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Where Dreams Collide: Wilson v. Maynard and the South Dakota Supreme Court's Interpretation of Restrictive Residential Covenants

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WHERE DREAMS COLLIDE: *WILSON V. MAYNARD* AND THE SOUTH DAKOTA SUPREME COURT'S INTERPRETATION OF RESTRICTIVE RESIDENTIAL COVENANTS

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Nestled in the scenic Black Hills and located approximately one mile from historic Deadwood, South Dakota, Shirt Tail Gulch was a place where lifelong dreams took form. Two couples, each envisioning beautiful "forever homes" that they would eventually occupy, began bringing their dreams to life in the picturesque neighborhood. For the Wilsons, out-of-state dental practice owners planning for retirement, the path was to build a peaceful vacation home that would eventually become their retirement home. For the Maynards, still building their future through property investments, the path was a profitable vacation rental that would eventually serve as their forever home. Dreams collided when the Maynards' income-to-forever home brought a stream of unknown, and sometimes unvetted, renters next door to what the Wilsons believed would be a quiet, private retreat. Ultimately, the neighbors brought the dispute before the South Dakota Supreme Court in Wilson v. Maynard. *In a split decision, the court ruled in favor of the Maynards, allowing them to continue operating their vacation rental business in the residential subdivision. Yet, in so doing, the court departed from established case precedent requiring that the interpretation of restrictive covenants in residential subdivisions must accord with the intent of the parties, as evinced by the contract as a whole. As such, Justice Kern's dissent advanced the more appropriate holding, concluding that when operated solely as a vacation rental rather than as an expressly allowed bed and breakfast, the Maynards' business endeavor altered the character of the residential subdivision in violation of the restrictive covenants.*

I. INTRODUCTION

Resplendent but ill-fated, lifelong dreams were born in the early 1990s with the creation of Shirt Tail Gulch, a residential development and subdivision near

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scenic Deadwood, South Dakota.[1] Nestled in the Black Hills of Western South Dakota, the entire community of Deadwood was designated a National Historic Landmark in 1961.[2] Since 1989, growth and change in the community has been carefully regulated by Deadwood's Historic Preservation Commission, Planning Commission, and City Commission to "plan for each future while protecting its past."[3] As a National Historic Landmark, Deadwood attracts significant tourism, as does the neighboring Sturgis community—particularly during the Sturgis Motorcycle Rally held each August.[4]

As with many residential communities developed in or near historic areas, restrictive covenants for Shirt Tail Gulch were established and filed long before construction began in order to preserve the quality and character of the neighborhood.[5] Resting at the intersection of property law and contract law, restrictive covenants embody and often manifest the tension between private property rights, quiet enjoyment, and the freedom of parties to contract for the purposes of protecting the nature and quality of communities for mutual benefit.[6] Chapter 43-12 of the South Dakota Codified Law governs Real Property Covenants.[7] From 1925 to 2021, South Dakota Codified Law section 11-5-4 restricted the duration of restrictive covenants to twenty-five years.[8] However, on July 1, 2021, the revised statute took effect, allowing such restrictions to continue in force for up to forty years.[9] South Dakota Codified Law section 43-12-3 provides that restrictive covenants are binding upon those who acquire ownership in properties subject to such covenants that run with the land.[10] Moreover, the

1. Wilson v. Maynard, 2021 SD 37, ¶ 2, 961 N.W.2d 596, 598-99.

2. CITY OF DEADWOOD, *A National Historic Landmark*, https://www.cityofdeadwood.com/historic-preservation/page/national-historic-landmark (last visited Feb. 4, 2022).

3. *Id.*

4. *Id.*; Brief for Appellee at 3, *Wilson*, 2021 SD 37, 961 N.W.2d 596 (No. 29307) [hereinafter Appellee's Brief]. Since 1938, the Sturgis Motorcycle Rally has been held in Sturgis, South Dakota. STURGIS, *The Story of the City of Sturgis Motorcycle Rally*, https://www.sturgismotorcyclerally.com//history/ (last visited Feb. 4, 2022). The rally takes place each August and draws hundreds of thousands of participants and spectators from around the world. *Id.* For instance, in 2015, approximately 739,000 attended the Sturgis Motorcycle Rally from all fifty states and numerous international communities. *Id.* The Sturgis Motorcycle Rally has a significant impact on the South Dakota economy, with an average of thirteen percent of the over three billion dollars visitor sales generated from four Black Hills area counties in the month of August alone. Mackenzie Huber, *Everything is Affected by the Sturgis Rally*, ARGUS LEADER, Aug. 3, 2021, at 1A, 2A.

5. Plaintiffs' Statement of Material Facts in Support of Summary Judgment ¶ 3, *Wilson*, 2021 SD 37, 961 N.W.2d 596 (No. 40 CIV17-000163) (quoting trial exhibits) [hereinafter Pls.' Statement of Material Facts in Supp. of Summ. J.].

6. 43 AM JUR. 3D *Proof of Facts* § 473, Westlaw (database updated Apr. 2022); Mark S. Dennison, Annotation, *Construction and Application of "Residential Purposes Only" or Similar Covenant Restriction to Incidental Use of Dwelling for Business, Professional, or Other Purposes*, 1 A.L.R. 6TH § 135 (2005); 150 AM. JUR. *Trials* § 185, Westlaw (database updated May 2022). *See* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) §1.3 cmt. e (AM. L. INST. 2000).

7. SDCL §§ 43-12-1 to -6 (2004).

8. SDCL § 11-5-4 (2018 & Supp. 2022).

9. *Id.*

10. SDCL § 43-12-3.

South Dakota Supreme Court has established that constructive notice of restrictive covenants is sufficient to bind property owners.[11]

Nevertheless, restrictive covenants fall prey to the same challenges posed to any other contract, including potential ambiguities in, and disagreements over, the parties' intent, construction, and interpretation of the contract.[12] Real estate constitutes the vast majority of Americans' nonfinancial assets: dreams are made—and broken—for many in their real estate holdings.[13] With so much at stake, disagreements over the provisions and prohibitions of restrictive covenants can easily devolve into battles over the survival of contending neighbors' dreams, finances, and businesses.[14]

One of many such battles came squarely before the South Dakota Supreme Court in *Wilson v. Maynard*.[15] At stake were properties that the contending neighbors invested over one million dollars into—both with the desire to ultimately reside in the scenic Shirt Tail Gulch community.[16] Yet each interpreted the provisions of the restrictive covenants differently—the resolution of which required a sacrifice of either one couple's vision of a peaceful, private residential community or the other's ability to sustain their property altogether through their vacation rental business.[17] Ultimately, the South Dakota Supreme Court held that the vacation rental business fell within the intended purpose of "residential use" among Shirt Tail Gulch properties.[18] Yet, in so doing, the court departed from established case precedent requiring that the interpretation of restrictive covenants in residential subdivisions must accord with the intent of the parties, as evinced by the contract as a whole.[19]

This article advances the position that the court erred in finding the vacation rental business accorded with the restrictive covenants of the Shirt Tail Gulch residential subdivision.[20] And while it would be undesirable for the Maynards to

11. Hammerquist v. Warburton, 458 N.W.2d 773, 777 (S.D. 1990).

12. *See infra* Part II (discussing the facts and procedure surrounding *Wilson v. Maynard*, in which a restrictive covenant was at issue).

13. Isabel V. Sawhill & Christopher Pulliam, *Six facts about wealth in the United States*, BROOKINGS (June 25, 2019), https://www.brookings.edu/blog/up-front/2019/06/25/six-facts-about-wealth-in-the-united-states/.

14. *See generally* Wilson v. Maynard, 2021 SD 37, ¶ 2, 961 N.W.2d 596, 599 (discussing a legal dispute between neighbors arising out of their property interests).

15. *Id.*

16. Brief & Appendix for Appellants at 10-11, *Wilson*, 2021 SD 37, 961 N.W.2d 596 (No. 29307) [hereinafter Appellants' Brief]; Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, ¶ 19 (citing trial exhibits).

17. Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, ¶ 15 (citing trial exhibits); Appellee's Brief, *supra* note 4, at 4; Appellants' Brief, *supra* note 16, at 11.

18. *Wilson*, 2021 SD 37, ¶¶ 26-29, 961 N.W.2d at 603-04.

19. *Id.* ¶¶ 35-39, 961 N.W.2d at 604-05 (Kern, J., dissenting). *See also* Charlson v. Charlson, 2017 SD 11, ¶ 16, 892 N.W.2d 903, 907-08 (conveying that in contract interpretation, the contract must be examined "as a whole," with words given "their plain and ordinary meaning"); Jones v. Siouxland Surgery Ctr. Ltd. P'ship, 2006 SD 97, ¶ 15, 724 N.W.2d 340, 345 (noting that words and phrases of contracts cannot be read in isolation but rather the language of the entire contract given effect).

