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.

MSC No. 166228

CoA No. 359300

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

Plaintiffs-Appellees' Response to Amicus Briefs

Craig H. Lubben (P33154)
Stephen J. van Stempvoort (P79828)
Andrew C. Goetz (P71410)
MILLER JOHNSON
Attorneys for Plaintiffs-Appellees
45 Ottawa Avenue, NW – Suite 1100
Grand Rapids, MI 49503
616.831.1700
vanstempvoorts@millerjohnson.com

Table of Contents

Cases

Table of Contents
(continued)

Page

Other Authorities

Introduction

Each of the amicus briefs supporting the appellants fails to address the dispositive issue in this appeal: the ordinary, common meaning of "single family residence purposes." Instead, many of the amici advance various policy reasons for allowing or disallowing short-term rentals generally, or attempt to tar the appellees with historical examples of racially discriminatory covenants that all parties agree are abhorrent and that have no connection to the question presented here. The question presented here, rather, is simply whether *this* Declaration's restrictive covenants—in particular, the limitation to "single family residence purposes"—prohibit the appellants from running de facto hotels on their properties using short-term rentals. Having failed to address the mainstay of the appellees' position, amici supporting the appellants have little to add to this Court's analysis.

Argument

I. The Declaration, as ordinarily and generally understood, prohibits the appellants from using the property solely for daily or weekly rentals to large groups.

A. This appeal is about the ordinary meaning of the Declaration's terms, not whether short-term rentals are wise as a matter of policy.

Although some of the amici characterize this appeal as a state-wide referendum on short-term rentals or the "sharing economy," the reality is much more mundane. The question is not whether short-term rentals are wise as a policy matter or whether some types of short-term rentals could potentially be permissible under these or other restrictive covenants. The question instead is whether the appellants' particular uses of their properties are permissible under the particular terms of the

Declaration that was drafted here, construing the relevant terms in their "ordinary and generally understood or popular sense." *Thiel v Goyings*, 504 Mich 484, 496; 939 NW2d 152 (2019) (citation omitted).

Because the focus is on "the restrictor's intent," the analysis turns on the language of the document itself, not on policy considerations that are external to it. *Id.* And even then, because the intent of the drafter is paramount, this Court is "not so much concerned with the rules of syntax or the strict letter of the words used as we are in arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument." *Id.* The language that is used in the restriction therefore "is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon." *Id.* (citation omitted). This Court looks at the document and relevant language as a whole, not isolated words or definitions plucked from context. *See id.* at 494–95.

The appellees' position here (which is consistent with every Michigan court that has considered the question for the last two decades) is quite simple: the term "single family residence purposes" has a common, ordinary meaning as used in the context of the Declaration. Although that term can potentially encompass non-transient uses like vacation homes and long-term tenancies, it does not include using a house for the sole purpose of renting it to large groups of serial, transient guests who stay for only a few days at a time, paying 6% lodging tax and collecting up to six cars on the property in the meantime. (App. 303b). That amounts to a hotel, not a single-family residence.

The amici supporting the appellants do not address this reality, focusing instead on constructing straw-person arguments and then shooting them down with misplaced or incorrect policy assertions. On the actual issue before this Court, they have virtually nothing to say.

B. Both "residence purposes" and "single family" imply non-transience.

Amici do not address the reality that both components of the operative phrase in the Declaration require relative permanence, not transience. That phrase not only limits property use to "residence purposes," but also contains a modifier, "single family," that limits the residence purposes to those involving a single housekeeping unit. Neither of those components is satisfied by groups of people using the property for purely transient visits.

"Residence purpose." As a matter of common, ordinary meaning, "residence purposes" requires non-transience. Numerous Michigan courts have concluded that the non-technical meaning of "residence" in the context of restrictive covenants prohibits using a property for transient guests. *Dingeman* specifically rejected the analysis that some other jurisdictions have adopted, under which a property may be used for "residence" purposes as long as someone merely sleeps, eats, or relaxes on it. See *Dingeman v Boerth's Estate*, 239 Mich 234, 235; 214 NW 239 (1927). Likewise, in contexts outside the land-use arena, Michigan courts have recognized that the non-technical meaning of "residence" requires permanence, not transience. See, e.g., *Mapp v Progressive Ins Co*, 346 Mich App 575, 596 (2023);

McGrath v Allstate Ins Co, 290 Mich App 434, 443–44; 802 NW2d 619 (2010); *Kubiak v Steen*, 51 Mich App 408, 413–14; 215 NW2d 195 (1974).

The amici do not identify a single Michigan case that has found otherwise. *O'Connor* follows a straight line from *Dingeman* and *Seeley*. See *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335; 591 NW2d 216 (1999); *Seeley v Phi Sigma Delta House Corp*, 245 Mich 252, 256; 222 NW 180 (1928).

