No. 16-1005

IN THE SUPREME COURT OF TEXAS

KENNETH H. TARR,

Petitioner,

v.

TIMBERWOOD PARK OWNERS ASSOCIATION, INC.,

Respondent.

On Petition for Review From the Fourth Court of Appeals
San Antonio, Texas, No. 04-16-00022-CV

PETITIONER'S BRIEF ON THE MERITS

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Trial Court: County Court at Law 3 of Bexar County, Texas, Hon. David J. Rodriguez

Court of Appeals: Fourth Court of Appeals, San Antonio, Justices Angelini, Barnard, and Martinez

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STATEMENT OF THE CASE

Nature of the case:	A homeowner sued his HOA for a declaratory judgment that the century-old deed restriction "residential purposes only" does not bar short-term rentals.
Trial court:	Hon. David J. Rodriguez, County Court at Law 3, Bexar County, Texas.
Trial court's disposition:	The trial court granted the HOA's motion for summary judgment and denied the homeowner's. **Tab A.** The court permanently enjoined the homeowner from renting out his home for short terms or to "multi-family parties" and awarded attorney's fees to the HOA. **Tab B.**
Parties on appeal:	Petitioner: Kenneth H. Tarr Respondent: Timberwood Park Owners Association, Inc.
Court of Appeals:	Fourth Court at San Antonio
Justices:	Karen Angelini, J., with Barnard and Martinez, JJ.
C of A Disposition:	Affirmed as Modified, take-nothing judgment entered. 510 S.W.3d 725; **Tab C**. The panel held that "residential purposes" clearly and unambiguously requires physical, permanent occupancy. The injunction was vacated as unpled.

STATEMENT OF JURISDICTION

The Court has conflicts, statutory construction, and importance jurisdiction. Tex. Gov't Code § 22.001 (3), (6); § 22.001(e).

ISSUE PRESENTED

If deed restrictions do not expressly address or restrict an activity, is that activity allowed because not expressly prohibited, or prohibited because not expressly allowed?

> Specifically as to short-term rentals, does the century-old deed restriction forbidding "business purposes" and requiring "residential purposes" impose a minimum duration requirement on leasing despite its silence as to both duration and leasing?

STATEMENT OF FACTS

I. Tarr Rents His Home To People Who Eat and Sleep

Tarr bought a home in the Timberwood Park subdivision in San Antonio in 2012 but was then transferred to Houston. CR434. He kept the San Antonio home to rent it out when he does not use it. CR434. He rents it out for terms of less than 30 days to persons who use it as a dwelling for eating and sleeping. CR434-35. Tarr pays state and local occupancy taxes, such as the Texas Hotel Tax, that apply to home rentals of less than 30 days. CR455-61; *see* Tex. Tax Code Ch. 156. He and his wife formed an LLC to manage the rental of the property. CR465.

Timberwood Park owners have been leasing out their properties since 1979. CR389, 494. The deed restrictions recorded that year are silent as to leasing and provide that each property is "held, sold and conveyed *only* subject to" the restrictions. **Tab E**, preamble (emphasis added). They also provide, central to this case, that –

> *All tracts shall be used solely for residential purposes, except tracts designated . . . for business purposes. . . .*

Tab E, ¶ 1.

Some prohibited uses, including certain business uses, are called out expressly. **Tab E**, ¶¶ 9, 10, 16. Duration-type requirements are few but include completing construction within six months. ¶ 3. The restrictions have an amendment clause. ¶ 17. Finally, a fact whose relevance Tarr contests, the deed restrictions

forbid the construction of buildings "other than a single family residence containing not less than 1,750 square feet . . . and having not less than 75% of its exterior ground floor walls constructed of masonry." ¶ 3.

II. The HOA Board Says Renting For Short Terms is Not Residential; Tarr Demurs and Files a DJ Suit

The subdivision HOA's board sent Tarr a cease-and-desist notice and began fining him based on (1) the "residential purposes only" restriction, (2) the "single family residence" requirement, and (3) advertising on the internet. CR462.[1] After an administrative hearing pursuant to Tex. Prop. Code § 209.006, the board continued fining Tarr. CR464.

The board had trouble deciding what minimum duration of occupancy the deed restrictions' silence requires. The board initially indicated that 6-9 months of occupancy should be implied, basing that position on a 1999 Beaumont case imposing 90 *days* as the minimum lease term. CR502 (transcr. p. 12), 506. Then the board veered to 30 days. 2RR8. Finally, the board alighted on "permanent" occupancy. That was based on a decision of the U.S. Supreme Court construing a Texas statute requiring students to qualify for free public education by having a bona fide intention to remain in a school district. CR492, 515, 598-99; 3RR44; *see Martinez v. Bynum*, 461 U.S. 321 (1983).

[1] The developer assigned its rights to the HOA in 2011, while reserving some powers to itself for developer-owned properties. CR416.

No effort has ever been made to amend the deed restrictions to specify a minimum duration for leasing. CR388, 398.

Tarr, facing continuing fines and the specter of legal action, sued to obtain a declaratory judgment that "residential purposes only" does not impose a minimum duration on occupancy, including lease occupancy. CR8, 299. He also contended that the HOA lacked various enforcement powers. CR304-305. The HOA answered with a general denial. Both parties sought attorney's fees under the DJ Act.

III. The Courts Below Say That A Home Is a Business Until It Qualifies as a Home

The parties filed cross-motions for summary judgment on Tarr's substantive claims. CR382, 509. The trial court granted the HOA's motion and denied Tarr's, holding that "residential purposes" clearly and unambiguously means that a home is not residential unless and until someone remains or intends to remain there physically and permanently. **Tab A**.[2] The trial court later awarded attorney's fees to the HOA. **Tab B**.

Tarr appealed. CR875. He pursued the short-term rental issue. The Fourth Court modified the judgment to vacate the unpled injunction but otherwise affirmed the trial court, declaring that "residential purposes" requires a home to "qualify" as

[2] The trial court also forbade "multi-family" use. Tarr preserved substantive and procedural contentions on that score. *See, e.g., Permian Basin Centers For Mental Health & Mental Retardation v. Alsobrook*, 723 S.W.2d 774, 776 (Tex. App. - El Paso 1986, writ ref'd n.r.e.) ("single family dwelling" was a construction restriction, not a use restriction).

residential. **Tab C**, 510 S.W.3d at 730. Going further:

> [T]he term "used solely for residential purposes" has a definite legal meaning and is unambiguous. *See id.* at 815. Therefore, like [*Munson v. Milton*, 948 S.W.2d 813, 815 (Tex. App. – San Antonio 1997, pet. denied)], we apply section 202.003 of the Texas Property Code and liberally construe the restrictive covenant to give effect to its purpose and intent. *See id.* at 816; *see also* Tex. Prop. Code Ann. § 202.003 (West 2014).
>
> [T]he term "residence" "generally requires both physical presence and an intention to remain." *Munson*, 948 S.W.2d at 816. Thus, "[i]f a person comes to a place temporarily, without any intention of making that place his or her home, that place is not considered the person's residence." *Id.* at 817. Instead, those persons are using a home for transient purposes. *Id.* And, as in *Munson*, we draw a distinction between "residential" purposes and "transient" purposes. *See id.* at 816–17. One leasing his home to be used for transient purposes is not complying with the restrictive covenant that it be used *solely* for residential purposes. *See also Benard v. Humble*, 990 S.W.2d 929, 931–32 (Tex. App.—Beaumont 1999, pet. denied)) (holding that homeowner's short term rental of home violated deed restriction that home could be used only for "single-family residence purposes").

Id.

IV. Courts Statewide Are Split On The STR Issue

As of June 2017, the courts of appeals are split 2-2 on whether "residential purposes" bars short-term rentals:

- The Fourth Court decisions of 1997 and 2016, and a 1999 Ninth Court decision, interpret "residential purposes" to impose a minimum duration on leasing. However, they differ

on how to arrive at that result and what unwritten minimum duration applies, as discussed below. *See Benard v. Humble*, 990 S.W.2d 929, 932 (Tex. App.–Beaumont 1999, pet. denied) (court imposed 90-day lease term. The 2016 Fourth Court decision also, by its logic, requires physical owner occupancy of second homes and vacation homes, whereas the Beaumont decision seems to be limited to lease occupancy.

- A 2015 Third Court decision with which the panel expressly disagreed has now been joined by a 2017 Second Court decision. The Third Court declined to write into the deed restrictions a minimum duration on leasing in the absence of clear deed restriction wording. *See Zgabay*[3] *v. NBRC Property Owners Association,* No. 03-14-00660-CV, 2015 WL 5097116, at *3 (Tex. App.—Austin Aug. 28, 2015, pet. denied) (mem. op.). The Second Court agreed on June 8, 2017 on identical facts. *See Garrett v. Sympson*, 02-16-00437-CV, 2017 WL 2471098, at *4 (Tex. App.—Fort Worth June 8, 2017, no pet. h.) (**Tab F**).

In addition, identical cases are pending again in both Beaumont and Austin. *See Boatner v. Reitz*, No. 03-16-00817-CV (Tex. App. – Austin 2016) (under submission); *Ridgepoint Rentals, LLC v. McGrath*, No. 09-17-000006-CV (Tex. App. – Beaumont 2017) (under submission July 11, 2017).

[3] Pronounced "sky-bye."

V. The HOA Sandbags Contentions

The board has pursued a strategy of sandbagging claims and making statements intended to appeal to prejudice. In the trial court, the board insisted after the close of summary judgment, in opposing Tarr's motion to reopen summary judgment, that the only issue left for the trial court to decide was the form of the judgment. CR845-46. The trial court agreed, denying the motion to reopen summary judgment and setting a hearing on the entry of judgment. 3RR5-6. At the hearing on the entry of judgment, the HOA began asserting unpled claims for violations of the deed restrictions, and the trial court rendered judgment in favor of the HOA on those claims:

- The HOA sought and obtained a permanent injunction for breaches of restrictive covenant even though the HOA had not counterclaimed for breach of restrictive covenant and had agreed at the hearing on entry of judgment that the request was improper. 3RR43; CR861-65.
- The HOA sought and obtained a finding that Tarr had rented to "multiple families," even though the HOA had not pled for any such breach and had admitted in written discovery answers that it was not relying on the "single family" wording in the deed restrictions. 3RR17-20, 22-23, 26-27, 42-44. In any event, there was no evidence of multi-family use, but instead a mere count of occupants with no

relationships identified. CR590-593.[4]

Tarr preserved objections. 3RR31-32.

The HOA continued arguing its several unpled claims on appeal. It also began arguing that "out-of-state" residents should not be allowed to rent property and that people who rent properties for short durations are "transients." Tarr objected and requested that portions of the HOA's brief be struck.

In this Court, the HOA has continued at the petition stage asserting claims it never pled, and Tarr has again objected.

The issue before the Court is a question of law whether the deed restriction "residential purposes only" imposes a minimum duration on occupancy, including leasing.

SUMMARY OF ARGUMENT

Deed restrictions are foundational governing documents that last decades or more but allow change and evolution through a built-in amendment process. When courts usurp the role of owners in the amendment process, owners are deprived of substantive and procedural contract rights that are constitutional in nature.

Texas has historically protected property rights against unclear deed restrictions through rules of interpretation that require judicial restraint. There is no reason to believe that the Legislature changed that in 1987 by requiring that deed

[4] Separately, Texas Property Code § 92.010 regulates maximum lease occupancy and creates a cause of action, but the HOA did not plead such a claim.

restrictions be "liberally" construed to effect their purposes and intent. Tex. Prop. Code. § 202.003(a) (**Tab D**).

However, what the Legislature intended in 1987 is not clear. The courts of appeals are split on how and when § 202.003(a) applies, and the issue of short-term rentals has brought the conflict to a head. The Second and Third Courts protect property rights in the absence of clear restrictions and leave it to the owners to amend their restrictions. The Fourth and Ninth Courts take away property rights and the owners' collective right to amend concerning leasing. However, while differing on the result, none of the cases explain what "liberal" means. The fallout is confusion and an information failure in the real estate market.

Outside of Texas, 16 of 17 states refuse to bar short-term rentals under common "residential purposes" wording.

Section 202.003(a) may be unconstitutionally vague. Nevertheless, several approaches that presume the validity of the statute all mandate reversal in this case:

- The Second and Third Courts' approach of not applying § 202.003(a) in cases of doubt or ambiguity does no harm. It protects the free and unrestricted use of property, and as a necessary corollary prevents judges from writing deed restrictions and intervening in local political questions.
- In the alternative, when deed restrictions evince conscious effort by the drafter to express his or her intentions

fully, the courts should not fill in silences with new restrictions. Property owners already have the power, through amendment, to write new restrictions.

- In the alternative, a deed restriction that does not exist cannot be liberally construed into existence.

- As a final alternative, nothing in the language of § 202.003(a) suggests that it disfavors property rights. A given set of deed restrictions, like those here, may equally favor the rights of both owners and lessees.

The flaw with the argument that short-term rentals are a "business" is that nearly every owner expects to make money from real estate. Landlords and builders sell residential use. Investors make capital gains. Owner-occupants hope for appreciation. All have the freedom to pursue the profit motive so long as no one operates a going concern upon the property.

The common meaning of "residential purposes" and "commercial purposes" asks: *what is the person in possession doing upon the land*? Eating, sleeping, praying, watching TV, and celebrating a birthday are not commercial, irrespective of duration. Blacksmithing, event venues, pop-up shops, and drive-in paintless dent repair tents are commercial, also irrespective of duration. Duration of use should not be confused with the character of the use. That simple rule simplifies and clarifies the jurisprudence in this area and gives Tarr the win.

ARGUMENT

It is not hyperbole to say that this case goes to the heart of property rights in Texas. It implicates the most common deed restriction extant: "residential purposes only." While this case is not *per se* a Constitutional one, it does involve a subdivision's local "constitution" and similarly –

> conjures legal buzzwords and pejoratives galore: activism vs. restraint, deference vs. dereliction, adjudication vs. abdication. The rhetoric at times seems overheated, but the temperature reflects the stakes. It concerns the most elemental—if not elementary—question of American jurisprudence: the proper role of the judiciary.... Judicial duty requires courts to act judicially by adjudicating, not politically by legislating....

