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STATE OF MICHIGAN
IN THE SUPREME COURT

THE MELVIN R. BERLIN REVOCABLE TRUST, THE RANDY LAMM BERLIN REVOCABLE TRUST, THE JANIS HEHMEYER TRUST, THE CAROLE J. NEWTON REVOCABLE TRUST, THE JEAN I. SMITH REVOCABLE TRUST, and THE STEPHEN L. SMITH REVOCABLE TRUST,

Plaintiffs/Counter-Defendants/Appellees,

v.

THOMAS C. RUBIN, NINA D. RUSSELL and 14288 LAKESHORE ROAD, LLC,

Defendants/Counter-Plaintiffs/Appellants, and Third-Party Plaintiffs/Appellants,

v.

SWIFT ESTATES ASSOCIATION, INC., STEPHEN L. SMITH, in his capacity as President of Swift Estates Association, Inc., and CHRISTOPHER HEHMEYER, in his capacity as Secretary of Swift Estates Association, Inc.,

Third-Party Defendants/Appellees.

MSC Case No. 166228

COA Case No. 359300

Berrien County Circuit Court
Case No. 19-0034-CH

Community Associations Institute's Amicus Brief

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STATEMENT OF INTEREST[1]

Community Associations Institute ("CAI") is an international organization dedicated to providing information, education, resources, and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 45,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 75.5 million homeowners who live in more than 365,000 community associations in the United States. In Michigan, more than 1.4 million homeowners live in more than 8,550 community associations across the state.

[1] Pursuant to MCR 7.312(H)(5), CAI certifies that no counsel for a party authored this brief in whole or in part or made a monetary contribution to fund or prepare the submission of this brief. No party other than CAI, its members, or its counsel made a monetary contribution or contributed to this brief. Counsel for this brief also served as counsel for Cherry Home Association during the trial court proceedings in *Cherry Home Association v Baker* (COA Docket No. 354841) and Apache Hills Property Owners Association, Inc. during the trial and appellate court proceedings in *Apache Hills Property Owners Association, Inc v Sears Nichols Cottages LLC* (COA Docket No. 360554; MSC Docket No. 165300).

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INTRODUCTION

Michigan public policy favors residential use restrictions and Michigan courts repeatedly have been asked to enforce these restrictions in a variety of contexts. For nearly 100 years, despite the various scenarios and changing societies that Michigan courts have been presented with, Michigan's judicial interpretation of what constitutes a residential use of property has remained consistent. There is a clear throughline of individuals who use the property as their residence and have a permanent presence at their residence. There is no mystery as to how the Michigan courts arrived at and continue to reiterate this definition of residential use in the context of restrictive covenants. To maintain a residential community, you need a group of individuals who have decided to live among each other and have committed to invest in the neighborhood as their home. You would be hard-pressed to find this type of community among a group of individuals who have never seen each other and are constantly changing on a nightly or weekly basis.

Michigan's short-term rental case law is based, in part, on the definition of "residential" that the Court adopted in *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335; 591 NW2d 216 (1999). While *O'Connor* considered the question of whether interval ownership of a single family dwelling complied with a residential purpose restriction, *O'Connor*'s definition of "residential" is not confined to interval ownership. When applied to short-term rentals, their nature prohibits individuals from establishing anything more than a fleeting presence because the next group of short-term renters needs to quickly cycle through the property. This frequent rotation of transient tenants, and many times property owners who have little to no personal use of the residences themselves, fails to satisfy the definition of residential use and has necessitated the same result in every short-term rental case that has come before the Court of Appeals.

Michigan's short-term case law is consistent with our state's public policy interests in protecting private, residential communities. Rather than bringing people together and strengthening neighborhood bonds, short-term rentals fracture and break apart communities with transient tenants who have no permanent ties to and no stake in the overall health of the community. Rather than opening up housing opportunities and communities to individuals and families with less financial means as Appellants claim,

short-term rentals fuel the state's tourism industry to the detriment of Michiganders searching for long-term rentals and affordable, permanent housing.

Should the Court grant the relief requested by Appellants, there are practical and judicial reverberations that would flow from the decision. Practically, Michigan's communities with residential use restrictions would no longer be guaranteed protection from investors and corporations that desire to buy single family homes within their neighborhoods and shuttle people in and out of those homes on a daily and weekly basis, no different than a hotel or motel in a business district or on a vacation resort. While Michigan courts would not feel the impacts of this change, the individuals and families who live in those communities would.

From a judicial standpoint, the Court would be overturning the definition of residential use that it adopted in *O'Connor* and reversing two published cases from the Court of Appeals. Of further concern is that this case will result in confusion where none currently exists because it does not have a corresponding business or commercial restriction. If the Court gives the Appellants what they want, it will dismantle the state's short-term rental framework and only rebuild half of it, leaving Michigan communities and courts left to figure out how the Court might one day rebuild the other half. There is no need to do this, especially when the Court is only considering an unpublished decision that is not binding authority.

Simply put, short-term rentals are incompatible with Michigan's case law on residential use restrictions and they are incompatible with Michigan's public policy that favors residential communities. To provide the relief requested by Appellants, the Court must reverse course on two decades of consistent, unanimous short-term rental case law from the Court of Appeals and overturn one of its own opinions. The law and the facts of this case do not warrant this relief and CAI respectfully requests that the Court affirm the opinion of the Court of Appeals.

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BRIEF STATEMENT OF FACTS

To help provide context of the character of the short-term rentals at issue, below is a brief summary of facts provided from the briefs of the parties.

Article IV, Section 1 of the Declaration of Covenants and Restrictions (the "Declaration") states, in relevant part, that "[n]o lot shall be used for other than single family residence purposes." Appellees' App., p. 253b. The Declaration defines "single family residence" as "any dwelling structure on a lot intended for the shelter and housing of a single family," and it defines "single family" as "one or more persons each related to the other by blood, marriage, or adoption, or a group of not more than three persons not all so related together with his or their domestic servants, maintaining a common household in a residence." Appellees' App., p. 251b. The Declaration does not prohibit business or commercial uses but it does prohibit conducting any home occupations or professions on any lot unless permitted by the Architectural Review Committee. Appellees' App., p. 255b. The Declaration also states that its common properties were designed for the private use of its owners. Appellees' App., p. 250b. Article VIII, Section 3 of the Declaration states, in relevant part, that "[f]ailure by the Association or any owner to enforce any covenant or restriction in no event shall be deemed a waiver of any right to do so thereafter." Appellees' App., p. 260b.

Historically, homeowners within the Swift Estates community *occasionally* rented their homes to third parties. Appellants' Br., p. 6. In 2012, Appellant 14288 Lakeshore Road LLC purchased a lot within Swift Estates and began advertising the property online as available for short-term rentals through a property management company. Appellees' Br., p. 4. The minimum required nightly stay was 3 nights and the rental rates for the property ranged between $3,600.00 and $3,995.00 per week, with an off-season nightly rate of $500.00. Appellees' Br., p. 5. The property was rented nine times in 2012, six times in 2013, nine times in 2014,[2] six times in 2015, five times in 2016, and seven times in 2017. Appellees' Br., p. 6. The owners of 14288 Lakeshore Road LLC, who live in London, England, did not spend any time at the property from the time they purchased it through at least 2020. Appellees' Br., pp. 4-5.

[2] Appellees' brief includes two different numbers for 2014: nine and 10. Appellees' Br., p. 6. CAI has cited the lower number.

In 2017, Appellants Thomas Rubin and Nina Russell, who live in Seattle, Washington, purchased a lot within Swift Estates and, in 2018, they also advertised their property online as available for short-term rentals. Appellees' Br., pp. 7-8. The rental rates for the property ranged between $3,500.00 and $4,195.00 per week, with an off-season nightly rate of $500.00. Appellees' Br., p. 8. The property was rented three times in 2018, two times in 2019, and two times in 2020. Appellees' Br., pp. 9-10.

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SHORT-TERM RENTALS ARE NOT RESIDENTIAL USES OF PROPERTY UNDER MICHIGAN CASE LAW

Summary of Argument

While short-term rentals are a relatively recent phenomenon, residential use restrictions in Michigan communities are not. Michigan's short-term rental cases do not pave new ground but instead are an extension of the Court's cases regarding residential uses of property. The Court of Appeals has relied on precedent to interpret the residential restrictions at issue and has reviewed the facts of each case to determine whether the short-term rentals fell within the bounds of the residential restrictions or could be considered incidental uses of the residential properties. Every single panel of the Court of Appeals has reached the same opinion and this Court has twice declined to reconsider one of those opinions.

Appellants' arguments that short-term rentals are residential uses of property, on the other hand, ask the Court to abandon this state's case law in favor of out-of-state authorities without a reasonable basis for doing so other than "everyone else is doing it." CAI respectfully submits that Michigan case law, including *O'Connor*, supports the Court of Appeals' opinions holding that short-term rentals are not residential uses of property and requests that this Court affirm the opinion of the Court of Appeals in this case.

A. Michigan's short-term rental cases are rooted in the Court's precedents regarding residential use restrictions and have been correctly decided.

