STATE OF MICHIGAN

COURT OF APPEALS

DONALD EAGER and CAROL EAGER,

Plaintiffs-Appellants,

v

CECILIA PEASLEY, Individually and as Trustee of the CECILIA L. KAURICH TRUST,

Defendant-Appellee,

and

JEFFREY CAVANAUGH and SANDRA CAVANAUGH,

Defendants.

FOR PUBLICATION
November 30, 2017
9:05 a.m.

No. 336460
Alcona Circuit Court
LC No. 2014-002282-CH

Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

K. F. KELLY, J.

Plaintiffs appeal by right an order denying their request for injunctive relief. Plaintiffs sought to preclude defendant from renting out a lake house for transient short-term use, arguing that such use violated certain restrictive covenants.[1] The trial court found that the restrictive covenant was ambiguous and that, as a result, the law required free use of the property including transient short-term rentals. Finding no such ambiguity, we reverse.[2]

I. BASIC FACTS

[1] Defendants Jeffrey and Sandra Cavanaugh reached a settlement agreement with plaintiffs early on in the litigation. This appeal solely concerns defendant Peasley's lake house, which she owns, not as a resident, but rather in her capacity as a trustee, and we shall refer to her hereafter as "defendant" for purposes of this opinion.

[2] We have not been asked to address - nor do we comment on - long-term rentals of private dwellings for residential use and whether such use is commercial in nature. The scope of this opinion addresses only short-term transient rentals.

Plaintiffs filed an amended complaint for breach of the restrictive covenants and nuisance against defendant, their neighboring property owner, who rented out a lake house for transient short-term use. Plaintiffs alleged that the rentals violated the restrictive deed covenants limiting defendant's use of the premises to "private occupancy" and prohibiting "commercial use" of the premises. Plaintiffs sought injunctive relief in the form of an order enjoining any further rental activity and abating the purported nuisance. No trial was conducted, nor does it appear that any hearing took place. Instead, the parties submitted the following stipulated facts to the trial court for resolution:

> 6. Plaintiff are owners of real property located in Caledonia Township, Alcona County, Michigan described as follows:
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> > "Lot 4 of Doctor's Point, a subdivision recorded in Liber 1 of Plats, Page 47, Alcona County Records, commonly known as 6351 Oak Street, Hubbard Lake, Michigan 49747 . . ."
>
> 7. Defendant, as Trustee of the Cecilia L. Kaurich Trust, is the owner of real property located in Caledonia Township, Alcona County, Michigan as follows::
>
> > "Lot 1 and part of Lot 2 of Doctor's Point, a subdivision recorded in Liber 1 of Plats, Page 47, Alcona County Records, commonly known as 653 Oak Street, Hubbard Lake, Michigan 49747 . . ."
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> 8. The subject cottage is a two-story structure with 150 feet of frontage on Hubbard Lake. It is approximately 2000 square feet in size and contains four bedrooms.
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> 9. Defendant Peasley has owned the cottage since 2009 and Defendant has been renting it during the summer season each year since then.
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> 10. Defendant advertises its rental availability on-line through a national website, www.homeaway.com, which also serves as the medium for payment.
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> 11. All rental agreements are between Defendant Peasley and a single responsible signatory.
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> 12. The renter must be at least 26 years old, and the rental is limited to 10 guests with no pets allowed.
>
> 13. The year 2016, which is typical of the rental history, shows 64 days booked over the four-month period of May through August. No dates have yet been booked in September.
>
> 14. Defendants have rented and continue to rent the Peasley Property on a short-term basis, for a minimum of two (2) nights to seven (7) nights for each rental, with prices ranging from $150.00 - $225.00 per night to $850.00 -

$1,700.00 per week depending upon the season, Spring May 19 – May 21, 2016; Summer May 22nd – September 2016.

15. The Defendant's calendar for 2016 reflects rentals for 10 different families and one business group (Leadership Retreat). The rentals average six (6) days in length.

16. There is no rental or business office maintained on site, no bed and breakfast service, and no other services provided while renters [are] on site[,] such as housekeeping or linen.

17. Title to the Eager Property and Peasley Property originated from a common Grantor who burdened Lots 1-9 of Doctor's Point Subdivision with the same restrictive covenants which are the subject of this proceeding.

18. Among the covenants and restrictions placed under the chain of title of each of these parties' by warranty deed dated February 26, 1946, recorded March 18, 1946 at Liber 78, Page 432, Alcona County Records are the following:

> " . . . the premises shall be used for private occupancy only; . . .that no commodity shall be sold or offered for the sale upon the premises and no commercial use made thereof, . . ."