Patel v. Texas Dep't of Licensing & Regulation, 469 S.W.3d 69, 95 (Tex. 2015) (Willett, J., concurring) (upholding substantive due process challenge to state regulation); *cf. Sommers v. Sandcastle Homes, Inc.*, No. 15-0847, slip op. at 8 (Tex. June 16, 2017) ("legislators enact, judges interpret").

The court of appeals inserted new, restrictive wording from unrelated legal contexts into private deed restrictions. In so doing, it deprived the affected subdivision's owners of their right to contractual due process – the right to vote on amendments to their constitution – that they paid dearly for when they bought their land. Not only is reversal required, but also guidance to the lower courts in enforcing deed restrictions without imposing new ones by fiat. The deed restrictions here are silent about leasing, much less

any duration restrictions on it, and not a single owner in Timberwood Park voted to amend their local constitution to bar short-term rentals. The panel below cast those votes for them.

I. Deed Restrictions Are Local-Local Constitutions

Deed restrictions (or restrictive covenants) are private agreements that restrict property uses. *See Rankin v. Covington Oaks Condo. Owners Ass'n, Inc.*, No. 04-04-00861-CV, 2005 WL 3161039, at *2 (Tex. App. - San Antonio 2005, no pet.) Tex. Prop. Code § 202.001. Typically drafted by developers initially, they run with the land and establish the smallest unit of local government for subdivisions. **Tab E**, preamble & ¶ 11; *see generally* Gregory S. Cagle, *Texas Homeowners Association Law* §§ 1.4.1, 9.1 (2d. Ed. 2013). They are local-local constitutions that define the powers and procedures of local-local government.

Some deed restrictions create mandatory HOA's that govern and enforce the restrictions on behalf of all owners; some do not and must be administered and enforced by the owners directly. In either case, the owners ultimately set the terms under which they live alongside their neighbors. To that end, deed restrictions usually have an express amendment clause, as in this case. **Tab E**, ¶ 17. For HOA-governed subdivisions, state law mandates an amendment right in any event. *See* Tex. Prop. Code § 209.0041 (setting 67% as the max. vote for HOA communities).[5]

[5] When deed restrictions that do not create an HOA lack any amendment clause, unanimity is required. That in itself is an important property right.

Owners should not ask courts to amend deed restrictions because owners must do it themselves. Judicial activism in this area interferes with and deprives the targeted owners of the contractual right to amend for which they paid dearly. *See Hooper v. Lottman*, 171 S.W. 270, 272 (Tex. Civ. App.—El Paso 1914, no writ) (restrictions "form an inducement to each purchaser to buy, and it may be assumed that he pays an enhanced price for the property purchased. The agreement therefore enters into and becomes a part of the consideration."); *Curlee v. Walker*, 112 Tex. 40, 43, 244 S.W. 497, 498 (1922) (same).

A few owners comprising an HOA board have asked the courts to amend the deed restrictions to insert leasing restrictions where none exist. Had the amendment procedure been pursued, the board members who take issue with lease duration, multi-family-occupancy, and maximum occupancy could have tested, through community discussion and voting, new restrictions in place of those the drafter implemented in 1979. That would have afforded local-constitutional procedural due process to all owners, and it is presumptively fair: every owner at Timberwood Park was put on notice upon purchasing a property that the deed restrictions might get amended. *See Couch v. SMU*, 10 S.W.2d at 974; *Hanchett v. East Sunnyside Civic League*, 696 S.W.2d 613, 615 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.), 30

S.W.2d 590 (Tex. Civ. App. — Dallas 1930, writ ref'd).[6]

The Fourth Court obliged the few owners who comprised the 2014-2015 board by hijacking the amendment process. It inserted language from various unrelated cases and statutes into the Timberwood Park restrictions and, by virtue of the decision's precedential value, countless others. Short-term leasing of some unknown minimum duration is now widely barred in the San Antonio district without any subdivision owners casting any votes. In doing that, the panel inserted the Texas courts deeply into private contractual relations and local political processes and jeopardized the rights of subdivision owners statewide. The new wording the panel imposed is not even *in* recorded deed restrictions and will not get flagged in title commitments. Everyone will have to hire a lawyer to understand what is *not* on the page, and even then, lawyers will not be able to give firm advice given the Fourth Court's unclear duration standard and the conflict among the courts of appeals.

It should be noted that the new panel decision actually went beyond a 1997 decision of the Fourth Court where the court deemed dispositive certain additional wording that barred "motel[s], tourist courts, and trailer parks." *Munson v. Milton*, 948 S.W.2d 813, 815 (Tex. App. – San Antonio 1997, pet. denied). The *Munson* court believed, rightly or wrongly, that the "motel"

[6] The latter two cases indicate that a subdivision could not, for example, bar leasing altogether, since that would work an unfair reformation.

wording evidenced an intent to impose a minimum duration on occupancy. *See, id.* at 818 (Duncan, J., dissenting) (restriction barring types of businesses is not a duration restriction).

The panel went too far. The court stepped outside its mandate when it wrote new deed restrictions taking away both property rights and foundational contract rights from Texas property owners.

II. Texas Has Long Held Property Rights Sacrosanct

When deed restriction enforcement issues end up in court, Texas law has long favored the rights of property owners, protecting them from unfair, surprise enforcement of double-secret, unwritten rules:

> [C]ovenants restricting the free use of land are not favored by the courts, but when they are confined to a lawful purpose and are clearly worded, they will be enforced. All doubts must be resolved in favor of the free and unrestricted use of the premises, and the restrictive clause must be construed strictly against the party seeking to enforce it.

Wilmoth v. Wilcox, 734 S.W.2d 656, 657 (Tex. 1987) (internal citations omitted); *see generally* David A. Johnson, *One Step Forward, Two Steps Back: Construction of Restrictive Covenants After the Implementation of Section 202.003 of the Texas Property Code*, 32 Tex. Tech L. Rev. 355, 363-65 (2001). That rule first appears in a 1925 case, *Settegast v. Foley Bros. Dry Goods Co.*, 114 Tex. 452, 455, 270 S.W. 1014, 1016 (Comm'n App. 1925).

The meaning of deed restrictions is an issue of law for the

court. *See Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). Unlike the case with ordinary contracts, where the finder of fact resolves ambiguity, *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983), ambiguity in deed restrictions is resolved according to rules of construction that in effect bar the courts from writing new restrictions, *see, e.g.*, *Wilmoth*, 734 S.Wd.2d at 658. These rules of construction, by favoring the unrestricted use of property, preclude courts from inserting new restrictions by fiat.

In this case, the deed restrictions are 38 years old and typical of their kind. Similar restrictions are ubiquitous in Texas. They are long enough and specific enough to show that the drafter thought about a number of issues and took care in the drafting, but they are not, as some restrictions are, extremely lengthy and all-encompassing. In allowing residential uses broadly, they do not then mention or restrict leasing or duration of leasing, conspicuous omissions given the historical importance of leasing rights. Many deed restrictions, old and new, contain express leasing duration requirements, and many deed restrictions are being amended currently to address short-term rentals, proving the vitality of local-local politics. The deed restrictions in this case, however, still reflect the choices that Mr. Gale (wherever he may be) consciously and deliberately made in 1979 to allow residential uses broadly subject to a few specific exceptions. The residents have not seen fit to alter them to date. The panel did that in their stead.

III. The Legislature Mandates an Interpretive Standard

In 1987, the Legislature injected uncertainty into common-law deed restriction jurisprudence by requiring that "[a] restrictive covenant shall be liberally construed to give effect to its purposes and intent." Tex. Prop. Code § 202.003(a); *see City of Pasadena v. Gennedy*, 125 S.W.3d 687, 693 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). The courts have not settled on what this statute means or how it relates to the common-law rule. *See id*; *see also Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 927 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (discussing the split); *see generally*, Johnson, 32 Tex. Tech L. Rev. 355 (examining cases through 2001).

The "purposes and intent" part of the statutory rule has long existed at common-law alongside the separate rule favoring property rights in cases of ambiguity. *See Knopf v. Standard Fixtures Co., Inc.*, 581 S.W.2d 504, 506 (Tex. Civ. App.—Dallas 1979, no writ) (citing *Couch v. SMU*, 10 S.W.2d 973). The courts have continued to use the "purposes and intent" test since 1987, viewing it as the main or even sole thrust of § 202.003. *See*, *e.g.*, *Highlands Mgmt. Co., Inc. v. First Interstate Bank of Texas, N.A.*, 956 S.W.2d 749, 752 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

The "liberal" part of the rule, however, has generated conflicting views. It has been held as either unhelpfully duplicative of the common law rules that predated it, *see*, *e.g.*,

Ashcreek Homeowner's Ass'n, Inc. v. Smith, 902 S.W.2d 586, 589 (Tex. App.—Houston [1st Dist.] 1995, no writ), or else as affirmatively contrary to the common law and therefore disfavoring the free and open use of land, *see*, *e.g.*, *Benard v. Humble*, 990 S.W.2d at 930. The statute "seems a legal Rorschach test," where one person's "liberal" is another person's "strict." *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 95 (Tex. 2015) (people of goodwill differ on what constitutes judicial activism).

In this case, the panel sidestepped discussion of what § 202.003(a) means, merely determining that it applies on these facts. Unlike *Benard*, the panel did acknowledge the continuing vitality of the common-law rule favoring the free use of property in cases of ambiguity. However, the panel found "residential purposes" unambiguous, disagreeing with *Zgabay* (and now *Garrett* also) which found the same wording ambiguous. 510 S.W.3d at 729, 731. What the panel found "clear," however, are in reality statutes from unrelated contexts, with no explanation why references to "residential" or "residence" in those contexts (tuition rights, doorlocks, venue, family law, etc.) have any bearing on what Mr. Gale intended in 1979. Indeed, one statute specifically targeted at HOA's defines "residential purpose" with no reference to duration:

> Sec. 209.015. REGULATION OF LAND USE: RESIDENTIAL PURPOSE.

* * *

> "Residential purpose" with respect to the use of a lot:
>
> (A) means the location on the lot of any building, structure, or other improvement customarily appurtenant to a residence, as opposed to use for a business or commercial purpose; and
>
> (B) includes the location on the lot of a garage, sidewalk, driveway, parking area, children's swing or playscape, fence, septic system, swimming pool, utility line, or water well and, if otherwise specifically permitted by the dedicatory instrument, the parking or storage of a recreational vehicle.

Tex. Prop. Code § 209.015(a)(2) (2013). This statute bars enforcement of deed restrictions that declare "residential purposes" to mean something other than the statutory definition. *Id*. (subsection (b)). Though equally irrelevant to what Mr. Gale intended in 1979, it is at least as compelling as the all the other unrelated laws that the Fourth and Ninth Courts have relied upon in imposing a duration limit on "residential purposes."

Statewide, then, § 202.003 has generated conflicting approaches in various factual settings over the past 20 years. More recently, however, with advent of the internet and the rise of the sharing economy, conflicts over older deed restrictions have come to a head with the issue of short-term home rentals.

IV. The Texas Courts Splinter On the Interpretive Standard

The ubiquitous "residential purposes" deed restriction dates back more than a century. *See, e.g.*, *Curlee v. Walker*, 244 S.W. 497 at 497 (1909 instance of the restriction). Deed restrictions

typically contrast "residential purposes" and "business purposes" expressly, as those here do, and then sometimes define or describe particular residential and business uses that are permitted or forbidden, also as those here do. Facially, "residential purposes" does not in and of itself differentiate owner-occupancy from tenant-occupancy, much less imply duration limits on either. Accordingly, such restrictions as it imposes must logically apply to both owners and tenants, barring specific other provisions to the contrary. Thus, "residential purposes," standing alone, applies to anyone who makes use of a property, consonant with the intent of the drafter to preserve the residential character of the subdivision. No occupant can operate a going concern upon the land.

All the short-term rental cases discussed herein are identical in relevant respects, differing only in irrelevant respects:

Zgabay (3rd Court) *Garrett* (2nd Court)	*Tarr* & *Munson* (4th Court) *Benard* (9th Court)
Deed restrictions require "single family residential purposes"	Deed restrictions require "solely residential purposes" as distinguished from "business purposes"
Deed restrictions allow "for rent" signs	Deed restrictions do not mention leasing

All the cases have equivalent "residential purposes" wording upon which opponents of short-term rentals base their arguments. True, some of the deed restrictions do not mention leasing expressly, but no one – least of all the HOA in this case – contends that leasing is

not a residential purpose.

A. Austin and Fort Worth Refuse to Impose Restrictions Not Clearly Set Out

The Austin and Fort Worth courts both hold that if "residential purposes" is not defined in terms of duration of use, then that restriction:

(1) is ambiguous;

(2) has no commonly-accepted meaning; and

(3) must be interpreted in favor of the free and unrestricted use of property.

Zgabay, No. 2015 WL 5097116, at *3 (2015); *Garrett*, 2017 WL 2471098, at *3 (June 8, 2017).

The recent *Garrett* decision sets out two different kinds of ambiguity present:

> [T]he phrase "residence purposes" is ambiguous in two respects. First, "residence purposes" is ambiguous as to whether "residence purposes" is viewed only in contradistinction to business or commercial purposes; and, if not so limited, it is ambiguous both as to whether "residence purposes" requires an intention to be physically present in a home for more than a transient stay and as to whether the focus of the inquiry is on the owner's use of the Property or the renter's use. *See Scott v. Walker*, 645 S.E.2d 278, 283 (Va. 2007). Second, if the phrase "residence purposes" carries with it a duration-of-use component, it is ambiguous as to when a rental of the Property moves from short-term to long-term. *Id.* Because we conclude that the Restriction requiring the Property to be used for "single family residence purposes" is ambiguous, we must strictly construe the ambiguity against Appellees and resolve all doubts in

> favor of the free-and-unrestricted use of the Property. *See Wilmoth*, 734 S.W.2d at 657; *Zgabay v. NBRC Prop. Owners Ass'n*, No. 03-14-00660-CV, 2015 WL 5097116, at *3 (Tex. App.—Austin Aug. 28, 2015, pet. denied) (mem. op.); *Dyegard Land P'ship*, 39 S.W.3d at 308–09.