20. For a review of various jurisdictions' interpretation of restrictive covenants with "residential purposes only" provisions, see Mark S. Dennison, *Construction and Application of "Residential Purposes Only" or Similar Covenant Restriction to Incidental Use of Dwelling for Business, Professional, or Other*

forfeit their substantial investment by prohibiting all rental income whatsoever, a feasible and more appropriate solution would have been to require the Maynards to operate their business as a bed and breakfast in accordance with the express provisions of the restrictive covenants.[21] As such, Justice Janine M. Kern's dissent advanced the more appropriate result by concluding that when operated solely as a vacation rental rather than a bed and breakfast, the Maynards' business endeavor violated the restrictive covenants and altered the character of the residential subdivision.[22]

II. FACTS AND PROCEDURE

In the early 1990s, Jon Mattson and Barbara Mattson purchased a picturesque 160-acre ranch just outside of historic Deadwood, South Dakota.[23] Soon after, Jon Mattson ("Mattson") began developing the property with the intent to create Shirt Tail Gulch as a thirty-three lot residential development.[24] In 1997, Mattson formalized this design with a declaration of restrictive covenants, filed with the Lawrence County Register of Deeds, with the stated purpose of "creating and keeping the above-described property, insofar as possible, desirable, attractive, free from nuisance . . . for the mutual benefit and protection of the owners of all lots, and the surrounding and adjacent property."[25] The Shirt Tail Gulch Subdivision Declaration of Restrictive Covenants ("Covenants") applied to Lots 1 through 31 and was written to be "binding upon each lot in the development, and each owner of the property therein, his successors, representatives and assigns, and shall continue in full force and effect until January 1, 2040."[26] The Covenants further provided that "[n]o lot may be used except for residential purposes, which shall include normal home occupations and offices of recognized professions and bed and breakfast uses allowed under State and County laws and regulations."[27] At the time the Covenants were filed with the Lawrence County Register of Deeds, rental websites such as Vacation Rentals by Owner ("VRBO") and Airbnb did not exist, and short-term rentals were less prevalent.[28] Nevertheless, since at least

Purposes, 1 A.L.R.6th 135 (originally published in 2005); *see also* Cai Roman, *Making a Business of "Residential Use": The Short-Term-Rental Dilemma in Common-Interest Communities*, 68 EMORY L.J. 801, 801 (2019) (discussing best practices of the regulation of short-term rentals and proposing that courts should interpret short-term rental businesses as a commercial use rather than residential use); J. Patrick Bradley, *Beware-bnb?: Adapting the Regulatory Approach of Community Associations to Residential Sharing & Zoning Trends*, 53 REAL PROP. TR. & EST. L.J. 373, 379-80 (2018) (discussing the limitations of various existing covenants in regulating growing short-term vacation rentals in residential communities).

21. *See Wilson*, 2021 SD 37, ¶¶ 52-55, 961 N.W.2d at 609-10.

22. *Id.*

23. Appellee's Brief, *supra* note 4, at 2.

24. *Wilson*, 2021 SD 37, ¶ 2, 961 N.W.2d at 598-99.

25. *Id.* ¶ 2, 961 N.W.2d at 599.

26. Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, ¶ 3 (quoting trial exhibits).

27. *Id.* ¶ 5 (alteration in original) (quoting trial exhibits).

28. Appellee's Brief, *supra* note 4, at 3. VRBO was founded in 1995 and has since grown to include over two million vacation home listings. VRBO, *Get to know Vrbo*, https://www.vrbo.com/about/ (last visited Feb. 5, 2022). Airbnb was founded in 2007 with two hosts and three guests in San Francisco and

2004, some owners residing in Shirt Tail Gulch rented their properties on a short-term basis, particularly during the Sturgis Motorcycle Rally.[29]

In 2006, Robert and Sharlene Wilson ("the Wilsons"), residents of Clay Center, Nebraska, and dentists with practices in Clay Center and Omaha, Nebraska, began to search for a home they could initially use as a vacation home and ultimately retire to.[30] The couple was drawn to Shirt Tail Gulch "because of the nature of the development and the character of the neighborhood."[31] The Wilsons' real estate agent reviewed the Covenants with the couple and informed them that the Covenants only permitted short-term rentals in the form of a bed and breakfast.[32] Moreover, the Wilsons understood the terminology of "residential use" in the Covenants to preclude the development of commercial rental properties within the residential neighborhood.[33] In reliance on the express language and restrictions of the Covenants, the Wilsons purchased Lot 24 of Shirt Tail Gulch in the spring of 2007.[34] The Wilsons subsequently invested over one million dollars renovating and constructing additions to the home on their lot.[35] The renovations included a significant garage addition that cost substantially more to construct than typical, given the requirements of the Covenants.[36] Robert Wilson stated he "would have never bought the property or built the property when there's different people there every week who I don't know who they are, because I worry about that. I don't know who these people are coming in."[37]

In 2016, Rory and Kristen Maynard ("the Maynards"), residents of nearby Spearfish, South Dakota, purchased Lot 25 of Shirt Tail Gulch, immediately adjacent to the Wilsons' Lot 24.[38] The Maynards intended to offer the property initially as a short-term rental, ultimately making use of it themselves as their "forever home."[39] After August of 2016, the Maynards began construction of a three-story structure on Lot 25, containing five suites, each with an en suite bath and a half-bath.[40] In addition to the Shirt Tail Gulch property, the Maynards owned several other commercial rental properties in the Deadwood and

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now includes over four million hosts, over five million listings worldwide, and over one billion guest arrivals. AIRBNB, *About us*, https://news.airbnb.com/about-us/ (last visited Feb. 5, 2022).

29. Appellee's Brief, *supra* note 4, at 3.

30. Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, ¶ 12 (citing trial exhibits); Appellee's Brief, *supra* note 4, at 3.

31. Pls.' Statement of Material Facts in Supp. of Summ. J. *supra* note 5, ¶ 13 (citing trial exhibits).

32. *Id.* ¶ 14.

33. *Id.* ¶ 15.

34. Appellants' Brief, *supra* note 16, at 10.

35. *Id.*; Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, ¶ 19 (citing trial exhibits).

36. Appellants' Brief, *supra* note 16, at 10; Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, ¶ 19 (citing trial exhibits).

37. Appellants' Brief, *supra* note 16, at 10-11 (quoting trial exhibits).

38. Appellee's Brief, *supra* note 4, at 4. Spearfish, South Dakota is approximately fifteen miles from Deadwood, South Dakota. DISTANCE BETWEEN CITIES, *Distance from Deadwood, SD to Spearfish, SD*, https://www.distance-cities.com/distance-deadwood-sd-to-spearfish-sd (last visited Mar. 11, 2022).

39. Appellee's Brief, *supra* note 4, at 4, Appellants' Brief, *supra* note 16, at 11.

40. Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, ¶ 21 (internal citations omitted).

neighboring Lead area and owned and operated two real estate holding companies: Legendary Investments and Alpine Adventures.[41] To secure financing for their Shirt Tail Gulch property, the Maynards maintained insurance against rent loss as well as agreed to unconditionally assign and transfer all rents and revenues to their financial institution in the event of default.[42] While the Maynards have at times stayed at their Shirt Tail Gulch property on a short-term basis, they have never resided at Shirt Tail Gulch as a primary residence or owner-occupied property.[43]

On October 24, 2016, the Wilsons sent a letter via counsel to the Maynards, informing the Maynards of the Covenants' requirement to use Shirt Tail Gulch properties for "residential purposes" rather than rental business, with the exception of bed and breakfast properties as provided by South Dakota state and county laws and regulations.[44] The Wilsons requested confirmation that the Maynards did "not intend to use the property in any manner that violates the Covenants, for instance by using it as a rental property."[45] Rory Maynard acknowledged receiving the letter in the early stages of construction yet continued construction without initially providing a response.[46] Thereafter, on April 28, 2017, Rory Maynard verbally confirmed to Robert Wilson that the Maynards intended to use the property as a short-term rental rather than a bed and breakfast property.[47]

Prior to when the Maynards began renting the property, the Shirt Tail Gulch Homeowners Association proposed amending the Covenants in 2017 to expressly permit short-term vacation rentals.[48] The proposed amendment would revise the permissible uses by providing that "[a] lot may be rented to a third party for use as a vacation rental at the Lot owner's discretion. Uses may include a 'bed and breakfast establishment' under SDCL 34-18-9.1 or a 'vacation home establishment' under SDCL 34-18-1."[49] However, the proposed amendment failed, falling short of majority approval among Shirt Tail Gulch property owners.[50]

On May 16, 2017, the Wilsons filed a complaint against the Maynards in the Fourth Judicial Circuit Court in Lawrence County, South Dakota.[51] Upon the onset of litigation, the Maynards transferred ownership of their Shirt Tail Gulch property to their company, Alpine Adventures of the Black Hills, LLC.[52] The Wilsons' complaint requested a declaratory judgment that the Maynards' use of their Shirt Tail Gulch property as a short-term vacation rental was in violation of the Covenants, as well as a temporary and permanent injunction prohibiting the

41. Wilson v. Maynard, 2021 SD 37, ¶ 5, 961 N.W.2d 596, 599.
42. Appellants' Brief, *supra* note 16, at 11.
43. *Id.* at 14.
44. *Id.* at 11-12.
45. Appellee's Brief, *supra* note 4, at 4 (quoting the trial record).
46. Appellants' Brief, *supra* note 16, at 12.
47. Appellee's Brief, *supra* note 4, at 4.
48. Appellants' Brief, *supra* note 16, at 12.
49. *Id.* (alteration in original) (quoting trial record).
50. *Id.*
51. Appellee's Brief, *supra* note 4, at 4.
52. *Id.*; Appellants' Brief, *supra* note 16, at 15.