Plenty of other jurisdictions have sided with the approach staked out by *Dingeman* and continued in *O'Connor*. See, e.g., *West Mountain Assets LLC v Dobkowski*, 228 AD3d 48; 211 NYS3d 531 (NY App Div, 2024); *Deslonde v Saint Tammany Parish*, 391 So 3d 706, 716 (La Ct App, 2024); *Working Stiff Partners, LLC v City of Portsmouth*, 232 A3d 379, 387 (NH, 2019); *Hensley v Gadd*, 560 SW3d 516, 519 (Ky, 2018); *Siwinski v Town of Ogden Dunes*, 949 NE2d 825, 830 (Ind, 2011). There is no reason for this Court to accept amici's invitation to upend a century of precedent, based on flawed legal reasoning adopted by some other jurisdictions that is incompatible with this Court's long-standing approach.

"Single family." The "single family" limitation only adds to the evidence against the appellants' position. This Court has long recognized that "single family" limitations also require permanence, not transience. See, e.g., *City of Livonia v Dep't of Soc Servs*, 423 Mich 466, 527; 378 NW2d 402 (1985); *Charter Twp of Delta v Dinolfo*, 419 Mich 253, 257; 351 NW2d 831 (1984); *Bellarmine Hills Ass'n v Residential Sys Co*, 84 Mich App 554, 562; 269 NW2d 673 (1978).

Many other courts have, too—and have relied on that characteristic of a "single family" use limitation to preclude use of the property for short-term rentals. See, e.g., *Styller v Zoning Bd of Appeals of Lynnfield*, 487 Mass 588, 599; 169 NE3d 160, 170 (Mass, 2021); *Slice of Life, LLC v Hamilton Twp Zoning Hearing Bd*, 652 Pa 224, 245–46; 207 A3d 886, 899 (Pa, 2019); *Bostick v Desoto Cnty*, 225 So 3d 20 (Miss Ct App, 2017); *Siwinski*, 949 NE2d at 829.

Amici's primary response is to suggest that all "single family" limitations are somehow suspect or unenforceable in all circumstances. But this Court, like many others, has recognized that single-family-use limitations do not require consanguinity between household members; they require only that the property be used by a single housekeeping unit. That is, the property must simply be used by a relatively stable, non-transient group of individuals who maintain a common household. See, e.g., *Boston-Edison Protective Ass'n v Paulist Fathers*, 306 Mich 253, 257; 10 NW2d 847 (1943); *Slice of Life*, 207 A3d at 890.

That is exactly what the Declaration here requires. The property may be used by a small group of unrelated persons for residence purposes, as long as they are "maintaining a common household in a residence." (App. 251b). And that is precisely what is missing from the large groups of 14 or more people who rent the appellants' properties for a few days or a week at a time. No one is arguing that they are "maintaining a common household in a residence" on the properties.

Nothing in amici's briefs moves the needle on the ordinary meaning of the relevant terms. As a matter of ordinary usage, the person who limited the use of

the property to "single family residence purposes" and further defined "single family" as people "maintaining a common household" did not intend to allow the homes to be used by an LLC solely for the purpose of renting to large groups of up to 14 people on a daily or weekly basis.

II. The amici focus on disconnected policy arguments that are either misguided or irrelevant.

Instead of seriously addressing the merits, the amici supporting the appellants resort to tactics that serve primarily to distract from the main issues.

A. This appeal will not determine whether all rentals are prohibited in all communities in Michigan.

Amici focus heavily on broad-brush arguments regarding short-term rentals. But nothing in this appeal will either approve or prohibit all types of short-term rentals everywhere in Michigan, without regard to the type of rental activity or the language of the controlling covenants.

To begin with, amici mistakenly treat all restrictive covenants that have the term "residence" in them as if they are the same. But restrictive covenants may use slightly different variations of similar terms in slightly different contexts—and those variations may introduce nuance that dictate results that differ between them. That is why, instead of construing terms in an isolated or abstract manner, courts review a restrictive covenant's language within the context of the particular document in which it is found. *Thiel*, 504 Mich at 496.

Amici's arguments likewise ignore the requirement that challenges to restrictive covenants must be considered "in a contextualized, case-by-case manner." *Id.* Different covenants intersecting with different types of rental activity, of course,

may potentially generate different outcomes. Homeowners who allow family friends to stay in their vacation home for the weekend, for example, are almost certainly exercising one of the incidental prerogatives of using their home for "residence purposes." Likewise, a restriction that limits property only to "residence" use but not "single family" use could potentially be met by a homeowner who rents out a portion of their home to someone else on a short-term basis while the owner continues to live in the other part of the home on a permanent basis. Other restrictive covenants might require a different reading.

