IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 23-0716

RODNEY BRANDT, HEIDI BRANDT, MARSHALL FLADAGER, NEVA FLADAGER, LARRY LAUTARET and RENA LAUTARET,

Plaintiffs/Appellees,

-vs-

R&R MOUNTAIN ESCAPES, LLC,

Defendant/Appellant.

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County
Hon. Danielle Coffman Presiding

APPELLANT'S COMBINED REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

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I. INTRODUCTION

Plaintiffs/Appellees' ("Plaintiffs") response brief and supplemental brief all but ignore two undisputed facts that resolve this case and distinguish it from *Myers v. Kleinhans*, 2024 MT 208, 418 Mont. 113, 556 P.3d 529.

First, the restrictive covenants at issue ("Covenants") expressly permit rentals: they allow property owners to post signage relating to rentals, and two of the Plaintiffs here (the Brandts) have rented out their property for years.

Second, the Covenants impose no durational limit on such rentals; indeed, they say nothing at all about the permitted length of any rental. Because the Covenants expressly contemplate rental use as a residential and non-commercial use of property, and because a rental's duration does not affect its fundamental character as a residential use, the Covenants cannot bar the short-term rentals offered by Defendant/Appellant ("R&R" or "the Palmers").

Plaintiffs nevertheless argue that a durational limit on rentals should be *written into* the Covenants based on so-called extrinsic evidence. But their *evidence* consists of verbal objections to short-term rentals raised informally by Plaintiffs—non-signatories to the Covenants—decades removed from the Covenants' signing. Montana law forbids such post-hoc, property-restriction-by-implication arguments because they undermine property owners' fundamental rights. *See, e.g.*, *Higdem v. Whitham*, 167 Mont. 201, 208-09, 536 P.2d 1185 (1975). The most basic rights to

property ownership have long included the right to tap into a property's value by leasing interests in it to others for any duration—a right the Brandts here exercise. Impliedly limiting that right to rentals only of certain durations flies in the face of that history.

The undisputed facts here—the Covenants' express allowance of rentals without regard to duration—distinguish this case from this Court's recent decision in *Kleinhans*, 2024 MT 208. In considering covenants that did not contemplate rentals—of any type or duration, this Court held that the commercial use prohibition there barred any activity that results in profit (including short-term rentals). That broad conception of commercial use cannot apply here, because it would prohibit the rentals that the Covenants expressly contemplate, including long-term rentals, which Plaintiffs agree are permitted. Instead, the Covenants treat rentals as a permissible residential use despite the generation of rental income, and nothing in the Covenants supports a durational limit that converts an expressly permitted residential use into an impliedly forbidden commercial use. Just as the Covenants permit long-term rentals and short-term stays by family and friends without a fee, so too they allow short-term rentals like those here.

Plaintiffs' argument flouts Montana's "overriding policy of individual expression in free and reasonable land use dictat[ing] that restrictions [on the use of property] should not be aided or extended by implication or enlarged by

construction." *Higdem*, 167 Mont. at 208-09; *see Craig Tracts Homeowners Ass'n, Inc. v. Brown Drake, LLC*, 2020 MT 305, ¶8, 402 Mont. 223, 477 P.3d 283. In arguing that a residential use covenant silent as to rental duration nonetheless bars all short-term rentals ("STRs"), Plaintiffs ignore that critical principle of contract construction—to the potential detriment of not just property owners, but of all those who rely on short-term stays to experience the beauty of Montana and those who rely on rent to pay mortgages and keep generational homes in families. Contrary to Montana's history, Plaintiffs' argument would go a long way toward limiting property ownership to only those who can afford to own in fee simple.

This case presents an important opportunity to reaffirm the fundamental principles of Montana law that parties cannot restrict the free and lawful use of property by implication or reinterpretation and that specific restrictive covenants must be given a fair reading, consistent with their context.