In pertinent part, the restrictive covenant provided:

> [T]hat the premises shall be used for private occupancy only; that no building to be erected on said lands shall be used for purposes otherwise than as a private dwelling and such buildings as garage, ice-house, or other structures usually appurtenant to summer resort dwellings are to be at the rear of said dwellings; that such dwellings shall face the lake unless otherwise specified; that no commodity shall be sold or offered for sale upon said premises and no commercial use made thereof . . . .

The court recited the stipulated facts and acknowledged the parties' arguments but then inexplicably denied plaintiffs' request for injunctive relief.

II. ANALYSIS

"The interpretation of restrictive covenants is a question of law that this Court reviews de novo." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008), citing *Terrien v Zwit*, 467 Mich 56, 60–61, 648 NW2d 602 (2002).

Our Supreme Court has confirmed that restrictive covenants are contracts with a particular value:

> Because of this Court's regard for parties' freedom to contract, we have consistently supported the right of property owners to create and enforce covenants affecting their own property. Such deed restrictions generally constitute

> a property right of distinct worth. Deed restrictions preserve not only monetary value, but aesthetic characteristics considered to be essential constituents of a family environment. If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions grants the people of Michigan the freedom freely to arrange their affairs by the formation of contracts to determine the use of land. 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 Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007) (citations and quotation marks omitted).]

In terms of restrictive covenants, our Supreme Court has recognized "two essential principles, which at times can appear inconsistent. The first is that owners of land have broad freedom to make legal use of their property. The second is that courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied." *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999). These types of cases are, therefore, decided on a case-by-case basis. *Id.*

"In construing restrictive covenants, the overriding goal is to ascertain the intent of the parties. Where the restrictions are unambiguous, they must be enforced as written." *Johnson*, 281 Mich App at 389 (citations omitted). "[T]he 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." *Borowski v Welch*, 117 Mich App 712, 716–717; 324 NW2d 144 (1982). Our Supreme Court has cautioned against judicial over-stepping when interpreting restrictive covenants:

> The dissent justifies its amending from the bench by asserting that "[t]he absence of a definition in the restrictive covenants" of the terms "commercial, industrial, or business enterprises" leaves these terms ambiguous, and thus "opens the terms to judicial interpretation." We find this to be a remarkable proposition of law, namely, that the lack of an explicit internal definition of a term somehow equates to ambiguity—an ambiguity that apparently, in this case, allows a court free rein to conclude that a contract means whatever the court wants it to mean. Under the dissent's approach, any word that is not specifically defined within a contract becomes magically ambiguous. If that were the test for determining whether a term is ambiguous, then virtually all contracts would be rife with ambiguity and, therefore, subject to what the dissent in "words mean whatever I say they mean" fashion describes as "judicial interpretation." However, fortunately for the ability of millions of Michigan citizens to structure their own personal and business affairs, this is not the test. As this Court has repeatedly stated, the fact that a contract does not define a relevant term does not render the contract ambiguous. Rather, if a term is not defined in a contract, we will interpret such term in accordance with its "commonly used meaning." [*Terrien*, 467 Mich at 75–76 (citations and footnotes omitted).]

The terms "private occupancy only" and "a private dwelling," coupled with the prohibition against "commercial use" in the restrictive covenant are clear and unambiguous and defendant is prohibited from renting the property on a transient short-term basis.

A. THE TERMS "PRIVATE OCCUPANCY ONLY" AND "A PRIVATE DWELLING"

In *Phillips v Lawler*, 259 Mich 567, 571; 244 NW 165 (1932), the building restriction at issue provided that " '[n]o building or structure shall be used, built or maintained thereon for any purposes except for a private residence and a private garage either in connection with the residence or built separately thereon.' " *Id*. at 570. Our Supreme Court concluded that a city's zoning ordinance could not impair the right of the parties to enter into such a contract. The Court concluded that: "In building restriction cases involving covenants, *the term 'private dwelling house' means a building designed as a single dwelling to be used by one family*." *Id*. at 571 (emphasis added), citing *Schadt v Brill*, 173 Mich 647; 139 NW 878 (1913); *Kingston v Busch*, 176 Mich 566; 142 NW 754 (1913); *De Galan v Barak*, 223 Mich 378; 193 NW 812 (1923); and *Seeley v Phi Sigma Delta House Corp*, 245 Mich 252, 254; 222 NW 180 (1928).

