to "be used only for residential purposes." *Id.* When one property owner (and his company) established short-term rentals on the residential lots, the developer sued, arguing that these rentals were effectively a "hotel" that would compete with other potential hotels in the "commercial" portion of the planned development. *Id.* The Kentucky court agreed with the developer based on (1) the unique and specific language of the covenants that limited nightly lodging at "hotels" to other parcels in the development, and (2) the substantial evidence the developer presented to the trial court proving that the "short-term, transient occupancy" of the rental properties made them akin to a hotel. *Id.* In reaching its conclusion, however, *Hensley* distinguished its prior, contrary conclusions that a prohibition on undefined "commercial" use was ambiguous and therefore unenforceable. *Id.*, 560 S.W.3d at 525-26 (distinguishing *Barrickman v. Wells*, 2015 WL 2357179 (Ky. App. 2015)).

Unlike *Hensley*, the Covenants in this case do not contain any specific definition of "commercial business." The Covenants at issue

here are more akin to the covenants in prior Kentucky cases, such as *Barrickman*, where "A majority of the [Kentucky] court believed that provision was ambiguous because 'commercial' was not otherwise defined. 2015 WL 2357179, at *2. Also unlike *Hensley*, Appellants in this case did not present the District Court with any evidence suggesting that the Kleinhans' receipt of occasional payment from guests is tantamount to operating a "hotel." Even under the more liberal Kentucky interpretation standard, the term "commercial" use was ambiguous and unenforceable in *Barrick*. The undefined "commercial business" prohibition in the Covenants is likewise ambiguous under Montana's strict ("old-time") interpretation requirement.

* * *

The non-Montana cases cited by Appellants represent a minority view, based on unique facts that are not present here – either in the Covenant language or in the Kleinhans' use of the property. None change the required conclusion that the Covenants do not preclude the Kleinhans' rental, as a matter of law.

3. Alternatively, the Covenants are at least ambiguous, as the District Court concluded.

Even if this Court concludes that Appellants' interpretations of the Covenants are reasonable (they are not), this Court must still affirm the District Court. At most, the Covenants would be ambiguous, because the Kleinhans' interpretation of the Covenants is likewise reasonable, as a majority of other courts have concluded.

The Covenants' ambiguity lies in the definition of "commercial business," to the extent that this language potentially ensnares residential rentals. Appellants' interpretation would transform the property into a "commercial business" upon the receipt of even the most infrequent and *de minimus* transfer of money (via the AirBNB internet booking site). As the District Court noted, interpreting "commercial business" to include ***any*** amount of economic activity would lead to absurd results. (Appx. 014.) This interpretation would preclude such common things as garage sales and rideshare employees who stop by their home between fares. (*Id.*) Thanks to modern technology, virtually every employed homeowner conducts some amount of business at home, whether it's checking emails, taking work phone calls, or reading legal

briefs. (*Id.*) Permanent, full-time work-from-home arrangements are common in the aftermath of the Covid-19 pandemic. Yet, Appellants' interpretation would preclude every such instance where individuals work from their kitchen table in exchange for money, no matter how briefly or infrequently. (*Id.*) Such an interpretation would yield absurd results. *See, e.g.*, *Montana Shooting Sports Assoc. v. State*, 2008 MT 190, ¶ 11.

Rather, any reasonable interpretation of the term "commercial business" necessarily implies a certain threshold quantum of commercial activity to avoid these absurd results. Just as the *Craig Tracts* covenants failed to define the minimum duration for a short-term guest's use to be "residential," the Covenants at issue here do not define the minimum amount or the nature of activity that rises to the level of a "commercial business." To be sure, the impact on the neighbors is *de minimus*. Appellants presented the District Court with no evidence that the Kleinhans' paying guests present any greater level of commercial activity than do non-paying guests. Appellants, frankly, have no idea whether a particular guest is paying the Kleinhans or is staying free of charge.

The Covenants' complete failure to define "commercial business" renders the term ambiguous and unenforceable. For the same reasons that the *Craig Tracts* covenants were ambiguous for failing to define a minimum duration a short-term stay to be "residential" so are these Covenants ambiguous for failure to define a minimum amount of economic activity to constitute a "commercial business." *See*, *e.g.*, *Yogman v. Parrott*, 937 P. 1019, 1023 (Or. 1997) (*en banc*) ("commercial enterprise" restriction was ambiguous and, therefore, unenforceable). The Covenants cannot, therefore, restrict the Kleinhans' rental.

CONCLUSION

For the foregoing reasons, Appellees Joe and Mandy Kleinhans respectfully request that this Court affirm the District Court.

Dated this 24th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,752 words, as determined by the undersigned's word processing program.

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