II. ARGUMENT

Plaintiffs' arguments ignore the terms of the restrictive covenants at issue and Montana's longstanding protection for lawful uses of private property. Plaintiffs turn the law on its head and demand that the Palmers produce evidence showing that the Covenants specifically *authorize* short-term rentals, a stark reversal of the applicable burden of proof. They ask the Court to read into the Covenants an implied durational limit on rentals, thereby forbidding the Palmers' rentals, while allowing

their own rental to continue unabated. And they assert that allegations of Covenant "enforcement" by Plaintiffs—long after the Covenants were signed—can control the Covenants' original meaning. But that is the opposite of how this Court evaluates restrictive covenants.

To protect fundamental rights in private property, Montana courts "construe restrictive covenants strictly and resolve ambiguities in favor of free use of property." *Craig Tracts*, 2020 MT 305, ¶8. This rule has constitutional roots: "All are born free and have certain inalienable rights, [including] the right to . . . acquir[e], possess[], and protect[] property." Mont. Const., art. II, § 3.

That protection is at its apex in the home due to the "overriding respect for the sanctity of the home has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). And this fundamental liberty includes the right to "lease" property as well as use it for other residential purposes. *See, e.g.*, *Terrace v. Thompson*, 263 U.S. 197, 215 (1923). Accordingly, as the Palmers have explained, Plaintiffs have a heavy burden of showing that an otherwise lawful use of property should be forbidden. Only clear language or intent that "definitively preclude[s]" short-term rental use will suffice. *Kleinhans*, 2024 MT 208, ¶12. Plaintiffs fail to satisfy that burden.

A. The Covenants Expressly Contemplate Rentals as a Residential, and Non-Commercial, Use of Property and Impose No Limit as to Duration.

The Palmers' opening brief explained that, while containing variants of a residential use provision and a commercial use prohibition, the Covenants' plain terms allow short-term rentals (as well as long-term rentals) because they (1) expressly contemplate rentals and (2) impose no express limitation as to duration. Palmer Br. 15-18. Plaintiffs have no persuasive response to either point.

First, Plaintiffs acknowledge that the Covenants expressly contemplate rentals as a residential and non-commercial use, Pls. Br. 30-31; as they must, because the Covenants permit owners to display "for rent" signs on their lots, *see* Opening Brf. Supp. Appx. ("Supp. Appx.") Ex. B, § A (6). That provision would be nonsensical if rentals themselves were considered prohibited, non-residential, or commercial uses. Consistent with this provision, two of the Plaintiffs, the Brandts, have used their property for long-term rentals since they moved out of state in 2022. Palmer Br. 12; Doc. 26, R. Stewart Aff., ¶ 10.

Plaintiffs respond that the provision contemplating "for rent" signs "is not properly interpreted as authorizing short-term rentals." Pls. Br. 30. Citing contract law principles requiring "the intention of the parties to be ascertained from the

writing alone," Plaintiffs assert that this provision permitting "for rent" signs exists in a vacuum and "extend[s] only to signs and no further." *Id.* at 31.

This response misunderstands both the Palmers' argument and rules for interpreting restrictive covenants. The Palmers' argument is not that the "for rent" sign provision *authorizes* short-term (or long-term) rentals; it is that the "for rent" sign provision underscores that rentals are permitted and not classified as forbidden non-residential or commercial uses. This is contract interpretation 101: contracts are interpreted "as a whole 'so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.'" *K&R P'ship v. City of Whitefish*, 2008 MT 228, ¶26, 344 Mont. 336, 189 P.3d 593 (citation omitted). Reading the Covenants to bar rentals is impossible to reconcile with the provision authorizing "for rent" signs. *Id.*; *see also Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 17, 364 Mont. 455, 276 P.3d 922 (courts should not "narrow the language" of the contract "when the parties chose not to do so"). Stated differently, "for rent" signs would be moot if rentals were forbidden.

Plaintiffs' response also misapprehends Montana's default rule favoring the "free use of the property." It is not the Palmers' burden to point to covenant language that *authorizes* STRs; it is Plaintiffs' obligation to show the covenants unambiguously *foreclose* STRs. *State ex rel. Region II Child & Family Servs, Inc. v. Dist. Ct. of 8th Jud. Dist.*, 187 Mont. 126, 130, 609 P.2d 245, 247-248 (1980).

Thus, Plaintiffs' claim that the "for rent" sign provision does not expressly "authoriz[e]" STRs is beside the point.