A discussion that is missing from the briefs in this case is the development of this state's short-term rental cases and the legal foundation upon which they are built. All the cases have held that short-term rentals are neither residential uses of property nor incidental uses of residential property after interpreting the residential restrictions and reviewing the factual circumstances of the short-term rentals at issue. The Court of Appeals has interpreted these restrictions and reviewed the facts of these cases under the same legal framework the Court has set forth for other residential use cases and every panel of the Court of Appeals has come to the same conclusion that short-term rentals are not residential uses of property.

i. *Torch Lake Protection Alliance v Ackermann.*

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The Court of Appeals first confronted the issue of short-term rentals and residential use restrictions in 2004 in *Torch Lake Protection Alliance v Ackermann*, unpublished per curiam opinion of the Court of Appeals, issued Nov 30, 2004 (Docket No. 246879) (App., p. 1). The question concerned whether short-term rentals were permissible in a community that included a "private residence purposes only" restriction when the short-term rentals at issue exceeded $50,000.00 during the height of the season. *Id.* at 1, 3 (App., pp. 1, 2).[3] The court answered no.

To arrive at this answer, the court interpreted the "private residence purpose" restriction, noting that "[t]he meaning of 'residential' in a restrictive covenant is not an issue of first impression in this state," and relied on the following definition of "residential" that the Court adopted in *O'Connor*:

> [W]hat's a residential purpose is the question. Well, a residence most narrowly defined can be a place which would be one place where a person lives as their permanent home, and by that standard people could have only one residence, or the summer cottage could not be a residence . . . but I think residential purposes for these uses is a little broader than that. **It is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It is another residence for them, and it has a permanence to it, and a continuity of presence, if you will, that makes it a residence**. *Id.* at 3 (App., p. 3).

When applying this definition to the short-term rentals at issue, the court emphasized the importance of the Court's precedent from *Wood v Blancke*, 304 Mich 283; 8 NW2d 67 (1943), that "a fact-specific inquiry into the use" be undertaken because "**incidental uses** to a prescribed residential use may not violate the covenant if it is **casual, infrequent, or unobstructive**, and **causes neither appreciable damage to neighboring property nor inconvenience, annoyance, or discomfort to neighboring residents**." *Id.* (emphasis added). The lower court undertook this same analysis and the Court of Appeals adopted its reasoning as its own:

[3] *Torch Lake* also included prohibitions against use "as a hotel or tourist camp or public place of resort." *Id.* at 1 (App., p. 1).

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> Mr. Crumb when he laid out these parcels and put these covenants in place, … he did attempt to make as clear as this Court believes any human can, is that the property was to have a private residential purpose; **it may be that subsumed within the notion of private residential purpose would be the occasional use of one's property by another, it's certainly not uncommon people swap their homes with friends, they have friends come and visit, they have overnight guests, guests for retractive [sic] periods of time, often people take care of aging parents, family members need to be nursed during a period of illness; I suspect in the vast majority of those occasions no money ever changes hands**….
>
> . . .
>
> If there was one core facet associated with these deed restrictions, it is that they restrict property to a private residential purpose. Has that purpose outlived its meaning? Is this an isolated pocket of residential property surrounded by encroaching motels or businesses? … This is extraordinary property, it is a precious resource and it is largely residential. There are some commercial establishments, marines, [sic] restaurants, motels, on various parts of the lake, but the property at issue here is private residential property, and it is not surrounded by or being encroached upon by motels or hotels or gas stations. The character of the neighborhood is not changed. The covenants have not outgrown their purpose, which is to preserve a private residential purpose. *Id.* at 2-3 (App., p. 2) (emphasis added).

ii. ***Enchanted Forest Property Owners Association v Schilling.***

A few years later, the Court of Appeals considered whether short-term rentals violated a "private residence" restriction in *Enchanted Forest Property Owners Association v Schilling*, unpublished per curiam opinion of the Court of Appeals, issued Mar 11, 2010 (Docket No. 287614) (App., p. 6).[4] The defendants hired a rental agent to rent their property, typically for periods of no more than one week, and the record in the case showed "that the property was rented for 33 days in 2005, 29 days in 2006, 34 days in 2007, and 31 days between January 1 and March 31, 2008." *Id.* at 2 (App., p. 7).

The court interpreted the "private residence" restriction, relying on the dictionary definition of "residential:"

> The term "residential" means "pertaining to residence or to residences." *Random House Webster's College Dictionary* (1997). "Residence" means "the place, esp[ecially] the house, in which a person lives or resides;

[4] *Enchanted Forest* also included a commercial restriction, prohibiting uses for commercial or manufacturing purposes. *Id.* at 1 (App., p. 6).

> dwelling place; home." *Id.* The term "residential" in the deed restriction thus refers to homes where people reside. *Id.* at 5 (App., p. 9).

The court also relied on the definition of "residence" adopted by the Court in *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933), defining it as "**the place where a person has his home, with no present intent of removing, and to which he intends to return after going elsewhere for a longer or shorter period of time.**" *Id.* (App., p. 10) (emphasis added).

After interpreting the restrictions and reviewing the facts of the case, the court held that the short-term rentals violated the restrictions,[5] stating:

> There is no dispute that defendants contracted with an agency to advertise their property as a vacation rental and did, in fact, rent the property for a fee. Although the financial documentation submitted by defendants shows that defendants did not make a profit when renting their property, this is not dispositive of whether the commercial purpose prohibition was violated. **Defendants clearly indicated that they rented out the property to transient guests. Use of the property to provide temporary housing to transient guests is a commercial purpose, as that term is commonly understood.** *Id.* at 7 (App., pp. 10-11) (emphasis added).

iii. ***Eager v Peasley.***

In 2017, the Court of Appeals released *Eager v Peasley*, 322 Mich App 174; 911 NW2d 470 (2017), its first published opinion regarding short-term rentals and residential use restrictions, holding that short-term rentals violated "private occupancy" and "private dwelling" restrictions.[6] The defendant offered a lake house to short-term renters during the summers and advertised it as available for rent on HomeAway, an online rental platform. *Id.* at 178. During 2016, the defendant rented the house for 64 days from May through August for an average of two to seven nights with prices ranging from $150.00 to $225.00 per night or $850.00 to $1,700.00 per week. *Id.* In 2016, the defendant rented to 10 different families and one business group. *Id.*

[5] *Enchanted Forest* held that the short-term rentals violated both the residential and the commercial restrictions.

[6] *Eager* also included a "commercial use" restriction. *Id.* at 177.

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Relying on *Phillips v Lawler*, 259 Mich 567; 244 NW 165 (1932), *Seeley v Phi Sigma Delta House Corporation*, 245 Mich 252; 222 NW 180 (1928), *O'Connor*, and *Torch Lake*, the majority held:

> In *Phillips v Lawler*, . . . [t]he Court concluded that: "[i]n building restriction cases involving covenants, ***the term 'private dwelling house' means a building designed as a single dwelling to be used by one family.'***"
>
> In *Seeley*, our Supreme Court concluded that a building restriction permitting " 'one single private dwelling house' " prohibited erecting a building for use as a college fraternity: "We hold that **a restrictive covenant running with land, limiting use thereof to 'one single private dwelling house,' means one house, for a single family, living in a private state**, and prohibits a college fraternity, or chapter house, intended to provide board and rooms for part of the members and a gathering place for fraternity purposes for all members." . . . .
>
> Here, the covenant provides that "the premises shall be used for private occupancy only" and that "no building to be erected on said lands shall be used for purposes otherwise than as a private dwelling…." ***Phillips* and *Seeley* confirm that transient use of the property as a short-term rental violates the covenant. There is no reason to treat "private occupancy" in this case any differently than "private residence" in *Phillips* or "single private dwelling house" in *Seeley***.
>
> . . .
>
> The *Torch Lake* case is on point with the case at bar, and we adopt the Court's analysis as our own . . . **Defendant's transient, short-term rental usage violates the restrictive covenant requiring "private occupancy only" and "private dwelling." Defendant, who lives in a neighboring county, does not reside at the property. She rents the property to a variety of groups**, including tourists, hunters, and business groups. **Those using the property for transient, short-term rental have no right to leave their belongings on the property. Rentals are available throughout the year and are advertised on at least one worldwide rental website. This use is not limited to one single family for "private occupancy only" and a "private dwelling," but is far more expansive and clearly violates the deed restrictions.** *Id*. at 182-83, 188-89 (emphasis added; italics original; citations omitted).

iv. ***Cherry Home Association v Baker.***

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In 2021, in *Cherry Home Association v Baker*, unpublished per curiam opinion of the Court of Appeals, issued Oct 21, 2021 (Docket No. 354841) (App., p. 13), **the Court of Appeals reaffirmed that "residential use" and "one family dwelling" restrictions prohibited short-term rentals.**

The court's interpretation of the residential restrictions referred not just to *O'Connor* but also to *Beverly Island Association v Zinger*, 113 Mich App 322; 317 NW2d 611 (1982), and *Bloomfield Estates Improvement Association v Birmingham*, 479 Mich 206; 737 NW2d 670 (2007), holding:

> There is no dispute that the declaration in the present case limited the use of the lots in Cherry Home to residential use. By limiting use to residential use, the restriction emphasizes that the lots may only be used for this purpose. Accordingly, the trial court properly applied the ***O'Connor*** definition of residence in this case. To conform with the residential use restriction, the use must have been more than transitory, **evidencing an intent to establish a permanence to the occupants'** presence there. *Id*. at 4, 5 (App., pp. 16-17) (emphasis added).