Maynards from offering their property as a short-term vacation rental.[53] Central to the controversy was the Wilsons' contention that the Maynards were in violation of paragraphs four and five of the Covenants.[54] Paragraph four provided that "[n]o lot may be used except for residential purposes, which shall include *normal home occupations and offices of recognized professions and bed and breakfast uses* allowed under State and County laws and regulations."[55] Paragraph five further provided that "[a]ll construction shall be new construction and shall be restricted to family or residential recreation type dwellings and attached or detached garages."[56]

The Maynards completed the construction of their intended short-term vacation rental property in the early summer of 2018.[57] The Maynards began renting the property to different groups in June of 2018, creating a website for potential renters to view the property and listing the property on VRBO and Airbnb.[58] The Airbnb listing noted that the property was "[b]uilt with large groups in mind."[59] At the time of litigation, the property approached 100% rental during the summer months and hosted groups as large as twenty individuals, with dozens more visiting during the day.[60]

On July 12, 2017, the circuit court denied the Wilsons' request for an injunction.[61] Both parties subsequently moved for summary judgment.[62] The Wilsons contended that the vacation rental violated the Covenants' requirements to utilize the property for residential purposes and that the short-term vacation rental business was contrary to "the Covenants' purpose to keep the subdivision free from nuisance."[63] Following a hearing on November 15, 2019, Judge Michelle K. Comer denied the Wilsons' motion for summary judgment and granted the Maynards' motion, finding that the Covenants were fully integrated and unambiguous and that the express terms did not prohibit the Maynards from renting their property.[64] Following the circuit court's entry of judgment on March 19, 2020, the Wilsons timely filed a notice of appeal to the South Dakota Supreme Court on April 10, 2020.[65]

On appeal, the Wilsons claimed that the circuit court erred in concluding that the Maynards' use of their property was not in violation of the Covenants.[66] The

53. Appellee's Brief, *supra* note 4, at 4.

54. Findings of Fact and Conclusions of Law, Wilson v. Maynard, No. 40CIV17-000163, 2020 WL 10316689, *1 (Feb. 27, 2020).

55. *Id.* (alteration in original) (emphasis added).

56. *Id.* (alteration in original).

57. Appellants' Brief, *supra* note 16, at 12.

58. *Id.* at 12-13; Appellee's Brief, *supra* note 4, at 4.

59. Appellants' Brief, *supra* note 16, at 13 (alteration in original).

60. *Id.*; Appellee's Brief, *supra* note 4, at 4-5.

61. Appellee's Brief, *supra* note 4, at 4.

62. *Id.* at 5.

63. Wilson v. Maynard, 2021 SD 37, ¶ 12, 961 N.W.2d 596, 600.

64. Appellee's Brief, *supra* note 4, at 5; Findings of Fact and Conclusions of Law, *supra* note 54, at *3-4.

65. Appellee's Brief, *supra* note 4, at 5.

66. *Id.*

Wilsons contended that, unlike other Shirt Tail Gulch homeowners, the Wilsons did not build a residential home but rather a three-story structure designed specifically to serve as a short-term vacation property.[67] Thus, rather than abiding by the Covenants' required residential use of properties, the Maynards altered the nature and character of Shirt Tail Gulch by introducing a commercial enterprise that brought hundreds of renters, noise, and increased traffic to the neighborhood each year.[68] The Wilsons thus requested that the South Dakota Supreme Court remand the case to the circuit court with instructions to permanently enjoin the Maynards from operating their property as a vacation rental business in any capacity other than bed and breakfast uses as provided by South Dakota State and County laws and regulations.[69]

Conversely, the Maynards urged the South Dakota Supreme Court to affirm Judge Comer's ruling, citing her various reasons for finding that the Maynards' short-term vacation rental did not violate the Covenants.[70] The Maynards contended that courts have traditionally applied a common law rule of construing restrictive covenants in favor of property owners' free use of property.[71] Moreover, the Maynards noted that in addition to the Covenants expressly allowing short-term rentals with bed and breakfast properties, the silence of the Covenants with regard to other forms of vacation property rental was not tantamount to a prohibition against them.[72]

The South Dakota Supreme Court considered the case on briefs on November 16, 2019.[73] The court reviewed de novo the grant of summary judgment and the legal question of the interpretation of restrictive covenants.[74] On June 16, 2021, the court issued a split 3-2 decision, with Chief Justice Steven R. Jensen, retired Chief Justice David E. Gilbertson, and retired Justice John K. Konenkamp affirming the circuit court.[75] Justice Kern provided a lengthy dissent, joined by Justice Patricia J. Devaney.[76]

Citing case law from Texas, Colorado, Missouri, Idaho, North Carolina, and the Eighth Circuit, the majority noted that courts have often concluded ambiguities in the language of "residential purposes" within restrictive covenants must "be construed in favor of the free use of property . . . ." and thus did not preclude the use of properties as short-term rentals.[77] Nonetheless, the majority noted that

67. Appellants' Brief, *supra* note 16, at 17.

68. *Id.*

69. *Id.*

70. Appellee's Brief, *supra* note 4, at 6.

71. *Id.* (citing Luedke v. Carlson, 41 N.W.2d 552 (S.D. 1950)).

72. *Id.* at 8-9.

73. *See generally* Wilson v. Maynard, 2021 SD 37, 961 N.W.2d 596 (reviewing the circuit court's grant of summary judgment for the defendants).

74. *Id.* ¶ 14, 961 N.W.2d at 600 (quoting State v. BP plc, 2020 SD 47, ¶ 18, 948 N.W.2d 45, 52; Jackson v. Canyon Place Homeowner's Ass'n, Inc., 2007 SD 37, ¶ 7, 731 N.W.2d 210, 212).

75. *Id.* ¶¶ 30-33, 961 N.W.2d at 604.

76. *Id.* ¶¶ 35-56, 961 N.W.2d at 604-10 (Kern, J., dissenting).

77. *Id.* ¶ 20, 961 N.W.2d at 601-02 (Jensen, J., majority) (citing Tarr v. Timberwood Park Owners Ass'n, Inc., 556 S.W.3d 274, 288-89 (Tex. 2018); Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc., 360 P.3d 255, 258-59 (Colo. App. 2015); Mullin v. Silvercreek Condo. Owner's Ass'n, Inc., 195

despite interpreting the Covenants differently, neither party claimed the Covenants to be ambiguous.[78] The court went on to find that the failure of the Covenants to define "residential purposes" did not render the terms ambiguous.[79]

Furthermore, while the Wilsons asserted the Maynards' receipt of substantial rental income transferred the property's use from residential purposes to strictly commercial, the majority concluded: "that receipt of income does not transform residential use of property into commercial use."[80] Instead, the majority reasoned that "[t]he critical issue is whether the renters are using the property for ordinary living purposes such as sleeping and eating . . . . [T]he nature of a property's use is not transformed from residential to business simply because the owner earns income from the rentals."[81] Finding that the renters indisputably used the property to "eat, sleep, and enjoy recreational activities," the majority concluded that the Maynards' use of the property as a short-term vacation rental was a residential purpose consistent with the Covenants.[82]

In her dissent, Justice Kern agreed that the Covenants' language was unambiguous but concluded that the Maynards were engaged in a prohibited commercial endeavor.[83] Beginning with the issue of contract interpretation, Justice Kern contended that "[i]n order to ascertain the terms and conditions of a contract, we examine the contract as a whole and give words their plain and ordinary meaning."[84] Moreover, "[w]e are required to give effect to the language of the *entire contract, and particular words and phrases are not interpreted in isolation*."[85]

Turning more specifically to restrictive covenants, Justice Kern noted that "[i]n South Dakota, 'servitude[s] should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument[.]'"[86] Justice Kern then took up an analysis of the Covenants, noting that the preamble stated that the declarations were to be "binding upon all parties and *persons having an interest in said property, for the benefit of and limitations on all present and future owners of said property, so long as said declarations remain in effect as hereinafter provided*."[87] Moreover, Justice Kern cited the first declaration, which provided that the stated purpose of the Covenants was for:

S.W.3d 484, 490 (Mo. Ct. App. 2006); Pinehaven Plan. Bd. v. Brooks, 70 P.3d 664, 667 (Idaho 2003); Russell v. Donaldson, 731 S.E.2d 535, 538-39 (N.C. 2012); Dunn v. Aamodt, 695 F.3d 797, 801-02 (8th Cir. 2012)).

78. *Id.* ¶ 21, 961 N.W.2d at 602.

79. *Id.* ¶ 22, 961 N.W.2d at 602.