2017 WL 2471098, at *3.

Opponents of short-term rentals seize on the most trivial of factual distinctions among these cases. In *Garrett*, for instance, the opponent argued that *Zgabay* turned on the "single family" wording instead of the "residential purposes" wording. In fact, the "single family" wording played no part in the *Zgabay* decision, and the Fort Worth court rejected the contention firmly. *Id.* at *5. Similarly, in this case, the HOA board tried below and in its response to the petition to inject "single family" vs. "multi-family" and maximum occupancy issues, but those are not at issue in this case either. The question in this and all the other cases is whether "residential purposes," in and of itself, is a duration restriction on occupancy or, even more specifically, lease occupancy.

To the extent there are any factual differences between this case and the recent Austin and Fort Worth cases, the wording here is merely less detailed in omitting any mention of leasing. But fewer restrictions should dictate, if anything, *greater* deference to property rights, not less. Thus, this case, where there is no express leasing right or reference to duration of occupancy, contrasts with *Zgabay* and *Garrett*, where the deed restrictions allowed "for rent" signs and barred temporary stays in temporary structures. The

latter provisions showed, in those cases, that the drafter contemplated leasing and chose not to restrict it by duration. But what if deed restrictions lack *any* such affirmations of leasing rights? Are they then to be construed to bar everything relating to leasing that is not expressly allowed? That is the upshot of the panel decision: that fewer express restrictions equate to greater regulation.

But the panel avoided mentioning leasing generally, and for good reason. If silence is a prohibition, then all leasing, regardless of duration, must be forbidden by "residential purposes only" wording. That result would throw the real estate market into chaos. The HOA board, for its part, thus always conceded that leasing is allowed because not forbidden, effectively endorsing the common-law rule of interpretation favoring the free use of property in the broader leasing context. CR389, 393-94; 421-23; 494-95.

Thus, the one factual distinction between this case and the *Zgabay* and *Garrett* cases – the lack of any leasing wording – reaffirms the importance of the common-law rule favoring property rights in the absence of a clear restriction. If deed restrictions are silent on a subject, particularly one as important as leasing, that silence is significant; it equates to freedom from interference with property rights.

B. San Antonio and Beaumont Bar Short-Term Rentals But Disagree Why and How

The difficulty a court faces filling in silences in a subdivision

constitution has led to disparate rationales and holdings in the cases. The courts struggle to settle on a consistent approach or a defensible external source for a minimum lease term. This becomes apparent when the cases (including one currently under submission in Austin and used here for illustration) are compared:

Case Barring STR's	Rationale for Minimum Lease Duration	Minimum Lease Duration Imposed	Source(s) for Minimum Lease Duration Imposed
Munson v. Milton (San Antonio 1997) *Tarr v. Timberwood Park* (San Antonio 2016)	"[R]esidential purposes" clearly and unambiguously requires both physical presence and an intention to remain permanently, ostensible based on § 202.003's requirement of a liberal interpretation	Unclear. Bars "temporary or transient housing purposes."	Tex. Educ. Code Ch. 54, (12-month residency requirement for in-state tuition) Tex. Tax Code § 156.001, (revenue generated from rentals of less than 30 days) Tex. Prop. Code Ch. 92, (landlords must install door locks) Texas venue statutes requiring that a residence be occupied over a substantial period of time and permanent rather than temporary
Benard v. Humble (Beaumont 1999)	Section 202.003 trumps the common-law rule favoring property rights	90 days	Tex. Fam. Code § 6.301, which requires 90 days of county residency before filing for divorce
Boatner v. Reitz, No. 03-16-00817-CV (Tex. App. – Austin 2017) (under submission June 20, 2017)	Trial court refused to follow controlling *Zgabay* precedent.	Unclear. Bars "vacation, non-residence, short-term/temporary, or transient type housing purposes, of less than 30 days or without the intent of the occupant to establish a residence."	Unclear. No other case imposes a 30-day minimum lease term or sets out alternative tests.

Two takeaways:

First, these courts differ on how to apply § 202.003's rule of liberal construction. The San Antonio cases recite the rule, but they do not explain if or how they weigh it, and in any event, they find the meaning of "residential purposes" clear, suggesting that their discussion of § 202.003 is dicta. The Beaumont case, deeming "residential purposes" ambiguous, found the statutory rule flat-out dispositive, concluding that the statute affirmatively *disfavors* property rights and trumps the common-law rule in cases of doubt.

Second, with nothing in the deed restrictions to provide any guidance what minimum lease term the drafter "clearly" sought to impose, these courts pick and choose external standards from unrelated legal contexts. These courts fail to explain (1) why those external standards from different contexts should be imported into private deed restrictions, or (2) why a particular case's or statute's definition of "residential" is preferred over others, including those that contain no minimum, mandatory duration. And, of course, they do not agree even amongst themselves what external duration standard to write into the deed restrictions, or even whether a bright-line numerical standard applies. (The *Zgabay* court faulted the San Antonio standard as too ambiguous to be enforceable. 2015 WL 5097116, at *2, n. 3).

Conspicuously, then, the San Antonio and Beaumont courts'

differing analytical approaches and holdings are irreconcilable. As a result, property owners across Texas do not know how to interpret or comply with the century-old, bare-bones, ubiquitous requirement of "residential purposes" and its silence as regards leasing or duration of occupancy. Even in the Austin appellate district, the trial court in the *Boatner* case refused to adhere to *Zgabay* and imposed by fiat a minimum rental period that combines both *Benard's* arbitrary line-drawing (but using 30 days instead of 90) and an alternative standard that is open-ended (the *Tarr* rule), the worst of both worlds and an added layer of confusion for property owners. This Court should take up this case to clarify the jurisprudence on how to interpret silence in deed restrictions and how and when § 202.003's requirement of liberal interpretation applies.

V. Nationally, The Courts Are All-But Unanimous In Safeguarding Property Rights Against Unwritten Restrictions

The new *Garrett* decision of the Fort Worth Court of Appeals adopted the reasoning of courts in several other states – that the ordinary incidents of renting out a property do not render a home a business owing to duration of occupancy. 2017 WL 2471098, at *4. These ordinary incidents of renting include earning rental income, advertising the property for rent, and the payment of mandatory occupancy taxes, among other factors. *Id*. (citing cases). These cases look instead to whether the occupants use the home as

a dwelling for eating and sleeping instead of as a factory or office. *See*, *e.g.*, *Pardo v. Southampton Civic Club*, 239 S.W.2d 141, 142 (Tex. Civ. App.-Galveston 1951, writ ref'd) (manufacturing liquor on property); *Stubblefield v. Pasadena Dev. Co.*, 250 S.W.2d 308, 309 (Tex. Civ. App.-Galveston 1952, no writ) (beauty shop). That is a simple test. Neither an owner nor a tenant is entitled to run a going concern upon a residential property. Mere lease occupancy is not a going concern, because if that were true, all leasing would be barred.

In fact, 17 other states have looked at this issue, and 16 agree that the duration of use does not determine whether the use is "residential" or else "business" in character:

(1) *Santa Monica Beach Prop. Owners Ass'n, Inc. v. Acord*, 1D16-4782, 2017 WL 1534769, at *2 (Fla. Dist. Ct. App. Apr. 28, 2017)

(2) *Gadd v. Hensley*, 2015-CA-001948-MR, 2017 WL 1102982, at *6 (Ky. Ct. App. Mar. 24, 2017)

(3) *Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc.*, 2015 COA 113, ¶ 18, 2015 WL 4760331 (Colo. App. Aug. 13, 2015)

(4) *Wilkinson v. Chiwawa Communities Ass'n*, 86870-1, 2014 WL 1509945 (Wash. Apr. 17, 2014)

(5) *Roaring Lion, LLC v. v. Exclusive Resorts PBL 1, LLC*, CAAP-11-0001072, 2013 WL 1759002 (Haw. Ct. App. Apr. 24, 2013)

(6) *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez,* 2013-NMCA-051, 300 P.3d 736, 743 (N.M. App. Feb. 8, 2013)

(7) *Slaby v. Mtn. River Est. Resid'l Assoc., Inc.*, 2012 WL 1071634 (Ala. Ct. Civ. App. March 30, 2012)

(8) *Dunn v. Aamodt*, 2012 WL 137463 (W.D. Ark. Jan. 18, 2012)

(9) *Mason Family Trust v. DeVaney*, 146 N.M. 199 (2009)

(10) *Ross v. Bennett*, 148 Wash. App. 40 (Wash. Ct. App. – Div. 1 2009)

(11) *Applegate v. Colucci*, 908 N.E.2d 1214 (Ind. Ct. App. 2009)

(12) *Scott v. Walker*, 274 Va. 209 (2007)

(13) *Lowden v. Bosley*, 395 Md. 58 (2006)

(14) *Mullin v. Silvercreek Condo. Owners Assoc., Inc.*, 195 S.W.3d 484 (Missouri Ct. App. 2006)

(15) *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826 (2003)

(16) *Yogman v. Parrott*, 325 Or. 358 (1997).

The lone dissenter is Tennessee, where a court's reasoning accords with the decision below in concluding that a "temporary" stay does not equate to "residing." *See Shields Mountain Prop. Owners Ass'n, Inc. v. Teffeteller*, E2005-00871-COA-R3CV, 2006 WL 408050, at *4 (Tenn. Ct. App. Feb. 22, 2006).

VI. Towards A Workable Test for Texas

Though the decisions in 16 of 17 other states favor the rights of property owners in the absence of a clear duration restriction on leasing, Texas is unique in having a statute expressly requiring a "liberal" interpretation alongside an older common-law rule favoring property rights in cases of doubt or ambiguity. However, the Texas courts' differing approaches on how to apply that statutory standard throw into question Texans' fundamental property rights and the expectations of buyers of real estate. Some courts allow what is not expressly forbidden (*Zgabay*, *Garrett*), while others forbid what is not expressly allowed (*Tarr*, *Benard*). Worse still, even the decisions that in one mood forbid what is not expressly allowed – leasing for short durations – in other moods allow what is not expressly forbidden – leasing generally.

This game of roulette is unfair to property owners, who face ruinous enforcement actions by HOA's and neighbors for rentals going back several years,[7] as well as for the real estate market generally, which cannot function when the bundle of uses being conveyed is indeterminate and thus cannot be accurately priced.

A. Section 202.003: Is There a There There?

The 1987 statute is at best difficult to apply, at worst ambiguous. *See* Johnson, *One Step Forward*, 32 Tex. Tech L. Rev. at 385-86. What constitutes a "liberal" reading of a restriction is in

[7] Owners stand to be sued for any of their rentals within the 4-year limitations period and are thus subject to damages and adverse fees awards. *See* Tex. Prop. Code § 202.004 (civil penalties); Tex. Prop. Code § 5.006 (fee shifting).

the eye of the beholder, particularly when it comes to disputes over property rights, where one person's *freedom to do something* often conflicts with another's *freedom from something*. Such statutory vagueness may violate due process to the extent it subjects property owners to unfair enforcement actions. *See Texas Liquor Control Bd. v. Attic Club, Inc.,* 457 S.W.2d 41, 45 (Tex. 1970); *State Bar of Texas v. Tinning*, 875 S.W.2d 403, 408 (Tex. App.—Corpus Christi 1994, writ denied). The specter of unfair enforcement rears its head in the short-term rental cases because owners who consult their deed restrictions and find "residential use only" discern no rental regulation at all, particularly when rentals of all durations have been occurring under that wording for over a hundred years.[8]

Thus far, however, the short-term rental cases have dodged the statutory vagueness problem, by, variously, (1) downplaying the statute, (2) not applying it, or else (3) declaring that it changed the common law by restricting property rights. The panel opinion takes the first route, downplaying § 202.003 by deeming the deed restriction sufficiently clear that the precise meaning of the statute is unimportant. The *Zgabay* and *Garrett* cases go the second route, avoiding the statute altogether by deeming the deed restriction sufficiently unclear that the statute does not apply. *Benard* is in the third category, embracing the "liberal" component

[8] Since the HOA has not brought an enforcement lawsuit, and now denies that it ever fined Tarr after notifying him twice that fines were accruing, whether § 202.003(a) is unconstitutionally vague is arguably not ripe. The only live claim in this case is Tarr's claim for a declaratory judgment.

of the statute as a change in the law, clamping down on property rights, and declaring by fiat a minimum number of days (90) that should be imported from a divorce statute into deed restrictions.

Three cases, three ways of avoiding explicating § 202.003. The short-term rentals cases present a microcosm of § 202.003 jurisprudence, and are focused on one short, ubiquitous, contentious deed restriction, affording this Court a singular opportunity to clarify Texas law surrounding the interpretation of deed restrictions more generally.

B. A Test Favoring Property Rights in Cases of Ambiguity Does No Harm

The San Antonio and Beaumont cases directly inject the judiciary into a contentious political issue. They have not just prohibited short-term rentals, but also promulgated regulatory standards – 90 days in the one case, physical permanent occupancy in the other. When these sorts of lines get drawn by courts in the absence of constitutional wording – arbitrary moments along timelines, for example – they stifle political choice and the rights of individuals otherwise empowered to vote their choice.

The San Antonio approach is the more dangerous of the two because it places property owners in jeopardy of prosecution without clear standards. If "residential" requires physical, permanent occupancy, then owners of vacation homes cannot use their own vacation homes "temporarily," nor for that matter leave their homes vacant, nor loan them to friends, nor even structure

their ownership as LLC's with multiple members who divvy up occupancy periods. Sellers cannot do post-sale rent-backs to ease their transition to a new home, an exceedingly common practice. Landlords must forego summer fill-in leases for visiting scholars and worry about the validity of post-termination month-to-month rentals, or co-tenants who travel on business and have no regular occupancy schedule. In San Antonio, military families seeking short-term housing to be near servicemembers lose that option. In addition, obvious questions arise how to "test" tenants about their "intention to remain" in a rental property that, by definition, they have no intention to remain at permanently, nor even use more than occasionally in the case of, say, airline pilots. This list is by no means exhaustive, and it is difficult to predict what other sorts of restrictions will get read into "residential use" besides duration. The panel has reached beyond the confines of the page to impose restrictions the drafter did not, and with far-reaching results on Texas property owners.