The court then turned its attention to the rentals at issue in the case:

> The trial court found that Serendipity was not used by defendants for a residential purpose, but instead, was used as a rental property. The trial court explained that **"when you put [a property] on a[n online] platform offering it to the public at large ... the purpose of that is raising money, it is not for a residential purpose."**
>
> . . .
>
> The weekly rentals in defendants' case do not establish the type of permanence needed to establish residential use. The evidence **overwhelmingly showed that defendants' property had been** used only for short-term rentals. The property was marketed through a company that advertised vacation rentals on various websites. Defendants do not reside at the property. The renters are transient guests who typically vacation at Serendipity for up to a week. **Indeed, the trial court found that defendants' use of their** property as a short-term rental is not a residential use, and defendants do not seem to dispute that short-term renting is not a residential use. *Id*. at 2, 5 (App., pp. 14, 17) (emphasis added).

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The trial court judge in *Cherry Home* was the same trial court judge in ***O'Connor*** who crafted the definition of "residential" that the Court later adopted as its own.[7]

v. *Apache Hills Property Owners Association, Inc v Sears Nichols Cottages LLC.*

In 2022, in *Apache Hills Property Owners Association, Inc v Sears Nichols Cottages LLC*, unpublished per curiam opinion of the Court of Appeals, issued Dec 22, 2022 (Docket No. 360554) (App., p. 21), the Court of Appeals held that short-term rentals violated a "single family private residence" restriction, even though leasing was expressly permitted in the restrictions.[8] The defendant, a Michigan limited liability company, advertised the property as available for short-term, vacation rentals on its website, permitting occupancy of up to 16 people at one time. *Id.* at 1 (App., p. 21). The defendant also had financed its purchase of the property through a commercial mortgage. *Id.*

The court, citing *O'Connor*, determined that **"[i]f continuous, year-long short-term leasing is conducted from the premises, the property is not being used as a single-family private residence. Indeed, defendant did not submit any evidence that the principals of the corporate entity resided at the home or stored items there evidencing a continuous presence or use as another residence."** *Id.* at 8 (App., p. 27) (emphasis added). The court also reiterated the holding from *Eager* that "[u]se of the property to provide temporary housing to transient guests is a commercial purpose, as that term is commonly understood." *Id.* The court further concluded that **"[a]dvertising the property on the worldwide web for lease to up to 16 people on a year-round basis changed the character of the use from single-family residential into a business operation of the premises."** *Id.* at 10 (App., p. 29) (emphasis added).

The defendant applied for leave to appeal the court's opinion, which the Court denied on June 27, 2023 and declined to reconsider on October 3, 2023.[9]

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[7] See MSC Docket No. 109832, COA Docket No. 354841.

[8] *Apache Hills* also included a business restriction. *Id.* at 4 (App., p. 23).

[9] See MSC Docket No. 165300.

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vi. ***Aldrich v Sugar Springs Property Owners Association, Inc.***

In early 2023, the Court of Appeals released its second published opinion regarding short-term rentals and residential use restrictions, holding that short-term rentals violated “residential purposes only” and “single-family residences” restrictions. *Aldrich v Sugar Springs Prop Owners Ass’n, Inc*, 345 Mich App 181, 183; 4 NW3d 751 (2022). In this community, the developer reserved the right to designate certain areas for commercial development but none of the single family residences, including those used for short-term rentals, had been designated for a commercial purpose. *Id*. at 194.

The court relied on the holding from *Eager* that the “act of renting property to another for short-term use is a commercial use, even if the activity is residential in nature” and stated that the legal reasoning of *O’Connor* is directly applicable to the issue of short-term rentals, noting that the focus is on a permanent presence and whether individuals at the property have a right to occupy it whenever they desire. *Id*. at 194-95. The court also indicated that **the plaintiffs failed to “present any evidence regarding their presence on the premises, their intentions regarding the premises, or what possessions they left in their homes. Thus, there was no evidence of a continuous presence or use as another residence,”** as required by *O’Connor*. *Id*. at 194, n 5 (emphasis added).

The throughline of Michigan’s short-term rental cases has been the Court of Appeals’ reliance on this state’s precedent, not just *O’Connor* but other cases, to interpret the residential restrictions at issue and review the facts to determine whether the use of the property falls within the bounds of the residential restrictions or can be considered an incidental use of the property. As the Court of Appeals reiterated in *Torch Lake*, Michigan’s short-term rental case law does not shut the door on Michiganders ever being able to share their homes with family or friends or occasionally rent their home on a short-term basis. “It may be that subsumed within the notion of private residential purpose would be the *occasional* use of one’s property by another, it’s certainly not uncommon people swap their homes with friends . . . I suspect in the vast majority of those occasions no money ever changes hands.” *Torch Lake*, unpub op at 2 (App., p. 2) (italics added).

What is not subsumed within the notion of residential use is when the property is used exclusively, or almost exclusively, for short-term rentals, which is what this state’s

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cases so far have presented. The defendant in *Eager* never stayed at her property and she listed it online as available for short-term rentals year-round. Similarly, the defendants in *Cherry Home* listed their properties online as available for short-term rentals and none of them resided at their properties. The evidence, instead, showed that the properties had only been used for short-term rentals. The defendant in *Apache Hills* was a limited liability company and its owners never resided at the property. Instead, the property was advertised online as available for short-term rentals year-round. And, yet again, in *Aldrich*, the plaintiff failed to show that the property had been used for any purpose other than short-term rentals. A decision by the Court in favor of Appellants would discard all these cases, determining that multiple panels of the Court of Appeals got it wrong every time they were presented with this issue and sending a message that a single family residence can be used exclusively for short-term rentals in a deed-restricted residential community without consequence.

B. **Neither the residential use restriction nor the use of the residences in this case warrant a different result.**

The restriction at issue in this case is that "[n]o lot shall be used for other than single family residence purposes." When looking to Michigan case law to interpret this restriction, the Court can look back nearly 100 years ago when it interpreted a similar, "single private dwelling house" restriction in *Seeley*. The Court held that the "single private dwelling house" restriction "means one house, for a single family, living in a private state, and prohibits a college fraternity, or chapter house, intended to provide board and rooms for part of the members and a gathering place for fraternity purposes for all members." 245 Mich at 256. To arrive at this conclusion, the Court noted that the purpose of the restriction "was to maintain the quiet, the privacy, and family character of a residential district." *Id*.

As the Court of Appeals discussed in *Eager*, "the language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon." 322 Mich App at 180-81, quoting *Borowski v Welch*, 117 Mich App 712, 716-17; 324 NW2d 144 (1982). In *Eager*, the Court of Appeals held that there was no reason to interpret "private occupancy" any differently

than how “private residence” had been interpreted in *Phillips* and how “single private dwelling house” had been interpreted in *Seeley*. 322 Mich App at 183. Similarly, there is no reason to interpret the “single family residence purposes” restriction in this case differently than those cases.

Turning to the use of the residences in this case, the facts support the decision from the trial court and the opinion from the Court of Appeals. Appellant 14288 Lakeshore Road LLC, a limited liability company, advertised its property online as available for short-term rentals with weekly and off-season rates and its owners, who live overseas, never spent a night at the property, at least from the time they purchased it through 2020. Similarly, Appellants Thomas Rubin and Nina Russell advertised their property online as available for short-term rentals with weekly and off-season rates and they primarily reside out of state.

Appellants point to *occasional* short-term rentals that historically occurred within the Swift Estates community as a basis to challenge enforcement of the Declaration’s “single family residence purposes” restriction. *Torch Lake*, however, illustrates that occasional, incidental uses of a residence for short-term rentals may be subsumed within a residential use restriction. *Torch Lake*, unpub op at 2 (App., p. 2). Even still, Article VIII, Section 3 of the Declaration states that “[f]ailure by the Association or any owner to enforce any covenant or restriction in no event shall be deemed a waiver of any right to do so thereafter.” And if Appellants somehow overcame this anti-waiver provision, as the Court held in *Carey v Lauhoff*, 301 Mich 168, 174-75; 3 NW2d 67 (1942), “[t]he character, as well as the number, of claimed violations must be considered in determining whether the complaining property owners have waived or forfeited the benefit of a restriction.” Appellants’ use of their residences, which have been primarily for short-term rentals, are of a far different character than the occasional short-term rentals they claim have occurred elsewhere in the community. As explained in *Carey*,

> It does not appear that there are any violations of the scope and character of that with which defendant is charged. No one is operating a general boarding house, with numerous rooms, although in some two or three instances the occupant of a residence may be from time to time renting one or two rooms. Surely the condition in this particular block is not such as to constitute a waiver of or an estoppel against enforcement of the restriction by other property owners. *Id*. at 175.

