S-24-0050

IN THE SUPREME COURT, STATE OF WYOMING

RAFTER J RANCH HOMEOWNER'S ASSOCIATION,
Appellant (Plaintiff),

v.

STAGE STOP, INC.,
Appellee (Defendant).

OPENING BRIEF OF APPELLANT

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The district court's Order on Summary Judgment Motions and Motions in Limine ("Order"), entered January 17, 2024, was a final, appealable order. *See e.g*. *Inman v. Inman (In re Estate of Inman)*, 2016 WY 101, ¶¶ 9–10. Plaintiff/Appellant timely initiated this appeal as required by Rule Wyo. R. App. P. 2.01(a). R. 727.

STATEMENT OF THE ISSUE

1. Does Appellee's desired use of its property for apartments violate the governing Declaration of Covenants, Conditions and Restrictions of the Rafter J Ranch subdivision?

STATEMENT OF THE CASE

This is the second appeal before this Court involving Stage Stop's desired apartments on Lot 333 of the Rafter J Ranch Subdivision ("Rafter J"). In case number S-23-157, certain homeowners within Rafter J appealed the May 3, 2022 decision of the Teton County Board of County Commissioners ("BCC") to authorize the apartments under a so-called "PUD Amendment." Among other things, the PUD Amendment unlawfully sought to override the Rafter J Plat, which Stage Stop and the Planning Department identified as articulating standards of the "PUD." Because Stage Stop recognized that its desired residential apartments were at odds with the Plat's "Local Commercial" designation for Lot 333 (as well as the property's current and historic zoning), Stage Stop sought, and ultimately persuaded the BCC to approve, an "amendment" to newly authorize apartment use on the property. Notwithstanding the County's issuance of the PUD Amendment, and later BCC approval of a related conditional use permit, Stage Stop could not immediately commence its

apartment use because such change in use was conditioned on this Court's ultimate review in S-23-157, which remains pending.

In the meantime, Stage Stop has pursued alternate permits for apartments on Lot 333 as accessory residential units or "ARUs." Those permits, initially approved by the Teton County Planning Director, were subsequently rejected by the BCC. Stage Stop has since appealed that decision to the district court, in what has now become the third judicial proceeding addressing its desire to use Lot 333 for apartment use.

All this tortured administrative process and resulting litigation is the unfortunate outcome of Stage Stop "putting the cart before the horse" by seeking zoning permits before determining if its desired apartment use violates Rafter J's Declaration of Covenants, Conditions and Restrictions ("CCRs"). Prior to its purchase, Stage Stop knew that the CCRs (like the Plat) set aside Lot 333 for *commercial* use. Stage Stop concedes that no County approval or permit can circumvent or change the CCRs, which in addition to use classifications contain specific density and other limitations plainly inconsistent with apartment use anywhere in the subdivision. At one point, Stage Stop acknowledged this, committing that it would seek to "amend" the CCRs (as it did the "PUD") to bring its apartment use into compliance. But Stage Stop has not made good on this promise; instead, it continues to doggedly pursue various County permits over the objection of the Rafter J Homeowner's Association ("HOA") and without regard to the CCRs, which the BCC deems a "private" matter for the HOA and Stage Stop to work out between themselves.

The HOA thus brought this civil action in the Ninth Judicial District Court of Teton County to enforce the CCRs and enjoin Stage Stop's desired apartment use of Lot 333

(whether under prior or future County permit applications) as contrary to the CCRs. The district court denied the HOA's requested relief, granting summary judgment to Stage Stop that apartment use of Lot 333 (and by implication, all other "commercial" lots in Rafter J) is permissible under the CCRs because apartments fit within one or more dictionary definitions of "commercial property." As argued here, the district court's decision is irrefutably at odds with proper contextual interpretation principles as well as the plainly expressed intent of the Rafter J developers concerning the resident community they sought to establish. Consistent with the CCRs, this Court should reverse with instructions that the district court enter summary judgment in favor of the HOA, thus putting an end to further administrative maneuvering by Stage Stop designed to circumvent the governing documents of the subdivision.

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1. <u>History of Rafter J Ranch & Overview of Subdivision Governing Documents</u>

Rafter J Ranch, approved in 1977, was conceived, designed, and built in recognition of Teton County's affordable housing shortage. The approved and recorded "Rafter J Master Plan," submitted in August 1977 by developer Charles Lewton, states:

> The purpose of the project is to improve the health, safety, and welfare of residents of the County by providing moderate cost **residential sites** and to improve housing opportunities which are currently in inadequate supply to meet the existing demand. The health, safety, and welfare of the **residents of the project** will be assured by meeting or exceeding all applicable local, state and federal regulations for land development.

R. 353 (emphasis added).

Like all housing projects, Rafter J was designed to serve its resident population on a defined amount of land with a specific density in mind. The Master Plan makes clear that

Rafter J would be limited to "495 total dwelling units" on "445 acres," with dwelling units built at a "maximum density" of 5 per acre. R. 352. The Master Plan includes a map designating 9 planned unit ("PU") areas, with PUs 1–5 (165 acres) being designated as "**residential**." R. 352. The remaining acreage is reserved for open space (250 acres) and various limited non-residential uses, including "commercial" uses designated in areas comprising just over 3% of the subdivision; the general area containing Lot 333 is labeled "PU 7" (6 acres), corresponding to planned "**community commercial**" use. *Id.* The Master Plan chart (R. 352) designating the originally contemplated "PU" areas and uses is replicated below:[1]

[1] While the Master Plan references "planned unit areas," it does not purport to approve Rafter J as a "planned unit development." The 1978 LDRs codifying the PUD tool did not come into existence until after Lewton had applied and obtained approval for his subdivision. *See* R. 440 (noting December 6, 1977 approval date for Plat /Master Plan). Nevertheless, the Teton County Planning Department now ascribes the "PUD" label to Rafter J, seemingly because its development generally meets the definition of a "PUD" as:

> [a] **residential development** on a site of 200 acres or more designed as a complete, integrated unit in which the **dwelling units are concentrated on the portion of the site most suitable for development**, and within which prescribed minimum standards for site area, setbacks, and the bulk and spacing of buildings may be modified to achieve open space areas of 50 percent or more of the total acreage.

R. 229 (1978 LDRs, emphasis added).

	USE	ACRES	%
A.	Residentail (PU1 - PU5).	165	37.10
B.	Community Commercial (PU7).	6	1.35
C.	Local Commercial (PU8)	8	1.80
D.	RV Storage (PU9)	2	0.45
E.	Public & Institutional (PU6)	14	3.10
F.	Undeveloped Open Space	250	56.20
	Total Site	445	100.00

Based on 495 dwelling units, Lewton projected in his Master Plan that Rafter J would house up to 1,535 persons (estimating 3.1 persons per dwelling unit), generate traffic between 2,970 and 3,960 vehicle trips per day (3–4 trips per persons per day), and result in $455,746 in new property taxes paid to Teton County by the owners of dwelling units. R. 353; 355. The Master Plan expressly states that covenants and a plat would set forth "land use restrictions" in the new neighborhood. R. 356.