The *Zgabay* and *Garrett* approach simply does no harm. It leaves it to the owners – as deed restrictions have for over a century – to amend their deed restrictions to clearly and unambiguously state what is not allowed. That is why the amendment process exists; it is what people pay for when they buy into a given subdivision and its restrictions. In the pending *Boatner* case before the Austin Court of Appeals, the deed

restrictions for a small subdivision require a 100% vote of the owners for amendment, which is in itself a valuable property right. Letting existing deed restrictions speak for themselves under these circumstances is preferable to the Fourth Court's approach because it does no more than give all affected owners the benefit of the bargain they already made. The Fourth Court, in this case, intervened in HOA governance and stole the vote. That is not the proper role of judges in our system.

C. Alternatively, Silence Is a Drafting Choice To Allow What is Not Forbidden

A possible alternative test applies both the statutory and common-law rules equally but does not assume that "liberal" disfavors property rights as the panel opinion arguably does and as *Benard* expressly does.

The Washington Supreme Court faced a dilemma similar to the one here. It altogether abandoned in 1993 its interpretive preference for the free use of land similar to the common-law standard in Texas. *See Wilkinson*, 2014 WL 1509945, at *4 (Wash. Apr. 17, 2014). It adopted instead a rule of interpretation "to ascertain and give effect to those purposes intended by the covenants," essentially the same standard as Texas Property Code § 202.003 (apart from the "liberal" aspect). *Id.*

Far from using the new rule to bar or disfavor property uses, however, the Washington State court used it to hew very closely to what the deed restrictions say – and *don't* say. It ended up exactly

where *Zgabay* and *Garrett* do, just by a different route:

> [T]he drafters included detailed provisions outlining what residents cannot do. From this it is evident that had the drafters wanted to prohibit rentals of a particular duration, they would have done so. The 1988/1992 covenants specify the rights and duties of Chiwawa residents in painstaking detail, spelling out, inter alia, the animals residents may keep, the minimum distance houses must be set back from the front lot line, the size of name signs residents may display, and their authority to bring enforcement actions. Most apparently, the drafters specifically anticipated and permitted rentals when they restricted the size of rental signs residents could hang. Indeed, the limit on rental signage proves not just that the Pope & Talbot and 1988/1992 covenants allow some rentals but that the drafters anticipated rentals and consciously decided not to limit their duration, restricting just the appearance of rental signs.
>
> . . . Despite the dissent's belief, silence as to duration does not create ambiguity. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.

2014 WL 1509945, at *4 (internal cites and quotes omitted).

This Court has long used a similar standard with ordinary contracts, adhering to the maxim that a conspicuous omission denotes intent to exclude. *See State Farm v. Pan Am*, 437 S.W.2d 542, 545 (Tex. 1969); *compare Gonzalez v. City of Houston*, 01-00-01195-CV, 2002 WL 221586, at *2 (Tex. App.—Houston [1st Dist.] Feb. 14, 2002, no pet.) (deed restrictions expressly barred car dealerships as a business use). That requires a close reading of all the pages and provisions, mindful of the need to avoid imposing

rules where silence reigns. *See*, *e.g.*, *Elbar Investments, Inc. v. Garden Oaks Maint. Org.*, 500 S.W.3d 1, 5 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (where restrictions did not require setback to apply indefinitely, it would not apply to home that fell out of compliance after being built).

The parallels between the State of Washington *Wilkinson* case and this one are striking and dictate the same result. The deed restrictions in this case check off all the *Wilkinson* boxes and then some:

Restrictions imposed	*Wilkinson*	*Tarr*
the animals residents may keep	√	√
lot line setbacks	√	√
advertising signage requirements	√	√
shooting		√
dumping		√
immoral uses		√
kennels		√
outdoor toilets		√
businesses that generate noxious odors, fumes, etc.		√

Thus, a way of preserving and harmonizing the common-law and statutory rules in cases where deed restrictions do not speak to a subject is to read silence as a choice made by the drafter. Stated another way, *what is not expressly forbidden is allowed*.

The 1979 deed restrictions in this case spell out a number of things the developer specifically wished to restrict or prohibit. Those include regulating "advertising" signs (which easily encompasses leasing), and at least one significant duration requirement – the six-month period to complete the construction of a home. The drafter of these restrictions made deliberate choices of various kinds, including duration, yet neither forbade leasing nor restricted it by duration. A straightforward interpretation that gives effect to the normal rules of contract interpretation, including giving effect to the purposes and intent of the deed restrictions, is all that is required to reverse the court of appeals and provide clarity to Texas courts going forward. *What is not expressly forbidden is allowed*. It is a profound, clear-cut rule that distills Texas law to its essence.

D. Alternatively, A Restriction That Does Not Exist Cannot Be Liberally Construed Into Existence

A different way of according deference to the Legislature in its adoption of § 202.003, despite the law's evident vagueness problem, is to read the statute closely, literally, and narrowly in a way that harmonizes it with the common law. This yields an approach similar to *Zgabay* and *Garrett* in that the statute ends up not determining the outcome, and yet the statute still gets *applied* to the extent of being vetted for whether it does any work upon a given restriction. The statute, again:

"A restrictive covenant shall be liberally construed to

give effect to its purposes and intent."

This rule operates on "a" restrictive covenant within a set of deed restrictions. Stated another way, it operates on a specific provision that restricts an activity. However, in the absence of a restriction on an activity, there is no work for the rule to do; there is nothing to be "liberally construed."

In this case, the board challenges leasing according to duration, asserting that some unspecified minimum duration already exists in the restriction by implication. In fact, there is no leasing duration restriction on which § 202.003 can do any work. The case would be different if the deed restrictions provided that "temporary occupancy is not allowed." *Cf.*, *Zgabay*, 2015 WL 5097116, at *2 (deed restriction barred residing in certain "temporary" structures for more than six months); *Garrett*, 2017 WL 2471098, at *3 (to the same effect). In such a case, both "temporary" and "occupancy" would raise interpretive issues, but the intent to bar short-term residential stays is plain enough. What about 31 days? Less clear, since that implicates month-to-month holdovers on existing leases and post-sale rent-backs to sellers. Nevertheless, the vagaries or nuances of a given case can inform the analysis, and at least there *is* a restriction upon which the rule can go to work. But there is no lease-duration restriction to liberally construe in this case. For that matter, there is no leasing provision at all. This is an easy case if § 202.003 means that there must, *a priori*, be a restriction on the complained-of

activity in the first place.

The deed restrictions here offer plenty of opportunities for § 202.003 to do work because plenty of things are restricted specifically. For instance, is a therapy chicken (true story) "livestock" or a "household pet"? Does running a lonely appellate practice from a home office, with no external signs of activity, constitute an impermissible business use? Do four 1960's hobby cars in various stages of restoration equate to an "auto storage yard"? All are pertinent questions under these deed restrictions, and each affords a day's work to § 202.003.

E. Alternatively, A "Liberal" Construction Allows Short-Term Occupancy in This Case

If this Court determines that § 202.003's rule of liberal construction trumps all other rules, that would still not dictate that occupancy is restricted by duration in this case. The board's position is that a "liberal construction" necessarily means that the party seeking enforcement wins, or that an HOA board always prevails in its interpretation. But what the rule requires is an inquiry into the "purposes and intent" of a deed restriction, and that is independent of the views of a given year's board. HOA boards come and go; deed restrictions run with the land.

The deed restrictions in this case place owner and lease occupancy on the same footing, restricting neither according to duration, maximum occupancy, or familial relationship.[9] If the

[9] The "single family" wording of ¶ 3 of the restrictions here is facially a

intent were to favor or require permanent occupancy, the restrictions would either mandate owner-occupancy or else express a preference for owner-occupancy over lease-occupancy, or for long-term occupancies over short-term ones. There is no such wording. The evident intent of the deed restrictions is to treat leasing and owner-occupancy the same for all purposes. Stated another way, any limitations on tenants apply equally to owners.

Given the lack of any occupancy-type restrictions, there is no basis for concluding that either an owner or a tenant must physically reside at a property or intend to remain there permanently. Some persons with the possessory interest do not reside at their properties at all, or do so only sporadically. But by the same token, neither owners nor tenants are entitled to operate a kennel, fire up a lead-smelter, or operate a barber shop. "Liberal" in the context of Timberwood Park's deed restrictions means "the free and unrestricted use of property" with an asterisk for specifically-prescribed uses and activities that give clear notice to those in possession what subject matter is being restricted. For these deed restrictions, unlike some that are more comprehensive and break out owner rights and tenant rights, or that ban leasing, *what is not expressly forbidden is allowed*.

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construction standard, not a use restriction. *See, e.g.*, *Permian Basin Centers For Mental Health & Mental Retardation v. Alsobrook*, 723 S.W.2d 774, 776 (Tex. App. - El Paso 1986, writ ref'd n.r.e.).

VII. Purpose Determines Purpose

The HOA insists that Tarr is "running a business" by renting out his home for a week or less at a time. That is a common refrain among opponents of short-term rentals in the reported cases. That argument, however, mistakes the right to profit *from owing land* for an active commercial activity occurring *upon the land*.

The new *Garrett* decision stresses that the restriction "residential purposes" does not require that a property actually be a residence, but that it be used for residential *purposes*. Said *Garrett:*

> Other courts that have looked at this issue have stated that if a vacation renter uses a home "for the purposes of eating, sleeping, and other residential purposes," as was done in the present case, "this use is residential, not commercial, no matter how short the rental duration." *See Wilkinson v. Chiwawa Cmtys. Ass'n*, 327 P.3d 614, 620 (Wash. 2014); *see also Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003). Moreover, an owner's receipt of rental income from either short- or long-term rentals in no way detracts from or changes the residential characteristics of the use by the tenant.

2017 WL 2471098, at *4.

Earning income from real property does not make the real property a "business." If it did, no one could rent out their land. To the extent that any landlord can be said to be "in business" by virtue of generating revenue or profit from real property, that mistakes a passive, income-producing activity (leasing) for the thing the landlord provides in exchange for money (the residential

use of the property). A landlord like Tarr *sells or leases for money* the residential use of a home, just as homebuilder or any other landlord does. Builders and lessors make money selling residential possessory interests in real estate. A builder, landlord, or tenant would cross the line by setting up a real estate sales, brokerage, or leasing office, with business hours, staffing, and customers who come and go, *at a residential home*. In that case, the home is being used as a business, no different from a used-car dealership.

The problem goes deeper, however. If earning income from land equates to commercial use, no one can even *own* property with any assurance of not running afoul of "residential purposes only." Some people buy homes as investments and never intend to use them or remain in them. Indeed, nearly everyone who buys property hopes for appreciation. Real property investments make money for their owners through rental income or capital gain or both. Thus, it cannot reasonably be contended that an owner violates the "residential purposes" requirement by virtue of monetary gain. If that were so, common deed restrictions would forbid anything but owner-occupancy of depreciating land, which would encourage waste. That is absurd. Whether someone gains from a use is not the issue; the *nature or purpose* of the use is.

Tarr's lawsuit, accordingly, seeks a declaration that occupants (owners, tenants, guests) who eat, sleep, watch TV, and otherwise use a home *for purposes of living in it like a dwelling* are

not operating a business from the dwelling, irrespective of duration. A stark example is an airline pilot who drives up to a house occasionally, parks in the garage, sleeps for 6-8 hours, eats a meal, gets in a workout on the treadmill, and departs again for the long-haul Hong Kong route. The airline pilot is doing what people ordinarily do in a home, just sporadically and for short durations, perhaps not even a full day. Neither she nor anyone else is running a business from that home. Someone may well be making money from how the pilot uses the home, but that is irrelevant.

VIII. Duration Does Not Determine Purpose

Contrary to the HOA's assertion, *duration* does not determine residential or commercial *purpose*. A residential purpose may be short, a commercial purpose may be long, and vice-versa. For example, renting out a home as a SXSW venue is short, and it is commercial. However, hosting a barbeque where the teenagers' garage band plays is not commercial, unless one sells tickets to it as an event. Operating a perfume shop or drug dispensary at one's home is commercial whether for a day or a year. Renting to an extended family with a *most* unconventional lifestyle is residential, no matter the occupants' consanguinity or individual occupancy periods. Two unrelated retired couples sharing rent and helping each other cope with aging is residential, even if not necessarily a "single family," which is a separate issue. The fact patterns are endless and evolving, but the rule is clear: no one may operate a going concern with obvious manifestations of

commercial activity upon the land.

Several observations can be made concerning this distinction between *duration* and *purpose of use*:

- If a short-term tenant sets up a pop-up shop at the residence, the violation is not the duration of the tenant's lease, but the manifestly commercial character of the tenant's use. Equally, a long-term tenant cannot set up a shop at the residence even if the business is laudable or inoffensive, like selling volumes of poetry or flowers. *See*, *e.g.*, *Fowler v. Brown*, 535 S.W.2d 46, 48 (Tex. Civ. App.—Waco 1976, no writ) (florist shop violated business use prohibition, not separate, unrelated prohibition on nuisance).
- There are various kinds of actionable claims separate and apart from character of the use – *e.g.*, over-occupancy, nuisance, noise, etc. Such violations form the bases for suits for damages and injunctive relief. All, however, are distinct from whether a use is residential or commercial, which is a category of violation in and of itself, separate from other kinds of claims or violations.
- Where deed restrictions contain a "single family purposes" requirement as in *Zgabay* and *Garrett*, that requirement is independent of duration. A lease to 10 strangers may not satisfy "single family purposes," whether for 5 days or 5

years. However, beyond a few stark examples, this area is fraught with difficult questions.[10]

Duration, therefore, does not in and of itself determine the character of the use of the property as either residential or commercial. The test, as *Garrett* pointed out, is what the occupants are actually doing at the property. 2017 WL 2471098, at *4. Tarr's claim for a declaratory judgment that rentals to ordinary people who eat, sleep, swim, watch TV, and relax on the porch are a "residential purpose" should therefore be vindicated.