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The Court of Appeals' decision in this case is no different than the short-term rental cases that came before it. Like the defendant in *Enchanted Forest*, Appellants contracted with a third-party agent to rent their properties for a fee and short-term rentals have been the primary use of their residences. Like the defendants in *Eager* and *Cherry Home*, Appellants advertised their properties online as available for short-term rentals throughout the year and they rented their properties to several different groups. Their transient renters did not have a right to leave their belongings on the property and Appellants reside out of state and outside of the country. Much like the defendants in *Cherry Home* and *Apache Hills*, the evidence shows that the properties were primarily or only being used for short-term rentals. And similar to *Aldrich*, Appellants cannot establish that their short-term rentals are merely an incidental use of their properties based on their limited to non-existent presence at their own properties.

As the Court of Appeals held in *Apache Hills*, if continuous, year-long short-term rentals are being conducted from the premises, the property is not being used as a single family residence. Advertising the property on online platforms as available for short-term rentals on a year-round basis changes the character of the use from a residential use into a business operation. The Court reviewed *Apache Hills* and declined considering it—twice. There is nothing in this case that warrants a different result. The Court of Appeals' opinion should be affirmed.

C. Appellants' argument that short-term rentals are residential uses of property is not supported by Michigan case law.

Appellants ask the Court to depart from its own cases on residential use restrictions and to disregard 20 years of short-term rental cases from the Court of Appeals because other state courts have decided differently. To support their argument, Appellants rely on those same out-of-state case authorities, but CAI respectfully submits that the Court has sufficient guidance from this state's own cases to decide this issue, though they lead to a different outcome than that advocated by Appellants.

i. Appellants' argument that short-term rentals are residential uses of property is based on out-of-state case law, not Michigan case law.

CAI respectfully urges the Court to consider that Appellants' argument that short-term rentals are residential uses of property relies heavily on out-of-state case authorities.

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Appellants only meaningfully discuss *Wood*, *Bloomfield Estates*, *Miller v Ettinger*, 235 Mich 527; 209 NW 568 (1926), and *Beverly Island Ass'n* as Michigan cases that purportedly support their argument that short-term rentals are residential uses of property. Appellants do not address this state's short-term rental cases or the precedential cases upon which they rely, with the exception of *O'Connor*, and instead analyze the "single family residence purpose" restriction at issue through the lens of out-of-state decisions.

"Cases from other jurisdictions are not binding precedent, but we may consider them to the extent this Court finds their legal reasoning persuasive." *New Covert Generating Co, LLC v Covert*, 334 Mich App 24, 86 n 8; 964 NW2d 378 (2020). While Appellants quote one or two sentences from some of these cases, most of the cases are presented to the Court in isolation, with no discussion of their legal reasoning or their similarities to or differences from Michigan law. This leaves the Court with the question as to whether any of the cases relied on by Appellants are consistent with Michigan law. "It is not enough for an appellant in his brief simply to announce a position . . . and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Furthermore, both Appellants and two amici that have filed briefs in support of Appellants, Michigan Realtors® and Goldwater Institute, rely on out-of-state cases involving short-term rentals and the interpretation of zoning ordinances to persuade the Court that short-term rentals are residential uses of property. "Definitions adopted for legislative purposes in housing codes and zoning ordinances cannot be employed in interpreting restrictive covenants running with the land." *Phillips*, 259 Mich at 570.[10] Accordingly, those cases should not be given any weight when interpreting the "single family residence purpose" restriction at issue.

CAI acknowledges that Appellees discuss and distinguish Appellants' out-of-state case authorities in further detail and also discuss out-of-state cases that have held that short-term rentals are not residential uses of property. CAI will not repeat those

[10] See also *Oosterhouse v Brummel*, 343 Mich 283, 290; 72 NW2d 6 (1955); *Terrien v Zwit*, 467 Mich 56, 79 n 30; 648 NW2d 602 (2002).

arguments and concurs with them. CAI will, though, add one out-of-state case for the Court's consideration.

In *Wood v Evergreen Condominium Association*, 2021 IL App (1st) 200687; 189 NE3d 1045 (2021), the Illinois Appellate Court held that short-term rentals booked through online platforms, such as Airbnb and VRBO, are licenses, not leases, to use property. The court noted that "lease" and "license" are not synonymous and distinguished between the two as follows:

> **A lease** is a definite agreement as to the extent and bounds of the property demised and **transfers exclusive possession thereof to the lessee**. [Citation.] In contrast, **a license** agreement **merely entitles a party to use the premises for a specific purpose, subject to the management and control retained by the owner.** *Id.* at ¶ 25 (emphasis added; quotation omitted).

As a result, the court held that the plaintiff did not violate her condominium association's governing documents that prohibited her from leasing, subleasing, or assigning her unit. *Id.* at ¶ 27.[11]

As applied to Michigan case law, like Illinois, "a license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it." *Kitchen v Kitchen*, 465 Mich 654, 658; 641 NW2d 245 (2002) (quotation omitted). "A lease, on the other hand, gives the tenant possession of the property leased and exclusive use or occupation of it for all purposes not prohibited by the terms of the lease." *United Coin Meter Co v Gibson*, 109 Mich App 652, 655-56; 311 NW2d 442 (1981), citing, in part, *Nowlin Lumber Co v Wilson*, 119 Mich 406, 410; 78 NW 338 (1899).

In *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431; 581 NW2d 794 (1998), the Court of Appeals considered whether the YMCA had a landlord-tenant or hotel-guest relationship with the individuals it rented residential rooms to within its facility. While CAI acknowledges that the residential arrangement described in *Ann Arbor Tenants Union* does not neatly map on to short-term rentals, the case does provide important points to consider when deciding whether a short-term rental establishes a

[11] The Illinois Appellate Court did hold, though, that the plaintiff's short-term licensing activities violated the association's business restriction. *Id.* at ¶ 36.

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residential landlord-tenant relationship, protected by a lease, or a business, hotel-guest relationship, supported only by a license.

The Court of Appeals held that the relationship created between the YMCA and the individuals it rented rooms to was that of a hotel and guest, not of a landlord and tenant, emphasizing the distinctive characteristic of exclusive possession and control of the premises:

> **It is this latter characteristic of exclusive possession and control of the premises—one that lies in the character of the possession—that is the fundamental criteria in distinguishing between a tenant and a guest. A tenant has exclusive legal possession and control of the premises against the owner for the term of his leasehold, whereas a guest is a mere licensee and only has a right to use of the premises he occupies, subject to the proprietor's retention of control and right of access.** In *Grant,* where the Michigan Supreme Court found that a tenancy existed, the Court specifically determined that there had been a transfer of possession and control by the defendant landlord to the plaintiff and that the plaintiff's occupation of the apartment was exclusive of the defendant. **Here, although an occupant of the YMCA must be assigned a room for the occupant's exclusive use, the occupant's right to occupy it is subject to the YMCA's retention of control and right of access to the room** . . . .
>
> Our decision is buttressed by several cases that have examined room-rental situations to determine whether the essential characteristics of a landlord-tenant relationship are present. **In making that determination, these cases have examined various factors, including: whether the place holds itself out to be a "hotel" and accords its occupants the status of "guest"**; whether there is a guest register; **whether the occupant has a permanent residence elsewhere; whether there is a lease, either written or oral, and what rights and duties it spells out; whether the length of the stay is for an agreed-upon or definite duration, how long the stay is, and what the purpose of the stay is;** whether rent is paid daily, weekly, or monthly; **what services are provided, such as linens, housekeeping, heat, and electricity;** whether the occupied premises include cooking or bathing facilities; **what kind of furnishings are in the premises and to whom they belong; and whether the proprietor's employees retain keys and access to the room.** *Id.* at 443-45 (emphasis added; citations omitted).

In this case, Appellants assert twice that short-term rentals create a "host" and "guest" relationship, with the homeowner never relinquishing possession or control of the residence:

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> By contrast, owners who lease their homes on a short term basis have unfettered ownership rights. They can use or alter the property at any time, leave belongings, or exclude renters indefinitely or for a given period. They are full owners in every sense. Short term renters are also unlike time-share owners. They are guests in a home. The home's ownership (and fundamental use) are not impacted by the presence of guests in the way that its ownership and use are impacted by the division of ownership in the time-sharing context.
>
> . . .
>
> In the short term residential rental context, homeowners have the full right to make permanent use of their property. The home remains the homeowners', even if they share it with other guests. Unlike timeshare owners, hosts of short term renters thus have every right to leave their belongings, reject bookings, or exclude guests—whether they choose to exercise those rights or not . . . Time-share owners are not like hosts, and they are also not like short term residential renters, who resemble guests more than owners. Allowing guests to stay in your home—even when those guests pay to defray the costs of their stay—does not change one's ownership rights or the fundamental use of the property as a place of abode. Appellants' Br., pp. 16, 39.

This host-guest, or hotel-guest, relationship is further supported by the occupancy agreement used by at least one of the Appellants, which was described as a "guest" occupancy agreement for the use of a "vacationing" home. See Appellees' App., pp. 303b-305b. The "guest" occupancy agreement also included a 6% lodging tax, which is required for "persons furnishing accommodations that are available to the public based on **commercial and business enterprise**, irrespective of whether membership is required for use of the accommodations." Mich Admin Code, R 205.88(1) (emphasis added).