Upon approval of the subdivision those documents were recorded. *See* R. 358-389 (CCRs); R. 343–349 (Plat).

The Plat maps the specific locations for the residential dwelling units and other uses identified in the Master Plan. R. 345–47. The approved density of 495 dwelling units was allocated between single-family lots numbered 1–324 (each approximately .25 acres in size) and 5 larger lots numbered 325–329 intended for multi-unit development (e.g. townhomes) not to exceed 168 units nor a density of more than 5 units per acre. R. 349. Thus, the Plat designates the specific location for 492 of the 495 total approved dwelling units for the neighborhood, leaving only 3 additional dwelling units for future development. R.

343–47. (The HOA owns rights to this remaining residential density but instead of further development has opted to maintain open space for the benefit of Rafter J residents.[2] *See* R. 442–48 (documenting residential "density transfer" of the 3 development rights that "remain" to the HOA.))

Lot 333 was not designated for residential use of any kind. Like the Master Plan, the Plat designates Lot 333 for commercial use—specifically, as "Ranch Headquarters & **Local Commercial**." R. 350 (emphasis added). Just one other lot in the subdivision (Lot 334, adjacent to Lot 333) features a like "commercial" designation. R. 344. (In 1989, Lot 334 was subdivided into renumbered Lots 336 and 337, respectively utilized for decades as a veterinary clinic and dental offices.) Lot 333 is 5.37 acres. R. 482.

By the time the CCRs were recorded, Lewton had taken on two partners, Jerry Wilson and local lawyer, Floyd King. R. 363. The three of them (together, the "Developers") set forth their intentions for the Rafter J neighborhood in the Declaration of Covenants Conditions and Restrictions (the "CCRs"), expressly acknowledging that the declaration was

[2] In 2011, a private developer proposed to utilize the remaining units to create three single-family lots on lands technically within the subdivision but on the opposite side of the highway within the area originally designated as "PU-8." *See* R. 439–41 (confirming at R. 441 that this area "contains the last remaining three residential development units permitted by the Rafter J Master Plan" and that "[t]he 1978 approval allowed a total of 495 units, of which 492 have been platted.")

made "in accordance with the plat." R. 363. (Similarly, the Plat states that the subdivision would be subject to recorded covenants and restrictions. R. 349).

Like the Plat (and the Master Plan), the CCRs set forth a specific land use-classification regime for Rafter J. Article VII is titled: "**LAND CLASSIFICATION AND RESTRICTIVE COVENANTS**." R. 376. Section 1 of the Article states "[a]ll land within the Rafter J Ranch has been classified into the following areas: (a) Residential; (b) Multiple Dwelling; (c) Commercial; (d) Common area; (e) Miscellaneous area, as more particularly shown on Exhibit C." *Id*. Exhibit C (R. 389) is reproduced here:

EXHIBIT C

LAND CLASSIFICATIONS

The Lots within the Rafter J Ranch Subdivision have been classified in accordance with Article VI, Section 1, into the following areas:

CLASSIFICATION		LOT NUMBERS
(a)	Residential	1 through 324
(b)	Multiple dwelling	325 through 329
(c)	Commercial	333 and 334
(d)	Miscellaneous	330, 331, 322, and 335

As in the Plat, the "multiple dwelling" area is described in the CCRs as being subject to a maximum density; the CCRs say these lots are "not to exceed 163 units [5 fewer than those authorized under the Plat] nor a density exceeding five (5) units per acre." R. 382 (Art. XI, Sec. 1). Subsequent townhome development within Rafter J complies with these limits. *See e.g.* R. 390–91 (plat for "Northeast Forty Townhouses" Phase A as part of Lot 328 featuring 12 units on 3.8 acres for a density of 3.16 units/acre); R. 392 (Phase B of Lot

328 featuring another 12 units on 2.76 acres for a density of 4.25 units/acre); R. 394 (Phase C of Lot 328 featuring final 12 units on 3.25 acres for a density of 3.69 units/acre).

Both the Plat and the CCRs thus make plain that the Developers envisioned and received approval for a subdivision comprised mostly of single-family lots with a smaller number of "multi-dwelling" residential lots (subject to specifically capped densities expressed in the Master Plan, Plat, and CCRs) with an overall density of 495 dwelling units across the subdivision. Specific, non-residential public-amenity areas (for a church, corrals/stables, and local commercial services) were designated for separate and discrete areas deemed appropriate and convenient for such uses—mostly at the entrance to the subdivision—where they would not conflict with the residential use areas. R. 389; 344–47.

Further, and critically for purposes of this appeal, the CCRs make explicit that which may only be implicit in the Master Plan and Plat. That is, the Developers intended that restrictions set forth in the Plat and CCRs be "for the purpose of protecting the value and desirability" of the subdivided properties for the "benefit of each **owner** thereof," and that the "**owners"** consist exclusively of those owning "fee simple title to any lot" including "fee simple title to any multiple family dwelling or condominium." R. 363–64 (emphasis added). In other words, Rafter J, in its conception, design, and development, was always intended to be a residential neighborhood prioritizing the rights and interests of residential **homeowners** purchasing lots in the community.

In sum, Rafter J was quite purposefully conceived, designed and built in furtherance of enabling a defined number of persons in Teton County to achieve the American Dream of home ownership—a dream that, even by the 1970s, the Developers understood was

becoming hard to achieve in Teton County. In keeping with that clear purpose, the CCRs are replete with provisions and restrictions intended to keep and maintain the neighborhood as an attractive community for homeowners. As will be shown, these provisions are entirely devoid of language indicating that apartment use is consistent with or authorized anywhere in the Rafter J community.

2. <u>History of Lot 333 & Legacy Lodge</u>

The Teton County Planning Department considers the "Local Commercial" designation in the Plat as referring to the historic "Local Convenience Commercial" or "C-L" zone, which apparently applied to Lot 333 for a period beginning on or around July 18, 1978. R. 434; 438. Per recorded minutes of BCC proceedings occurring that day, a "map change" (presumably advanced by Lewton) was approved to "designate lots 334 and 333 as local commercial [from "RA-3 to C-L"]" "subject to commercial development of these lots meeting county performance standards or the covenants of Rafter J, **whichever is more restrictive**." R. 438 (emphasis added). Given this and/or the assumption that Lewton intended by his "Local Commercial" designation in the Plat to authorize uses consistent with the comparably worded "Local Convenience Commercial" zone (so long as such uses did not violate the CCRs), County Planning Staff (and the BCC) have considered and processed applications for Lot 333 according to the C-L zone standards contained in the 1978 LDRs. *See e.g.*, R. 551 ("The Rafter J PUD directs this site to utilize the standards of the Local Convenience Commercial (CL) District in the 1978 LDRs"). "Apartments" were never authorized in the C-L zone—nor are they authorized under Lot 333's current "Rural-3" zoning. *See* R. 489; 530.