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." *Seeley*, 245 Mich at 256. The Court first noted that "[t]he 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." *Id*. at 253. The Court's focus was on the purpose of the language: "The term as a connected whole was employed for a purpose, and if such purpose is manifest, and the words to accomplish it apt, we need only make application thereof to the facts established by the evidence." *Id*. In *Seeley*, "the restriction was imposed by an owner when he sold lots in a residential district, and the purpose was to preserve such character with its assurance of privacy and quiet enjoyment for the reciprocal benefit of all purchasers of lots." *Id*. Therefore, although the term "dwelling house" was capable for multiple meanings, it assumed "concrete meaning" when accorded with the purpose behind the restriction. The *Seeley* Court confirmed 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." *Id*. at 254. A college fraternity whose "relation is purely artificial, is a business proposition, and more nearly approximates the character of a club, boarding house, or apartment house, with added recreational privileges," was not a family. *Id*. at 255.

Here, the covenant provides that "that the premises shall be used for private occupancy only; 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*.

In *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 336; 591 NW2d 216 (1999), the use and character restrictions provided: "No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than for the purpose of one single dwelling not to exceed two stories in height." *Id*. at 337. The *O'Connor* Court concluded that interval use – or timesharing – violated this restriction. It reviewed *Wood v Blancke*, 304 Mich 283; 8 NW2d 67 (1943), which involved a dispute over language that restricted use to "residence purposes only" and whether such language prevented an owner from raising racing pigeons on the property. *O'Connor*, 459 Mich at 341. The *O'Connor* Court reiterated that the term "residence" involved an inquiry beyond what structures were permitted on the property:

> Restrictive covenants in deeds are construed strictly against grantors and those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property. Notwithstanding this rule of construction, covenants restricting the erection of any building except for dwelling house purposes have been held to apply to the use as well as to the character of the building; and in strictly residential neighborhoods, where there has always been compliance with the restrictive covenants in the deeds, nullification of the restrictions has been deemed a great injustice to the owners of property. It is the policy of the courts of this State to protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings.
>
> > "Restrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The courts have long and vigorously enforced them by specific mandate. This court has expressly recognized that the right of privacy for homes is a valuable right."
>
> [*O'Connor*, 459 Mich at 341–342, quoting *Wood* 304 Mich at 287–288 (citations omitted).]

The *O'Connor* Court recognized that the issue of whether interval ownership violated the restrictive covenant was one of first impression and turned its attention to *Wood's* imperative "that the usual, ordinary and incidental use of property as a place of abode does not violate the covenant restricting such use to 'residential purposes only,' but that an unusual and extraordinary use may constitute a violation . . .". *O'Connor*, 459 Mich 344-345, quoting *Wood*, 304 Mich at 288-289. The Court then turned to the term "residential purpose":

> [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, the summer home at Shanty Creek could not be a residence if the principal residence, the place where they permanently reside, their domicile is in some other location, 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. [*O'Connor*, 459 Mich at 345.]

However, interval or timesharing use did not constitute residential use:

> 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 any time 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 346.]

The defendants argued that the plaintiffs had waived the use restriction because they had allowed short-term rentals. The *O'Connor* Court disagreed:

> 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. [*O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 346; 591 NW2d 216, 221 (1999).]

Defendant argues that *O'Connor* "cautions against rigid definitions when interpreting covenants," but, like the Court in *Torch Lake Protection Alliance v Ackermann*, unpublished opinion per curiam of the Court of Appeals, issued November 30, 2004 (Docket No. 246879), we conclude that defendant's attempt to distinguish the short-term rentals from the interval ownership activity in *O'Connor* is unavailing because the case before us does not present a question of waiver. *Id.* at unpub op, p 5.[3]

In *Torch Lake*, the trial court concluded that rental use of property violated deed restrictions providing that the property "shall be used for private residence purposes only" and not used for any commercial purpose. *Id*. at unpub op, pp 1-2. The Court found these terms to be unambiguous:

[3] "Although unpublished opinions of this Court are not binding precedent, they may, however, be considered instructive or persuasive." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145; 783 NW2d 133 (2010) (internal citations omitted).

The trial court found, and we agree, that the residential use and business prohibition covenants in defendants' deed are not ambiguous, and no genuine issue of material fact was shown with respect to defendants' violation of those covenants. The trial court's reasoning is clear and cogent:

> 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 . . .[B]ut perhaps the best writer to ever serve on the Michigan Supreme Court was Justice Volker . . .Justice Volker wrote about the inherent ambiguity of language and the ability of lawyers to make almost any argument about any set of words that man could be constrained to put together; . . . I think the point is often the more detail one provides it simply provides more opportunity to try to insert ambiguity where none was intended.
>
> 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.
>
> But, to the extent we have clear precedent in *O'Connor v Resort Owners* with regard to what is a residence and what is not, there is no question that rentals are in excess of $50,000 during the height of the season. [*Torch Lake*, unpub op, pp 3-4.]