Under Appellants' own description and at least one of their occupancy agreements, property owners who offer and provide a room or a house to transient guests, at best, establish a relationship that is no different than the relationship between a hotel and its guests, a quintessentially business relationship. This is a problem, though, when the "hotel" is in a residential neighborhood.

ii. **In Michigan, residential restrictions focus on the overall nature and character of the use, not the individual activities occurring in isolation.**

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Appellants argue that a residential use of property includes any activity involving a residence in which an individual is relaxing, eating, sleeping, bathing, or gathering with friends. They state that this perspective captures the overall nature and character of the use of the property and the Court's analysis can end there. CAI respectfully asserts that Appellants' articulation of the nature and character of use of residential property is too narrow and not supported by Michigan case law. Instead, a court's analysis goes beyond merely viewing the individual activities that are occurring in isolation.

This more intense judicial scrutiny into the nature and character of the use of property can be seen nearly 100 years ago when the Court interpreted a residential restriction in *Dingeman v Boerth's Estate*, 239 Mich 234, 235; 214 NW 239 (1927). The restriction at issue stated "[t]hat the said premises shall be used for residence purposes only." The defendant in *Dingeman* converted a residence into a rooming house and had nine occupants at the time the case was heard. *Id*. at 236. The Court adopted the opinion of the trial court judge and held:

> The restriction in question must be read as a whole and construed in the light of the general plan or scheme of development under which the restricted district was built. It is to be noted that not only are the premises to be used 'for residence purposes only,' but that 'no double house shall be erected on said premises nor more than one house on each lot of 50 feet front.' At once it is apparent that this language precludes the erection of an apartment building, or apartment hotel, or any building of like character. The restriction clearly was intended to limit the buildings to single residences.
>
> **Could a lot owner erect a large single residence on his lot and then turn it into a hotel or boarding house and still claim to be using it for residence purposes? It seems to me obvious that such a use would violate the clear intent and purpose of the whole plan of development. Eating is one of the incidents of 'residing' on a lot as well as 'rooming' or sleeping on the premises. If one may conduct a business of renting rooms for hire and be within the restrictions, then one should also be entitled to conduct the business of renting rooms and serving meals (a hotel or boarding house), or the business of serving meals alone (a restaurant). But either use in my opinion would be conducting a business, and, consequently, a violation of the restriction. So, too, running a rooming house or lodging house is clearly a business venture and contrary to the intent and purpose of the restrictive covenants.**
> *Id*. (emphasis added).

Had the Court narrowly focused on the fact that the individuals were relaxing, eating, sleeping, bathing, and gathering with others at the property, the outcome would have been different. Instead, the Court engaged in a broader analysis of how the property was being used (i.e., offering lodging and meals similar to other business establishments) and determined that the use was not consistent with a residential purpose.

And in 1928, the Court interpreted a "single private dwelling house" restriction in the context of the construction of a college fraternity house in *Seeley*. The Court held that the "single private dwelling house" restriction "means one house, for a single family, living in a private state, and prohibits a college fraternity, or chapter house, intended to provide board and rooms for part of the members and a gathering place for fraternity purposes for all members." 245 Mich at 256. To arrive at this conclusion, the Court noted that the purpose of the restriction "was to maintain the quiet, the privacy, and family character of a residential district." *Id*. It rejected the fraternity's argument that its house could be considered a single private dwelling, stating:

> The defendant corporation does not intend to erect a single private dwelling house upon the premises. Such a house would be of no use for its purposes. It needs a large building to serve as a boarding place for many members, sleeping accommodations for 30 or more, and club and recreational and gathering headquarters for all of its members. But it is said that the house is to have but one kitchen, and such fact will constitute it one single private dwelling house. We do not think so. **A family hotel, a boarding house, lodge quarters, churches, clubs, and restaurants may have but one kitche[n], and yet not one such be able to qualify under the term 'one single private dwelling house.'** *Id*. at 255 (emphasis added).

Again, had the Court narrowly focused on the fact that the fraternity members would be eating and sleeping on the property and gathering with each other, the result would have been different. The Court, again though, took a broader perspective of how the property would be used (i.e., like a hotel, boarding house, club, restaurant, etc.) and held that the use was not consistent with a single private dwelling.

The outcomes in *Dingeman* and *Seeley* make sense. For a court to hold otherwise would open the door to allowing owners of single family residences to use their properties similar to hotels, motels, rooming houses, and beds and breakfasts within residential neighborhoods simply because the transient tenants using the residences are eating,

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sleeping, relaxing, and gathering with one another. Instead, a sharper focus on the overall nature and character of the use of the property is required.

Applying the overall nature and character of short-term rentals to *Dingeman*, they would not pass the test. Short-term rentals effectively turn a single residence into a hotel with the transient tenants (or guests) eating and sleeping on the premises, no different than a hotel or a restaurant. Are these not a business venture like the rooming house in *Dingeman*? Similarly, short-term rentals do not overcome *Seeley*. The structure being used for short-term rentals may be defined as a single family residence and designed to accommodate a single family but it is being used to continuously provide accommodations to transient individuals looking for a place to eat, gather, and sleep. When these uses occur in a hotel, motel, or restaurant setting, we identify them as business and commercial uses of property. Why would we identify the use differently when it occurs in a residential neighborhood?

iii. ***O'Connor* applies to all residential uses and is not limited to interval ownership.**

Appellants argue that the Court of Appeals misapplied *O'Connor* in their case because the court required a permanence in their presence at their residences. Appellants argue that the Court of Appeals, not only in this case but in all its short-term rental cases, has been misreading and misapplying *O'Connor* and ask the Court to limit *O'Connor*'s holding to the issue of interval ownership. This assertion centers on the following language from that opinion:

> With regard to whether plaintiffs waived the use restriction by allowing short-term rentals, we agree with the circuit court that such an alternative use is different in character and does not amount to a waiver of enforcement against interval ownership. Further, defendants have not demonstrated that the occasional rentals have altered the character of the Valley View subdivision to an extent that would defeat the original purpose of the restrictions. 459 Mich at 346.

Appellants claim that this language suggests that short-term rentals are a residential use and are not bound by *O'Connor*'s definition of "residential." This argument presents a flawed understanding of *O'Connor*.

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When reviewing the *O'Connor* opinion as a whole, the trial court, and then this Court, first adopted a definition of "residential" that was untied to any particular use of property, stating:

> Proceeding on that basis, we return to the trial court's analysis. We conclude that its reasoning is sound, and adopt it as our own:
>
> **[W]hat's a residential purpose is the question.** Well, a residence most narrowly defined can be a place which would be one place where a person lives as their permanent home . . . but **I think residential purposes for these uses is a little broader than that. It is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It is another residence for them, and it has a permanence to it, and a continuity of presence, if you will, that makes it a residence.** *Id*. at 345 (emphasis added).

Only after this definition was adopted did the trial court, and then this Court, apply the definition to interval ownership and the facts of the case, stating:

> The trial court then correctly determined that **interval ownership did not constitute a residential purpose under the circumstances of this case**:
>
> I don't think that's true of weekly—of timeshare units on a weekly basis of the kind, at least, of the kind being discussed here, which includes trading, and is a traditional—usually associated with condominiums, but in this case happens to be instead of an apartment happens to be a building that is a single family building other than this arrangement for its joint ownership by, at least, up to forty-eight people in this case. **The people who occupy it, or who have these weekly interests in this property, they have the right to occupy it for one week each year, but they don't have any rights, any occupancy right, other than that one week. They don't have the right to come whenever they want to, for example, or to leave belongings there because the next resident, who is a one-fiftieth or one forty-eighth co-owner has a right to occupy the place, too, and the weekly owner has no right to be at the residence at anytime other than during their one week that they have purchased. That is not a residence. That is too temporary. There is no permanence to the presence, either psychologically or physically at that location**, and so I deem that the division of the home into one-week timeshare intervals as not being for residential purposes as that term is used in these building and use restrictions.... *Id*. at 345-46 (emphasis added).

Appellants' argument that *O'Connor*'s definition of "residential" is limited to the issue of interval ownership is not supported by the language of *O'Connor* itself.

Appellants also point to language within *O'Connor* that states that short-term rentals are different in character from interval ownership as dispositive that short-term rentals are a residential use or, somehow, are not bound by *O'Connor*'s definition of "residential." This argument fails to appreciate the context in which this statement was made, a discussion of waiver, and the elements a defendant is required to prove that a restriction has been waived. As stated in *Carey*, 301 Mich at 174, "[t]he **character**, as well as the number, of claimed violations must be considered in determining whether the complaining owners have waived or forfeited the benefit of a restriction." (emphasis added). Applied to *O'Connor*, the Court's decision that short-term rentals are different in character from interval ownership was not a pronouncement that short-term rentals are residential uses but only a statement that the presence of short-term rentals, while potentially violations of the community's restrictions, would not be considered to determine whether the ability to enjoin interval ownership had been waived.

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O'CONNOR WAS NOT WRONGLY DECIDED AND IT SHOULD NOT BE OVERRULED

If Appellants cannot succeed in limiting the application of *O'Connor* to the issue of interval ownership, they request the Court to overrule the decision instead. CAI respectfully urges the Court to consider the request being made by Appellants. If one of the Court's own cases stands in the way of aligning itself with other states, they ask the Court to overturn it. This is extraordinary relief requested by Appellants and CAI respectfully requests that this Court deny it and affirm the opinion of the Court of Appeals.