Regardless of the propriety of the Teton County Planning Department's approach—including its disregard of the aforementioned map change requiring consideration of the CCRs, this was the lens through which the BCC viewed the application of "American Healthcare for Rafter J Ranch Partners" for the initial construction of an assisted living facility at Lot 333. R. 282; 484. While such a facility was not expressly permitted within the C-L zone, R. 434, Planning Staff determined that it was like a "nursing home," which *was* an expressly authorized C-L use. R. 484. Thus, under this "similar use determination," the Planning Department concluded an assisted living facility could and should be approved (without any "PUD amendment") consistent with the provisions of the 1978 LDRs. *See* R. 236 (original 2001 permit). Notably, these LDRs describe the C-L zone in general terms as accommodating "within commercial centers" certain "[r]etail business, office, and personal service establishments **of the type primarily intended to provide the day-to-day needs of local residents**." R. 434 (emphasis added); *see also* R. 487.

At the time, and as Stage Stop recognizes, an assisted living facility was generally viewed as "provid[ing] a service to the community." R. 484. Although the use was arguably inconsistent with the CCRs, the Rafter J HOA supported the proposed assisted living center, particularly after American Healthcare agreed to modify its proposal from 110,000 square feet to 50,000 square feet to address concerns of Rafter J residents. *See* R. 237 ("[i]n the final analysis there was considerable support for an assisted living center.") In public comment, HOA representatives wrote in part that "most of the concerns expressed by Rafter J residents [could] be successfully resolved in the course of final development plan preparation." R. 238. This belief was undoubtedly shaped by American Healthcare's

willingness to work with the HOA and Architectural Review Committee to reduce the size of the building and apply for contemporaneous CCR variances, some of which were favorably considered subject to conditions designed to ensure that the "design solution for Lot #333 [was] in the best interest of the site development and to the Rafter J community." R. 240. The Architectural Review Committee further noted: "The variances being applied for and approved of are limited only to Lot #333 and to American Healthcare Management with regard to the development of an assisted living center only." R. 240.

Following initial approval and later construction in 2005 of the assisted living facility (which eventually became known as "Legacy Lodge"), support within Rafter J continued, during which time many Rafter J residents (including the Appellants in S-23-157) saw their elderly friends or family members housed and taken care of at the center.

In the words of Stage Stop, as designed and built, the building is "a 57 unit assisted living facility located in a single building that includes common areas, dining facilities and common amenities for assisted living facilities." R. 483. The units are small (all under 600 square feet, R. 396; 399) and do not contain kitchens adequate to qualify them as "dwelling units" under the LDRs. *See* R. 552 (noting that unlike the existing units, dwelling units "must include all the functions as presented in the LDRs . . . [which] includes each unit having a full kitchen as defined by Division 9.5 of the LDRs.")

3. <u>Stage Stop's Acquisition & Applications</u>

Unfortunately, the Covid-19 pandemic forced Legacy Lodge to suddenly close its doors. On April 30, 2021, Stage Stop acquired the property. R. 469–70.

Prior to its purchase, one or more of Stage Stop's principals reviewed the Rafter J CCRs and obtained the County Planning files relevant to the property. R. 402; 413. Legal counsel for Stage Stop also reviewed the title pre-purchase. R. 409. As part of its due diligence, Stage Stop's president acknowledged having "looked at" the CCRs and observed "there's a distinction between commercial and residential." R. 413.

But notwithstanding this distinction and the restrictions otherwise imposed under the CCRs and the recorded Plat and Master Plan, Stage Stop formed a desire early on to utilize the former Legacy Lodge for high-density residential apartments to house local employees (apparently including those of Hotel Jackson, owned and operated by Stage Stop's members). *See* R. 406–407 (Stage Stop is a "real estate investment business" with interests in Hotel JH, which owns Hotel Jackson); R. 407 (Hotel JH has an average of 50 employees). Consistent with this, on June 6, 2021, Stage Stop submitted a request for "Pre-Application Conference" to "discuss the requirement for amending the Rafter J Planned Unit Development to allow residential uses for the Legacy Lodge property." R. 476. Stage Stop's cover letter candidly confessed: "it is evident from Planning Department reports and discussions . . . that **residential uses are not permitted on the subject parcel**." R. 476 (emphasis added). Consequently, according to Stage Stop, an "*amendment*" to the "Rafter J PUD" was needed. *Id*.

3.1 Stage Stop's Combined Application for PUD Amendment & CUP

On October 5, 2021, Stage Stop filed combined applications for a "planned unit development (PUD) amendment and conditional use permit (CUP)." R. 481. From the beginning, the Rafter J community expressed overwhelming opposition to Stage Stop's

applications. Concerns expressed by Rafter J residents included the number of potential renters, parking deficiencies, and other issues surrounding traffic, transportation, water supply, and safety. Many felt that Rafter J (arguably Jackson's original "workforce" neighborhood) was being sacrificed on the "altar of workforce housing," even though Stage Stop was "not willing to agree to an affordable restriction" on the units. R. 510.

Members of the Rafter J HOA Board of Directors and HOA counsel wrote to Stage Stop and the BCC urging denial of the applications as violative of the Lot 333 restrictions, including the CCRs classifying Lot 333 for commercial use. *See e.g.* R. 499. On December 31, 2021, counsel for the HOA publicly expressed the view that "the proposed use is in no way similar to the assisted living facility" and that to accomplish its desired apartment use, Stage Stop would not only need to partially vacate the Plat but also amend the CCRs. R. 499–50.

On March 2, 2022, counsel for the HOA reiterated that Stage Stop's desired use of Lot 333 was contrary to the CCRs while advising that apartment use would require "proper amendment of the CCRs, in accordance with Article XII, Section 3 thereof, prior to initiating such use." R. 502.

On March 11, 2022, counsel for Stage Stop replied to the HOA in part that its "pending applications before the County really have nothing to do with the CC&Rs." R. 504. Even so, Stage Stop represented that it was "aware of the Rafter J CC&Rs, and their content," and would "sit down with the HOA at the conclusion of the PUD and CUP process to discuss the CC&Rs, and obligations thereunder." *Id*.

On May 17, 2022, the BCC issued the PUD Amendment permit, under which apartments were newly authorized as a "conditional use" on Lot 333. R. 506. The approved PUD permit provides for a maximum occupancy of 132 individuals. R. 246.

The same day, the BCC denied Stage Stop's related CUP application. R. 519–520.

On May 23, 2022, the BCC voted in favor of a motion to reconsider its denial of the CUP and to continue the decision to the September 20, 2022 meeting. R. 520.

In the meantime, certain Rafter J homeowners appealed the BCC's issuance of the PUD Amendment, ultimately resulting in district court proceedings and S-23-157 still under advisement. R. 307–308.