PRAYER FOR RELIEF

The Court should grant the petition for review, reverse the court of appeals, and render judgment for Tarr on his claim for declaratory judgment. The award of attorney's fees and costs to the Respondent should be remanded for renewed consideration by the trial court.

Respectfully submitted,
/s/ JPS
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[10] For example, can an elderly couple who own a home limited to "single family" purposes cohabit with a slightly younger couple who help them manage? Can a homeowner struggling to pay the mortgage bring on a renter? Such fact patterns make for very unhappy cases and point up the need for subdivisions to amend their deed restrictions to evolve to address societal changes.

CERTIFICATE OF SERVICE

I certify that on June 30, 2016, per T.R.A.P. 6.3(b), a true and correct copy of this brief was served by efiling on:

Frank O. Carroll III
fcarroll@rmwbhlaw.com
Mia B. Lorick
mlorick@rmwbhlaw.com

/s/ *J. Patrick Sutton*
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in Century Schoolbook 14-point for text and 12-point for footnotes. Spacing is expanded by .5 point for clarity. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i)(2)(D) because it contains 10,154 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ *J. Patrick Sutton*
Attorney for Petitioner

No. 16-1005

IN THE SUPREME COURT OF TEXAS

KENNETH H. TARR,

Petitioner,

v.

TIMBERWOOD PARK OWNERS ASSOCIATION, INC.,

Respondent.

On Petition for Review From the Fourth Court of Appeals
San Antonio, Texas, No. 04-16-00022-CV

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

APPENDIX TAB A

CAUSE NO. 2014CV02779

KENNETH H. TARR	§	IN THE COUNTY COURT
	§	
v.	§	COUNTY COURT AT LAW NO. 3
	§	
TIMBERWOOD PARK OWNERS ASSOCIATION, INC.	§	BEXAR COUNTY, TEXAS

ORDER GRANTING DEFENDANT TIMBERWOOD PARK OWNERS ASSOCIATION, INC.'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

The Court considered Defendant Timberwood Park Owners Association, Inc.'s (the "Association") Traditional Motion for Summary Judgment and Plaintiff Kenneth H. Tarr's ("Plaintiff") Motion for Partial Summary Judgment (collectively "Motions").

After considering the Motions, Pleadings, Responses, Replies (if any), the evidence properly before the Court, and arguments of counsel, the Court is of the opinion that the Defendant's Traditional Motion for Summary Judgment is good and should be, and hereby is, in all things GRANTED while Plaintiff's Partial Motion for Summary Judgment should be, and hereby is, in all things DENIED for the following reasons.

1) The Court finds that the Declaration of Covenants, Conditions and Restrictions for Timberwood Park Owners Association, Inc. contains an unambiguous prohibition against business uses on residential lots. The Court finds that Plaintiff is operating a business on his residential lot, and is accordingly in

violation of the deed restrictions. For this reason, Defendant's summary judgment is GRANTED.

2) In addition, or in the alternative, the Court finds that Plaintiff is renting his property for short terms to parties that are not individuals or single-families. These "multi-family" short-term rentals are a violation of the Declaration of Covenants, Conditions and Restrictions for Timberwood Park Owners Association, Inc.[1] For this reason, Defendant's summary judgment is GRANTED.

3) In addition, or in the alternative, the Court finds that Plaintiff is subject to the Declaration of Covenants, Conditions and Restrictions for Timberwood Park Owners Association, Inc., and that the applicable provisions of the restrictive covenants are not ambiguous. While it is the Court's duty to determine the intent of the drafter of the covenants, the Court must do so by balancing the statutory requirement to liberally construe language within restrictive covenants with the common law mandate to strictly construe restrictive clauses in real estate instruments resolving all doubt in favor of the free use of real estate.[2]

The key word central to the instant dispute from within the subject covenants is the word "residential." Common law authorities whose opinions are controlling upon this Court from the United States and Texas Supreme Courts along with the 3rd Court of Appeals in Austin hold, for various purposes and reasons, that a

[1] The Court notes that these "multi-family" short-term rentals place this case outside of the holding of cases such as *Zgabay v. NBRC Property Owners Association.*

[2] *See generally, Bernard v. Humble*, 990 S.W.2d 929, 930 (Tex.App.—Beaumont 1999, *writ ref'd n.r.e.)* (noting the invariable legal conflict).

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"residence" is a place occupied over a substantial period such that it is permanent rather than temporary, evidenced by one's physical presence simultaneous with a then-existing intent to remain.[3]

Although the legislature has assigned differing minimum lengths of time (i.e. 30 days to 6 months) that a person might obtain some various benefit or avoid some various consequence, the Texas Supreme Court held in *Mills*, *supra*, that for a purpose of residency under the Texas Election Code "no specific length of time [is required] for the bodily presence to continue."[4] The San Antonio Court of Appeals, albeit in construction of a more specific set of covenants than are at issue here, noted the well-recognized distinction in Texas law between a permanent residence and temporary housing.[5] Without ascribing any specific length of time or bright-lined rule, the San Antonio Court modified the lower court's injunction enjoining a homeowner from "renting and/or leasing [the subject] property to the public for lodging, vacation and recreation purposes" to prohibit "renting and/or leasing [the subject] property to the public for temporary or transient housing purposes."[6]

Based upon the existing and proper summary judgment record, the Court finds that the Declaration of Covenants, Conditions and Restrictions for Timberwood Park Owners Association, Inc., created and filed in 1979, allow

---

[3] *See generally*, *Martinez v. Bynum*, 461 U.S. 321, 103 S.Ct. 1838, 1843, 75 L.Ed.2d 879 (1983) ("Although the meaning may vary according to context, 'residence' generally requires both physical presence and an intention to remain."), *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964) ("Neither bodily presecnce alone nor intention alone will suffice to create the residence, but when the tow coincide at that moment the residence is fixed and determined."); *Howell v. Mauzy*, 899 S.W.2d 690, 697 n. 9 (Tex.App.—Austin 1994, *writ denied*) (residence is a fixed place of abode occupied substantially enough to become permanent).

[4] *Mills*, *supra at* 637.

[5] *Munson v. Milton*, 948 S.W.2d 813, 816-17 (Tex.App.—San Antonio 1997, *writ denied*).

[6] *Id. At* 815 & 817.

property to be rented or leased for residential purposes consistent with the then-existing common law understanding and meaning of that word at that time. Thus, the Court declares that, within the Declaration of Covenants, Conditions and Restrictions for Timberwood Park Owners Association, Inc., to be "residential" means to occupy a place over a substantial period such that it is permanent rather than temporary evidenced by one's physical presence simultaneous with a then-existing intent to remain. Plaintiff's short-term rentals are not consistent with the "residential" restriction contained within the Declaration of Covenants Conditions and Restrictions for Timberwood Park Owners Association, Inc. For this reason, Defendant's summary judgment is GRANTED.

It is therefore ORDERED that Plaintiff immediately cease operating a business on his residential lot. This applies to Plaintiff, or his tenants, assigns, heirs or successors.

It is further ORDERED that Plaintiff, nor his tenants, assigns, heirs or successors, shall allow or cause the Property to be rented, sub-rented, leased or subleased for short-term rentals to multi-family parties.

It is further ORDERED that neither Plaintiff, nor his tenants, assigns, heirs or successors, shall allow or cause the Property to be rented, sub-rented, leased or subleased to any person or the public for temporary or transient purposes.

It is further, ORDERED that Plaintiff takes nothing against Defendant and that all claims asserted by Plaintiff are denied and all costs of court be taxed against Plaintiff.

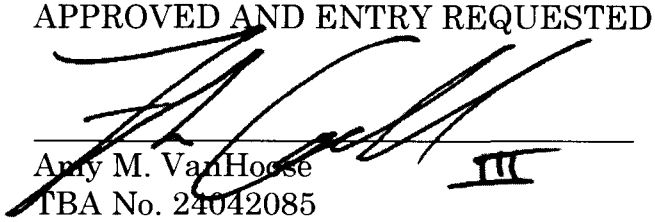
It is further, ORDERED that Defendant recover from Plaintiff reasonable and necessary attorney's fees to be determined at a later hearing.

It is further, ORDERED that all relief sought herein which is not expressly granted is denied, with the exception of Defendant's attorneys fees.

Signed this 6 day of November, 2015.

JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:



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APPENDIX TAB B

CAUSE NO. 2014CV02779

KENNETH H. TARR	§	IN THE COUNTY COURT
	§	
v.	§	COUNTY COURT AT LAW NO. 3
	§	
TIMBERWOOD PARK OWNERS ASSOCIATION, INC.	§	BEXAR COUNTY, TEXAS

FILED IN MY OFFICE
GERARD RICKHOFF
COUNTY CLERK BEXAR CO.
2015 DEC 18 PM 11:46

ORDER GRANTING DEFENDANT TIMBERWOOD PARK OWNERS ASSOCIATION, INC.'S ATTORNEY'S FEES

TO THE HONORABLE JUDGE OF SAID COURT:

The Court considered Defendant Timberwood Park Owners Association, Inc.'s ("Defendant") Attorney's Fees. The Court, having considered the Defendant's Attorney's Fees, response, pleadings and arguments of counsel, if any, is of the opinion that Defendant should be awarded Attorney's Fees. It is therefore,

ORDERED that Plaintiff Kenneth H. Tarr ("Plaintiff") is to pay Defendant attorney's fees in the amount of $ 54,000 within 45 days of the execution of this Order. It is further,

ORDERED that if Plaintiff unsuccessfully appeals this judgment to an intermediate court of appeals, Defendant will additionally recover reasonable fees and expenses in the amount of $ 12,500 for anticipated fees and expenses for the defense of the appeal. It is further,

ORDERED that if Plaintiff unsuccessfully appeals this judgment to the Texas Supreme Court, Defendant will additionally recover reasonable fees and expenses in the amount of $ 12,500 for anticipated fees and expenses for the defense of the appeal. It is further,

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ORDERED that if Plaintiff unsuccessfully appeals this judgment to the Texas Supreme Court, Defendant will additionally recover reasonable fees and expenses in the amount of $_____ for anticipated fees and expenses for the representation at the petition for review stage in the Supreme Court of Texas. It is further,

ORDERED that if Plaintiff unsuccessfully appeals this judgment to the Texas Supreme Court, Defendant will additionally recover reasonable fees and expenses in the amount of $_____ for anticipated fees and expenses for the representation at the merits briefing stage in the Supreme Court of Texas. It is further,

ORDERED that if Plaintiff unsuccessfully appeals this judgment to the Texas Supreme Court, Defendant will additionally recover reasonable fees and expenses in the amount of $_____ for anticipated fees and expenses for representation through oral argument and the completion of proceedings in the Supreme Court of Texas. It is further,

ORDERED that Defendant recovers post-judgment interest on all of the above at the rate of 5%, compounded annually, from the date this judgment is entered until all amounts are paid in full.

All motions not herein granted are denied. All relief not herein given is denied. This is a final and appealable order.

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2014 CV 00779

Signed this 14 day of December, 2015.

JUDGE PRESIDING

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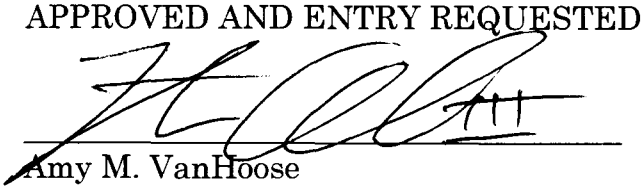
APPROVED AND ENTRY REQUESTED:



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APPENDIX TAB C

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-16-00022-CV

Kenneth H. **TARR**,
Appellant

v.

TIMBERWOOD PARK OWNERS ASSOCIATION INC.,
Appellee

From the County Court at Law No. 3, Bexar County, Texas
Trial Court No. 2014CV02779
Honorable David J. Rodriguez, Judge Presiding

BEFORE JUSTICE ANGELINI, JUSTICE BARNARD, AND JUSTICE MARTINEZ

In accordance with this court's opinion of this date, the trial court's judgment is modified to delete those parts of the judgment that grant injunctive relief. The trial court's judgment is AFFIRMED AS MODIFIED. Costs of appeal are taxed against Kenneth H. Tarr.

Kenneth H. Tarr's Motion to Strike Portions of Appellee's Brief is DENIED.

SIGNED November 16, 2016.

Karen Angelini

Karen Angelini, Justice

510 S.W.3d 725
Court of Appeals of Texas,
San Antonio.

Kenneth H. TARR, Appellant
v.
TIMBERWOOD PARK OWNERS ASSOCIATION INC., Appellee

No. 04–16–00022–CV
|
Delivered and Filed: November 16, 2016

Synopsis

Background: Homeowner brought action against homeowners association for a claim of breach of restrictive covenant and a declaratory judgment arising out of a dispute over homeowner renting out the house for short periods of time. The County Court at Law No. 3, Bexar County, David J. Rodriguez, J., 2015 WL 10567902, granted association's motion for summary judgment. Homeowner appealed.

Holdings: The Court of Appeals, Karen Angelini, J., held that:

[1] restrictive covenant barred homeowner from leasing out his house for short periods, and

[2] homeowners association was not entitled to injunctive relief.

Affirmed as modified.

***727** From the County Court at Law No. 3, Bexar County, Texas, Trial Court No. 2014CV02779, Honorable David J. Rodriguez, Judge Presiding

Attorneys and Law Firms

J. Patrick Sutton, The Law Office of J. Patrick Sutton, Austin, TX, for Appellant.

Frank Carroll III, Mia Lorick, Roberts Markel Weinberg Butler Hailey PC, Houston, TX, for Appellee.