Citing *Wood*, the Court acknowledged that "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*., unpub op, p 4. The Court then considered the *O'Connor* Court's consideration of what constituted a "residential purpose." *Id.* Because the defendants failed to present admissible evidence to support their claim that their rental use did not exceed an incidental use of property for "private residence purposes only," the trial court properly concluded that the use violated the deed restrictions.

The *Torch Lake* case is on point with the case at bar and we adopt the Court's analysis as our own. We reject defendant's tortured attempt at reading an ambiguity into the restrictive covenant that simply does not exist. 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 world-wide 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.

B. THE TERM "COMMERCIAL USE"

In denying plaintiffs' request for injunctive relief, the trial court focused primarily on the term "private dwelling" and spent little time discussing whether defendant's actions amounted to "commercial use" of the property. We conclude that, even if the short-term rentals did not specifically violate the deed restrictions limiting the property to "private occupancy only" and "private dwelling," the rentals most assuredly violated the restrictive covenant barring "commercial use" of the property.

In *Terrien*, our Supreme Court noted:

> The operation of a "family day care home" for profit is a commercial or business use of one's property. We find this to be in accord with both the common and the legal meanings of the terms "commercial" and "business." "Commercial" is commonly defined as "able or likely to yield a profit." *Random House Webster's College Dictionary* (1991). "Commercial use" is defined in legal parlance as "use in connection with or for furtherance of a profit-making enterprise." Black's Law Dictionary (6th ed). "Commercial activity" is defined in legal parlance as "any type of business or activity which is carried on for a profit." *Id*. [*Terrien*, 467 Mich at 63–64.]

We conclude that, under the definitions set forth in *Terrien*, the act of renting property to a third-party for short-term use is a commercial use, even if the activity is residential in nature.

We specifically adopt this Court's reasoning in *Enchanted Forest Property Owners Ass'n v Schilling*, unpublished opinion per curiam of the Court of Appeals, issued march 22, 2010 (Docket No. 287614). The defendants in *Enchanted Forest* "occasionally rented out their property, typically for periods of one week or less, for a rental fee." *Id*. at unpub op, p 2. The rentals were not as frequent as the case at bar with records revealing "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*. This Court concluded that such short-term rentals violated the restrictive covenants prohibiting commercial use of the property:

> 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. The trial court properly granted summary disposition in favor of the EFPOA on the basis of Article XI of the deed restrictions. [*Id.* at unpub op, p 7.]

"Commercial use," which is clearly prohibited in the restrictive covenant, includes short-term rentals even without resorting to technical refinement of what constitutes "private occupancy" or "private dwelling." That defendant and her renters may use the property as a private dwelling is not dispositive. Short-term rentals still violate the restrictive covenant barring commercial use of the property. Where defendant's commercial use of the home was in clear violation of the unambiguous restrictive covenant, the trial court should have granted plaintiffs' request for injunctive relief.

Reversed and remanded for the trial court to enter a judgment granting plaintiffs' request for injunctive relief. We do not retain jurisdiction. Plaintiffs may tax costs as the prevailing party. MCR 7.219.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell

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Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

MURPHY, J. (*dissenting*).

Plaintiffs Donald and Carol Eager filed a complaint against defendants Cecilia Peasley, individually and as trustee of the Cecilia L. Kaurich Trust, and Jeffrey and Sandra Cavanaugh, alleging that defendants, who are neighboring property owners, were renting out their lake houses for short-term use in violation of restrictive deed covenants that limited the use of their premises to "private occupancy," that only permitted the construction of "private dwelling[s]," and that did not allow for the "commercial use" of their premises.[1] Plaintiffs' lawsuit claimed breach of the deed restrictions and creation of a nuisance, and they sought injunctive relief in the form of an order enjoining any further rental activity and abating the purported nuisance. The crux of the dispute concerns the proper interpretation of the restrictive covenant, and the parties submitted stipulated facts to the trial court for resolution. The trial court issued a written opinion and order denying plaintiffs' request for injunctive relief, concluding that the language in the

[1] Defendants Jeffrey and Sandra Cavanaugh entered into a settlement agreement with plaintiffs, and this appeal pertains solely to defendant Peasley, whom I shall refer to as "defendant" for the remainder of my dissent.

deed restrictions is ambiguous with respect to whether short-term rentals are permissible, that any doubts regarding the interpretation of the restrictive covenant must be resolved in favor of the free use of the property and against the would-be enforcers, and that defendant, therefore, could not be found to have violated the deed restrictions.[2] Plaintiffs appeal as of right, and I would affirm the trial court's ruling. Accordingly, I respectfully dissent.