At the September 20, 2022 meeting, the BCC again voted to continue decision on the CUP application to October 4, 2022. R. 520. Just prior to this rescheduled meeting, Stage Stop's counsel wrote the BCC to report as to the "progress made over the last few months" including its work to "better understand the concerns of the Rafter J neighborhood." R. 508. Among other things, Stage Stop reported that it had met with representatives of the Rafter J HOA and that

> [t]here has been much discussion since this application was first submitted about how the owner would handle the CCRs. The owner has discussed the CCRs with representatives of the HOA Board of Directors and understands the HOA's position on this matter. We believe the HOA also understands the owner's position on the CCRs, as this was discussed at the meeting with the HOA Board during an August meeting**. *The applicant is willing to commence the CCR amendment process if the CUP is approved.*** Any application to amend the CCRs would occur only if the CUP is approved.

R. 510 (partial emphasis added).

At another meeting, the CUP application was again continued and conditions again discussed, including as proposed to assure that Stage Stop would receive HOA approval. R. 515; 523. Stage Stop later wrote the BCC to make clear: "The Applicant ***cannot*** accept a condition based on Rafter J CC&R approval. The County's purview is whether the CUP meets Teton County's LDRs." R. 515 (emphasis in original).

On November 1, 2022, the BCC finally voted to approve the CUP subject to various conditions, including that the CUP would not "issue" until "the current legal action regarding [the PUD Amendment] is fully and finally resolved beyond all applicable appeal periods." R. 523; 531–34.

As noted, it remains to be seen how the Court will resolve S-23-157 but in the event the PUD Amendment is affirmed, the CUP would require Stage Stop to satisfy numerous conditions. These include retrofitting the units to create 57 new "dwelling units" within Rafter J to house up to 99 members of the "Teton County Workforce." R. 529. In addition, Stage Stop would be required to expand the parking lot to afford a "minimum of one parking space per unit occupied and 1 additional guest space per 10 occupied units." R. 529. Consequently, assuming full occupancy of all 57 units, Stage Stop would need to nearly double the existing parking—but even then, a mere 63 spots would be available for the apartments' commuting worker occupants of up to 99 individuals under the CUP or 132 individuals under the PUD Amendment. *See* R. 548 (noting existing parking lot provides 37 parking spaces). "[O]ne owner" (presumably Stage Stop) would then rent out the units (under individual or "master" leases as short as 6 months, R. 535) in a manner designed to maximize Stage Stop's profits while "supporting the use of a business" lessee. R. 411–12.

3.2 Stage Stop's BUP Applications for Apartments as "ARUs"

After the filing of the PUD Amendment Appeal and the BCC's initial denial of the CUP application, Stage Stop submitted yet another different set of applications for a series of basic use permits or "BUPs." This time, Stage Stop sought to add a "professional office space" to its desired use of Lot 333. R. 539. Because it proposed to utilize part of the existing building for one or more offices, Stage Stop took the position that it was entitled to 27 residential units as "accessory" to its non-residential use. *See* R. 550 –51 (analyzing application under this framework and 1978 LDRs).

On January 31, 2023, the Planning Director (without any public process or BCC input) issued 24 permits for BUPs and in doing so authorized Lot 333's immediate use for 24 apartments as accessory residential units or "ARUs" with *no* limit as to the number of renters and (aside from workforce occupancy and the creation of dwelling units) *none* of the conditions imposed under the prior CUP.[3] R. 546 47. For example, under the BUPs, parking lot expansion would not be required as the Planning Director deemed the existing 39 spaces sufficient for the unspecified office use *plus* the unlimited number of workers that may occupy the "ARUs." R. 546–47.

[3] The BUPs do not identify any maximum capacity, and Stage Stop has previously (inaccurately) stated: "the Rafter J PUD has no limitation on density or intensity of use." R. 490; 546–47. Stage Stop has also inaccurately represented: "there is no 'Maser Plan' [sic] that governs how Lot 333 can be developed and used." *See* R. 482.

During the pendency of this case, but in separate contested case proceedings before the BCC, the BCC stayed the BUPs and later reversed the Planning Director's approval, thereby revoking the permits for the ARUs. R. 552–53. In response, Stage Stop filed its own appeal, seeking to overturn the BCC's decision and resurrect the BUPs as an apparent "back up" in the event this Court declares the PUD Amendment invalid. *See* R. 546 (noting that BUPs will be discontinued if "the use approved by CUP2021-0005 is implemented.") Whether and how two-dozen ARUs could ever be considered lawful under the "PUD" (as amended or not) or otherwise considered "accessory" is unclear, but Stage Stop's challenge to the BCC's decision in this regard has yet to be fully briefed to the district court and remains pending. The possibility further remains that Stage Stop may pursue one or more new County permits under some other new theory to authorize its singular aim of utilizing Lot 333 for apartments.

4. Stage Stop Declines to Say Whether & When It Will Pursue CCR Amendment

On February 2, 2023, immediately following the initial issuance of the BUPs for ARUs, counsel for the HOA wrote Stage Stop: "[t]he issuance of the BUPs by Teton County does not obviate the need for Stage Stop to use and occupy Lot 333 consistent with the mandates of the CCRs." R. 556. The letter further requested that Stage Stop confirm its previously stated intentions "to comply with the CCRs and seek approval of residential usage of Lot 333 via amendment to the CCRs, **in writing and prior to any residential occupancy.**" R. 557 (emphasis in original). The letter asked for assurances against Stage Stop's anticipatory breach of the CCRs within 10 days. *Id*.

Stage Stop did not respond.

On February 15, 2023, the HOA filed its Complaint. R. 1–12.

5. <u>District Court Proceedings</u>

The Complaint raises specific claims for declaratory judgment that Stage Stop's desired apartment use is "not a permitted use of Lot 333 under the CCRs" and seeks an injunction to prevent Stage Stop from implementing such a use. R. 9–11. (In addition, the Complaint asserts claims in the alternative for anticipatory breach of contract and nuisance, the latter of which would ripen in the event Stage Stop chose to initiate its offending apartment use. R. 7–8.)

On February 22, 2023, under threat of Stage Stop's redevelopment and leasing of apartments under the BUPs, the HOA sought a preliminary injunction. R. 89–96.

On March 3, 2023, Stage Stop answered and counterclaimed for declaratory judgment that "Defendant's apartment complex is a commercial use under the CCRs" and that "no amendment to the CCRs is necessary to accommodate the above uses." R. 118. This contradicted the entire premise for Stage Stop's PUD Amendment and CUP application, which for over a year sought an amendment to the operative "PUD" standards to authorize residential apartments that were otherwise not a permitted "commercial" use. Moreover, Stage Stop made clear that despite its prior commitment (designed to encourage the BCC's approval of its CUP application), Stage Stop would not be seeking any amendment of the CCRs after all because, under its new theory, apartment use was actually a permitted "commercial use" such that a CCR amendment was now unnecessary. (Stage Stop's President

later testified that amending the CCRs would involve a "huge, huge, huge, huge process." R. 413.)