Sitting: Karen Angelini, Justice, Marialyn Barnard, Justice, Rebeca C. Martinez, Justice

OPINION

Opinion by: Karen Angelini, Justice

At issue in this appeal is whether the deed restrictions for Timberwood Park Owners Association, Inc. ("the Association"), which provide that homes should be "used solely for residential purposes," prevent homeowner Kenneth H. Tarr from leasing his home for short periods of time to individuals who have no intent to remain in the home. We conclude that the deed restrictions do prevent such activity; therefore, the trial court did not err in granting summary judgment. However, because the trial court's judgment granted the Association injunctive relief in the absence of pleading for such relief, we modify those parts of the judgment that grant the Association injunctive relief and affirm the judgment as modified.

BACKGROUND

In 2012, Tarr bought a single-family home located in the Timberwood Park subdivision of San Antonio. In 2014, when his employer transferred him to Houston, he began advertising his San Antonio home online for the purpose of renting his home for short periods of time. To manage the home, Tarr formed a limited liability company called "Linda's Hill Country Home LLC." From June 2014 to October 2014, Tarr entered into thirty-one short-term rental agreements ranging from one to seven days, totaling about 102 days. As a practice, Tarr leased the entire home rather than individual rooms, and paid Texas Hotel Tax, which is applicable to all rentals ***728** of less than thirty days. Tarr also remitted the San Antonio/ Bexar County Hotel/Motel Tax, which applies to rentals of less than 30 days. In July and September 2014, Tarr was notified by the Association that he was using the home as a commercial rental property rather than for residential purposes as required by the deed restrictions. On September 2, 2014, at a hearing before the Association's board, his appeal of fines was denied.

Tarr then filed a declaratory judgment action and a claim for breach of restrictive covenant against the Association, seeking a declaration that the deed restrictions do not impose duration limits on leasing. The Association filed a general denial and a request for attorney's fees pursuant to section 37.009 of the Texas Rules of Civil Practice and Remedies Code.

Tarr and the Association then filed cross traditional motions for summary judgment. The trial court granted the Association's motion for summary judgment and denied Tarr's

motion. In a separate final order, the trial court granted the Association attorney's fees. Tarr appealed.

RESTRICTIVE COVENANT

[1] [2] [3] We review a trial court's ruling on a motion for summary judgment de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004). Summary judgment is proper only if the movant establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Id.*; *see* TEX. R. CIV. P. 166a(c). When, as here, both parties seek summary judgment and the court grants one and denies the other, we render the judgment that the trial court should have rendered. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000).

[4] [5] [6] [7] [8] Further, we review a trial court's interpretation of restrictive covenants de novo. *Buckner v. Lakes of Somerset Homeowners Ass'n, Inc.*, 133 S.W.3d 294, 297 (Tex. App.—Fort Worth 2004, pet. denied). When construing restrictive covenants, we apply general rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998); *Buckner*, 133 S.W.3d at 297. As when interpreting any contract, our primary duty in construing a restrictive covenant is to ascertain the parties' intent from the instrument's language. *Bank United v. Greenway Improvement Ass'n*, 6 S.W.3d 705, 708 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). In doing so, we construe the language of the restrictions to give effect to their purposes and intent and to harmonize all of the provisions so that none are rendered meaningless. *Rakowski v. Committee to Protect Clear Creek Village Homeowners' Rights*, 252 S.W.3d 673, 676 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). We give a restrictive covenant's words and phrases their commonly accepted meaning. *Truong v. City of Houston*, 99 S.W.3d 204, 214 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

[9] [10] [11] [12] Whether restrictive covenants are ambiguous is a question of law. *Pilarcik*, 966 S.W.2d at 478. We examine the covenants "as a whole in light of the circumstances present when the parties entered the agreement." *Id.* A covenant is unambiguous if, after appropriate rules of construction have been applied, the covenant can be given a definite or certain legal meaning. *Id.* In contrast, if, after appropriate rules of construction have been applied, a covenant is susceptible of more than one reasonable interpretation, the covenant is ambiguous. *Id.*

[13] [14] [15] Covenants restricting the free use of land are not favored by the courts, but will be enforced if they are clearly worded and confined to a lawful purpose. ***729** *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987); *Jennings v. Bindseil*, 258 S.W.3d 190, 194–95 (Tex. App.—Austin 2008, no pet.). When the language of a restrictive covenant is

unambiguous, section 202.003(a) of the Property Code requires that the restrictive covenant be liberally construed to give effect to its purpose and intent. *Jennings*, 258 S.W.3d at 195; *see* TEX. PROP. CODE ANN. § 202.003(a) (West 2014). On the other hand, if a restrictive covenant is ambiguous, we resolve all doubts in favor of the free and unrestricted use of the property, strictly construing any ambiguity against the party seeking to enforce the restriction. *Wilmoth*, 734 S.W.2d at 657; *Jennings*, 258 S.W.3d at 195.

The restrictive covenant at issue in this appeal provides the following:

> All tracts shall be used *solely for residential purposes*, except tracts designated on the above mentioned plat for business purposes, provided, however, no business shall be conducted on any of these tracts which is noxious or harmful by reason of odor, dust, smoke, gas fumes, noise or vibration ....”

Tarr argues that nothing in the language of this restrictive covenant prevents a homeowner from leasing his home on a short-term basis. According to Tarr, the individuals to whom he leases are using the home for living purposes and thus are not violating the requirement that the home be used for residential purposes. Tarr points to the fact that the Association has admitted the restrictive covenant allows a homeowner to lease a home for residential purposes and that there is no requirement a homeowner personally occupy his home. According to Tarr, there is no difference between such a permitted renter and those individuals to whom he leases on a short-term basis.

The Association responds that Tarr's short-term renters are not residents and are thus not using the home solely for residential purposes; instead they are using the home for transient purposes. In support of its argument, the Association points to this Court's opinion in *Munson v. Milton*, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied), where this Court held that similar language in a restrictive covenant prohibited short-term leases to vacationers.

In *Munson*, the homeowner rented his house, which was located in the Chisum's Subdivision, to third parties through “Rio Frio Bed n Breakfast and Lodging,” a professional rental agent. *Id.* at 815. The third parties were generally vacationers who used the property for short periods of time, generally two to five days. *Id.* Other owners in the Chisum's Subdivision filed suit against the homeowner, seeking a temporary and permanent injunction to prohibit him from renting his house in violation of a restrictive covenant. *Id.* The restrictive covenant provided the following:

> All tracts within the Chisum's subdivision shall be used solely for residential, camping or picnicing purposes and shall never be used for business

> purposes. Motel, tourist courts, and trailer parks shall be deemed to be a business use.

Id. at 815. The trial court granted the other owners a temporary injunction enjoining the homeowner from "renting and/or leasing said property to the public for lodging, vacation and recreation purposes." *Id.* The homeowner filed an interlocutory appeal of the trial court's temporary injunction, contending the temporary injunction imposed an unlawful restraint on the alienation of his property. *Id.*

Noting that the language of the restrictive covenant was unambiguous, this Court applied section 202.003 of the Texas Property Code, explaining that in construing ***730** the intent of the framers of the restrictive covenant, it would "liberally construe the covenant's language and ... ensure that every provision is given effect." *Id.* at 816. This Court explained that "[a]lthough the term 'residence' is given a variety of meanings, residence generally requires both physical presence and an intention to remain." *Id.* "If a person comes to a place temporarily, without any intention of making that place his or her home, that place is not considered the person's residence." *Id.* Additionally, this Court emphasized that the "Texas Property Code draws a distinction between a permanent residence and transient housing, which includes rooms at hotels, motels, inns and the like." *Id.* at 817.

Further, this Court noted that "[a]lthough the venue statutes permit a defendant to have a residence in two or more counties, the residence must be occupied over a substantial period of time and must be permanent rather than temporary in order to qualify as a second residence." *Id.* According to this Court, "[j]ust as the foregoing cases and statutory provisions draw distinctions between temporary or transient housing and a residence," the framers of the restrictive covenant intended to draw a similar distinction between residential and transient uses. *Id.* It noted that "[a]t least two of the activities listed as business uses in this sentence are directed at transient-type housing." *Id.* Thus, this Court concluded that because the restrictive covenant prohibited the homeowner from leasing the home for such transient purposes, the other owners had "established a probable violation of the restrictive covenant." *Id.*

[16] Tarr stresses that *Munson* is not mandatory authority as it dealt with the appeal of a temporary injunction; however, we find the reasoning in *Munson* persuasive. As in *Munson*, the term "used solely for residential purposes" has a definite legal meaning and is unambiguous. *See id.* at 815. Therefore, like *Munson*, we apply section 202.003 of the Texas Property Code and liberally construe the restrictive covenant to give effect to its purpose and intent. *See id.* at 816; *see also* TEX. PROP. CODE ANN. § 202.003 (West 2014).

[17] **[18]** **[19]** We also agree with *Munson* that the term "residence" "generally requires both physical presence and an intention to remain." *Munson*, 948 S.W.2d at 816. Thus, "[i]f a

person comes to a place temporarily, without any intention of making that place his or her home, that place is not considered the person's residence." *Id.* at 817. Instead, those persons are using a home for transient purposes. *Id.* And, as in *Munson*, we draw a distinction between "residential" purposes and "transient" purposes. *See id.* at 816–17. One leasing his home to be used for transient purposes is not complying with the restrictive covenant that it be used *solely* for residential purposes. *See also Benard v. Humble*, 990 S.W.2d 929, 931–32 (Tex. App.—Beaumont 1999, pet. denied) (holding that homeowner's short term rental of home violated deed restriction that home could be used only for "single-family residence purposes").

[20] Here, the record is clear that Tarr, through Linda's Hill Country Home LLC, leased his home to be used for transient purposes. The leasing agreement between Linda's Hill Country Home and its "guests" discusses a "check-in" time of 4:00 p.m. and a "check-out" time of 11:00 a.m. The agreement requires "a two-night minimum stay" and states that a "two-night rate" will be charged to guests who leave early. The agreement provides for a full refund if a cancellation is made more than thirty days prior to arrival, but does not provide for any refund if a cancellation is made less than thirty days. The leasing ***731** agreement is not consistent with a renter who has the intent to remain at the home; the agreement thus shows that the home is being used for transient purposes rather than residential purposes. Furthermore, the record shows that Tarr paid hotel state and municipal hotel taxes. We therefore find the trial court did not err in granting summary judgment in favor of the Association and ordering that Tarr take nothing on his claims.

We recognize that our sister court in Austin has found no violation of a restrictive covenant under similar circumstances. In *Zgabay v. NBRC Property Owners Association,* No. 03–14–00660–CV, 2015 WL 5097116, at *3 (Tex. App.—Austin Aug. 28, 2015, pet. denied) (mem. op.), the Austin Court of Appeals determined that the covenant restricting homes to be used "for single family residential purposes" was ambiguous. The court thus did not apply the requirement in section 202.003(a) of the Texas Property Code that a restrictive covenant be liberally construed to give effect to its purpose and intent. Instead, by determining the language to be ambiguous, the Austin Court of Appeals "resolve[d] the ambiguity against the Association and in favor of the [homeowner's] free and unrestricted use of their property." *Id.* It therefore held that the trial court erred in granting summary judgment in favor of the homeowners' association. *Id.* We respectfully disagree with the Austin Court of Appeals and do not find its reasoning persuasive.

INJUNCTIVE RELIEF

In its order granting the Association's motion for summary judgment and denying Tarr's partial motion for summary judgment, the trial court granted injunctive relief to the Association. Specifically, the trial court ordered the following relief:

> It is therefore ORDERED that Plaintiff immediately cease operating a business on his residential lot. This applies to Plaintiff, or his tenants, assigns, heirs or successors.
>
> It is further ORDERED that [neither] Plaintiff, nor his tenants, assigns, heirs or successors, shall allow or cause the Property to be rented, sub-rented, leased or subleased for short-term rentals to multi-family parties.
>
> It is further ORDERED that neither Plaintiff, nor his tenants, assigns, heirs or successors, shall allow or cause the Property to be rented, sub-rented, leased or subleased to any person or the public for temporary or transient purposes.

[21] Tarr complains that the trial court erred in granting such injunctive relief because the Association never made an affirmative claim for injunctive relief. The Association merely filed a general denial and a claim for attorney's fees in defending the declaratory judgment action. We agree with Tarr.

[22] **[23]** "An applicant for injunctive relief must demonstrate (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of irreparable injury; and (4) the absence of an adequate remedy at law." *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 384 (Tex. App.—Dallas 2009, no pet.). "Persons seeking the extraordinary remedy of injunction must be specific in pleading the relief sought, and courts are without authority to grant relief beyond that so specified." *Id.* Without a pleading to support injunctive relief, the trial court erred in granting such relief in its order. [1]

1 We note that Tarr also claims that the trial court "found violations of the deed restrictions even though the HOA never pled breach of restrictive covenant or pursued it at summary judgment." We disagree that the trial court in its summary judgment order and subsequent final order found a breach of restrictive covenant. Instead, the trial court in its summary judgment gave reasons for its decision to award summary judgment and render a take-nothing judgment against Tarr.

*732 CONCLUSION

Because the record shows that Tarr was using his home for transient purposes and not solely residential purposes in violation of the restrictive covenant, the trial court correctly granted summary judgment in favor of the Association and rendered a take-nothing judgment against Tarr. However, because the Association never pled for injunctive relief, the trial court erred in granting such relief. Therefore, the trial court's judgment is modified to delete those parts of the judgment that grant injunctive relief, and the judgment is affirmed as modified.

APPENDIX TAB D

Vernon's Texas Statutes and Codes Annotated
Property Code (Refs & Annos)
Title 11. Restrictive Covenants (Refs & Annos)
Chapter 202. Construction and Enforcement of Restrictive Covenants

V.T.C.A., Property Code § 202.003

§ 202.003. Construction of Restrictive Covenants

Currentness

(a) A restrictive covenant shall be liberally construed to give effect to its purposes and intent.