80. *Id.* ¶ 25, 961 N.W.2d at 603 (quoting *Houston*, 360 P.3d at 260).

81. *Id.* (alteration in original) (quoting Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord, 219 So. 3d 111, 114-15 (Fla. Dist. Ct. App. 2017)).

82. *Id.* ¶ 29, 961 N.W.2d at 604.

83. *Id.* ¶ 35, 961 N.W.2d at 604 (Kern, J., dissenting).

84. *Id.* ¶ 37, 961 N.W.2d at 604 (quoting Charlson v. Charlson, 2017 SD 11, ¶ 16, 892 N.W.2d 903, 907).

85. *Id.* (emphasis added).

86. *Id.* ¶ 38, 961 N.W.2d at 605 (some alterations in original) (quoting Brandt v. Cnty. of Pennington, 2013 SD 22, ¶ 13, 827 N.W.2d 871, 875).

87. *Id.* ¶ 39, 961 N.W.2d at 605.

> creating and keeping the above-described property, insofar as possible, desirable, attractive, free from nuisance and suitable in architectural design, materials and appearance, and for the purpose of guarding against fires and unnecessary interference with the natural beauty of the lots, for the mutual benefit and protection of the owners of all lots, and the surrounding and adjacent property.[88]

Thus, reading the Covenants as a whole, Justice Kern asserted that the fourth article, which restricted the use of Shirt Tail Gulch properties to residential purposes, was intended to place limitations on the *owners'* use of the property lots, *not on how renters use the properties*.[89] Ultimately, Justice Kern contended, the majority improperly rested their decision on the latter.[90] In doing so, the majority "skip[ped] the important step of examining the Covenants' plain meaning within its unique and specific context. The Covenants here place plain limitations on how *the owners* use their property."[91]

Turning then to the Maynards' use of their Shirt Tail Gulch property, Justice Kern noted that the Maynards remained residents of Spearfish, South Dakota, never having made Shirt Tail Gulch their personal residence.[92] Moreover, the property was purposefully built for use as a vacation rental business, as apparent from the terms of their construction loan, their maintenance of insurance against rent loss, and their assignment of rents and revenue to their financial institution in the event of default.[93] Justice Kern also cited the Maynards' income of nearly $60,000 on the property each year and the fact that they charged customers sales tax on rentals.[94] Justice Kern, therefore, concluded that "[r]eviewing just this cursory enumeration of undisputed facts, it can hardly be said that the Maynards have anything other than a 'commercial' venture."[95]

Justice Kern went on to distinguish short-term vacation rentals from the bed and breakfast and "normal home occupations" permitted by the Covenants.[96] Justice Kern noted that "[a]lthough the Covenants do not define residential purposes, in each of the permitted commercial uses detailed in the Covenants, *the owner must live in the home where the commercial activity occurs*. This also evinces the intent of the Covenants to permit some types of commercial uses and not others."[97] Finding that the Maynards' short-term vacation rental

88. *Id.*
89. *Id.* ¶¶ 39-40, 961 N.W.2d at 605-06.
90. *Id.* ¶ 40, 961 N.W.2d at 605-06.
91. *Id.* ¶ 42, 961 N.W.2d at 606 (emphasis added).
92. *Id.* ¶ 43, 961 N.W.2d at 606-07.
93. *Id.*
94. *Id.* ¶ 43, 961 N.W.2d at 607.
95. *Id.* ¶ 44, 961 N.W.2d at 607 (citing THE AMERICAN HERITAGE COLLEGE DICTIONARY 280 (3rd ed. 1997)).
96. *Id.* ¶¶ 52-54, 961 N.W.2d at 609-10.
97. *Id.* ¶ 54, 961 N.W.2d at 610 (emphasis added).

fundamentally altered the residential nature of Shirt Tail Gulch, Justice Kern concluded that the Maynards were in violation of the Covenants.[98]

III. BACKGROUND

Under South Dakota law, "[a] covenant is a contract between the governing authority and individual lot owners."[99] As such, "[w]hen interpreting the terms of a restrictive covenant, [the court] use[s] the same rules of construction applicable to contract interpretation."[100] When the language and terms of a contract are unambiguous, the interpretation of the contract is taken from the "four corners of the instrument without resort to extrinsic evidence of any nature."[101] A covenant is considered ambiguous "if it is reasonably capable of being understood in more than one sense"[102] and if the court has "a genuine uncertainty as to which of two or more meanings is correct."[103] However, a finding of ambiguity requires more than simply a disagreement between two parties regarding the meaning of a term.[104] Moreover, the failure of restrictive covenants to define a term does not automatically render the covenants ambiguous.[105]

South Dakota law does not require restrictive covenants to be strictly construed in favor of the free use of property.[106] Instead, such covenants "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument[.]"[107] The official comments of section 4.1 of the Restatement Third of Property (Servitudes) clarifies that "[t]he rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs from the often expressed view that servitudes should be narrowly construed to favor the free use of land."[108] This rule is designed to recognize the broad use of covenants in modern land development and their role in managing the use of land resources.[109]

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98. *Id.* ¶ 55, 961 N.W.2d at 610.

99. Harlan v. Frawley Ranches PUD Homeowners Ass'n, Inc., 2017 SD 54, ¶ 20, 901 N.W.2d 747, 753 (alteration in original) (quoting Countryside S. Homeowner's Ass'n v. Nedved, 2007 SD 70, ¶ 11, 737 N.W.2d 280, 283).

100. Halls v. White, 2006 SD 47, ¶ 7, 715 N.W.2d 577, 580 (citing Harsken v. Peska, 1998 SD 70, ¶¶ 11-20, 581 N.W.2d at 173-74).

101. *Wilson*, 2021 SD 37, ¶ 15, 961 N.W.2d at 600-01 (quoting Jackson v. Canyon Place Homeowner's Ass'n, Inc., 2007 SD 37, ¶ 9, 731 N.W.2d 210, 212).

102. *Jackson*, 2007 SD 37, ¶ 9, 731 N.W.2d at 212 (citing Piechowski v. Case, 255 N.W.2d 72, 74 (S.D. 1977)).

103. *Id.* (quoting *Harksen*, 1998 SD 70, ¶¶ 11-20, 581 N.W.2d at 173-74).

104. *Id.* (citing *Harksen*, 1998 SD 70, ¶ 15, 581 N.W.2d at 173).

105. *Wilson*, 2021 SD 37, ¶ 22, 961 N.W.2d at 602 (citing *Jackson*, 2007 SD 37, ¶ 11, 731 N.W.2d at 213).

106. *Id.* ¶ 21, 961 N.W.2d at 602 (citing Luedke v. Carlson, 41 N.W.2d 552, 554 (S.D. 1950); *Piechowski*, 255 N.W.2d at 74 n.2 (S.D. 1977)).

107. *Id.* ¶ 38, 961 N.W.2d at 605 (Kern, J., dissenting) (alteration in original) (quoting Brandt v. Cnty. of Pennington, 2013 SD 22, ¶ 13, 827 N.W.2d 871, 875).

108. *Id.* (citing RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1 cmt. a (AM. L. INST. 2000)).

109. *Id.* (citing RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1 cmt. a (AM. L. INST. 2000)).

Restrictive covenants "represent[] a meeting of the minds and results in a relationship that is not subject to overreaching by one party or sweeping subsequent change."[110] Covenants "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created."[111] In accordance with the interpretation of contracts under South Dakota law, the court must "examine the contract *as a whole* and give words their plain and ordinary meaning."[112] The court is "required to give effect to the language of the entire contract, and particular words and phrases are not interpreted in isolation."[113]

The decision of the majority rested upon the interpretation of "residential purposes" in the use of Shirt Tail Gulch properties and, more specifically, whether short-term vacation rentals fell within the meaning of "residential purposes" due to similarities with bed and breakfast properties.[114] South Dakota Codified Law section 34-18-9.1 defines bed and breakfast establishments as:

> (1) "Bed and breakfast establishment," any building or buildings run by an operator which is used to provide accommodations for a charge to the public, with at most five rental units for *up to an average of ten guests per night* and in which family style meals are provided;
>
> (2) "Family style meal," any meal ordered by persons staying at a bed and breakfast establishment which is served from common food service containers, as long as any food not consumed by those persons is not reused;
>
> (3) "Operator," *the owner or the owner's agent, who is required to reside in the bed and breakfast establishment or on contiguous property*.[115]

South Dakota Codified Law section 34-18-1(17) explicitly defines a vacation home establishment as distinguishable from a bed and breakfast:

> "Vacation home establishment," any home, cabin, or similar building that is rented, leased, or furnished in its entirety to the public on a daily or weekly basis for *more than fourteen days in a calendar year and is not occupied by an owner or manager during*

110. Appellants' Brief, *supra* note 16, at 18-19 (quoting Countryside S. Homeowners Ass'n, Inc. v. Nedved, 1998 SD 70, ¶ 11, 737 N.W.2d 280, 283).

111. *Id.* at 19 (quoting *Brandt*, 2013 SD 22, ¶ 13, 827 N.W.2d at 875).