I. STANDARD OF REVIEW

In *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002), our Supreme Court observed as follows:

> Because the parties have stipulated the essential facts, our concern here is only with the law: specifically, whether covenants permitting only residential

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[2] The majority states that the trial court, after reciting the stipulated facts and acknowledging the parties' arguments, "inexplicably denied plaintiffs' request for injunctive relief." This observation is not consistent with my review of the record. In its written opinion and order, the trial court recited the stipulated facts, reviewed the parties' arguments, set forth Michigan law on restrictive covenants, discussed some opinions from other jurisdictions, state and federal, and then ruled as follows:

> The restrictive covenant at issue here does not use the term "residential purpose" but instead uses the phrase "private dwelling[,]" which is even more ambiguous than "residential purpose." The restriction [here] further describes the subdivision as having "summer resort dwellings[,]" which may reasonably be construed to mean cottages or vacation homes.
>
> In the absence of a clear definition by Michigan Courts of "private dwelling" or "commercial use[,]" the restriction must be construed in favor of the free use of the land. It would have been easy to specifically articulate the intent that "private dwelling" and "commercial use" specifically prohibited short-term rentals but such was not the case. In the absence of such clarity, and the fact that numerous courts have found "residential purpose" and "commercial enterprise" to be ambiguous, in the case at bar it is clear that pursuant to the stipulated facts there is no business or commercial enterprise being conducted on the premises itself. Further[,] the short-term rentals allow transients to use the property in the same fashion as all the other property owners, and therefore do not violate any use provisions of the restriction.

The trial court indicated that it was relying on well-established common-law principles that courts will not lightly restrict the free use of property, that a restrictive covenant is to be strictly construed against the would-be enforcer, and that all doubts as to the construction of a restrictive covenant must be resolved in favor of the free use of property. The trial court denied plaintiffs' request for injunctive relief, determining "that defendant [was] not in violation of the restrictive covenant."

> uses, and expressly prohibiting commercial, industrial, or business uses, preclude the operation of a "family day care home," and, if so, whether such a restriction is unenforceable as against "public policy." These are questions of law that are reviewed de novo[.] [See also *Conlin v Upton*, 313 Mich App 243, 254; 881 NW2d 511 (2015) ("This Court . . . reviews de novo the proper construction of restrictive covenants involving real property.").]

We are likewise concerned solely with the construction of deed restrictions, given that the parties stipulated to the facts; therefore, our review is de novo. Additionally, this Court reviews de novo a trial court's dispositional ruling on equitable matters. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

II. THE LAW REGARDING RESTRICTIVE COVENANTS

In *Conlin*, 313 Mich App at 255-256, this Court recited the principles that have developed in our civil jurisprudence pertaining to deed restrictions or restrictive covenants:

> It is well-grounded in Michigan's common law that property owners are free to attempt to enhance the value of their property in any lawful way, by physical improvement, psychological inducement, contract, or otherwise. A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a valuable property right. However, although Michigan courts recognize that restrictions are a valuable property right, this right must be balanced against the equally well-settled principle that courts will not lightly restrict the free use of property. Courts sitting in equity do not aid one man to restrict another in the use to which he may put his property unless the right to such aid is clear. Similarly, the provisions of a covenant are to be strictly construed against the would-be enforcer and doubts resolved in favor of the free use of property. When construing a restrictive covenant, courts may only give it a fair construction; courts may not broaden or limit the restriction. To that end, courts will not infer the existence of a restriction—the restriction must be expressly provided in the controlling documents. Courts will not enlarge or extend a restriction through interpretation, even to accomplish what it may be thought the parties would have desired had a situation that later developed been foreseen by them at the time the restriction was written. [Citations, quotation marks, and ellipsis omitted.]

Restrictive covenants allow parties to preserve desired characteristics of a neighborhood, "which the parties may consider valuable for raising a family, conserving monetary value, or other reasons particular to the parties." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007). It is a "well-understood proposition that a breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement." *Terrien*, 467 Mich at 65.