As the Court is aware, "[s]tare decisis ensures 'uniformity, certainty, and stability in the law.'" *Stokes v Swofford*, Docket Nos. 162302, 163226, 2024 WL 3543753, at *10 (Mich July 25, 2024), quoting *Parker v Port Huron Hosp*, 361 Mich 1, 10; 105 NW2d 1 (1960) (App., p. 30). When deciding whether to overturn precedent, the Court must consider the following:

> However, our precedents can be revisited if wrongly decided. *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). A decision is wrongly decided if it misunderstood or misconstrued a plainly worded statute or if it "has fallen victim to a subsequent change in the law." *Id*. . . . [T]he next step is to determine whether that precedent should be overruled. *Robinson* invokes a three-part test to examine the effects of overruling a previous incorrect judicial decision: (1) whether the questioned decision "defies 'practical workability,' " (2) "whether reliance interests would work an undue hardship" if the decision were overturned, and (3) "whether changes in the law or facts no longer justify" the decision. *Id*. at 464; 613 NW2d 307.
> *Stokes*, 2024 WL 3543753, at *10 (App., p. 37).

Appellants first do not argue that *O'Connor* was wrongly decided. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham*, 355 Mich at 203. Consequently, the three-part test set out by *Robinson* does not need to be considered.

Should the Court overlook this omission, Appellants still have failed to satisfy each part of *Robinson*'s three-part test.

1. ***O'Connor* does not defy practical workability, as evidenced by 20 years of short-term rental cases that have relied on the decision and reached similar results.**

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Appellants contend that *O'Connor* must be overruled because it will be difficult for Michigan courts to analyze the facts of each short-term rental case that comes before them and determine whether a sufficient presence has been established by the respective property owners or transient tenants under *O'Connor*. Appellants, though, point to no evidence that supports this assertion. Michigan's short-term rental cases show that the courts are well-equipped to review these cases and reach the appropriate result. *Enchanted Forest*, *Eager*, *Cherry Home*, *Apache Hills*, and *Aldrich* all did so after reviewing the evidence regarding the presence of the property owners and their short-term renters.

For the short-term renters in these cases, the result is unsurprising because they clearly have no intent to establish a permanence to their presence at the property beyond their limited stay and they have no right to occupy or return to the property beyond the few nights that they rent, or have a license to use, the property. For the property owners, up to this point, the outcome in these cases has been the same because all the property owners have made little to no personal use of their residences and they failed to present the courts with any evidence that they intended to have a permanent presence at their residences. This does not mean that a future case with a different set of facts may not produce a different result. That case simply has not arrived.

If *O'Connor* was wrongly decided and its framework could not be applied to short-term rentals, Michigan's short-term rental cases would have conflicting analyses, opinions, and outcomes. The fact that this has not occurred in 20 years of short-term rental cases from the Court of Appeals should be evidence enough that *O'Connor* does not defy practical workability and it can be appropriately applied to short-term rentals.

2. **There are reliance interests at stake if *O'Connor* is overturned.**

Appellants assert that there are no reliance interests that would be impacted if *O'Connor* were overturned, stating that there is no reason to believe that any Michigan community association enacted *new* restrictive covenants relying on *O'Connor*. Appellants fail to appreciate the many Michigan residential communities and community associations that already have residential restrictions similar to the one at issue in this case and have relied on *O'Connor* and this state's short-term rental cases for the past two decades to preserve the residential character of their communities by prohibiting short-

term rentals. Rather than throwing the gear into reverse and changing how this state defines residential use, Michigan's deed-restricted communities and community associations already have a mechanism by which Appellants and those similarly situated to them can obtain the relief they seek. They can utilize the democratic process provided for in their restrictions and pursue an amendment to their restrictions to expressly permit short-term rentals in their community.

3. **There have been no changes in the facts or law that justify overturning *O'Connor*.**

Appellants do not make a meaningful argument that there have been changes in Michigan law or facts relative to *O'Connor* that justify overturning the decision. At most, Appellants claim that *O'Connor* is outdated and "made in a different context and at a different time." If this argument were enough to reconsider and overturn *O'Connor*, what would be next for the Court's other residential use restriction cases that were decided in a different context and at a different time, such as *Seeley* and *Wood*? Michigan's definition of what is considered a residential use of property has developed over several decades as society has changed and individuals have found new ways to use their properties yet also has remained consistent. Short-term rentals are not such a novel use that they require a disruption to this state's case law by overturning a precedential case simply to align with other state courts.

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SHORT-TERM RENTALS HARM MICHIGAN'S RESIDENTIAL COMMUNITIES

Determining that short-term rentals are not residential uses of property is supported both by Michigan case law and Michigan public policy. Residential use restrictions, unlike discriminatory covenants, are not only favored by state public policy but also are routinely protected by Michigan courts. *Smith v First United Presbyterian Church*, 333 Mich 1, 12; 52 NW2d 568 (1952); *Oosterhouse*, 343 Mich at 287. "This court has expressly recognized that the right of privacy for homes is a valuable right." *Id*. The Court previously has explained that the value of these restrictions is linked to the peaceful, quiet nature of the community that they protect:

> The conversion of a large portion of a residential subdivision to business in direct violation of a contrary covenant undoubtedly affects every home therein. **Home owners seek, by purchasing in areas restricted to residential building, freedom from noise and traffic which are characteristic of business areas. How much in dollars the peace and quiet of this neighborhood is worth**, or how much the contemplated major business invasion would diminish that value, would be hard to establish. But **it is clear in our mind that residential restrictions generally constitute a property right of distinct worth.** *Cooper v Kovan*, 349 Mich 520, 530-31; 84 NW2d 859 (1957) (emphasis added).

"Such contracts allow the parties to preserve desired 'aesthetic' or other characteristics in a neighborhood, which the parties may consider valuable for raising a family, conserving monetary value, or other reasons particular to the parties." *Bloomfield Estates*, 479 Mich at 214. "Covenants of restriction, especially those pertaining to residential use, preserve not only monetary value, but aesthetic characteristics considered to be essential constituents of a family environment. Consequently, failure to give complete effect to restrictive covenants in accordance with their import works a great injustice to the property owners." *Bellarmine Hills Ass'n v Residential Sys Co*, 84 Mich App 554, 559; 269 NW2d 673 (1978). Short-term rentals, however, disrupt the communities that these residential restrictions are intended to protect.

Rather than providing opportunities to those who are economically disadvantaged, short-term rentals impose additional obstacles to individuals and families looking for long-term rental and affordable, permanent housing, especially in Michigan's tourist

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areas. This is because short-term rentals present lucrative, revenue-generating opportunities that encourage individuals and investors to remove their residential properties from the long-term housing market, even if it means that their properties will sit vacant for weeks or months at a time. And for Michiganders living in condominium associations, the proliferation of short-term rentals in their community can impact their ability to obtain or refinance mortgages, further exacerbating their access to affordable housing.

Short-term rentals also tear at the communal bond and sense of responsibility many homeowners seek when they choose to live in a deed-restricted community or community association. Absent property owners and a revolving door of transient tenants can prevent the sense of belonging or meaningful relationships that transform a few houses on a street into a vibrant neighborhood. These communities and associations can also suffer from apathy as less people are regularly present in the neighborhood and become less invested in the community.

A. Short-term rentals negatively impact access to long-term and affordable, permanent housing, particularly in Michigan's tourist destinations.

Appellants advocate that short-term rentals serve a greater public good because they open up opportunities to Michiganders, particularly to those who otherwise would not have access to these houses or places in Michigan. Appellants, though, provide little evidence to support this position. As explained below, quite the opposite is the reality as the average price of short-term rentals in Michigan's tourist destinations would consume a significant portion of a Michigan family's budget and short-term rentals lock out individuals and families looking for permanent housing.

i. The short-term rental market in Michigan is primarily made up of entire units listed throughout the year, with average daily rates on Michigan's northern and western coastlines exceeding $350.00.

An analysis of Michigan's short-term rental market is necessary to understand how these short-term rentals can negatively impact long-term and affordable, permanent housing, particularly in areas that draw in tourists. As of late December 2024, Michigan

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had 5,733 properties with active short-term listings on Airbnb and Vrbo.[12] Nearly all the short-term rentals are for the entire place, which means that an entire unit (such as a house or an apartment) is either occupied or left vacant at any given time:

Region	**Entire Place**[13]
Michigan Area	93%
Michigan West Coastal	96%
Michigan North Coastal	98%
Michigan East Coastal	97%
New Buffalo[14]	98%

Only 29% of Michigan's short-term rentals are listed for 90 nights or less, with 30% listed between 91 and 180 nights, and 41% listed for more than 180 nights of the year:

Michigan Area	**Annual Listing Availability**[15]
1-90 Nights	29%
91-180 Nights	30%

[12] This data is sourced from AirDNA, which describes itself as "the leading provider of data and analytics for the $140 billion [ ] short-term rental industry." The service "tracks the daily performance of over 10 million properties on Airbnb and Vrbo in 120,000 global markets . . . AirDNA has developed advanced artificial intelligence and machine learning technology that allows us to accurately track and forecast the revenue potential of any property in the world." The service touts a 97% data accuracy rate. See AIRDNA: About AirDNA, https://www.airdna.co/about (last visited Jan 23, 2025).