112. *Wilson*, 2021 SD 38, ¶ 37, 961 N.W.2d at 604 (Kern, J., dissenting) (emphasis added) (quoting Charlson v. Charlson, 2017 SD 11, ¶ 16, 892 N.W.2d 903, 908). *See also* Kling v. Stern, 2007 SD 51, ¶ 7, 733 N.W.2d 615, 617 (quoting Harksen v. Peska, 1998 SD 70, ¶ 20, 581 N.W.2d 170, 174) (holding that "[i]n determining a covenant's meaning, it 'should be considered as a whole and all of its parts and provisions will be examined to determine the meaning of any part[]'").

113. *Wilson*, 2021 SD 38, ¶ 37, 961 N.W.2d at 604 (Kern, J., dissenting) (quoting Jones v. Siouxland Surgery Ctr. Ltd. P'ship, 2006 SD 97, ¶ 15, 724 N.W.2d 340, 345).

114. *Id.* ¶¶ 24-30, 961 N.W.2d at 602-04.

115. SDCL § 34-18-9.1 (2011) (emphasis added).

> *the time of rental. This term does not include a bed and breakfast establishment as defined in subdivision 34-18-9.1(1)*[.][116]

As a matter of first impression before the South Dakota Supreme Court, no case law prior to *Wilson* addressed the precise issue of whether short-term vacation rentals fell within use as a "residential purpose" in similar restrictive covenants.[117] This is not altogether surprising, given the vast variation in restrictive covenants to address the unique nature and character of residential developments and neighborhoods.[118] Indeed, as Justice Kern noted, a critical step that the majority bypassed in its analysis was "examining the Covenants' plain meaning *within its unique and specific context*."[119] Nevertheless, several cases with analogous controversies provide guideposts for the South Dakota Supreme Court in interpreting the terms and provisions of restrictive covenants.[120]

In *Hammerquist v. Warburton*,[121] the South Dakota Supreme Court upheld the enforcement of a restrictive covenant in a historic Black Hills residential neighborhood, prohibiting a landowner from utilizing a single-family home as a two-family home for rental purposes—despite the covenants allowing a "guest home" on the lot in question.[122] The property at issue was a 3,500-square-foot home "with four bedrooms, two bathrooms, and two kitchens."[123] In addition to being zoned as a "low-density residential area" that prohibited two-family residences, a contract for deed filed with the warranty deed to the land included the following restrictive covenant:

> It is agreed that Tract P and the additional homesites to be platted out of the above-described meadows area shall not be further subdivided and shall be restricted to one (1) family dwelling only, provided that each lot or tract may be permitted to construct upon said homesite a guest home for guests of the owner of the building site which shall be restricted to nonpermanent use and will not be rented out for commercial purposes.[124]

John M. Warburton ("Warburton") began considering the purchase of Tract P and the home thereon in 1983.[125] At that time, he informed the realtor that he

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116. SDCL § 34-18-1(17) (2021) (emphasis added).

117. *See Wilson*, 2021 SD 38, ¶¶ 18-20, 961 N.W.2d at 601-02 (discussing the law of other jurisdictions).

118. *Id.* ¶ 42, 961 N.W.2d at 606 (Kern, J., dissenting) (emphasis added).

119. *Id.*

120. *See generally* Hammerquist v. Warburton, 458 N.W.2d 773 (S.D. 1990) (discussing a restrictive covenant); Prairie Hills Water & Dev. Co. v. Gross (*Prairie Hills*), 2002 SD 133, 653 N.W.2d 745 (discussing a restrictive covenant).

121. 458 N.W.2d 773.

122. *Id.* at 773-79. The home was located in the Black Hills, overlooking a mountain meadow and scenic cliffs retaining the remnants of a century-old mining structure built by Chinese laborers. *Id.* at 774.

123. *Id.*

124. *Id.* at 773-74.

125. *Id.* at 774. Over a decade before the controversy in question, a contract for deed was executed between Hammerquist and Porter on October 30, 1970. *Id.* at 773. Upon fulfillment of the contract price, Hammerquist provided the warranty deed to Porter, which was filed with the register of deeds on February 3, 1971. *Id.* at 774. While the warranty deed did not mention the restrictive covenant or the contract for deed, the contract itself, containing the restrictive covenant, was filed with the registrar of deeds on April

would need to rent out a portion of the home in order to afford it.[126] Additionally, Warburton spoke with neighboring property owners regarding his intended use of the property, sought a Conditional Use Permit from the Pennington County Planning Commission ("Planning Commission"), and wrote an offer contingent upon obtaining a "special use permit" that would allow for renting out a portion of the home.[127] Among the neighbors that Warburton spoke with, Paul F. Hammerquist ("Hammerquist") and William G. Porter ("Porter") both expressed reservations about Warburton's plans to rent a portion of the property and the possibility of him being an absentee landlord—yet neither informed Warburton of the restrictive covenant that ran with the land at the time of his purchase.[128]

Over Hammerquist and Porter's objections, Warburton obtained a special use permit from the Planning Commission in April of 1983.[129] He subsequently began renting out the lower level of the house.[130] On April 8, 1985, the Planning Commission met to review Warburton's permit.[131] Hammerquist and Porter appeared again in opposition, citing traffic problems, dogs running loose, and loud parties held by tenants as disrupting the quality of the residential neighborhood.[132] A second hearing was held on April 22, 1985, at which time Porter appeared with counsel to oppose Warburton's ongoing use of the property as a two-family home for rental purposes.[133] At this hearing, Porter's attorney informed the Planning Commission for the first time of the restrictive covenants that applied to the residential subdivision.[134] Warburton contended that he had sealed off the spiral staircase connecting the upper and lower floors to allow for independent living areas and further that he was renting to fewer tenants than contemplated at the time the original permit was issued.[135] Concerned that denial of the permit would pose a hardship to Warburton, the Planning Commission extended the permit for one year.[136] On June 17, 1986, finding no additional complaints had been filed against Warburton, the Planning Commission voted unanimously to extend his permit an additional three years.[137]

20, 1971. *Id.* Porter later sold Tract P, and the property was subsequently sold several times before entering foreclosure. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 774, 778.

129. *Id.* at 774. The Planning Commission met on April 11, 1983, to consider Warburton's request for a special use permit. *Id.* Hammerquist and Porter appeared at the Planning Commission meeting to oppose Warburton's intended use of the property, warning that by approving Warburton's request, the Planning Commission risked setting a precedent that would change the quality of the neighborhood. *Id.* However, again, neither mentioned the restrictive covenant than ran with the land. *Id.* The Planning Commission approved Warburton's permit the following day, to be reviewed after two years. *Id.*

130. *See id.* (stating that Warburton expressed that he would have to rent out the lower level of the home in order to afford the monthly payments).

131. *Id.*

132. *Id.* at 774-75.

133. *Id.* at 775.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

On July 13, 1988, Hammerquist and Porter filed a complaint in the Seventh Judicial Circuit Court of Pennington County, seeking to enforce the restrictive covenant against Warburton.[138] The circuit court held that the restrictive covenant was a collateral contractual provision and was therefore not subject to merger.[139] Moreover, the court found that Hammerquist and Porter had not waived their right to enforce the restrictive covenant despite taking no action to enforce it until years after Warburton's purchase and receipt of the initial special use permit.[140]

On appeal, the South Dakota Supreme Court noted that the contract containing the restrictive covenant must be viewed as a collateral contract provision, as it not only contained the restrictive covenant at issue, but also provided for necessary easements and a first-right-of-refusal to purchase certain adjacent property.[141] Moreover, the court found the intent of the contracting parties to be critical and that the intent for the restrictive covenant to run with the land was evident.[142] Finally, the court found that Warburton had sufficient constructive notice of the restrictive covenant and that Hammerquist and Porter had not waived their right of enforcement, as they had opposed Warburton's intended use of the property from the time Warburton first informed them.[143] As such, despite any financial hardship posed, Warburton was prohibited from using the property as a two-family home for rental purposes in violation of the restrictive covenants.[144]

In *Prairie Hills Water and Development Company v. Gross* (*Prairie Hills*),[145] the South Dakota Supreme Court found that a property owner's business operations in sandblasting and welding were not compatible with the residential character of the subdivision, despite the fact that no restrictive covenant expressly prohibited "businesses" and numerous other commercial businesses operated within the subdivision.[146] The homeowners bringing action against Linda Paulson, Jim Gross, Scott Gross, and Steve Gross ("the Grosses") for business operations in the residential subdivision stated they had moved into the subdivision because of the residential character of the neighborhood.[147] The homeowners thus grounded their complaints in noise and traffic generated by the Grosses' business operations, constituting a nuisance that interfered with their

138. *Id.* At trial, Hammerquist and Porter cited increased traffic, illegal hunting, noise, and dogs running loose as increasing danger and decreasing value of properties in the residential neighborhood. *Id.* In response, Warburton contended that his tenants were responsible, that he was currently renting to a dentist and her husband, that he had no actual notice of the restrictive covenants until two years after he had purchased the property and that the restrictive covenant had merged with the warranty deed—as such, it was unenforceable. *Id.* at 775-76.