"If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations[.]" *Bloomfield Estates*, 479 Mich at 214. When a term in a restrictive covenant

is not defined within the covenant or deed, the term is to be construed in accordance with its commonly used meaning. *Id.* at 215. Additionally, under the doctrine of *noscitur a sociis*, a term or phrase is given meaning by its setting or context. *Id.* The simple fact that a restrictive covenant in a deed does not define a relevant term does not render the covenant ambiguous; rather, as noted, the term must be interpreted in accordance with its commonly used meaning. *Terrien*, 467 Mich at 76-77.

III. DISCUSSION

A. PRIVATE OCCUPANCY AND PRIVATE DWELLING

The terms in dispute are "private occupancy," "private dwelling," and "commercial use," none of which are defined in the restrictive covenant or deed. "In building restriction cases involving covenants, the term 'private dwelling house' means *a building designed as a single dwelling to be used by one family*." *Phillips v Lawler*, 259 Mich 567, 571; 244 NW 165 (1932) (emphasis added); see also *Seeley v Phi Sigma Delta House Corp*, 245 Mich 252, 254; 222 NW 180 (1928).[3] I shall refer to this definition as the "one-family definition" relative to occupancy and use of a dwelling. As reflected in the stipulated facts, the restrictive covenant at issue originated in 1946, after *Phillips* and *Seeley* had been issued. When the common grantor employed the terms "private occupancy" and "private dwelling," it is reasonable to conclude that the grantor's intent was for those terms to be construed and understood in a manner consistent with the status of the law at the time and our Supreme Court's determination that a "private dwelling house" means a dwelling designed to be used by one family.

Plaintiffs narrowly construe the one-family definition, arguing that it necessarily limits occupancy and use of a dwelling to "one family, not multiple parties on a transient basis." In essence, plaintiffs' position is that "one family" equates to the "same family" relative to the entire period of ownership of a dwelling, ostensibly limiting occupancy and use to the grantee or grantees under a deed of conveyance, along with any family members. Defendant broadly interprets the one-family definition, contending that occupancy or use of a dwelling by one family can encompass any given family that rents the dwelling at a point in time, if even for a short period, such as the ten different families that rented defendant's house in 2016. Defendant maintains that the "private" aspect of occupancy or of use of a dwelling is not lost when families, individuals, or suitably-small groups rent a dwelling, with their occupancy and use of the dwelling being to the exclusion of all non-renters and the public in general. According to

[3] Moreover, the word "private," which, used as an adjective, modifies "occupancy" and "dwelling," is defined as "intended for or restricted to the use of a particular person, group, or class . . .[;] belonging to or concerning an individual person, company, or interest . . . [;] restricted to the individual or arising independently of others[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). Occupancy or use restricted to a particular person or group, such as a family, would be consistent with the Supreme Court's definition of "private dwelling house."

defendant, the occupancy and use of a dwelling remains private if authorized and permitted by the owner.[4]

I find it impossible to discern whether the common grantor, by employing the terms "private occupancy" and "private dwelling," intended to preclude an owner from renting out premises located in the subdivision, especially in the context where a house is leased to a family, as is mostly the case with respect to defendant's rentals. The parties present reasonable arguments in favor of their conflicting interpretations of "private occupancy" and "private dwelling." It would have been quite simple for the common grantor to have included language expressly barring rentals or mandating that a dwelling be owner-occupied, but this was not done. Taking into consideration the principles that courts will not lightly restrict the free use of property, that restrictions must be clear and expressly provided for in controlling documents, that restrictions are to be strictly construed against a would-be enforcer, and that any doubts are to be resolved in favor of the free use of property, *Conlin*, 313 Mich App at 255-256, I would hold that the "private occupancy" and "private dwelling" language does not bar defendant from using her lake house for short-term rentals.

Contrary to the majority's view, *Seeley*, 245 Mich 252, wherein the Court ruled that the restrictive covenant limiting use of the land to "one single private dwelling house" prohibited the construction of a fraternity house, is easily distinguishable. The *Seeley* Court found that the restriction meant "one house, for a single family, living in a private state," which did not encompass "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." *Id.* at 256. Plaintiffs' short-term rentals, almost exclusively to families, are much more consistent with a one-house, single-family, private-state use of the property than with the operation of a fraternity house. *Seeley* ultimately provides no clear insight or definitive direction with respect to whether short-term rentals are permissible under the language at issue in the instant case. Ambiguity persists, which supports my position.