On March 10, 2023, the HOA withdrew its motion for preliminary injunction, explaining that the BCC had recently held its hearing "staying" the BUPs pending resolution of the separate contested case proceedings. R. 112.

On July 11, 2023, the BCC voted to reverse the Planning Director's issuance of the BUPs for ARUs in the contested case proceedings. R. 341.

On September 21 and 22, 2023, the parties filed their respective motions for summary judgment. *See* R. 145–61 (Stage Stop memo); R. 413–31 (HOA memo). Both motions asked the district court to consider and interpret the "unambiguous" language of the CCRs as dispositive. Stage Stop's repeated refrain throughout the litigation was that "[t]he **only issue** in this case is whether Defendant's contemplated uses for Lot 333 comply with the provisions of the [CCRs]." R. 646 (emphasis added); *see also* R. 455; 457; 458; 459; 461; 462; 463.

In resisting the HOA's motion, which highlighted the above-referenced residential/commercial use distinctions and density and other limitations within the CCRs, Stage Stop argued (contrary to its prior positions) that apartment use is "commercial" and therefore authorized on Lot 333. *See* R. 571–72. To buttress this contention, Stage Stop stressed Lot 333's prior use as an assisted living facility. *See* R. 579; 166–70. Notably, however, Stage Stop did not argue that the HOA's failure to contest the assisted living center had resulted in a waiver or abandonment of its ability to enforce CCR use restrictions and density limitations as they pertain to Lot 333. *See* R. 145–61; 570–84.

On January 17, 2024, the district court issued its Order on Summary Judgment Motions and Motion in Limine ("Order"). R. 710; *see also* Appendix 1. The district court's legal analysis is primarily based on Article IX of the CCRs, which broadly authorizes the use of Lot 333 for "any commercial purpose." R. 711; 716–17. Because the CCRs "do not define the word 'commercial,'" the district court considered other definitions including from *Winney v. Hoback Ranches* and Black's Law Dictionary. R. 717. Ultimately, the district court disregarded the definition from *Winney* in favor of a 1978 definition from Black's, under which "commercial property" includes "income producing property" such as "apartments." R. 717. The district court further observed that the CCRs do not expressly prohibit residential use in the "Commercial Area," which otherwise is subject to "minimal restrictions." R. 720.

From there, the district courted "note[d]" that there were "already existing residential units on Lot 333," which the district court elsewhere described as having been "approved of and allowed" by the HOA to "provide residential units" which had "housed people for the purpose of making a profit for sixteen years." R. 721. The district court did not note the legal significance of this observation, other than to say Stage Stop would be "offering a service to all of its lessors just like the assisted living facility did to its residents." R. 721. The district court concluded: "The residential units already exist on the property and were used for the purpose of an assisted living center. Now the residential units will be used for the purpose of for-profit residential housing." *Id.*

Thus, the district court reasoned, Stage Stop's proposed use of Lot 333 "does not violate the CCRs" R. 725. The district court did not consider as part of its analysis the

provisions of the Rafter J Plat or Master Plan, nor did it consider the density limits of the subdivision or whether/how the CCRs as a whole could be read to support any intent on the part of the Developers that Lot 333 (or any other location in Rafter J) could be used for apartments.

STANDARD OF REVIEW

This Court "reviews a district court's order granting summary judgment *de novo* and afford[s] no deference to the district court's ruling." *Pioneer Homestead Apts. III v. Sargent Eng'rs, Inc.*, 2018 WY 80, ¶ 15. Likewise, the interpretation of the CCRs is a matter of law that the Court reviews *de novo*. *See Stevens v. Elk Run Homeowners' Ass'n*, 90 P.3d 1162, 1166 (Wyo. 2004).

ARGUMENT

I. Stage Stop's Proposed Apartment Use Violates the CCRs.

The fundamental issue here is not whether residential apartment use may under certain definitions be properly considered "commercial" but whether such apartment use violates the community design, density, and residential ownership restrictions unambiguously laid out in the Rafter J CCRs and Plat. As explained below, apartment use located **anywhere** in Rafter J is contrary to the purpose and intent of the Rafter J Developers as plainly expressed in those documents, as well as the Rafter J Master Plan which preceded them. Before discussing this fundamental proposition, however, we start with the "commercial" versus "residential" distinction at the heart of the district court's improper construction of the CCRs.

1. Apartments are Not a "Commercial" or "Local Commercial" Use.

Article IX, Section 1 of the CCRs provides that "Lots 333 and 334 are designated as commercial areas, and may be used for any commercial purpose, subject to these covenants and such restrictions as may be contained in deeds, leases, or other instruments of conveyance." R. 381. The district court adopted a narrow focus and construed "commercial" within this provision as authorizing apartments, which Stage Stop has repeatedly described in its County applications as *residential*. *See* R. 476 (requesting pre-application conference to discuss requirement of amending "PUD" "to allow residential uses"); 548 (documenting Stage Stop's request to allow 27 accessory residential units).

As noted above, at one point Stage Stop acknowledged that "residential apartments" are simply not authorized on Lot 333—whether under the Plat's "Local Commercial" designation or the County's Local Convenience Commercial zone (which did not allow such residential uses). R. 476. Hence, Stage Stop concluded it needed to amend the so-called PUD (the standards of which were purportedly expressed in one or more of these documents). *See id*. Consistent with this, Stage Stop recognized it would also need to amend the CCRs because they too designate Lot 333 (along with Lot 334, later subdivided into Lots 336 and 337) as "Commercial Area." Indeed, Stage Stop told the entire community it was "willing to commence the CCR amendment process" to authorize apartments after the BCC approved them. R. 510.

Stage Stop now seeks to retreat from these positions, blowing hot and cold depending on the setting and the strategic context. *See Baker v. Speaks*, 2013 WY 24, ¶ 60 ("Judicial estoppel is a doctrine intended to prevent a party from "blowing hot and cold"; that is,

taking inconsistent positions.") Having presided over the appeal of the PUD Amendment, the district court was aware of Stage Stop's inconsistent arguments as otherwise pointed out by the HOA. *See* R. 597. But the district court did not address this—stressing instead the *HOA's* past position from over 15 years ago authorizing the use of Lot 333 for assisted living use. *See* R. 711. This was wrong for several reasons, as discussed *infra* at 33–36.

Regardless of the inconsistencies surrounding Stage Stop's positions, the meaning of "commercial" within the Rafter J CCRs (and Plat) should be clear based upon this Court's recent definition of the term in the context of subdivision covenants as "the exchange of goods or services involving transportation from place to place **which is inconsistent with the residential use of one's property**." *Winney v. Hoback Ranches Prop. Owners Improvement & Serv. Dist*., 2021 WY 128, ¶ 65 (emphasis added). Based on this definition, derived from Merriam Webster, *id.* at ¶ 64, the Court concluded in *Winney* that the restriction of lots to "residential purpose" in the Hoback Ranches subdivision covenants by definition prohibited "commercial activity." *See id*.