139. *Id.* at 776.

140. *Id.*

141. *Id.* at 777.

142. *Id.*

143. *Id.* at 777-78.

144. *Id.* at 778-79.

145. 2002 SD 133, 653 N.W.2d 745.

146. *Id.* ¶¶ 23-26, 50, 653 N.W.2d at 751-52, 757.

147. *Id.* ¶ 24, 653 N.W.2d at 751.

enjoyment of the residential properties.[148] The Grosses contended that no covenant expressly prohibited their business operations and, further, that commercial businesses such as a hair salon, bee factory, retirement home, and in-home real estate office operated undisturbed in the residential subdivision.[149] Nonetheless, no other business generated the same level of noise, debris, traffic, and annoyance, and thus, no complaint had ever been lodged against another business in the neighborhood.[150]

In analyzing the interpretation of the subdivision's restrictive covenants, the court stated, "it must be finally remembered that 'we regard the *real purpose* of restrictive covenants contained in a residential subdivision . . . as to *increase the desirability* of [the] lots as residences through the existence of such restrictions.'"[151] Moreover, the court noted "the real intention of the parties, particularly that of the grantor, should be sought and carried out whenever possible."[152] As such, the court agreed "that *although the subdivision had allowed some business activity*, the subdivision had, *with the exception of Grosses' commercial business*, maintained its residential character."[153] Despite the hardship posed to the Grosses' business, the South Dakota Supreme Court ruled that the Grosses could not continue operating their business in the residential neighborhood.[154]

While no South Dakota case law prior to *Wilson* addressed the precise issue of whether short-term vacation rentals fell within use as a "residential purpose" in restrictive covenants, the argument that short-term vacation rentals violate such restrictive covenants finds support from various persuasive authorities.[155] For instance, in *Eager v. Peasley*,[156] the Michigan Court of Appeals found that the short-term rental of lakefront property violated a restrictive covenant limiting property use to "private occupancy only" and "private dwelling" and prohibiting "commercial use."[157] While the property owner argued that both she and her renters used the property as a "private dwelling," the court found that the short-term rental unquestionably constituted a "commercial use" in violation of the

148. *Id.* ¶¶ 8-13, 653 N.W.2d at 748-49.

149. *Id.* ¶¶ 23-25, 653 N.W.2d at 751.

150. *Id.* ¶ 25, 653 N.W.2d at 751.

151. *Id.* ¶ 26, 653 N.W.2d at 751 (alteration in original) (emphasis added) (quoting Piechowski v. Case, 255 N.W.2d 72, 75 (S.D. 1977)).

152. *Id.* (quoting Northwestern Pub. Serv. Co. v. Chicago & N.W. Railway Co., 484, 210 N.W.2d 158, 160 (S.D. 1973)).

153. *Id.* (emphasis added).

154. *Id.*

155. *See, e.g.*, Eager v. Peasley, 911 N.W.2d 470, 479 (Mich. Ct. App. 2011) (holding that the short-term vacation rental of a lakefront property was a commercial use in violation of restrictive covenants); Hensley v. Gadd, 560 S.W.3d 516, 521-28 (Ky. 2018) (finding that every part of restrictive covenants must be given meaning and effect where possible, and the short-term vacation rental of houses in a residential subdivision constituted commercial use in violation of the covenants); Munson v. Milton, 948 S.W.2d 813, 816 (Tex. App. 1997) (citing Smith v. Bd. of Regents of the Univ. of Houston Sys., 874 S.W.2d 706, 712 (Tex. App. 1994)) (noting that "[a]lthough the term 'residence' is given a variety of meanings, residence generally requires both physical presence and an intention to remain[]").

156. 911 N.W.2d 470.

157. *Id.* at 472, 479.

covenants.[158] Moreover, while the court clarified that undefined terms in restrictive covenants do not render the covenants ambiguous, such terms should be read alongside the language of the contract with the goal "to ascertain the intent of the parties."[159] Additionally, as Justice Kern noted, in every authority cited by the majority to support their finding that the short-term vacation rental fell within the provisions of the restrictive covenants, the owner of the property resided in the home.[160]

IV. ANALYSIS

This article contends that the result of *Wilson* was incorrect because the court misconstrued case precedent and the interpretation of restrictive covenants.[161] As such, Justice Kern's analysis was correct in concluding that when used as a vacation rental property rather than a bed and breakfast, the Maynards' business operations were in violation of the restrictive covenants.[162] The position set forth below relies on three arguments.[163] First, the Maynards had actual notice of the Covenants as well as neighboring property owners' opposition to the Maynards' intended use of property, yet the Maynards chose to continue construction before seeking a legal resolution.[164] Second, while the Covenants were silent about expressly prohibiting vacation rentals, the court has elsewhere held that even if some business endeavors are permitted by restrictive covenants, other businesses are not allowable when they disrupt the character and quality of the neighborhood.[165] And third, while the loss of investment may have posed a financial hardship to the Maynards, a reasonable resolution that accorded with the provisions of the Covenants was readily available: to operate the property as a bed and breakfast rather than a vacation rental property.[166]

A. NOTICE OF THE RESTRICTIVE COVENANTS AND NEIGHBORING PROPERTY OWNERS' OPPOSITION TO THE INTENDED USE OF THE PROPERTY

While South Dakota law requires only *constructive notice* of restrictive covenants, unlike *Hammerquist*, the Maynards had *actual notice* of the Covenants

158. *Id.* at 479.

159. *Id.* at 474.

160. Wilson v. Maynard, 2021 SD 37, ¶ 51, 961 N.W.2d 596, 608 (Kern, J., dissenting).

161. *Infra* Part IV.

162. *Wilson*, 2021 SD 37, ¶¶ 52-55, 961 N.W.2d at 609-10.

163. *Infra* Part IV A-C (discussing the Maynards' actual notice, the court's willingness to enforce restrictive covenants in other contexts in order to maintain the nature and quality of the neighborhood, and a solution to what the court contended would have been a financial hardship for the Maynards had it enforced the Covenants).

164. Appellee's Brief, *supra* note 4, at 4 (quoting the trial record); Appellants' Brief, *supra* note 16, at 11-12.

165. Prairie Hills Water & Dev. Co. v. Gross (*Prairie Hills*), 2002 SD 133, ¶¶ 23-26, 50, 653 N.W.2d 745, 751-52, 757.

166. *See Wilson*, 2021 SD 37, ¶¶ 52-54, 961 N.W.2d at 609-10 (Kern, J., dissenting).

alongside notice of neighboring property owners' opposition to the Maynards' intended use of the property.[167] In all three cases discussed above, the controversies revolved around a conflict between residential property owners' quiet enjoyment of property and the ability of property owners to operate businesses within residential neighborhoods.[168] Put another way, in all three cases, at issue was the conflict between the property owners' quiet enjoyment and broad recognition of property owners' free use of their property.[169] Moreover, in all cases, all property owners relied upon their interpretation of restrictive covenants to make substantial property and/or business investments.[170] As such, substantial investments were at stake for all parties—and for most, the enjoyment of their home.[171]

Like in *Hammerquist*, the Maynards' intended use of the property to generate rental income was made known to both realtors and neighbors prior to construction on the property in question.[172] Moreover, as in *Hammerquist*, neighboring property owners verbally expressed immediate opposition to the intended property use and further voiced such opposition in public forums.[173] In *Hammerquist*, it was sufficient for the South Dakota Supreme Court that Warburton had only constructive notice of the restrictive covenants, despite not having actual notice of the covenants' content until well after Warburton had purchased the property and invested in renovations.[174] And despite Hammerquist and Porter not expressing an intent to enforce the restrictive covenant until well after Warburton had purchased and renovated the property, the South Dakota Supreme Court upheld the enforcement of the covenant.[175]

As in *Wilson*, the restrictive covenants in *Hammerquist* expressly allowed substantially similar use of the property.[176] Namely, while the restrictive covenants required the property to be used as a single-family home, the covenants

167. Hammerquist v. Warburton, 458 N.W.2d 773, 777 (S.D. 1990); Appellee's Brief, *supra* note 4, at 4 (quoting the trial record); Appellants' Brief, *supra* note 16, at 11-12.

168. Appellants' Brief, *supra* note 16, at 10-11; Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, at ¶¶ 15-16 (citing Ex. A-3, Shar Dep. 14:16-15:6; Ex.A-4, Bob Dep. 5:13-5:17); *Hammerquist*, 458 N.W.2d at 773-75; *Prairie Hills*, 2002 SD 133, ¶¶ 23-26, 653 N.W.2d at 751-52.

169. *See* Appellants' Brief, *supra* note 16, at 10-11; Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, at ¶¶ 17, 22 (citing Ex. A-4, Bob Dep. 19:16-19:20); *Hammerquist*, 458 N.W.2d at 775; *Prairie Hills*, 2002 SD 133, ¶ 24, 653 N.W.2d at 751.