In *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335; 591 NW2d 216 (1999), our Supreme Court examined a residential-purposes subdivision restriction, holding that interval ownership or timesharing violated the restriction. The Court noted that homes in the subdivision were also used for daily and weekly rentals, and the defendant argued, in part, that the restriction, if it indeed barred timeshares, was waived because short-term rentals had been and were being allowed. *Id.* at 338-339. After concluding that interval ownership does not constitute a residential purpose under the facts of the case, the *O'Connor* Court addressed the defendant's waiver argument and the analogy to short-term rentals:

> 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

[4] I note that defendant also argues that the reference to "summer resort dwellings" in the restrictive covenant lends support for her position that short-term vacation rentals are permissible. At best, the language merely likens the dwellings in the subdivision to "summer resort dwellings," but really provides no insight in regard to whether rentals are permitted.

> 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 . . . subdivision to an extent that would defeat the original purpose of the restrictions. [*Id.* at 345-346.[5]]

Here, the term "residential purposes" is not contained in the restrictive covenant; there is no express "residential" limitation of any kind in the covenant.[6] Assuming that the "private occupancy" limitation equates to permitting only residential uses or purposes, *O'Connor* tends to support defendant's position with respect to short-term rentals. Although couched in terms of analyzing a waiver issue, the Court nonetheless stated that short-term rentals are different in character than timeshares, strongly suggesting that such rentals would not violate a residential-purposes restriction.

In sum, I agree with the trial court's analysis and ruling regarding the terms "private occupancy" and "private dwelling."

B. COMMERCIAL USE

In my view, the prohibition against the "commercial use" of property also lacks clarity in relationship to divining whether short-term rentals to transients are permitted. The term "commercial" is defined as "occupied with or engaged in commerce or work intended for commerce." *Merriam-Webster's Collegiate Dictionary* (11th ed). And in *Terrien*, 467 Mich at 64, our Supreme Court, quoting Black's Law Dictionary (6th ed), defined "commercial use" as meaning, in legal parlance, " 'use in connection with or for furtherance of a profit-making enterprise.' " Although the stipulated facts might perhaps be viewed as showing that defendant is engaged in commerce and using her house to further a profit-making enterprise, the house itself completely retains its residential and familial character while being rented and there are no services provided on site, as would be the case with a hotel or bed and breakfast establishment. Unlike the family day care home that was found to be a commercial or business use of the

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[5] The Supreme Court effectively rejected this Court's determination in the case that interval ownership cannot be distinguished from year-round renting. *O'Connor*, 459 Mich at 341.

[6] The majority indicates its agreement with and adopts the reasoning in *Torch Lake Protection Alliance v Ackermann*, unpublished opinion per curiam of the Court of Appeals, issued November 30, 2004 (Docket No. 246879), examining the opinion at length. Like *O'Connor*, *Torch Lake* concerned a residential-purposes limitation, which language does not exist here. Moreover, the restrictions in *Torch Lake* specifically barred use of the property as a " 'tourist camp or public place of resort.' " *Torch Lake*, unpub op at 1. For these reasons, I find *Torch Lake* to be distinguishable. The majority relies on and adopts another unpublished opinion issued by this Court; however, unpublished opinions are not binding, and I find the case cited by the majority to be unpersuasive. See MCR 7.215(C)(1). I think that this Court would be better served by not utilizing unpublished opinions in crafting its opinions, especially its published opinions.

dwelling in *Terrien*, 467 Mich at 83, there are no business operations or commercial activities whatsoever taking place on defendant's premises during a rental period.[7]

I could not locate any published Michigan opinions that are directly on point in regard to the issue presented. However, courts from other jurisdictions have held, apparently uniformly so, that language in a restrictive covenant that precludes the commercial use of premises or prohibits using property for commercial purposes or enterprises does not bar short-term rentals of a dwelling. In *Mason Family Trust v Devaney*, 146 NM App 199, 201; 207 P3d 1176 (2009), the New Mexico Court of Appeals held that "rental of a house or abode for a short-term use as a shelter to live in is significantly different from using the property to conduct a business or commercial enterprise on the premises." In *Silsby v Belch*, 952 A2d 218, 222-223 (Me, 2008), the Supreme Judicial Court of Maine held:

> Adopting [the plaintiffs'] reading would result in an affirmative rule of law holding that every single- or multi-family residence that is rented for use by someone other than the owner is a commercial enterprise. Under such a rule of law, innumerable properties would invariably run afoul of local zoning ordinances prohibiting commercial uses. The use of this property is residential; the fact that this use may involve income in some fashion does not change a fundamentally residential use to a commercial enterprise. The fact remains that the original grantor could have limited the use of this property to an owner-occupied, single-family residence if she wished by placing such commonly used language in the covenant.