In short, there are myriad ways in which particular types of rentals may or may not be permitted under restrictions that differ slightly from the Declaration that is at issue here. This appeal will resolve only the appellant's use of their property solely for the particular rental activities in which they are engaged; it will not decide the propriety of all types of rentals under all types of restrictive covenants statewide.

Nor are amici correct that upholding the Court of Appeals' ruling will adversely impact long-term rentals. Long-term rentals, of course, have the requisite permanency that make them non-transient and therefore consistent with use for "residence purposes." Nothing in this case suggests otherwise, and the implication that the appellees are somehow trying to keep long-term renters out of the neighborhood is not tethered to anything in the record. The appellees have never contended, for instance, that the Declaration would prohibit a property from being rented for an entire summer or a few months. Unlike the short-term rentals here, most month-to-month or longer leases involve the type of permanency that fits within

the Declaration's language and matches long-standing law. (Appellees' Br. at 52 (citing authorities)). The problem in this case is that the appellants are not using the property that way. When an LLC whose owners live in England uses the property *solely* for serial rentals of a few days or a week at a time, it is not using the property for "single family residence purposes."

Amici are likewise incorrect in asserting that the Court of Appeals' approach will doom all short-term rentals everywhere in the State. Communities are—and will remain—perfectly free to open themselves to short-term rentals if they so choose. All that they need to do is adopt restrictive covenants that are worded differently than the ones here. The Court of Appeals' ruling simply recognized that some communities (like Swift Estates) may make the opposite choice—that is, to opt out of opening themselves to the type of short-term rentals in which the appellants wish to engage. Honoring some neighborhoods' voluntary decisions to opt out of short-term rentals does nothing to prevent other neighborhoods from opting in.

B. Amici's policy arguments are both improper and mistaken.

Several amici also argue that allowing short-term rentals is wise economic policy. But their resort to those sorts of policy considerations is misguided.

First, amici are asking the wrong question. Notably, amici do not seem to care about what the person who drafted the Declaration meant by the words that she or he used. But that intent is the whole ball game. The meaning of the words controls. *Thiel*, 504 Mich at 496. The goal is to determine the intent of the drafter of the Declaration, not to determine whether—if someone else were the drafter—they could have good reasons for making a different decision. Courts do not rewrite

contracts whenever they think that the parties could have allocated responsibilities and obligations differently than they actually did. Restrictions cannot be rewritten that way, either. *Id*. at 497.

The question in this appeal is simply what the ordinary, non-technical meaning of the terms used in the Declaration are. This Court has answered that question almost for a century in the same way: these terms require a single housekeeping unit to live on the property on a non-transient basis. *City of Livonia*, 423 Mich at 527; *Dingeman*, 239 Mich at 235. Set against that backdrop, there is no real question about what the drafter intended to communicate by selecting terms that align with that long-standing precedent. Amici can argue that, as a matter of policy, the drafter should have chosen to use different terms in the Declaration; but that does not change the terms that the drafter actually chose to use. And amici may represent strong economic forces that seek to undo a century of this Court's jurisprudence; but economic forces are not a valid reason for ruling that words no longer mean what they have meant for a hundred years.

Second, the policy arguments asserted by many of the amici assert that short-term rentals should be permitted notwithstanding the language of the Declaration primarily because they are economically beneficial. That is extraordinarily revealing. Amici's emphasis on the economic characteristics of short-term rentals underscores their fundamental nature. Their goals are not residence-oriented; they are commercially oriented. Those goals are misaligned with the residential purpose that the Declaration is attempting to preserve.

It may be true that allowing short-term rentals might be economically advantageous for a community in some ways. But some communities have chosen not to monetize themselves, not to privilege economic development at all cost, and to value things other than maximizing financial remuneration—like quality of life and character of neighborhood. Not every neighborhood wants to turn itself into a bustling resort that maximizes its economic potential at the expense of everything else. Those communities' decision to self-limit to "single family residence purposes" reflects a decision to forego certain economic opportunities in pursuit of other, equally permissible ends.

If other neighborhoods and communities want to take advantage of the (purported) economic boon that would follow from opening themselves to short-term rentals, they are perfectly able to do so. No one is stopping them; certainly not the appellees. But communities also have the ability to decide that they value other things besides money. That is what Swift Estates has done. Despite their high-sounding rhetoric, amici are asking this Court to force communities like Swift Estates to be turned into commodities, even though those communities have done everything in their power to avoid being turned into simply another commercial asset to be monetized by an LLC whose members live on another continent.