Second, Plaintiffs do not dispute that the Covenants contain no limitation or minimum threshold as to permissible rental durations. In arguing that a durational limit should nevertheless be implied, Plaintiffs state, without explanation, that "[p]lacing a duration" on the requisite rental "makes sense for proper enforcement." Pls. Br. 24. But "proper enforcement" of what?

Plaintiffs elide that the Covenants' signatory wrote nothing about any durational minimum—whether 2 days, 15 days, 30 days (as the district court unilaterally selected), or something else. Plaintiffs' attempt to read a durational limit into the contract violates contract principles that Plaintiffs' themselves invoke: "a court may neither insert nor omit terms to the contract," and the "the intention of the parties is to be ascertained from the writing alone." Pls. Br. 31. Plaintiffs do not and cannot reconcile these conflicting positions.

Plaintiffs' attempt to read implied terms into the Covenants is especially problematic given the property rights at stake. Restrictions on a property use cannot be "aided or extended by implication or enlarged by construction." *Higdem*, 167 Mont. at 209. So even if omitted terms can sometimes be read into a contract, they certainly cannot in the context of restrictive covenants. *Czajkowski v. Myers*, 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 94. Here, Plaintiffs' whole purpose in

reading an implied durational limit into expressly allowed rentals is to restrict owners' abilities to exercise their rights to rent their properties.

Applying Montana law to the undisputed facts here, however, the outcome is straightforward. The Covenants' plain text acknowledges that rentals are permitted, and Plaintiffs do not disagree. The Covenants' plain text contains no limitation on duration, and Plaintiffs can point to none. Accordingly, the Covenants, especially when "strictly construed," permit short-term rentals.

B. Any Alleged Ambiguity in the Covenant Language Must be Read in Favor of the Free Use of Property.

While the Palmers contend the terms are clear, if the Court considers the Covenants to be ambiguous, any ambiguity in the language should be read in favor of the free use of property. As this Court explained in its 2020 decision in *Craig Tracts*, this Court "construe[s] restrictive covenants strictly and resolve[s] ambiguities in favor of free use of property." 2020 MT 305, ¶ 8. Plaintiffs attempt to overcome this rule by pointing to the Covenants' residential and commercial use provisions and to *Kleinhans*, purportedly bolstered by extrinsic evidence. But Plaintiffs' argument misinterprets these specific Covenants and this Court's precedent.

1. Short-Term Rental Use is Consistent With the Covenants' Residential Use Provision.

Plaintiffs' primary argument on appeal has been that the Palmers' short-term rentals violate the Covenants' residential use restriction under *Craig Tracts*, 2020 MT 305, ¶ 8. That argument rests on two basic errors.

First, and most fundamentally, Plaintiffs misread *Craig Tracts* as having interpreted residential use restrictions to impose a durational limit on rentals, *see* Pl. Br., 24, even though *Craig Tracts* found Brown Drake's STRs to be residential and even though that understanding of residential use could not be transplanted to restrictive covenants like those here that treat rentals as a permissible residential use. Second, Plaintiffs invoke, as "extrinsic evidence," post-drafting events that do not alter the Covenants' meaning under Plaintiffs' own case law.

Begin with Plaintiffs' threshold error: that *Craig Tracts* supposedly joined "the minority of jurisdictions that define 'residential use' as going beyond just the activity [to] consider the duration of the stay." Pls. Br., 15, 24. In fact, *Craig Tracts* merely began its analysis by setting forth alternative interpretations—the minority view and the majority view of "residential use" covenants.

In the minority view, residential use covenants sometimes convey an "expectation of regular[] [presence] over time," thus excluding short-term stays. 2020 MT 305, ¶ 12. The Court explained, in the passage on which Plaintiffs chiefly rely, that "[w]e agree with [the minority of] jurisdictions that the common

understanding of the word 'residential' *often* goes beyond the mere existence of an activity at a fleeting instant in time to imply a pattern of regularity or duration." *Id.* ¶ 13 (emphasis added). From that permissive line, Plaintiffs incorrectly assert that the Court made a "pronouncement of Montana law" that "residential use [goes] beyond just the activity and must consider the duration of the stay." Pls. Br. 15.