(b) In this subsection, "family home" is a residential home that meets the definition of and requirements applicable to a family home under the Community Homes for Disabled Persons Location Act (Article 1011n, Vernon's Texas Civil Statutes). [1] A dedicatory instrument or restrictive covenant may not be construed to prevent the use of property as a family home. However, any restrictive covenant that applies to property used as a family home shall be liberally construed to give effect to its purposes and intent except to the extent that the construction would restrict the use as a family home.

Credits
Added by Acts 1987, 70th Leg., ch. 712, § 1, eff. June 18, 1987.

Footnotes
1 Repealed; see, now, V.T.C.A., Human Resources Code § 123.001 et seq.

V. T. C. A., Property Code § 202.003, TX PROPERTY § 202.003
Current through the end of the 2015 Regular Session of the 84th Legislature

End of Document

Appendix Tab E

AUG-24-79 147162 LS — I 9.00

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DEED

THE STATE OF TEXAS ‖

COUNTY OF BEXAR ‖

TIMBERWOOD DEVELOPMENT COMPANY, herein called declarant, is the owner in fee simple of certain real property located in Bexar County, Texas, and, known by official plat designation as TIMBERWOOD PARK, UNIT III, a Subdivision, pursuant to a plat recorded in the Plat Records of Bexar County, Texas, in Volume 8700 Pages 32-37 for the purpose of enhancing and protecting the value and usefulness of the lots or tracts constituting such Subdivision. Declarant hereby declares that all the real property described in said Plat, and each part thereof, should be held, sold and conveyed only subject to the following easements, covenants, conditions, and restrictions, which shall constitute and covenant running with the land and shall be binding on all parties having any right, title or interest in the above described property, or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each owner thereof:

1. All tracts shall be used solely for residential purposes, except tracts designated on the above mentioned plat for business purposes, provided, however, no business shall be conducted on any of these tracts which is noxious or harmful by reason of odor, dust, smoke, gas fumes, noise or vibration, and provided further that the Seller expressly reserves the right until January 1, 1983 to vary the use of any property notwithstanding the restrictions embodied in this contract, should Seller in its sole judgment deem it in the best interest of the property to grant such variances. The granting of any such variance shall be specifically stated in both the contract of sale and in the Seller's deed conveying said tract or tracts.

2. Tracts designated as business may be used either for residential or business purposes, provided, however, that if used for a business, the nature and purpose of the business use shall first be approved in writing by Seller, its successors, assigns and designees. No tract may be subdivided unless written approval is given by the seller, its assignees, successors or designees.

3. No building, other than a single family residence containing not less than 1,750 square feet, exclusive of open porches, breezeways, carports and garages, and having not less than 75% of its exterior ground floor walls constructed of masonry, i.e., brick, rock, concrete, or concrete products shall be erected or constructed on any residential tract in Timberwood Park Unit III and no garage may be erected except simultaneously with or subsequent to erection of residence. No less than a 300 lb. per square asphalt or fiberglass shingle shall be used in any construction in Timberwood Park Unit III. All other types of roofing shall be approved in writing by the Seller prior to construction. All buildings must be completed not later than six (6) months after laying foundations and no structures or house trailers of any kind may be moved on to the property. Servants quarters and guest houses may be constructed to the rear of the permanent residence. All buildings must be completely enclosed from ground level to the lower portion of outside walls so as to maintain a neat appearance and remove posts or piers from outside view.

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* RETURN TO: TIMBERWOOD DEVELOPMENT COMPANY, 15315 San Pedro, San Antonio, Texas 78232

Tarr MSJ Exhibit A-1

4. No improvements shall be erected or constructed in Timberwood Park Unit III, nearer than fifty (50) feet to the front property line, except lots 4 through 27, Block 15, which have a building setback line of seventy (70) feet; nor nearer than five (5) feet to the side property line except that in case of corner tracts no improvements shall be erected or constructed within ten (10) feet of the side property line adjacent to the streets. No materials of any kind shall be placed or stored on the property unless construction of a permanent residence has been commenced and is underway. No used material shall be stored on the property or used in any construction. In the event that materials of any kind are placed on the property which are, in the opinion of the Seller, in violation of the above stipulation and agreement, Seller may notify Purchaser by mail of such violation and if the violation is not corrected and subject material is not removed within ten (10) days after mailing such notice, Purchaser agrees that Seller may remove said material from the property, dispose of said material and charge Purchaser with removal costs, the exercise of which shall leave Seller free of any liability to Purchaser.

5. No building or structure, or fences shall be erected or constructed on any tract until the building plans, specifications, plot plans, and external design have first been approved in writing by the Seller, or by such nominee or nominees as it may designate in writing.

6. No advertising or "For Sale" signs shall be erected in Timberwood Park Unit III without written approval of Seller. Shooting of fire arms or hunting for birds or wild game of any kind on any tract is strictly prohibited.

7. No building or structure shall be occupied or used until the exterior thereof is completely finished in accordance with Paragraph 3 above and any structure or part thereof constructed of lumber shall be finished with not less than two coats of paint. No outside toilet shall be installed or maintained on any premises and all plumbing shall be connected with a sanitary sewer or septic tank approved by the State and Local Department of Health. Before any work is done pertaining to the location of utilities, buildings, etc., approval of said location must be first obtained from the Seller and the local Department of Health. No removal of trees or excavation of any other materials other than for landscaping, construction of buildings, driveways, etc., will be permitted without the written permission of Seller. All driveways must be constructed of concrete or asphalt substance, and must be completed simultaneously with the completion of the residence.

8. An assessment of $_____ annually per tract owner (which may be paid simi-annually or annually), shall run against each tract in said property for the use and maintenance of parks and operating costs according to rules and regulations of Seller. The decision of the Seller, its nominee or cosignee with respect to the use and expenditure of such funds shall be conclusive and the Purchaser shall have no right to dictate how such funds shall be used. Such assessment shall be and is hereby secured by a lien on each tract respectively, and shall be payable to the Seller in San Antonio, Texas, on the 1st day of June of each year, commencing June 1, _____, or to such other persons as Seller may designate by instrument filed of record in the Office of the County Clerk of Bexar County, Texas. In cases where one owner owns more than one (1) tract there will be only one(1) assessment for such owner. Provided, however, that if such an owner should sell one or more of his tracts to a party who theretofore did not own property, then said tract or tracts so transferred shall thereafter be subject to the lien provided herein. Seller shall have the option of increasing said assessment on an annual basis but in no case should assessment increase by more than 10% in any one year.

9. No noxious, offensive, unlawful or immoral use shall be made of the premises.

10. No livestock or wild animals of any kind shall be raised, bred or kept on any tract. Dogs, cats, or other household pets may be kept provided that they are not kept, bred, or maintained for any commercial purpose. No kennels may be kept or maintained on any tract.

11. All covenants and restrictions shall be binding upon the Purchaser or his successors, heirs or assigns. Said covenants and restrictions are for the benefit of the entire Subdivision.

12. The Seller reserves to itself, its successors and assigns, an easement or right-of-way over a five (5) foot strip along the side, front and rear boundry lines of the tract or tracts hereby conveyed, for the purpose of installation or maintenance of public utilities, including but not limited to gas, water, electricity, telephone, drainage and sewage and any appurtenance to the supply lines thereof, including the right to remove and/or trim trees, shrubs or plants. This reservation is for the purpose of providing for the practical installation of such utilities as and when any public or private authority or utility company may desire to serve said tracts with no obligation to Seller to supply such services. Should a utility pipe line be installed in the rear property easement as herein reserved, Purchaser agrees to install a gate in any fence that shall be constructed on such easement for utility company access to such pipe line.

13. All tracts as subject to easements, liens, and restrictions of record and are subject to any applicable zoning rules and regulations.

14. This contract may not be assigned or recorded without the written consent of Seller. In the event this agreement is assigned, a transfer fee of $25.00 will be charged by Seller.

15. That an assessment for the purpose of bringing water to each tract of $8.00 per lineal foot of frontage along the front property line, with a minimum charge of $795.00, a maximum charge of $1,500.00 on any one tract, shall run against each tract and part thereof in said property. Such assessment shall be and is hereby secured by a lien on each tract respectively; and when Seller, its successors or assigns, shall construct a water main in the street and/or easement running by said tract and water is made available to same, said assessment aforesaid shall become due and payable to Seller, its successors or assigns, in San Antonio, Texas, at the time the water supply is made available to said property. Said assessment may be arranged on a satisfactory monthly payment basis. Should said assessment not be paid when due as specified above, the unpaid amount shall be charged interest at the rate of eight percent (8%) per annum. In the event the Purchaser shall desire water service and has paid his water assessment, Seller, its successors or assigns, shall furnish water service within ninety (90) days of payment or upon delivery deed, whichever is the earliest date. It is agreed by and between Seller and Purchaser that Purchaser will not hold Seller or water utility responsible for any acts of God, including such services and supply as may be installed.

16. No tract shall be used or maintained for a dumping ground for rubbish. Trash, garbage or other waste shall not be kept except in sanitary containers. All incinerators or other equipment for the storage or disposal of such material shall be kept in a clean and sanitary condition. No junk, wrecking or auto storage yards shall be located on any tract.

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17. The foregoing covenants are made and adopted to run with the land and shall be binding on the undersigned and all parties or persons claiming through and under it, until January 1, 1998, at which time said covenants shall be automatically extended for successive periods of ten years, unless an instrument, signed by a majority of the then owners of the tracts in Timberwood Park has been recorded, agreeing to change said covenants, in whole or in part.

18. Invalidation of any of these covenants or restrictions by judgment of any Court shall in no wise affect any of the other provisions which shall remain in full force and effect.

EXECUTED this 24 day of July, 1979, at San Antonio, Bexar County, Texas.

TIMBERWOOD DEVELOPMENT COMPANY

BY _____
G.G. GALE, JR., General Partner

THE STATE OF TEXAS §

COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared G.G. Gale, Jr., General Partner of TIMBERWOOD DEVELOPMENT COMPANY, known to me to be the person whose name is subscribed to the foregoing instrument, and he acknowlwdged to me that he executed the same for the purposes and consideration therein expressed, in the capacity stated therein, and as the act and deed of said Corporation.

GIVEN UNDER my hand and seal of office this 24th day of July, 1979.

Jodie Black
Notary Public, Bexar County, Texas

JODIE BLACK
Notary Public, Bexar County, Texas
My Commission Expires March 14, 1980

NOTARY PUBLIC COUNTY OF BEXAR, TEXAS

STATE OF TEXAS }
COUNTY OF BEXAR }
I hereby certify that this instrument was FILED in File Number Sequence on the date and at the time stamped hereon by me; and was duly RECORDED, in the Official Public Records of Real Property of Bexar County, Texas on

AUG 24 1979

COUNTY CLERK, BEXAR COUNTY, TEXAS

FILED IN MY OFFICE
ROBERT D. GREEN
COUNTY CLERK BEXAR CO.

1979 AUG 24 AM 10 52

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Tarr MSJ Exhibit A-1

APPENDIX TAB F

2017 WL 2471098
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,
Fort Worth.

William T. GARRETT and Lanetta M. Garrett, Appellants
v.
Georgia Kaye SYMPSON and Clifford A. Hall, Sr., Appellees

NO. 02–16–00437–CV
|
DELIVERED: June 8, 2017

FROM THE 355TH DISTRICT COURT OF HOOD COUNTY, TRIAL COURT NO. C2016184. HON. RALPH H. WALTON, JR., TRIAL COURT JUDGE

Attorneys and Law Firms

Michael Alfred, Molly Cowan, Hallett & Perrin, P.C., Dallas, TX, for Appellant.

Janna Clarke, Fort Worth, TX, for Appellee.

PANEL: WALKER, KERR, and PITTMAN, JJ.

MEMORANDUM OPINION [1]

1 *See* Tex. R. App. P. 47.4.

SUE WALKER, JUSTICE

I. INTRODUCTION

***1** This is an interlocutory appeal from a temporary injunction order prohibiting Appellants William T. Garrett and Lanetta M. Garrett from using their lake house for "commercial/business purposes," from renting or leasing their lake house to multiple individuals, and from renting their lake house to any person for "temporary or transient purposes." The sole issue

we address is whether short-term vacation rentals violate restrictive covenants that require the lots to be used for "single family residence purposes" and prohibit commercial use of the lots. Because the restrictive covenants at issue are ambiguous and because we are required to resolve any ambiguity against Appellees Georgia Kaye Sympson and Clifford A. Hall Sr. and in favor of the Garretts' free and unrestricted use of their property, we will reverse the trial court's order granting the temporary injunction and we will order the temporary injunction dissolved.

II. FACTUAL AND PROCEDURAL BACKGROUND

In December 2015, the Garretts purchased the lake house located at 405 Peninsula Court in the Scenic View Estates in Granbury, Texas ("the Property"). The Property is governed by deed restrictions ("the Restrictions"), which require the Property to be used for "single family residence purposes" and prohibit the Property from being used for commercial purposes. The Restrictions, however, provide that for-rent "signs not exceeding five (5) square feet in size" may be posted.

In February 2016, the Garretts began advertising and renting the Property through the website VRBO. As of November 4, 2016,[2] the Garretts had rented the Property for approximately 100 nights to various groups of individuals.[3] The Garretts' practice is to rent the entire house to one individual who is at least twenty-five years old, and that individual is allowed to bring other individuals to stay overnight at the Property. The Garretts also require the individual who rents the Property to explain his or her planned use of the Property; the Garretts turned down rental requests that they "just didn't feel like fit the [P]roperty as well as the neighborhood." The Garretts expected to earn $50,000 in rental income from the Property during the first twelve months it was listed on VRBO and up to $100,000 in rental income from the Property during the following twelve-month period.[4]

2 This is the date the trial court conducted the temporary-injunction hearing.

3 The reviews from the VRBO website, which were admitted into evidence at the temporary-injunction hearing, mention that guests used the "tremendous eating, game playing[,] and conversation areas" and the "delightful bed & bath arrangements."