The district court's Order describes *Winney* as providing a "template for addressing the meaning of 'commercial' and whether the Defendant's proposed commercial use of Lot 333 meets the definition of 'any commercial purpose'" under Article IX. R. 721. But instead of adhering to *Winney's* "template" the district dismissed its definition of commercial because the covenants and commercial activity in *Winney* were "different" and, unlike Rafter J, the Hoback Ranches neighborhood was exclusively residential. R. 721. This misses the point. Regardless of whether a subdivision is exclusively residential, and regardless of the particular commercial use at issue, *Winney* instructs that where, as here,

CCRs **categorize commercial use as a distinct use from residential use** "commercial" uses cannot be considered "residential." *See also Four B Properties, LLC v. The Nature Conservancy*, 2020 WY 24, ¶ 43 (finding phrases should be afforded distinct meaning where they "contrast[]" and should not be read interchangeably where "nothing" in the document, there a conservation easement, "suggests those phrases should be read interchangeably.")

The district court was wrong to not apply *Winney's* definition of commercial and thus its conclusion that Stage Stop's apartment use is "commercial" rather than "residential" is also wrong. *See accord Houston v. Wilson Mesa Ranch Homeowners Association*, 360 P.3d 255, 260 (Co. App. 2015) (observing that the "majority of jurisdictions" do not view residential rentals of one's own property as amounting to "commercial use" and that "receipt of income does not transform residential use of property into commercial use.") This is particularly true considering the Plat's further proviso that Lot 333's use be *"**local** commercial"* in nature, consistent with the CCR provisions protecting the rights and interests of Rafter J's residential owners. *See infra* at 30–33. The district court did not and could not find on the record before it that Stage Stop's proposed apartments would in any way benefit or serve the needs of Rafter J's homeowning residents. They do not.

2. Context Matters.

When interpreting restrictive covenants, the Court's goal is the same as it is with respect to any other contract: "to determine and effectuate the intention of the parties, **especially the grantor[s] or declarant[s]**, as may appear from the **context** of the Declaration." *Fayard v. Design Comm. Of Homestead Subdivision*, 2010 WY 51, ¶ 12 (emphasis added).

As noted above, while dictionary definitions can be useful, the proper construction of restrictive covenants involves broader concerns. Even if apartment use might abstractly satisfy a particular dictionary definition of the word "commercial," a dictionary meaning of a word in isolation is not dispositive of the drafter's intent. *See Bowers Welding and Hotshot Inc. v. Bromley*, 699 P.2d 299, 303–304 (Wyo. 1985) ("[T]he court is not limited to dictionary definitions, but the meaning of words used is governed by the intention of the parties, to be determined upon the same rules of evidence as other questions of intention.") (quoting 20 Am. Jur. 2d, Covenants, Conditions and Restrictions 186, p. 753 (1965)). "The contract as a whole should be considered, taking into consideration the relationship between the various parts." *Four B Properties*, ¶ 39; *see also Felix Felicis, LLC v. Riva Ridge Owners* Ass'n, 375 P.3d 769, 775 (Wyo. 2016) ("Intention of the parties is to be determined from the entire context of the instrument, not from a single clause."); *Bowers Welding*, 699 P.2d at 303 (". . . the entire context of the covenant is to be considered").

Here, this principle is expressly incorporated in Article IX, Section 1 and elsewhere within the CCRs. *See* R. 386 (providing at Art. IX, Sec. 1 that the uses for the "commercial areas" are expressly "subject to these covenants"); R. 386 (providing at Art. XII, Sec. 6 that "all of" the CCRs "shall be construed together").

In addition to the CCRs expressly referencing the Plat (and vice versa), Article IX, Section 1 further states that Lot 333's uses are "subject to . . . such restrictions as may be contained in deeds, leases, or other **instruments of conveyance**." R. 381 (emphasis added). Under Wyoming Statute, the Plat is such an "instrument of conveyance." *See* Wyo. Stat. § 34-1-102 (providing that a "conveyance" "shall be construed to embrace every

instrument in writing by which *any estate or interest* in real estate is created, alienated, mortgaged, or assigned or which *by which the title to any real estate may be affected in law or in equity*.") (emphasis added). Plat restrictions are therefore relevant in considering Lot 333's authorized uses and also inform (along with the Master Plan) "the context within which the contract was made." *See Prancing Antelope I, LLC v. Saratoga Inn Overlook Homeowners Ass'n*, 2021 WY 3, ¶ 26 (quoting *Davidson v. Wyoming Game & Fish Comm'n*, 2010 WY 121, ¶ 9). Thus, even when reviewing unambiguous contracts, this Court considers the surrounding circumstances including "the subject matter of the contract" and "the parties' purpose in making the contract." *See Prancing Antelope*, ¶¶ 26, 30 (rejecting "narrow focus" and considering recorded restrictive covenants and bylaws in interpretating unambiguous articles of incorporation); *see also Pennaco Energy, Inc. v. KD Co. LLC,* 2015 WY 152, ¶ 26 ("Extrinsic evidence can be considered in interpreting an unambiguous contract to the extent it involves facts and circumstances surrounding execution of the contract.")

By narrowly focusing on the dictionary meaning of "commercial purpose" within Article IX, the district court failed to embrace these fundamental principles.

3. Apartment Use Is Contrary to the Developer's Vision & Design of Rafter J.

Considering the CCRs as a whole and the context in which they were recorded in "accordance" with the Plat, it is plain that Rafter J was not intended as a subdivision where commercial and residential uses could be randomly intermixed, residential density haphazardly dispersed, or apartment complexes located within the midst of single-family residences. Rather, the subdivision was designed and approved as a residential homeowners'

community, featuring mostly single-family lots with a smaller number of "multi-dwelling" lots located *within specific residential areas*, all subject to specific *density restrictions* expressed in the CCRs (R. 382), the Plat (R. 349) and the Master Plan (R. 352). As noted, the non-residential public amenities were designated for separate non-residential areas—mostly at the entrance to the subdivision. R. 389; 344–47. Consistent with this, the CCRs classify the subdivision lots according to distinct categories and "areas" in a manner resembling municipal zoning (which again did not exist in Teton County when Rafter J was approved). R. 389; *see City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995) ("land use restrictions typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial.")

It defies logic under this scheme that dozens of apartments could now be authorized within the "local commercial" area (again including Lot 333 *and* Lot 334, as later subdivided into Lots 336 and 337). Aside from vastly exceeding Rafter J's approved density of 495 dwelling units, Stage Stop's desired 57 apartment units on Lot 333's 5.37 acres would amount to over 10.5 units per acre—more than double the maximum 5-unit density set forth in the CCRs and the Plat for multi-unit lots. *See* R. 349; 382. Such density cannot be supported when the highest density lots in Rafter J are subject to lesser caps and there is otherwise *no* indication in any of the subdivision's governing documents that unlimited density (or more than 495 units) would be allowed in Rafter J. And, as noted, the Plat designates the specific location for 492 of the 495 total approved dwelling units for the neighborhood such that no more than 3 additional dwelling units were ever available for future development as of 1978. R. 343–47.