In doing so, Plaintiffs skipped over *Craig Tracts*' recognition of what the court termed the "majority" view—that a residential use covenant "do[es] not prohibit short term rentals." These jurisdictions "focus on *what* is being done at a particular premises, not *how long* any particular individual is doing the activity for." 2020 MT 305, ¶ 10 (citing, *e.g.*, *Scott v. Walker*, 645 S.E.2d 279 (Va. 2007); *Applegate v. Colucci*, 908 N.E.2d 1214 (Ind. 2009); *Yogman v. Parrott*, 937 P.2d 1019 (Or. banc 1997)); *see* Palmer Br. 18-19, 25-27, fn 4. (collecting cases from the overwhelming majority of jurisdictions holding short-term rentals are residential).

Most critically, Plaintiffs ignore the Court's holding that, along with the minority view, it *also found* "reasonable" the majority interpretation: that "residential use" focuses on the property's use "for ordinary living purposes such as sleeping and eating, and not the duration of the rental." 2020 MT 305, ¶ 10, 15. So, far from siding with the "minority of jurisdictions," as Plaintiffs claim (Pls. Br. 15), the Court chose to "*join* with those courts to have found such language ambiguous in this context" and upheld short-term rentals on that basis. 2020 MT 305, ¶ 15

(emphasis added) (citing *Scott*, 645 S.E.2d 278; *Yogman*, 937 P.2d 1019; *Applegate*, 908 N.E.2d 1214).

The practical effect of Plaintiffs' misunderstanding of *Craig Tracts* is to require the Palmers to overcome a presumption that residential use covenants bar short-term rentals. The default rule in Montana, however, is the opposite: lawful property uses are allowed, unless they are clearly and unambiguously prohibited. *See infra*, 12-13. Plaintiffs' theory effectively would relieve them from their burden of establishing that the Covenants "definitively preclude" short-term rentals, *Kleinhans*, 2024 MT 208, ¶12—a burden they cannot meet.

The second error in Plaintiffs' reading of *Craig Tracts* is their misuse of extrinsic evidence. In another effort to sidestep the Covenants' meaning and the requirement that ambiguities be interpreted in favor of the free use of property, Plaintiffs cite evidence of purported "enforcement" of the Covenants against short-term rentals and assert that *Craig Tracts* bars short-term rentals any time "neighbors . . . make efforts to enforce their [residential use] covenants against short-term rental use." Pls. Br. 11. That extremely broad legal theory has no basis in Montana law.

Most importantly, as Plaintiffs acknowledge, extrinsic evidence matters only to the extent it bears on the *drafters'* intent. "'[E]xtrinsic evidence may be utilized to discover the parties' intent,'" and "the intention of the parties to an agreement *must be determined from the circumstances that existed at the time of contracting*

and in the same light which the parties possessed when the contract was made." Pls. Br. 25, 32 (citations omitted) (emphasis added). They claim that "[o]n two separate occasions, the Neighbors enforced" the residential use covenant to prevent short-term rentals. Pls. Br. 21. But these events occurred *decades* after the Covenants were signed and involved property owners that were not original signatories. So they cannot possibly shed light on "the circumstances that existed at the time of contracting." *Id.* at 32. Indeed, evidence of Plaintiffs' own self-serving objections in recent years provides "no insight as to the [drafter's] intent when the [Covenants] were entered into in" 1990. *Friends of Lake Five, Inc. v. Flathead County Comm'n*, 2024 MT 119, ¶ 24, 416 Mont., 525, 549 P.3d 1179; *see also Region II*, 187 Mont. at 130 ("Courts should not construe the intent of the restrictive covenant when adopted so broadly as to cover the desires of owners confronted with situations developing thereafter.") (citation omitted). If accepted, Plaintiffs' theory would signal to disputing neighbors that whenever they want to use covenants against each other, they can attempt "enforcement" efforts and offer those as "extrinsic evidence" of the drafters' meaning of terms in residential covenants—regardless of who drafted the covenants and when.