[13] See **Table 1** (App., pp. 57-61). The data in this table and the following tables is located behind a paywall and cannot be produced through a printable PDF. It has been captured through screenshots of the website page that include the website address and date and time that the website page was captured.

[14] The smaller region of New Buffalo is highlighted because it includes Lakeside, where Swift Estates is located.

[15] See **Table 1** (App., pp. 57-61).

181-270 Nights	22%
271-365 Nights	19%

This means that many of Michigan's short-term rental properties are being set aside for more than occasional or incidental short-term rentals.

The daily rates for a Michigan short-term rental vary widely depending on the location and the type of property being rented. The average daily rate for a Michigan short-term rental across the state is $248.50; however, the average luxury short-term rental daily rate is $456.60:

Michigan Area	**Daily Rate**[16]
Average	$248.50
Entire Place	$257.60
Professionally Managed	$288.70
Luxury	$456.40

The daily rates on Michigan's eastern coastline present similar numbers:

Michigan East Coastal	**Daily Rate**[17]
Average	$246.60
Entire Place	$248.90
Professionally Managed	$347.50
Luxury	$466.50

Michigan's northern and western coastlines, including the New Buffalo area, however, present a different picture:

[16] See **Table 2** (App., pp. 62-66).

[17] *Id.*

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Michigan North Coastal	**Daily Rate**[18]
Average	$364.70
Entire Place	$369.70
Professionally Managed	$401.40
Luxury	$579.10

Michigan West Coastal	**Daily Rate**[19]
Average	$430.30
Entire Place	$439.60
Professionally Managed	$507.00
Luxury	$691.60

New Buffalo	**Daily Rate**[20]
Average	$543.70
Entire Place	$551.90
Professionally Managed	$610.40
Luxury	$815.50

[18] *Id.*

[19] *Id.*

[20] *Id.*

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The 2023 median household income for a Michigan family was $71,149.00[21] and, with a three-day average length of a stay in a Michigan short-term rental,[22] it is hard to imagine that short-term rentals provide *more* access to Michigan families, especially along the northern and western coastlines, when the minimum average nightly rates range between $364.70 and $543.70.

The opportunities, instead, appear to advantage those who own the short-term rental properties. Below are the average annual revenues a Michigan short-term rental could have expected to generate over a 12-month period ending in late December 2024 for a single family residence:

Region	**House**[23]
Michigan Area	$36.4k
Michigan West Coastal	$65.9k
Michigan North Coastal	$57.3k
Michigan East Coastal	$34.8k
New Buffalo	$80.6k

ii. **The short-term rental market benefits the state's tourism industry to the detriment of Michigan's homeowners and residential communities.**

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[21] U.S. CENSUS BUREAU: QuickFacts, Michigan, https://www.census.gov/quickfacts/fact/table/MI/INC110223#INC110223 (last visited Jan 23, 2025).

[22] See **Table 3** (App., pp. 67-71).

[23] See **Table 4** (App., pp. 72-76). AirDNA determines these revenues figures by, first, calculating the revenue of individual short-term listings (multiplying the number of days booked by the listing's average daily rate), and then looking at the median figures of all the individual short-term listings in the market to determine the market's overall performance. See AIRDNA: How does AirDNA calculate revenue?, https://help.airdna.co/en/articles/8374548-how-does-airdna-calculate-revenue-h_767d98990f (last visited Jan 23, 2025).

With the potential to generate these types of revenues through short-term, limited commitment transactions, it is no surprise that owners will be drawn to short-term rentals, particularly in tourist and vacation destinations. As the data shows, units used for short-term rentals in Michigan mostly are removed from the market entirely, limiting the housing options available to local residents who are looking for longer-term housing. The high nightly and weekly rates and potential revenues of these properties also increase the resale value, making it difficult for local residents to compete with more wealthy buyers.

These are not hypothetical fears. They are already playing out across the state. In June 2024, the Chief Executive Officer of the Michigan State Housing Development Authority ("MSHDA"), Amy Hovey, noted that "Michigan has seen some of the highest rent increases of any state in recent years – with many households seeing 25% rent increases in a single year."[24] MSHDA estimates that the state is short 190,000 housing units and Hovey stated that local governments would need to step up to help close this gap, including in tourist towns where short-term rentals have taken over and affordable housing is not available.[25]

Park Township has been the center of ongoing litigation about the role of short-term rentals in its community, with property owners stressing the profitability of short-term rentals over long-term rentals and the benefits to the tourism and local economy while the township argues that "short-term rentals ruin the local housing market, driving up housing and rent prices."[26] In 2023, Frankfort worked with MSHDA to build four houses that would sell at $175,000.00, below the **$750,000.00** median price of the previous five homes that had sold in the city where its homes were increasingly being used

[24] Anna Liz Nichols, *Michigan's housing crisis can be fixed, but it needs to be all hands on deck, Hovey says*, MICHIGAN ADVANCE (June 5, 2024, 4:29 AM), https://michiganadvance.com/2024/06/05/michigans-housing-crisis-can-be-fixed-but-it-needs-to-be-all-hands-on-deck-hovey-says/.

[25] *Id.*

[26] Kylie Martin, *West Michigan beachfront town works to ban short-term vacation rentals,* DETROIT FREE PRESS (Aug 5, 2024, 4:51 PM), https://www.freep.com/story/news/local/michigan/2024/08/05/vacation-short-term-rentals-beach-michigan-airbnb-vrbo-park-township-ban/74671886007/.

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for short-term rentals.[27] In Benzie County, where Frankfort is located, "about 60 percent of houses are occupied by vacationers in summer."[28] Frankfort also has struggled with keeping its businesses open year-round because it cannot find people to hire as they have been priced out of the city.[29]

Traverse City is well-known for its struggles with short-term rentals and affordable housing, with local residents:

> frustrated by large multifamily buildings that in the winter months are just dark.
>
> 'They're empty, they're not occupied while people are struggling to find housing,' . . . 'A lot of that is just so they can be operated as short-term rentals in the warmer summer months, and it is true that some of those properties go up for lease, but it's hard to lease a place from October to May when you need a place year-round. So, it doesn't really help solve people's problems.'[30]

"Traverse City has a rental housing gap of 1,010 units and a for-sale housing gap of 1,192 units. In Grand Traverse County, 66.7% of vacant housing units are seasonal or recreational."[31] Muskegon also recently proposed changes to its short-term rental zoning ordinance "after resident concerns of increasing short-term rentals, lack of affordable housing and complaints about existing rentals."[32] In 2022, Marion Township considered

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[27] Paula Gardner, *In Frankfort, small homes offer big hope in northern Michigan housing crunch*, BRIDGE MICHIGAN (Apr 17, 2023), https://www.bridgemi.com/business-watch/frankfort-small-homes-offer-big-hope-northern-michigan-housing-crunch.

[28] *Id.*

[29] *Id.*

[30] Alli Baxter, *Northern Michigan communities try to balance vacation rentals with year-round housing need*, UPNORTHLIVE (Nov 26, 2024, 10:43 AM), https://upnorthlive.com/news/local/northern-michigan-communities-try-to-balance-vacation-rentals-with-year-round-housing-need-affordable-airbnb-vrbo-crisis-frankfort-charlevoix-traverse-city-seasonal.

[31] *Id.*

[32] Kayla Tucker, *Muskegon dials back short-term rental changes after community feedback*, MLIVE (Sep 10, 2024, 4:34 PM),

a housing development that would require properties be made available for year-round residents, which received support from local businesses that had trouble hiring employees who could not find an affordable place to live near their work.[33]

Despite these harms, amicus Michigan Realtors® advocates that short-term rentals are necessary components of *second* homes and they support home values and businesses in *resort* communities. They also assert that short-term rentals are a "vital part of Michigan's economy" and a decision affirming the opinion of the Court of Appeals would "stifle[ ] a traditional resort culture and economy in the area of tourism and short-term rentals." Similarly, amicus Goldwater Institute advocates that short-term rentals contribute to Michigan's tourism industry, supporting bars, restaurants, stores, recreation sites, and other local businesses. It is notable that Michigan Realtors® and Goldwater Institute emphasize the business and economic interests behind short-term rentals but they do not point out any supposed benefits that the residential neighborhoods receive from them. If short-term rentals truly were residential uses of property, separate and distinct from business and commercial uses of property, there would not be such an inextricable link between them and the tourism industry.

iii. The presence of short-term rentals in condominium associations can make it difficult for individuals to obtain or refinance a mortgage.

In addition to potentially higher rents or housing costs, individuals who live in condominium associations can have difficulty obtaining or refinancing mortgages if short-term rentals are present in their community, further exacerbating the problem of affordable housing.

First, mortgages that are insured by the Federal Housing Administration (the "FHA") are not guaranteed in condominium associations that permit short-term rentals (rentals of 30 days or less) and the FHA statutorily prohibits transient housing in

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https://www.mlive.com/news/muskegon/2024/09/muskegon-dials-back-short-term-rental-changes-after-community-feedback.html.