4 At the time of the temporary-injunction hearing, the Property was booked through October 2017.

***2** Approximately seven months after the Garretts started renting the Property on VRBO, Appellees, who own nearby property, filed suit for a declaratory judgment and sought a temporary and permanent injunction based on the following Restrictions:

SECTION II. USE OF LAND:

> (a). No lot or plot shall ever be used for other than single family residence purposes. No dwelling house located there-on shall ever be used for any other than single family residence purposes, no[r] shall any outbuilding or structure located thereon be used in any manner other than incidental to such family residence purposes. The erection and/or maintenance and/or use of any lot or plot for other purposes including but not limited to commercial or professional purposes is hereby expressly prohibited.
>
> ....
>
> SECTION VIII. MISCELLANEOUS:
>
> ....
>
> (d) No noxious or offensive trade or activity shall be carried on upon any lot or plot, nor shall anything be done or placed thereon, which may be or become an annoyance or nuisance to the neighborhood.

Appellees challenged the short-term rentals of the Property because they "believe personally that one year should be the minimum period of time for leasing a property."

The Garretts answered and asserted the affirmative defenses of unclean hands, laches, and waiver. The Garretts also filed a brief in opposition to Appellees' application for temporary injunction, arguing that the Restrictions allow the Property to be rented without limiting or addressing the duration of such rentals[5] and that rental of the Property was neither a commercial purpose nor could it be considered a noxious or offensive trade or activity under the Restrictions.

5 Section VIII listing the miscellaneous Restrictions includes the following: "(f) The construction or maintenance of billboards, poster boards[,] or advertising structures of any kind on any part of any lot or plot is prohibited, except that signs not exceeding five (5) square feet in size advertising property shown on said plat for sale or rental, are permitted[.]"

The trial court held a hearing on Appellees' application for temporary injunction and heard testimony from Mr. Garrett and both Appellees. The trial court granted Appellees' application for temporary injunction and ordered the Garretts to immediately cease and desist from the following: using the Property for "commercial/business purposes"; renting, sub-renting, leasing, or subleasing the Property to multiple individuals, multiple families, and groups; and renting, sub-renting, leasing, or subleasing the Property to any person or the public for "temporary or transient purposes."[6] The temporary-injunction order further ordered Appellees to execute and file a $1,000 bond. The Garretts then perfected this interlocutory appeal.

6 The trial court's order did not specifically address the miscellaneous Restriction pertaining to a "noxious or offensive trade or activity," presumably because it enjoined the Garretts from renting the Property.

III. APPELLEES DID NOT ESTABLISH THAT THE RESTRICTIONS ARE ENFORCEABLE AS WRITTEN

In their first issue, the Garretts argue that the trial court erred by applying the Restrictions to enjoin them from renting the Property to guests on a short-term basis.

A. Standard of Review

While we review a trial court's grant of a temporary injunction for an abuse of discretion, *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (op. on reh'g), the temporary injunction's validity here rests upon the trial court's construction of the Restrictions, which we review de novo, *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000); *Bizios v. Town of Lakewood Vill.*, 453 S.W.3d 598, 600 (Tex. App.–Fort Worth 2014), *aff'd*, 493 S.W.3d 527 (Tex. 2016).

B. Law on Interpreting Restrictive Covenants

***3** When interpreting restrictive covenants, we apply the general rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). Our primary task is to determine the drafter's intent from the instrument's language. *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987). In ascertaining the drafter's intent, we must examine the covenant as a whole in light of the circumstances present when the covenant was made. *Pilarcik*, 966 S.W.2d at 478. Words used in a restrictive covenant may not be enlarged, extended, stretched, or changed by construction; words and phrases used in the covenant must be given their commonly accepted meaning. *Wilmoth*, 734 S.W.2d at 657–58; *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 308 (Tex. App.–Fort Worth 2001, no pet.).

If a restrictive covenant can be given definite legal meaning, it is unambiguous and should be construed liberally to effectuate its intent. *See* Tex. Prop. Code Ann. § 202.003(a) (West 2014); *Jennings v. Bindseil*, 258 S.W.3d 190, 195 (Tex. App.–Austin 2008, no pet.). However, when a restrictive covenant may reasonably be interpreted in more than one way, it is ambiguous, and we will resolve all doubts in favor of the free and unrestricted use of the property, strictly construing any ambiguity against the party seeking to enforce the restriction. *Wilmoth*, 734 S.W.2d at 657; *Dyegard Land P'ship*, 39 S.W.3d at 308–09. The

party seeking to enforce a restrictive covenant has the burden of showing that the restriction is valid and enforceable. *Gillebaard v. Bayview Acres Ass'n*, 263 S.W.3d 342, 347 (Tex. App.–Houston [1st Dist.] 2007, pet. denied).

C. The Restrictions Are Ambiguous [7]

7 Only a handful of Texas cases exist construing restrictive covenants similar to the one at issue to determine whether short-term rentals of property are allowed. Because the Garretts point out in their brief that a number of courts in other states have looked at this issue, we reference out-of-state cases in our analysis in addition to the Texas cases on point.

Here, the Restrictions provide that the Garretts may use the Property solely for "single family residence purposes." The phrase "single family residence purposes" is not defined in the Restrictions, nor does the phrase "single family residence purposes" have a commonly accepted meaning. The Restrictions do, however, reflect that the drafters contemplated the leasing of homes because the Restrictions permit signs advertising the Property for rent. The Restrictions do not state a minimum permissible duration for the leasing of homes but do set a limit of six months for utilizing a garage or outbuilding as a dwelling while the construction of the main dwelling is proceeding. Moreover, despite allowing the Property to be rented, the Restrictions prohibit the Property from being used for commercial purposes without specifying what activities constitute commercial purposes.

Under these circumstances, we conclude that the phrase "residence purposes" [8] is ambiguous in two respects. First, "residence purposes" is ambiguous as to whether "residence purposes" is viewed only in contradistinction to business or commercial purposes; and, if not so limited, it is ambiguous both as to whether "residence purposes" requires an intention to be physically present in a home for more than a transient stay and as to whether the focus of the inquiry is on the owner's use of the Property or the renter's use. *See Scott v. Walker*, 645 S.E.2d 278, 283 (Va. 2007). Second, if the phrase "residence purposes" carries with it a duration-of-use component, it is ambiguous as to when a rental of the Property moves from short-term to long-term. *Id.* Because we conclude that the Restriction requiring the Property to be used for "single family residence purposes" is ambiguous, we must strictly construe the ambiguity against Appellees and resolve all doubts in favor of the free-and-unrestricted use of the Property. *See Wilmoth*, 734 S.W.2d at 657; *Zgabay v. NBRC Prop. Owners Ass'n*, No. 03–14–00660–CV, 2015 WL 5097116, at *3 (Tex. App.–Austin Aug. 28, 2015, pet. denied) (mem. op.); *Dyegard Land P'ship*, 39 S.W.3d at 308–09.

8 Because Appellees specifically state that they do not object to the parties to whom the Property is rented, we focus our analysis solely on the "residence purposes" portion of the Restriction.

D. Appellees' Contentions on Appeal

1. Whether Section 202.003(a) Applies

***4** Because we hold that the Restrictions are ambiguous, we are not required to liberally construe the Restrictions to effectuate their intent, as set forth in Texas Property Code section 202.003(a) and as argued by Appellees. *See Zgabay*, 2015 WL 5097116, at *3; *see also Wilmoth*, 734 S.W.2d at 657 (stating that restrictive covenants will not be enforced if they are not clearly worded). Nor are we bound by the decisions that Appellees rely on from the San Antonio and Beaumont courts of appeals, which treated the restrictive covenants before them as unambiguous and applied section 202.003(a) in construing the restrictive covenants. *See Tarr v. Timberwood Park Owners Ass'n, Inc.*, 510 S.W.3d 725, 729–30 (Tex. App.–San Antonio 2016, pet. filed); *Benard v. Humble*, 990 S.W.2d 929, 931 (Tex. App.–Beaumont 1999, pet. denied); *Munson v. Milton*, 948 S.W.2d 813, 815–17 (Tex. App.–San Antonio 1997, pet. denied).

2. Whether Short–Term Rentals Constitute Transient Use and Commercial Purposes Rather than "Residence Purposes"

Appellees argue that short-term rentals of the Property violate both the Restriction requiring the Property to be used for "residence purposes" and the Restriction prohibiting using the Property for commercial purposes. Appellees first argue that, based on the United States Supreme Court's two-part definition of "residence" that requires both "physical presence and an intention to remain," a renter must intend to make the Property his residence; otherwise, the renter's use of the Property as his temporary dwelling constitutes only a transient use. *See Martinez v. Bynum*, 461 U.S. 321, 330, 103 S. Ct. 1838, 1843–44 (1983). Although Appellees invite us to utilize the *Martinez* two-part definition of "residence," we decline to do so because the Restrictions here do not limit the Property's use to merely a residence but rather to "residence *purposes*." [Emphasis added.] Our holding above—that "residence purposes" is ambiguous when construed as a whole with the Restriction allowing the Property to be rented for an unspecified duration—requires that we construe the ambiguity against Appellees and in favor of allowing the Garretts to use the Property for short-term rentals. *See Wilmoth*, 734 S.W.2d at 657; *Zgabay*, 2015 WL 5097116, at *3; *Dyegard Land P'ship*, 39 S.W.3d at 308–09.

Appellees also argue that "[a] transient rental is a commercial use and is a violation of the ... Restrictions" and contend, without citing any authority, that "[t]he marketing and booking through the VRBO service is a clear indication of the commercial nature of the

Appellants' enterprise." Essentially, Appellees argue that they believe rentals of the Property for a minimum of one year are permissible under the Restrictions as long as a renter uses the Property as a permanent residence and evinces an intent to stay, but advertising and renting the Property through VRBO for a shorter period of time constitutes transient rentals that violate the Restrictions' prohibition on using the Property for "commercial purposes." [9] Other courts that have looked at this issue have stated that if a vacation renter uses a home "for the purposes of eating, sleeping, and other residential purposes," as was done in the present case, "this use is residential, not commercial, no matter how short the rental duration." *See Wilkinson v. Chiwawa Cmtys. Ass'n*, 327 P.3d 614, 620 (Wash. 2014); *see also Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003). Moreover, an owner's receipt of rental income from either short- or long-term rentals in no way detracts from or changes the residential characteristics of the use by the tenant. *Wilkinson*, 327 P.3d at 620; *see also Slaby v. Mountain River Estates Residential Ass'n*, 100 So.3d 569, 580 (Ala. Civ. App. 2012) (on reh'g) ("When the Slabys rent their cabin, they no doubt realize some pecuniary gain, but neither that financial benefit nor advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial"). The Garretts' short-term rentals of the Property thus do not violate the Restriction prohibiting commercial use. *See Slaby*, 100 So.3d at 582 (holding short-term vacation rentals are not barred by commercial-use prohibition in covenants); *Pinehaven Planning Bd.*, 70 P.3d at 668 (same); *Wilkinson*, 327 P.3d at 621 (same).

9 Within their argument, Appellees rely on *Wein v. Jenkins*, No. 03–04–00568–CV, 2005 WL 2170354, at *1–3 (Tex. App.–Austin Sept. 9, 2005, no pet.) (mem. op.). That case, however, is distinguishable on its facts; the deed restriction at issue prohibited lots from be used "for anything other than single-family, *private* residential purposes," and the property was being used as a commercial bed and breakfast. *Id.* at *1 (emphasis added).

3. Whether *Zgabay* Is Distinguishable

***5** Appellees further assert that the *Zgabay* opinion from the Austin Court of Appeals, which we rely on, is "completely distinguishable from the instant case" because "[t]here, the determination was what a 'single family' was." Contrary to Appellees' assertions, the court in *Zgabay* looked at the same issue presented here—whether restrictive covenants can be enforced if they allow a property to be leased but provide no term of duration—and construed a restrictive covenant worded similar to the one here. 2015 WL 5097116, at *1. The *Zgabay* court held that the restrictive covenant—which restricted the property's use to "single family residential purposes"—was ambiguous because the drafters of the restrictive covenants recognized and permitted the leasing of homes via a restriction on the size of rental signs, recognized and disallowed most temporary residencies in the context of temporary structures, and did not define "single family residential purposes" to exclude temporary or

transitory use of permanent homes as dwellings. *Id.* at *3. *Zgabay* is thus squarely on point and supports our holding.

E. Appellees Did Not Meet Their Burden

Here, the burden of proof was on Appellees to show that the Restrictions are enforceable as written. *See Gillebaard*, 263 S.W.3d at 347. Appellees, however, did not meet their burden because the Restrictions are ambiguous. Accordingly, the Restrictions must be interpreted in favor of the Garretts' free and unrestricted use of the Property, thus allowing the Property to be used for short-term rentals. *See Wilmoth*, 734 S.W.2d at 657; *Zgabay*, 2015 WL 5097116, at *3; *Dyegard Land P'ship*, 39 S.W.3d at 308–09. Accordingly, we hold that the trial court abused its discretion by granting Appellees' application for temporary injunction, [10] and we sustain the Garretts' first issue.

10 Our holding does not prohibit residential communities from proscribing short-term rentals; we hold only that the Restrictions at issue did not do so.

IV. CONCLUSION

Having sustained the Garretts' first issue, which is dispositive of this appeal, we reverse the trial court's order granting the temporary injunction and we order the temporary injunction dissolved. [11]

11 In their second issue, the Garretts argue that the trial court abused its discretion by finding "that (a) the Garretts breached the restrictive covenants, and/or (b) Plaintiffs were not barred from obtaining a temporary injunction based on the defenses of unclean hands, delay, and/or waiver." In their third issue, the Garretts challenge the adequacy of the injunction bond. Having sustained the Garretts' first issue and reversed the order granting the temporary injunction, we need not address the Garretts' second and third issues. *See* Tex. R. App. P. 47.1; *Mussina v. Morton*, 657 S.W.2d 871, 873 (Tex. App.–Houston [1st Dist.] 1983, no writ) (refusing to consider adequacy of injunction bond after holding that trial court abused its discretion by granting temporary injunction).

All Citations

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