To be sure, *Craig Tracts* did consider evidence of the property owner's reliance interests and short-term rental use in its analysis. Its focus, however, was on ensuring that the property owner's constitutional reliance interests were

adequately protected. 2020 MT 305, ¶ 17. The *Craig Tracts'* Court's "willingness to consider that evidence to protect such constitutional and equitable principles does not support impermissibly *expanding* the covenants' reach beyond the text and [beyond] Declarant's intent." Palmer Br. 34 n.5. Plaintiffs have offered no response.

It is especially important for this Court to reaffirm the limited role that post-drafting evidence plays in the interpretation of covenants because of the "overriding policy of individual expression in free and reasonable land use," and this Court's guidance that covenants must be read "strictly" and "in favor of free use of property" to protect fundamental property rights. *Higdem*, 167 Mont. at 209. Only "compelling evidence contemporaneous to the Covenants' adoption" can resolve an ambiguity in the Covenants. Palmer Br. 37.

Here, Plaintiffs' evidence falls well short. Plaintiffs offered no extrinsic evidence of Ms. Astrope's intention in executing the Covenants in 1990. With no evidence to resolve the ambiguity, it must be read in favor of the free use of property. Indeed, the residential nature of the Palmers' rental here is even more apparent than for the rental in *Craig Tracts*.[1] That case involved a "fishing lodge" being advertised and booked through a "local flyfishing shop." 2020 MT 305, ¶5. The lodge involved

[1] Although the precise nature of the rental here is not dispositive, it is notable that renting the Palmers' single-family home is even *more* residential than renting an accessory dwelling unit ("ADU") above a garage, as was the case in *Kleinhans*, or of renting multiple cabins to some 70 people in *Friends of Lake Five*.

multiple "three-bedroom suites," which were used by numerous separate families as guests. *Id.* ¶18. Each family presumably paid separately for the privilege of staying in what was more akin to a hotel. This case, by contrast, involves *a single-family home*, used for quintessential residential purposes—"eating, sleeping, and other typical activities associated with a residence or dwelling place." *Applegate,* 908 N.E.2d 1214, 1220 (Ind. 2009).[2] So it is a quintessential residential use.

2. The Palmers' Short-Term Rental Use is Consistent With the Covenants' Commercial Use Prohibition

Nor does the Covenants' commercial use prohibition change the outcome.

As noted above, the Covenants prohibit conducting "business, trade, manufacture, or any other commercial purpose whatsoever, including such as junk or wrecking lots, mobile home parks, etc." Supp. Appx. Ex. B § A(1)(a). While Plaintiffs clarify their argument in their Supplemental Brief, Plaintiffs were initially inconsistent about whether they were even invoking this prohibition. *See* Pls. Br. 33 ("[w]hether a short-term rental is a 'commercial use' is not at issue"). Now, they

[2] Plaintiffs try but fail to distinguish *Craig Tracts* based on the Covenants' reference to "country residential *living*" (as opposed to residential *use* or *purpose*). Pls. Br. 17-18. A person staying in a short-term rental is just as much *living* in that property as they are *using* that property for residential purposes. Plaintiffs also ignore that the "country residential living" provision merely addresses the kinds of development that should be "encourage[d]"; the "land use" provision at issue requires use to be for "country residential *purposes*." *See* Supp. Appx. Ex. B, § A (emphasis added).

assert that the commercial-use prohibition *unambiguously* prohibits short-term rentals under *Kleinhans*. They are wrong on the Covenants and wrong on *Kleinhans*.

a. Rentals of Any Duration Are Consistent With the Commercial Use Prohibition.

Because the set of Covenants at issue here recognizes rental use without durational requirements and contemplates owners advertising rentals on their properties, the commercial use prohibition—in the same set of Covenants—cannot bar short-term rentals. Plaintiffs have not argued that the commercial use prohibition somehow bars rentals or that it bars other activities involving income or profit. Nor could they: the Covenants expressly contemplate that rentals are permitted, and rentals earn the property owner or landlord income, whether the rental terms are short or long. *See Midfirst Bank, State Sav. Bank v. Ranieri*, 257 Mont. 312, 316, 848 P.2d 1046 (1993). Consistent with that understanding, two of the Plaintiffs have used their property for a longer-term rental.[3]