Third, many of the policy arguments made by amici demonstrate exactly why complex policy decisions should not be decided through litigation: namely, the most likely policy outcomes are exactly the opposite of what amici say that they will be. Some amici, for example, argue that short-term rentals should be allowed due to

high housing and rental prices. But converting more of this State's long-term housing stock into hotel rooms will diminish supply, not increase it. Not surprisingly, studies have repeatedly shown that—by reducing long-term housing stock—short-term rentals increase housing and rental prices. (Appellees' Br. in Opp. to App., at 40-44). Increasing the number of short-term rentals would thereby do the opposite of what amici purport to desire; they would add to the woes of which amici complain, instead of reducing them. Amici are arguing against their own interests.

Similarly, some amici assert that upholding the Court of Appeals' ruling will eliminate Michigan's tourist industry. But the Court of Appeals' holding did not change the rules; it was consistent with a century of unbroken Michigan precedent on this question. One amicus cites figures showing that 128.3 million tourists spent $29.3 billion in Michigan in 2023. (Travelers Br. at 7). That, of course, occurred under the legal regime that amici are trying to overthrow. After all, *O'Connor* was the law of the land in 2023, and every Michigan decision has for the last 20 years rejected the notion that short-term rentals are permissible as a "residential" use. Apparently, the extant legal regime has not stymied tourists in the slightest. Amici fail to explain why—as a policy matter—this Court should fix what isn't broken.

C. Amici's attempt to taint restrictive covenants by association is misguided.

Finally, some amici attempt to add weight to their side of the scale by emphasizing that some restrictive covenants in the past have been used to advance illegally discriminatory purposes. But there is nothing in the record here that even remotely suggests any sort of illegal or discriminatory purpose or effect. And this

Court has repeatedly explained that a landowner's ability "to preserve the neighborhood's character" via a restrictive covenant is a "valuable property right" that must be enforced consistent with the drafter's intent. *Thiel*, 504 Mich at 496. Restrictive covenants are simply a tool that, just like any other tool, may be used for purposes malign—or salutary. In some instances, for example, restrictive covenants may be used to advance fair-housing goals, mandate income caps (to ensure that the projects serve disadvantaged groups) and expense caps (to ensure that the projects remain affordable for those groups), and to set inspection, maintenance, and reserve requirements (to ensure that the projects are in good condition for those groups).[1]

The true thrust of amici's arguments appears to be an attempt to discredit the Declaration by association. Amici's attempt to taint the discussion in this manner suggests some desperation, not confidence in the merits of their position. Otherwise, they would presumably feel no need to proceed *ad hominem*.

The same is true for amici's reference to the few, haphazard occasions on which some of the appellees' rented their homes to family or friends. The appellants asserted claims against the appellees with respect to those allegations—and the appellants lost on the merits. See *Melvin R Berlin Revocable Tr v Rubin*,

[1] See, e.g., Michigan State Housing Development Authority, Low Income Housing Tax Credit Compliance Manual § 200, available at https://www.michigan.gov/mshda/-/media/Project/__Websites/mshda/rental/Property-Managers/Compliance-for-Rental-Housing/Manuals-Policies-and-Codes/LIHTC-Compliance-Manual/mshda_crh_m_lcm1305_chapter_02_responsibilities.pdf?rev=8fb984e54f904ac88a171749388a7bfd&hash=58F1D413341DD5A4422EFF02C79EC8CB; "Regulatory Agreement," https://www.michigan.gov/-/media/Project/Websites/mshda/assets/Folder3/REGULATORY_AGREEMENT_TEAM_wSection_1602.pdf?rev=05e996cc24054d7786d353ca05202d90.

unpublished per curiam opinion of the Court of Appeals issued July 20, 2023 (Docket No. 359300), 2023 WL 4671407, at *7–8. The unsupported assertions that the appellees have engaged in impropriety have no merit and should have no bearing on the arguments at issue before the Court.

Conclusion

The lower courts' judgments should be affirmed.

MILLER JOHNSON
Attorneys for Plaintiffs-Appellees

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By: /s/ Stephen J. van Stempvoort

Craig H. Lubben (P33154)
Stephen J. van Stempvoort (P79828)
Andrew C. Goetz (P71410)
45 Ottawa Avenue, NW – Suite 1100
Grand Rapids, MI 49503
616.831.1700
lubbenc@millerjohnson.com
vanstempvoorts@millerjohnson.com

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/s/ Stephen J. van Stempvoort

Stephen J. van Stempvoort
Miller Johnson
45 Ottawa Avenue SW, Suite 1100
Grand Rapids, MI 49503
(616) 831-1700
vanstempvoorts@millerjohnson.com
Counsel for Plaintiffs-Appellees