To interpret the CCRs as somehow allowing apartments in defiance of all this would render the density limitations meaningless. *See Four B Properties*, ¶ 44 ("Each provision within the Conservation Easement has its purpose, and no provision can render another provision inconsistent or meaningless.") (cleaned up).

Likewise, it would render meaningless the distinct residential/commercial/amenity use classifications and areas if every use were allowed everywhere. The classifications must be upheld as written and "in accordance" with the Plat, while giving meaning to *all* the classifications and their basic purpose to "preserve the character of neighborhoods." *City of Edmonds*, 514 U.S. at 732.

The district court did not address density restrictions or community design, other than to note that residential uses are not "expressly" prohibited under Article IX, Section 1, which, unlike Article VIII (governing "Miscellaneous Areas and Future Developable Property"), also does not expressly prohibit future subdivision "for residential or multiple family dwelling." R. 720–21. The district court remarked: "[i]f the original developers and drafters of the CCRs intended to exclude residential uses on commercial lots they were free to exclude such uses."[4] R. 721. But it stands to reason that the Developers would not have

[4] One might as easily say: if the Developers intended to allow an entirely different form of residential occupancy on Lot 333 and 334 (e.g. apartment rentals) then they were free to authorize them. As discussed herein, however, this would have introduced a significant new subject into the CCRs that would seemingly have required specific provisions

seen the need for such a prohibition where (i) commercial uses are distinguished from residential use; (ii) it was not reasonably foreseeable that a commercial lot owner would pursue a residential use (whereas undesirable residential use might certainly be foreseeable in unspecified "future developable" areas); and (iii) Rafter J's density cap already precluded all but a handful of future dwelling units once the subdivision had been platted. In any event, Article IX's silence on this point was no reason to disregard the Developers' entire community development vision. "Silence does not create 'authorization for an activity that would otherwise be explicitly prohibited." *Four B Properties*, ¶ 56.

The district court's misguided analysis on this point seems to derive from the general rule, cited in its Order and quoting *Four B Properties*, that "restrictions upon the use of land . . . will not be extended by implication, and in case of doubt . . . will be construed in favor of the free use of land." R. 716. In *Four B Properties*, however, this Court went on to comment about this rule as announced in *Kindler v. Anderson* as follows:

> The *Kindler* court, immediately thereafter, adds the following caveat, 'Nevertheless, **if the language imposing the restrictions is clear and unambiguous the rule of strict construction does not apply.** Where a [land restriction] is unambiguous, we seek to determine and effectuate the intention of the parties, **especially the grantor(s)**, as it **may appear or be implied** from the instrument itself."

Four B Properties, ¶ 62 (citing *Kindler v. Anderson*, 433 P.2d 268, 271 (Wyo. 1967) (emphasis added)). The district court found that the CCRs here were unambiguous but

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addressing restrictions applicable to apartment use, parking requirements, and special assessment amounts for apartment owners. *See infra* at 30–33.

nevertheless sought to construe them in favor of Stage Stop's use. In doing so, the district court adopted an unsupported strict construction of the CCRs and effectively **rewrote** them to create an entirely new "Commercial Residential Apartment" classification. This is at odds with every governing document in the subdivision and is unsupported as a matter of law. *See id.* at ¶ 57 ("This Court is not at liberty to rewrite the Conservation Easement . . .") The "Commercial Area" classification for Lot 333 should be upheld consistent with the plain intention of the developers and the reasonable expectations of the members of the HOA.

4. Apartment Use Is Contrary to Rafter J's Residential Assessment & Ownership Provisions.

The district court also disregarded the fundamental home-ownership character of Rafter J clearly expressed in the CCRs. The CCR preamble and definitions state that the CCRs are "for the purpose of protecting the value and desirability" of the subdivided properties for the "benefit of each **owner** thereof," which "owners" consist exclusively of those owning "**fee simple title to any lot**" or "**fee simple title to any multiple family dwelling or condominium**." R. 363–64 (emphasis added). "Apartments" are not mentioned as part of this. Instead, in the context of describing the select multi-unit or "multiple dwelling" lots, the CCRs (and the Plat and Master Plan) mention only condominiums and townhomes. *See e.g.*, R. 365 (Art. III, Sec. 2); R. 366 (Art. IV, Sec. 1).

This makes sense and it matters because, as Stage Stop pointed out below, unlike a condominium or townhome, commercial apartment units are not owned by those residing in them. *See* R. 151; 452. Only owners of Rafter J lots and homes are members of the HOA

who are eligible under the CCRs to vote on matters impacting the subdivision (R. 365), and only owners of lots and homes (again, as "including each **owner of a condominium or townhouse**") are required to pay assessments under Article IV. R. 366–67. The purpose of assessments is "to promote the recreation, health, safety, and welfare of the residents" and "for the improvement and maintenance of the common area, and of the **homes** situated upon the properties." R. 367 (Art. IV, Sec.2). This recognizes that the owners of lots (including the owners of multi-units) enjoy the benefits of the subdivision and therefore must pay to maintain them.

The district court's interpretation that commercial apartments are permitted in Rafter J (whether as multi-units or something else and whether on Lot 333, divided Lot 334, or elsewhere) is contrary to the very nature and character of the Rafter J community established by the Developers to facilitate home ownership in Teton County. While Stage Stop's proposal to pursue its own "real estate investment business" may result in profit to Stage Stop, it presents no upside to the Rafter J homeowners, who have invested enormous sums over the decades making their community a wonderful place while enhancing their home values. The HOA (and Rafter J Improvement Service District) are funded by Rafter J homeowners and these investments in the Rafter J community were not made with the view of benefitting landlords of "commercial apartment complexes" rented out to large numbers of non-dues paying tenants under "negotiated rate" block leases. *See* R. 171; 491. The district court failed to reasonably reconcile these ownership and assessment provisions, which as noted above otherwise conflict with the land area classifications and Article IX if apartment use is allowed. *See Anderson v. Bommer*, 926 P.2d 959, 962 (Wyo. 1996) ("contract

provisions which apparently conflict must be reconciled if such can be done by any reasonable interpretation.")

Beyond the owner assessment provisions, the CCRs are replete with restrictions intended to keep and maintain Rafter J as an attractive place for *homeowners*. By way of example, the following restrictions apply in all residential and multiple dwelling areas:

- "no noxious or offensive activity shall be carried out. . . nor shall anything be done . . . which may be or become a nuisance . . . or cause unreasonable . . . disturbance or annoyance to other owners in the enjoyment of their lots," R. 378;

- no animals are allowed "other than not more than two generally recognized house or yard pets, provided, however that such animals shall at all times be restrained or leashed," R. 378–79;

- "no trailer of any kind, truck camper, snowmachine, boat, or any other recreational or commercial vehicle, tractor, equipment, or machinery shall be kept, placed or maintained upon any lot in such a manner that it is visible from neighboring property," R. 377;

- "all garbage and trash shall be placed and kept in covered containers which shall be maintained so as not to be visible from neighboring property," R. 380;

- "no more than one (1) family, including its servants and transient guests shall occupy each unit located within . . . multiple dwelling lots," R. 378; and

- "no dwelling unit on a multifamily site shall have a floor area less than 600 square feet."