Critically here, the commercial-use prohibition draws no distinction between an (undisputedly permissible) long-term rental and an (allegedly forbidden) short-term rental; it simply says nothing about duration. There is no way for the Palmers

[3] Plaintiffs Rodney and Heidi Brandt have historically operated a commercial cattle operation on their Property. Despite their contentions to the contrary, the Brandts admitted in discovery that they have grazed cattle on covenanted property, as confirmed by photos produced during discovery. Opening Br. 7-8; Doc. 25, Def.'s Resp. to Pltf.'s Mot. for SJ at 4 (quoting discovery responses); Doc. 26, R. Stewart Aff. ¶¶ 5-8, Ex. A.

to have known, from reading the Covenants as written, that a rental of 28 days was not allowed, but a rental of 35 days would have been. Thus, the Covenants treat any and all rentals as permissible residential use and not impermissible commercial use, even though all rentals generate income. *See infra*, 18-20.

b. The Conception of Commercial Use Adopted by This Court in Kleinhans Cannot Apply to Covenants That Permit Rentals.

Because the Covenants here expressly contemplate rental use, this Court's decision in *Kleinhans* is inapposite. In a decision grounded on a "commercial business" prohibition, this Court in *Kleinhans* barred owners from renting their ADU. 2024 MT 208, ¶ 13. Without covenant definitions, and looking to definitions of "business" and "commerce" under Montana law and in dictionaries, this Court concluded that any "for profit" use of property necessarily violated the "commercial business" provision. *Id.* ¶ 15. Notably, the parties there emphasized that the covenants "include[d] no language regarding rental of property, either on a short-term or long-term basis." *See* Br. for Appellees 4, *Kleinhans*, No. DA-24-0069.

The dictionary definitions that the Court adopted in *Kleinhans* cannot apply here because they would preclude *all* rentals—even the long-term rentals that Plaintiffs agree are permissible under the Covenants and that they have operated since 2022. Both long and short-term rentals involve an activity "carried on for profit," so neither would be allowed under *Kleinhans'* definition of "commercial use," 2024 MT 208, ¶ 15. This can only mean that the parties here could not have

intended to adopt the same "commercial use" definition that was applied in *Kleinhans*.[4]

This result follows from this Court's teaching that "we must read the covenants as a whole in order to ascertain their meaning, rather than reading *any one covenant* or part of a covenant in isolation," *Gosnay v. Big Sky Owners Ass'n*, 205 Mont. 221, 227, 666 P.2d 1247, 1250 (1983) (internal citation omitted) (emphasis added). As Montana and other jurisdictions have long recognized, the specific terms of each set of covenants, like contract terms, must be considered in context. *See* § 28-3-501, MCA (explaining contract terms should be given ordinary meaning "unless a special meaning is given to them by usage"); *see also Avon Trails Homeowners Ass'n v. Homeier*, 1 N.E.3d 731, 736 (Ind. Ct. App. 2013) ("covenanting parties' intent must be determined from the specific language used and from the situation of the parties when the covenant was made") (citation omitted). Accordingly, it is not surprising that the Court's construction of the *Kleinhans*' commercial use prohibition does not apply to a case with distinct Covenants and a different intent.

[4] Further supporting this view is the Covenants' list of illustrative examples of the kinds of "commercial uses" the Covenant had in mind: "junk or wrecking lots" or "mobile home parks, etc." Supp. Appx. Ex. B § A(1)(a). A short-term rental in a single-family home looks nothing like those uses. *See In re Estate of Dower*, 2021 MT 245, ¶ 11, 405 Mont. 443, 495 P.3d 1083 (terms should be interpreted by "the company [they] keep" under *noscitur a sociis* canon).

Unlike in *Kleinhans*, the Covenants here recognize that residential uses such as rentals are *not* commercial in nature, which is logical because "receiving rental income [does] not transform" a residential use into a commercial one. *Vera Lee Angel Revocable Tr. v. Jim O'Bryant & Kay O'Bryant Joint Revocable Tr.*, 537 S.W.3d 254, 258-59 (Ark. 2018). Montana law makes clear that rentals are generally non-commercial uses, because the Montana Landlord Tenant Act ("MLTA") excludes from its coverage "occupancy under a rental agreement covering premises used by the occupant primarily for *commercial* or agricultural *purposes*." M.C.A. § 70-24-104(6) (emphasis added). "Commercial purposes" in the MLTA, as here, includes retail and other businesses; it does not extend to residential rentals—or else the MLTA would not cover anything at all.