[33] Cassandra Lybrink et al., *Michigan thrives on tourism. Are short-term rentals pushing out long-term residents?*, HOLLAND SENTINEL (Oct 28, 2022, 1:29 PM), https://www.hollandsentinel.com/story/news/state/2022/10/28/michigan-thrives-on-tourism-are-short-term-rentals-pushing-out-long-term-residents/69589607007/.

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condominium associations that are FHA-certified or wish to be FHA-certified.[34] FHA loans are an important tool to address affordable housing issues because they are focused on borrowers with lower credit scores or who do not qualify for a conventional mortgage.[35] In 2023, the FHA provided mortgages to over 765,000 homeowners.[36]

Second, Fannie Mae and Freddie Mac have strict requirements when it comes to short-term rentals and home mortgages within condominium associations. Mortgages cannot be sold to Freddie Mac if they secure units in "condominium hotel" projects, which can include projects that require rental-pooling agreements, host and receive revenue from a rental registration website and hosting platform, and charge a fee whenever a unit is rented on a transient basis, to name a few.[37] Mortgages also cannot be sold to Fannie Mae if they secure units in condominium projects that operate as a hotel or motel, which can include projects that are primarily transient in nature or offer hotel-like services, such

[34] See HUD Handbook 4000.1: FHA Single Family Housing Policy Handbook, II. Origination Through Post-Closing/Endorsement, C. Condominium Project Approval, 2. Project Eligibility, c. General Condominium Project Approval Requirements; HUD Handbook 4000.1: FHA Single Family Housing Policy Handbook, II. Origination Through Post-Closing/Endorsement, A. Title II Insured Housing Programs Forward Mortgages, 4. Restriction on Investment Properties for Hotel and Transient Use, https://www.allregs.com/tpl/Home/IndexWithDocumentId?documentId=8c916270-a3b4-4bbb-a605-5bcb07352efa&libraryId=62ab7b5e-4613-45e7-b5a8-dddb8f34a66c (last visited Jan 23, 2025).

[35] Taylor Freitas, *FHA loans: Definition, requirements and limits*, BANKRATE (Dec 17, 2024), https://www.bankrate.com/mortgages/what-is-an-fha-loan/.

[36] U.S. Department of Housing & Urban Development, *Federal Housing Administration Helps Over 765,000 Families Buy Homes and Maintains a Strong Insurance Fund* (Nov 15, 2023), https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_260.

[37] See Freddie Mac Series 5000, Section 5701.3: Ineligible projects (effective July 3, 2024), https://guide.freddiemac.com/app/guide/section/5701.3 (last visited Jan 23, 2025).

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as units available for rent on a daily or short-term basis.[38] Fannie Mae also will flag projects where 75% or more of the units are owned as investment and second homes.[39]

Failing to comply with Fannie Mae's and Freddie Mac's lending requirements presents even more severe consequences than not qualifying for FHA certification or loans. "Fannie and Freddie buy about 70% of the mortgage loans that lenders make . . . Because lenders want to sell their loans to [Fannie and Freddie], they structure mortgages to Fannie and Freddie standards."[40] If a condominium association falls out of compliance with Fannie Mae's and Freddie Mac's standards, it will drastically limit the pool of prospective buyers who will be able to buy homes within the community.

B. Short-term rentals do not promote or preserve the value in communities that residential restrictions are designed to protect.

One of the unique features of deed-restricted communities, particularly those governed by community associations, is the sense of community and belonging that is developed by bringing people together around a common cause. A group of individuals have chosen to live together under a common set of rules to achieve a particular desired community, such as a quiet, family neighborhood or a retreat away from the noise and congestion of the city. These individuals have decided to establish a permanent presence and make an investment in their neighborhood. Even if they do not know everyone who lives there, they know who their neighbors are.

Contrast this with a neighborhood where regular short-term rentals are occurring. There are new groups of people entering the community on a nightly or weekly basis, who many times are unfamiliar with the rules that everyone agreed to and the character of the community that has been built around those rules. Those who do regularly live in the neighborhood do not know each new group of individuals as they come and go and they

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[38] See Fannie Mae Originating & Underwriting Selling Guide, Section B4-2.103, Ineligible Projects (Nov 6, 2024), https://selling-guide.fanniemae.com/sel/b4-2.1-03/ineligible-projects#P4256 (last visited Jan 23, 2025).

[39] *Id.*

[40] Hal M. Bundrick, *Here's Why Fannie Mae and Freddie Mac Matter When Seeking a Mortgage*, NERDWALLET (Dec 11, 2023), https://www.nerdwallet.com/article/mortgages/fannie-mae-freddie-mac.

may not even know who owns the house itself. The property owner could be an individual but it also could be an investor or company with a portfolio of short-term rental properties. Instead of living next to a house, individuals may feel as if they live next to a hotel or motel. As the community faces challenges, the transient tenants will be unaware or not care. They will be leaving soon enough anyway. The property owners also may not be aware of the community's challenges or simply may not care, especially if they spend little to no time at the house themselves, leaving those who reside in the neighborhood on a permanent basis to shoulder the extra burden.

The strains that short-term renters place on a community are acknowledged by those within community associations and the courts themselves. In *Watts v Oak Shores Community Association*, 235 Cal App 4th 466, 473; 185 Cal Rptr 3d 376 (2015), the California Courts of Appeal stated that:

> That short-term renters cost the association more than long-term renters or permanent residents is not only supported by the evidence but experience and common-sense places the matter beyond debate. Short-term renters use the common facilities more intensely; they take more staff time in giving directions and information and enforcing the rules; and they are less careful in using the common facilities because they are not concerned with the long-term consequences of abuse.

An April 2022 snap survey of community association board members, managers, management company executives, business partners, and residents also captured a number of concerns of rentals and investor-owned properties:

> The tenants are not familiar with the community covenants: 73%
>
> The tenants do not follow the community covenants: 71%
>
> The investor/short-term rental owner does not maintain the home/unit to the standards of the community: 62%
>
> Homes/units in the community have less access to mortgage financing due to the investor/owner ratio requirements of FHA, Fannie Mae, and/or Freddie Mac: 34%
>
> The tenants make requests of the association board/management for issues that are the responsibility of the owner (i.e., fix my washing machine, repair my toilet, etc.): 30%
>
> The investor/short term rental owner does not support saving for a reserve fund: 12%

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> The investor/short-term rental owner does not pay their assessments in a timely manner: 8%[41]

Because of the transients' transitory, temporary nature and the frequent absence of the property owners, short-term rentals are incompatible with the purpose of deed-restricted communities and community associations to promote a common, agreed-upon framework of living together. A decision that short-term rentals are not residential uses of property is consistent with the Court's cases holding that residential restrictions, which are designed to preserve communities stitched together by people agreeing to live with each other under a shared set of rules, are a valuable property right that must be protected.

[41] *Snap Survey: Rentals and Leasing in Community Associations,* FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH (Apr 2022), https://foundation.caionline.org/wp-content/uploads/2022/06/SnapSurveyRentals.pdf.

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IF THE COURT REVERSES THE OPINION OF THE COURT OF APPEALS, THE DECISION SHOULD BE LIMITED TO THIS CASE

Should the Court reverse the opinion of the Court of Appeals, CAI respectfully requests that the Court's decision be limited to this case. The potential impacts of a decision broader in scope risk too much confusion in the lower courts where none has previously existed stemming from a case that is not the proper vehicle to review this issue.

Appellants argue that this case is ideal for the Court's first foray into the issue of short-term rentals and restrictive covenants because their case only includes a residential use restriction, not also a business or commercial use restriction. This argument ignores the 20 years of short-term rental case law that has been developed in the Court of Appeals, much of which involves both residential and business use restrictions, including one of its two published opinions.[42] If Appellants were granted all the relief they requested, not only would *O'Connor* be overruled but half of the binding precedent from *Eager* and all of *Aldrich*, the second published opinion from the Court of Appeals, would be overturned as well.

What the trial courts, Court of Appeals, and Michigan communities would be left with is a declaration that short-term rentals are residential uses of property but no opinion on whether short-term rentals violate business or commercial restrictions. Half of *Eager*, which holds that short-term rentals are a commercial use and violate commercial use restrictions, would remain binding precedent. What Appellants propose would leave the issue half resolved.

There is no reason to create this confusion, particularly when the case law in this area has been consistent and clear, the Court has been presented with an unpublished case that has no precedential value in the trial courts or the Court of Appeals, and the Court previously was presented with a short-term rental case that included both residential and business restrictions and twice declined to consider it. If the Court disagrees with whether the short-term rentals in this case complied with the "single family residence purposes" restriction or the remedy that was fashioned, then CAI respectfully

[42] *Torch Lake*, *Enchanted Forest*, *Eager*, and *Apache Hills*.

requests that the Court limit its decision to the facts of this case and reserve the issue of short-term rentals and restrictive covenants for another day.

Respectfully submitted,

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STATEMENT OF COUNTABLE WORDS

This brief complies with the word limit of MCR 7.212(B)(1) because, counting only the elements required by MCR 7.212(B)(2), it contains 14.063 words. The word count was generated using Microsoft Word.

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