In addition, under Article VI (Design Standards), "automobile storage shall provide for a minimum of two outdoor and one indoor parking spaces, in either a carport or garage, for each dwelling unit. If a carport is used to provide the required indoor parking space, a

fully enclosed and roofed storage space with a minimum floor area of fifty square feet shall be provided in addition to the carport." R. 372; 374.

Each Rafter J homeowner is required to "**strictly comply**" with the above restrictions. R. 385 (emphasis added).

While the district court noted the "three pages of detailed restrictions" governing "residential and multi-dwelling lots," it cast these aside by reasoning that Lot 333 was a separate "commercial area with minimal restrictions." R. 720. Seemingly, this means that none of the restrictions related to residential use elsewhere in Rafter apply to Lot 333 so that "anything goes" with respect to Stage Stop's proposed commercial apartments—even though they would violate community standards for required parking, single-family use, and dwelling unit size before a single tenant even moves in. *See* R. 533; 551 (describing proposed parking under CUP and BUPs); R. 532–33; 546 (not limiting occupants to members of the same family); R. 550 (providing for unit sizes under 600 square feet). This cannot be. The detailed residential restrictions further illustrate that Rafter J was conceived, designed, and developed as a *residential community for homeowners*. Apartment dwellings by short-term occupants do not fit within the land classification scheme, assessment structure, density restrictions, or residential use regulations of the community.

II. Legacy Lodge Is Irrelevant and Not Properly Considered.

While not expressly explaining its legal reasoning, the district court was influenced by Lot 333's prior use as an assisted living facility. The district court "note[d]" that there were "already existing residential units on Lot 333," that the HOA "approved of and allowed" this use "as an assisted living facility that provided residential units to the elderly,"

and that the facility had "housed people for the purpose of making a profit for sixteen years" (while also "offering a service to all of its . . . residents.") R. 721. Given this, the district court did not perceive that Stage Stop's use would be at all different from Legacy Lodge, summing up its analysis as follows: "The residential units already exist on the property and were used for the purpose of an assisted living center. Now the residential units will be used for the purpose of for-profit residential housing." *Id*.

As an initial matter, this recitation of the history of Legacy Lodge is misleading and missing a great deal, such as the context within which Legacy Lodge was first approved *by the BCC* as consistent with the former Teton County "Local Convenience Commercial" zone. Unlike apartments (whether standalone or ARUs), an assisted living facility was deemed similar to authorized nursing home use in the historic C-L zone as "meeting the day to day needs of local residents." As made clear in S-23-157, Stage Stop decided it had to apply for a "PUD Amendment" precisely because it was unable to make the case that its proposed apartment use was "similar" to assisted living or any other approved "Local Convenience Commercial" use. *See also* R. 434 ("ARUs were not defined uses in the 1978 LDRs.")

Moreover, unlike Legacy Lodge's assisted living use, Stage Stop's apartment use (i) requires the installation of "dwelling units,"[5] (ii) may house an unlimited number of people,

[5] The CCRs (R. 373) and Master Plan (R. 352) both expressly limit the number of "dwelling units," as defined under current and historic LDRs as requiring full kitchens. *See* R. 226; 552–53.

and (iii) will create excess/overflow parking and traffic concerns. By comparison, Legacy Lodge housed fewer elderly occupants who were otherwise a quiet and largely non-driving set. As Stage Stop knows, parking and traffic continue to be among the most significant concerns expressed with respect to its proposed apartment use.

Notwithstanding these differences, the living center use at Lot 333 was also arguably violative of the CCRs. Still, the two HOA letters of record show that American Healthcare Centers involved the HOA in its County applications and applied early on for CCR variances to its physical development, all of which finally resulted in significant community buy-in and appreciation for the benefits the assisted living center brought to Rafter J. As noted, Rafter J homeowners housed their elderly relatives there—providing a very valuable service to the "local community."

Regardless, the HOA's "approval" of another use at another time is not legally significant for at least four reasons:

First, before the district court, Stage Stop did not present any arguments as to the legal significance of Legacy Lodge. Stage Stop did not argue that the HOA had waived or forfeited its rights under the CCRs.

Second, the CCRs contain a no-forfeiture provision. *See* R. 385 (Art. XII, Sec. 1) ("Failure by the association or by any owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.")

Third, in resisting and limiting factual discovery, Stage Stop took the position that "[t]he **only issue** in this case is whether Defendant's contemplated uses for Lot 333 comply with the provisions of the [CCRs]." R. 646 (emphasis added); *see also* R. 455; 457; 458;

459; 461; 462; 463. Stage Stop did not raise any arguments that equitable defenses (such as estoppel, waiver of laches) were relevant on summary judgment. *See* R. 570–85 (Stage Stop opposition memo).

And *fourth*, as recognized by the parties and the district court, the CCRs are unambiguous. R. 719. It follows that extrinsic evidence concerning Legacy Lodge or other uses made in the commercial areas is not properly considered. *See Wolter v. Equitable Res Energy Co., W. Region*, 979 P.3d 948, 951 (Wyo. 1999) ("We turn to extrinsic evidence . . . only when the contract language is ambiguous.")

CONCLUSION

Stage Stop's strategic decision to try to leverage approvals from Teton County for its desired apartment complex in disregard of Rafter J's CCRs and Plat was ill advised and has resulted in an enormous amount of wasted administrative and judicial process. Those seeking to conduct businesses within established residential subdivisions should ensure that their desired enterprises comport with the neighborhood before they engage with the government to receive other necessary approvals. Stage Stop's business plan for Lot 333 is violative of the CCRs and Plat, and is profoundly inconsistent with the Rafter J envisioned and designed by the Developers of the community. This Court should reverse the district court and enter summary judgment in favor of the HOA that apartment use of Lot 333 is not permitted under the CCRs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 8, 2024, a true and accurate copy of the foregoing Opening Brief of Appellant was served electronically via email and the Wyoming Supreme Court C-Track Electronic Filing System (CTEF) to the following:

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The original paper copy plus six (6) copies of the Opening Brief of Appellants will be sent to the Wyoming Supreme Court by U.S. Mail, first class postage pre-paid, on April 9, 2024. I have accepted the terms for e-filing and hereby certify that the foregoing document, as submitted in electronic form, is an exact copy of the original and hard-copy documents filed with the Wyoming Supreme Court Clerk and is free of viruses. Additionally, I certify that, to my knowledge, no privacy redactions were required.

/s/Leah C. Schwartz
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