This analysis of the Palmers' Covenants is consistent with the clear majority of other state high courts to consider the scope of similar commercial use prohibitions that allow residential rentals. Palmer Br. 25-26 n.4 (collecting decisions). Among those decisions are two that this Court "join[ed]" in *Craig Tracts*: *Applegate* and *Yogman*. In *Applegate*, the Indiana Court of Appeals concluded a covenant prohibiting any "commercial business" on the parcel did not preclude short-term rentals. 908 N.E.2d at 1220.[5] The Connecticut Supreme Court

[5] Plaintiffs also note that the declaration in *Craig Tracts* had removed a prohibition on commercial use. Pls. Br. 17. But as R&R explained in its opening brief, the provision that was removed in *Craig Tracts,* nearly contemporaneously to

recently joined the majority rule, holding that short-term rentals are consistent with residential use and no-commercial-use provisions in zoning where "long-term rentals are permitted" and nothing "clearly differentiates between long term rentals" and "short-term rentals." *Wihbey v Zoning Bd. of App. of Pine Orchard Ass'n*, 300 Conn. 87, 93 (July 29, 2024).

Plaintiffs' Supplemental Brief addresses none of these issues, instead offering conclusory references to *Kleinhans* with no discussion of how they map onto the Covenants in this case. Plaintiffs assert that "[*Kleinhans*] rejects [the Palmers' argument that 'Short-term rentals are no more 'commercial' than long-term rentals].'" Pl. Supp. Br., 3. But that is obviously wrong: *Kleinhans did not address long-term rentals* because the covenants there did not contemplate rentals and so the parties did not raise the issue. Thus, *Kleinhans* could not have addressed Plaintiffs' argument here that the Court should adopt an implied distinction between long-term and short-term rentals.

Plaintiffs also raise several case-specific arguments about the ostensibly commercial nature of the Palmers' rentals, but those arguments likewise fail because they apply equally to permissible long-term rentals. Both kinds of rentals can

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the drafting of those covenants, barred use of property for "commercial or business use *or for the use of a motel, hotel, or apartment house*." 2020 MT 305, ¶ 16. That is quite different from the commercial use prohibition here, which refers to junk yards and wrecking lots.

involve "substantial income;" both are frequently advertised on "national commercial websites;" and both can involve a "[property management] company." Pls. Br. 19, 20.

Plaintiffs also assert that short-term rentals can "generate[] more income than renting on an extended term." *Id.* at 20. Putting aside the hypothetical (and factually dubious) nature of this argument, something does not become more commercial if more profit is derived from it; here, neither short nor long-term rentals are commercial because they involve a quintessential residential use of property. *See supra*, 13-14. Moreover, Plaintiffs do not seek to bar only those short-term rentals that earn more income than long-term rentals. The ruling they defend would prevent homeowners from renting homes for even a single weekend in the summer. Clearly, there is a mismatch between Plaintiffs' substantive concerns and their claims.[6]

[6] Plaintiffs' brief repeatedly falls back on unfounded claims that the Palmers' property is being used in ways that are a nuisance to their neighbors. *See* Pls. Br. 6-9 (citing up to four vehicles and ATV use). But these claims could apply to any property owner. The resolution to them is not to bar lawful property use, but to bring a nuisance claim. And, the District Court's decision (and, unsurprisingly, Plaintiffs' argument) sweeps far more broadly than necessary to address any arguable nuisance. The court barred the Palmers from *any* short-term rental use—whether it limited guests to one car, required stays of over 25 days, or barred ATVs. There is no justification for such an intrusion on the free use of property.