170. Appellants' Brief, *supra* note 16, at 10-11; Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, at ¶ 19 (citing Ex. A-4, Bob Dep. 8:3–8:19; Ex. B, Bob Aff. ¶¶ 3, 21); *Hammerquist*, 458 N.W.2d at 774; *Prairie Hills*, 2002 SD 133, ¶ 5, 653 N.W.2d at 748 (discussing the building of storage and work areas for the defendants' business).

171. Appellants' Brief, *supra* note 16, at 10-11; Pls.' Statement of Material Facts in Supp. of Summ. J., *supra* note 5, at ¶¶ 17, 19 (citing trial exhibits); *Hammerquist*, 458 N.W.2d at 774-75; *Prairie Hills*, 2002 SD 133, ¶¶ 5-13, 653 N.W.2d at 748-49.

172. *Hammerquist*, 458 N.W.2d at 774; Appellee's Brief, *supra* note 4, at 4; Appellants' Brief, *supra* note 16, at 11-12.

173. *Hammerquist*, 458 N.W.2d at 774-75; Appellee's Brief, *supra* note 4, at 4; Appellants' Brief, *supra* note 16, at 11-12.

174. *Hammerquist*, 458 N.W.2d at 776, 778.

175. *Id.* at 776, 779.

176. Wilson v. Maynard, 2021 SD 37, ¶ 3, 961 N.W.2d 596, 599; *Hammerquist*, 458 N.W.2d at 773-74.

expressly allowed a guest home to be located on the property without precisely defining the nature of a guest home.[177] Like the Maynards, Warburton's ability to retain the property rested upon his ability to generate rental income from it.[178] Indeed, unlike the Maynards, Warburton was concerned enough about ensuring his ability to generate rental income through his intended use that he wrote his offer contingent upon receipt of a special use permit and immediately sought approval for such a permit through the Planning Commission.[179] Yet even though Warburton had no alternatives for generating alternate rental income from the property, the court upheld the restrictive covenants, prohibiting Warburton from continuing to rent out the lower floor of his primary residence.[180]

In contrast, the Maynards had *actual* notice of the Covenants alongside notice that neighboring property owners opposed the intended use of the Shirt Tail Gulch property as a vacation rental property.[181] Prior to the initiation of construction, the Wilsons expressed immediate verbal opposition, followed by a letter sent through counsel, requesting assurances that the Maynards would not use the property in violation of the Covenants.[182] Moreover, prior to the property being rented, the Shirt Tail Gulch Homeowners Association *rejected* a proposed amendment to the Covenants that would expressly allow both bed and breakfast operations *and* vacation rental businesses.[183] The latter, in particular, makes clear that the majority of property owners in Shirt Tail Gulch viewed the intent of the Covenants similarly: to preserve the nature and character of Shirt Tail Gulch as used *by owners* for residential purposes.[184]

The legal distinction between bed and breakfast properties is also critical here.[185] Under South Dakota law, a bed and breakfast establishment not only limits the number of guests to an average of ten guests at any given time[186]—less than half the size of some groups the Maynards had rented to[187]—but also requires that the owner or owner's agent *reside* at the property or a contiguous property.[188] In both *Wilson* and *Hammerquist*, a central concern raised by opposing neighbors rested on the fact that an absent property owner often resulted in renters' activities becoming a nuisance to others' quiet enjoyment of property in a residential neighborhood.[189] Yet while, in *Hammerquist*, Warburton resided at the property as his primary residence, in *Wilson*, the Maynards neither occupied the property as their primary residence at any point nor hired a landlord or operator to reside at

177. *Hammerquist*, 458 N.W.2d at 773-74.
178. *Hammerquist*, 458 N.W.2d at 774. *See* Appellants' Brief, *supra* note 16, at 10.
179. *Hammerquist*, 458 N.W.2d at 774.
180. *Id.* at 777.
181. Appellee's Brief, *supra* note 4, at 4; Appellants' Brief, *supra* note 16, at 11-12.
182. Appellee's Brief, *supra* note 4, at 4; Appellants' Brief, *supra* note 16, at 11-12.
183. Appellants' Brief, *supra* note 16, at 12.
184. *See id.*
185. *See* SDCL § 34-18-9.1.
186. *Id.*
187. Appellants' Brief, *supra* note 16, at 13.
188. SDCL § 34-18-9.1.
189. Appellants' Brief, *supra* note 16, at 10-11 (quoting the brief's appendix); Hammerquist v. Warburton, 458 N.W.2d 773, 774-75.

the property.[190] As such, as the owners, the Maynards' use of the property violated the preamble and provisions of the Covenants.[191]

B. RESTRICTIONS AGAINST CERTAIN BUSINESSES THAT ALTER THE CHARACTER AND QUALITY OF THE NEIGHBORHOOD

A critical argument to the Maynards' case rested on the assertion that the silence of the Covenants with regard to vacation property rental businesses was not tantamount to a prohibition against them.[192] However, this assertion dismisses the fact that the Shirt Tail Gulch Homeowners Association explicitly rejected an amendment to the Covenants to allow vacation rental businesses—and that it did so well in advance of the Maynards listing their property for vacation rental purposes.[193] The rejection of the proposed amendment clearly conveyed that the majority of property owners in Shirt Tail Gulch interpreted the Covenants to prohibit vacation property rentals—and wished to maintain the Covenants as written to protect the nature and character of the neighborhood.[194]

Even setting aside the decision of the Homeowners Association, the South Dakota Supreme Court had previously established under *Prairie Hills* that silence with regard to prohibiting certain business operations could not be construed to allow those that pose a nuisance, thereby altering the character and nature of the neighborhood.[195] And while the covenants at issue in *Prairie Hills* generally allowed for businesses, the Covenants in *Wilson* expressly allowed only for a form of rental business that, under South Dakota law, is defined *in contrast to* vacation rental properties.[196] Nonetheless, under *Prairie Hills*, even if the covenants fail to expressly define and distinguish types and forms of business, the court will singularly disallow business activity based on nuisance that interferes with the quiet enjoyment of residential property owners.[197]

It is worth noting that *Wilson* can be distinguished from *Prairie Hills* in that the nature and extent of the nuisance, when compared to that of other "businesses" in the residential neighborhood, was much less pronounced.[198] While the Grosses' business operations in *Prairie Hills* introduced nuisances of noise, traffic, and industrial-type operations, the Maynards' business operations in *Wilson* were limited to noise, traffic, and the presence of unfamiliar and, at times,

190. *Hammerquist*, 458 N.W.2d at 775; Wilson v. Maynard, 2021 SD 37, ¶ 8, 961 N.W.2d 596, 599.
191. *Wilson*, 2021 SD 37, ¶ 55, 961 N.W.2d at 610 (Kern, J., dissenting).
192. Appellee's Brief, *supra* note 4, at 8-9.
193. Appellants' Brief, *supra* note 16, at 12.
194. *See id.*
195. Prairie Hills Water & Dev. Co. v. Gross (*Prairie Hills*), 2002 SD 133, ¶¶ 23-26, 50, 653 N.W.2d 745, 751-52, 757.
196. *Id.* ¶ 25, 653 N.W.2d at 751; Findings of Fact and Conclusions of Law, *supra* note 54, at *1. *See* SDCL § 34-18-9.1; SDCL § 34-18-1(17).
197. *Prairie Hills*, 2002 SD 133, ¶¶ 25-33, 653 N.W.2d at 751-53.
198. *Id. See* Appellee's Brief, *supra* note 4, at 11-12.

unvetted renters.[199] Even so, the nuisance cited by neighbors in *Wilson* was substantially similar to, if not greater than, the nuisance neighbors complained of in *Hammerquist*.[200] In both *Wilson* and *Hammerquist*, neighboring property owners cited concerns about increased dangers and decreased property values associated with unsupervised renters' activities.[201] Yet while this nuisance was sufficient for the court to disallow Warburton's rental activities in *Hammerquist*, the court allowed the Maynards to continue their rental activities—*even without the presence or supervision of an owner or operator*.[202]

Furthermore, like the Grosses in *Prairie Hills*, the Maynards cited the income-generating activities of other property owners in the residential neighborhood.[203] Importantly, in *Prairie Hills*, other businesses operated from residential homes in the neighborhood, such as a hair salon and bee factory, were purely commercial in nature and largely continuous.[204] Nonetheless, the court distinguished the Grosses' business operations from others within the neighborhood on the basis that other businesses did not pose a nuisance to residential owners, nor did they change the character and nature of the residential neighborhood.[205] In contrast, the Maynards claimed that their use of the Shirt Tail Gulch property was substantially similar to others' use of their homes as short-term vacation rentals during the Sturgis Motorcycle Rally.[206] This may be so.[207] Yet, as the court has made clear, the ultimate determination rests on whether the business operations change the nature and character of the neighborhood in contravention of the restrictive covenants.[208] While other owners rented out their properties short-term, their *primary* purpose and the predominant use of property use was not commercial.[209] The owners who rented out their Shirt Tail Gulch homes during the Sturgis Motorcycle Rally *resided* at the property, and they did not rent out the properties for the entire summer or otherwise throughout the

199. *See Prairie Hills*, 2002 SD 133, ¶¶ 27-28, 653 N.W.2d at 752; Appellants' Brief, *supra* note 16, at 16-17.