In *Yogman v Parrott*, 325 Or 358, 366; 937 P2d 1019 (1997), the Oregon Supreme Court ruled that because a prohibition against short-term rentals was not plainly within the provisions of the covenant, the defendants were permitted to rent their property to others despite restrictive language that did not allow commercial enterprises on the property. In *Pinehaven Planning Bd v Brooks*, 138 Idaho 826, 830; 70 P3d 664 (2003), the Idaho Supreme Court held:

> Renting the property for residential purposes, whether short or long-term, does not fit within the[] prohibitions [against commercial ventures or businesses of any type]. The only building on the [defendants'] property remains a single-family dwelling and renting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood.

In *Houston v Wilson Mesa Ranch Homeowners Ass'n, Inc*, 360 P3d 255, 260 (Colo App, 2015), the Colorado Court of Appeals, after reviewing out-of-state opinions that concluded that covenant prohibitions against commercial use did not bar short-term rentals of residential property, either because they were ambiguous or because they unambiguously did not preclude

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[7] In *Terrien*, 467 Mich at 59 n 2, the Court noted that a "family day care home" receives minor children for care and supervision. Thus, employed adult personnel are on site providing services. But here there are no on-site services or personnel.

such use, held that it agreed with these cases and that "short-term vacation rentals . . . are not barred by the commercial use prohibition in the covenants" at issue. In *Russell v Donaldson*, 222 NC App 702, 706-707; 731 SE2d 535 (2012), the North Carolina Court of Appeals held:

> Under North Carolina case law, restrictions upon real property are not favored. Ambiguities in restrictive covenants will be resolved in favor of the unrestricted use of the land. A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals.

Finally, I find instructive and persuasive the following sentiments expressed by the Alabama Court of Appeals in *Slaby v Mountain River Estates Residential Ass'n, Inc*, 100 So3d 569, 580 (Ala App, 2012), which concerned a subdivision cabin and a restrictive covenant prohibiting commercial uses of the property:

> Unlike in *Reetz* [*v Ellis*, 279 Ala 453; 186 So2d 915 (1966)], in which the property owners planned to manage the mobile-home park on site, in this case no mercantile or similar activity occurs at the cabin. The actual renting of the cabin, and any financial transactions associated therewith, occurs off-site. The Slabys [cabin owners] do not solicit renters on-site, but do so through the Internet, where potential tenants can view the premises without actually going there. While occupying the cabin, the tenants must cook and clean for themselves and they do not receive any services from the Slabys. Although the Slabys remit a lodging tax, . . . that fact does not detract from the conclusion that no commercial activity takes place on the premises.
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> Most importantly, unlike in *Reetz,* the income the Slabys derive from the rental of the property derives solely from the use of the property in the same manner as the other landowners in the subdivision use their properties. The fact that the Slabys receive rental income does not transform the character of the surrounding subdivision like the maintenance of a mobile-home park or a hotel would.

The *Slaby* court concluded that the "commercial use" prohibition did not preclude the Slabys from renting out the cabin on a short-term basis, given that the purposes for which the cabin is used by renters, "such as for eating, sleeping, and other residential purposes, do[] not amount to commercial use." *Slaby*, 100 So3d at 582.

In the instant case, as reflected in the stipulated facts, defendant rents her property through a national website, "which also serves as the medium for payment," and "[t]here is no rental or business office maintained on site, no bed and breakfast service, and no other services provided while renters [are] on site[,] such as housekeeping or linen." Defendant's house is thus merely used by renters for eating, sleeping, and other residential purposes, just like any of the other houses in the subdivision; there are no commercial activities or business operations taking place on site. Once again, it would have been quite simple for the common grantor to have included language expressly barring rentals or mandating that a dwelling be owner-occupied, but this was not done. For the reasons expressed in the caselaw from other states, and taking into

consideration the principles from our jurisprudence that courts will not lightly restrict the free use of property, that restrictions must be clear and expressly provided for in controlling documents, that restrictions are to be strictly construed against a would-be enforcer, and that any doubts are to be resolved in favor of the free use of property, *Conlin*, 313 Mich App at 255-256, I would join those jurisdictions discussed above and hold that language in a restrictive covenant that prohibits making commercial use of a dwelling does not bar short-term rentals of the dwelling in the manner exercised by defendant. Therefore, I would hold that the trial court did not err in ruling in favor of defendant. Accordingly, I respectfully dissent.[8]

/s/ William B. Murphy

[8] As a final note, the majority indicates that it is not commenting on long-term rentals of private dwellings. However, I believe that the majority's underlying analysis can effectively be invoked to bar long-term rentals in the context of the language at issue in this case.