C. The District Court Appropriately Used Its Discretion to Deny Plaintiffs' Attorney's Fees.

Plaintiffs cross-appeal from the District Court's denial of their request for attorney's fees. Pls. Br. 36. Plaintiffs rely on the following *permissive* provision in the Covenants:

> Any person who shall prosecute an action successfully may recover any damages resulting form such violations, and IT IS EXPRESSLY UNDERSTOOD by any person purchasing this property that if an action is successfully brought against him for a violation of these covenants, that a reasonable attorney's fee *may be assessed* against him in addition to any other damages.

Id. (quoting Covenants, § B(2)) (emphasis added).

Based on this language, Plaintiffs argue that they succeeded before the District Court, and district courts lack "discretion to deny a request for attorney's fees where a contract requires an award of fees." *Id.*, 36 (quoting *Gibson v. Paramount Homes*, 2011 MT 112, ¶ 10, 360 Mont. 421, 253 P.3d 903)). At the outset, any award of fees should be denied because the Palmers are correct on the merits—and so, if this Court reverses, Plaintiffs will not have prosecuted a "successful" action.

Moreover, Plaintiffs' claim (that this fees provision is mandatory) contradicts its plain terms, which *permit*, but do *not require,* fee awards. The Montana Supreme Court has emphasized that the use of the word "may" in fee shifting provisions typically means that fee awards are discretionary, as "[t]he word 'may' is commonly

understood to be permissive or discretionary." *Gaustad v. City of Columbus*, 265 Mont. 379, 381-382, 877 P.2d 470, 472 (1994).

Plaintiffs cite *Wittich Law Firm, P.C. v. O'Connell*, 2013 MT 122, 370 Mont. 103, 304 P.3d 375, to argue that fee awards are still mandatory where contractual provisions indicate that they "may" be awarded," but *that case reveals no actual support for this bald assertion*. The contract in that case mandated fees—it stated that "[f]ailure to pay [fees and costs incurred in the course of representation]" would also subject the party "to all collection costs, including attorney fees, for any action necessary." *Id.*, ¶ 29 (brackets in original). Based on this language, the *Wittich* Court concluded a fee award was mandatory; it said nothing about whether a permissive fee provision could somehow be treated as mandatory despite contrary language.

The District Court appropriately used its discretion to deny fees. In granting Plaintiffs summary judgment, the District Court noted the difficulty of its decision, stating that because "the parties refuse[d] to dispute any facts," they effectively "forced" a ruling on summary judgment. SJ. Trans. at 65:4-9. Further, even after ruling, the Court encouraged the Palmers to appeal, stating the "*Craig Tracts* case [was] not super clear for these situations," effectively recognizing that an appeal would be credible. *Id*. Because the Palmers have presented at the very least a

reasonable interpretation of the Covenants, the District Court appropriately denied Plaintiffs fees.

III. CONCLUSION

Plaintiffs seek to rewrite Covenants that permit rentals without regard to duration into Covenants that prohibit rentals only of certain durations, based on decades-later evidence of purported covenant enforcement. Basic principles of Montana property and contract law prohibit that reasoning and result.

The effects of Plaintiffs' reasoning would not be limited to this case. Plaintiffs' argument threatens Montanans who rely on rentals of all durations as permissible residential and non-commercial uses of property to access Montana. Plaintiffs would cause severe damage to landlords, many of whom purchased homes counting on being able to rent out a room or rent for a week to afford their mortgages. And, Plaintiffs' argument would hamstring travelers who wish to hunt or fish in rural areas where there are no hotels to be found. Their desired result is one of exclusion—exclusion of travelers seeking access to nature; exclusion of Montanans who wish to spend a weekend in a lake house across the state that is otherwise unavailable to them; and exclusion of would-be owners who could not afford their dream mountain home without using income from short-term rentals to help pay their mortgages.

For all these reasons and those presented in Appellants' Opening Brief, the Court should reverse the District Court's grant of summary judgment and deny Plaintiffs' Cross Appeal for attorneys' fees.

RESPECTFULLY SUBMITTED this 14th day of November, 2024.

MOULTON BELLINGHAM PC

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 5,490 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ Stephanie Baucus
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CERTIFICATE OF SERVICE

I, Stephanie Denton Baucus, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant Reply and Answer to Cross Appeal to the following on 11-14-2024:

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