200. *See* Appellants' Brief, *supra* note 16, at 10-11 (quoting the brief's appendix); Hammerquist v. Warburton, 458 N.W.2d 773, 775 (S.D. 1990).

201. *Hammerquist*, 458 N.W.2d at 775. *See* Appellants' Brief, *supra* note 16, at 10-11, 29 (quoting the brief's appendix).

202. *Hammerquist*, 458 N.W.2d at 777. *See* Wilson v. Maynard, 2021 SD 37, ¶ 29, 961 N.W.2d 596, 604.

203. *Prairie Hills*, 2002 SD 133, ¶¶ 23-25, 653 N.W.2d at 751; Appellee's Brief, *supra* note 4, at 3.

204. *Prairie Hills*, 2002 SD 133, ¶¶ 23-25, 653 N.W.2d at 751.

205. *Id.* ¶ 25, 653 N.W.2d at 751.

206. Appellee's Brief, *supra* note 4, at 3.

207. *See* Miranda O'Bryan, *People rent out their property during the Sturgis Motorcycle Rally*, KEVN BLACK HILLS FOX (Aug. 5, 2020, 5:51 PM), https://www.blackhillsfox.com/2020/08/05/people-rent-out-their-property-during-the-sturgis-motorcycle-rally/; Jason M. Smiley, *Renting Your Home for the Rally*, GUNDERSON, PALMER, NELSON & ASHMORE, LLP, https://gpna.com/news/renting-your-home-for-the-rally (last visited Mar. 7, 2022).

208. *See Prairie Hills*, 2002 SD 133, ¶ 26, 653 N.W.2d at 751; *Hammerquist*, 458 N.W.2d at 778-79.

209. *See* Appellee's Brief, *supra* note 4, at 3; Reply Brief of Appellants at 11-12, Wilson v. Maynard, 2021 SD 37, 961 N.W.2d 596 (No. 29307) [hereinafter Appellants' Reply Brief].

year.[210] As such, the residential properties fell within the Covenants' required residential use by property owners, while the Maynards' did not.[211]

C. Reasonable Resolution to Generate Rental Income in Accordance with the Restrictive Covenants was Readily Available

Beyond the black letter of the law, the South Dakota Supreme Court has looked generally to policy concerns in disputes over restrictive covenants.[212] Underlying all cases cited above was a concern for financial hardships posed to property and business owners and the potential for default on substantial investments.[213] In all cases, the parties operating businesses from residential neighborhoods expressed concern about their ability to afford and maintain the property in the absence of generating income.[214]

Yet of all the cases, the Maynards' business activities were by far the most straightforward and cost-effective to bring into compliance with the Covenants.[215] A simple solution would have been for the Maynards to live at the property and operate it as a bed and breakfast or hire an operator to reside at the property.[216] While imposing a cost may not have been the Maynards' ideal, moving or hiring an operator to reside on-site would comply with Covenants that the Maynards had actual notice of *in advance of construction*.[217] Instead, despite collectively expressing their opposition to vacation rental properties in Shirt Tail Gulch, the remaining property owners were required to sacrifice their quiet enjoyment of residential properties and the intended nature and character of the neighborhood.[218]

It is worth noting that in both *Hammerquist* and *Prairie Hills*, the costs imposed by enforcing the restrictive covenants were substantial hardships.[219] In *Hammerquist*, despite having only constructive notice and obtaining special use permits, the only option for Warburton to later bring his property in compliance with the restrictive covenants was, ostensibly, to construct a *separate* guest house rather than operating his lower floor as a guest house for rental purposes.[220] While the court recognized this hardship, they nonetheless enforced the covenants

210. Appellee's Brief, *supra* note 4, at 3; Appellants' Reply Brief, *supra* note 209, at 11-12.

211. Appellants' Reply Brief, *supra* note 209, at 11-12. *See* Findings of Fact and Conclusions of Law, *supra* note 54, at *1.

212. *See Hammerquist*, 458 N.W.2d at 774; *Prairie Hills*, 2002 SD 133, ¶¶ 38-39, 653 N.W.2d at 754.

213. *See* Appellants' Brief, *supra* note 16, at 11; *Hammerquist*, 458 N.W.2d at 774; *Prairie Hills*, 2002 SD 133, ¶¶ 38-39, 653 N.W.2d at 754.

214. *Wilson*, 2021 SD 37, ¶¶ 43-44, 961 N.W.2d at 606-07 (Kern, J., dissenting); *Hammerquist*, 458 N.W.2d at 774; *Prairie Hills*, 2002 SD 133, ¶¶ 38-39, 653 N.W.2d at 754.

215. *See Wilson*, 2021 SD 37, ¶¶ 43-55, 961 N.W.2d at 606-10 (Kern, J., dissenting).

216. *See* SDCL § 34-18-9.1.

217. *Wilson*, 2021 SD 37, ¶¶ 6, 43-55, 961 N.W.2d at 599, 606-10 (Kern, J., dissenting).

218. *See id.* ¶ 43, 961 N.W.2d at 606-07 (discussing the business nature of the property); Appellants' Brief, *supra* note 16, at 11-12.

219. *Hammerquist*, 458 N.W.2d at 774; *Prairie Hills*, 2002 SD 133, ¶¶ 38-39, 653 N.W.2d at 754.

220. *See Hammerquist*, 458 N.W.2d at 773-74.

against Warburton.[221] In *Prairie Hills*, the Grosses were required to cease business operations in the neighborhood altogether, requiring either that they find alternate employment or purchase a commercial property at substantial cost.[222] Nonetheless, the burden fell to the Grosses to remedy the violation of the restrictive covenants, rather than requiring the remaining residents in the neighborhood to tolerate the nuisance.[223] Yet where perhaps a resolution to the violation of restrictive covenants was *least* costly and *most* feasible for the business owners, the court declined to enforce the Covenants.[224] In so doing, the court not only departed from existing precedent, but set a new precedent that property owners may knowingly violate restrictive covenants in opposition to the covenants' intent and provisions[225]—*as well as* the expressed opposition of Homeowners Associations that hold the power to accept or reject amendments to such covenants.[226]

V. CONCLUSION

This article advanced the position that the court erred in finding that the Maynards' operation of their vacation rental business accorded with the Covenants of the Shirt Tail Gulch residential subdivision.[227] This position rested on three arguments.[228] First, the Maynards had actual notice of the Covenants as well as neighboring property owners' opposition to the Maynards' intended use of property, yet the Maynards chose to continue construction before seeking a legal resolution.[229] Second, while the Covenants were silent about expressly prohibiting vacation rentals, the court elsewhere held that even if some business endeavors are permitted by restrictive covenants, other businesses are not allowable when they disrupt the character and quality of the neighborhood.[230] And third, while the loss of investment may have posed a financial hardship to the Maynards, a reasonable resolution that accorded with the provisions of the Covenants was readily available: to operate the property as a bed and breakfast rather than a vacation rental property.[231]

Significant investments built from, and in some cases constituting, the lifelong goals and professional endeavors often converge in real estate

221. *Id.* at 779.
222. *Prairie Hills*, 2002 SD 133, ¶¶ 38, 40, 653 N.W.2d at 754-55.
223. *Id.* ¶¶ 38, 40, 50, 653 N.W.2d at 754-55, 757.
224. Wilson v. Maynard, 2021 SD 37, ¶¶ 29-30, 961 N.W.2d 596, 604. *See* SDCL § 34-18-9.1.
225. *See Wilson*, 2021 SD 37, ¶ 6, 961 N.W.2d at 599.
226. *See* Appellants' Brief, *supra* note 16, at 12.
227. *See supra* Part IV (supporting the assertion that the court erred in reaching its decision in *Wilson v. Maynard*).
228. *See supra* Part IV (summarizing the three arguments posed throughout this article).
229. Appellee's Brief, *supra* note 4, at 4 (quoting the trial record); Appellants' Brief, *supra* note 16, at 11-12.
230. Prairie Hills & Water Dev. Co. v. Gross (*Prairie Hills*), 2002 SD 133, ¶¶ 23-26, 50, 653 N.W.2d 745, 751-52, 757.
231. *See* SDCL § 34-18-9.1.

developments.[232] Hopes and plans soar and shatter as property owners approach and interpret restrictive covenants from divergent perspectives and purposes.[233] Where negotiations short of litigation carried to appeal fail, the South Dakota Supreme Court is called upon to interpret and enforce covenants to ultimately serve justice where dreams collide.[234] In *Wilson*, the court departed from established case precedent and, for better or worse, set the stage for a return to deference to the free use of property over both quiet enjoyment and collective agreement in restrictive covenants.[235]

232. *See supra* note 13 and accompanying text (stating real estate makes up a large part of Americans' assets and much depends on these holdings).

233. *See supra* note 14 and accompanying text (stating that disagreements originate from differing real estate interests).

234. *See supra* note 12 and accompanying text (stating restrictive covenants are subject to different interpretations).

235. *See supra* Part IV (discussing the South Dakota Supreme Court's decision in *Wilson v. Maynard*).