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

PETITION FOR REVIEW

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December 29, 2016

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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 property owner who rents out his second home for short terms brought suit against his HOA for a declaration that the century-old deed restriction "residential purposes" does not impose a minimum duration on occupancy, including leasing. CR299.
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. The homeowner appealed. CR875.
Parties on appeal:	Petitioner: Kenneth H. Tarr Respondent: Timberwood Park Owners Association, Inc.
Court of Appeals:	Fourth Court at San Antonio
C of A Disposition:	Affirmed as Modified, take-nothing judgment entered. 2016 WL 6775591 (Tab B). Justice Angelini's opinion requires physical, permanent occupancy but did not address the "multi-family" issue. The permanent injunction was vacated because not pled. Neither party sought rehearing.

STATEMENT OF JURISDICTION

The Court has conflicts, statutory construction, and importance jurisdiction. Tex. Gov't Code § 22.001(a)(2), (3), (6); § 22.001(e).

ISSUES PRESENTED

1. At common law, deed restrictions have always been interpreted in favor of the free and unrestricted use of property. In 1987, the Legislature enacted Tex. Prop. Code § 202.003, requiring that a deed restriction be "liberally construed to give effect to its purposes and intent."

   Does the statutory rule apply where deed restrictions are silent on a subject and thus not clear?

   Even if the statutory rule applies, does it necessarily mean that what is not expressly allowed is prohibited?

2. Does the century-old deed restriction "residential purposes only" forbid short durations of residential occupancy, including short-term leasing, even though it is silent as to both leasing and duration?

STATEMENT OF FACTS

Most subdivision deed restrictions, like those here, require "solely residential purposes" and forbid "business purposes." Tab B, Op. at 4; Tab C (¶ 1). Those here are silent as to leasing.

A homeowner leases out his home for up to a week at a time to ordinary people who do what people ordinarily do in a home. CR434-35. The HOA board, seizing on the "residential purposes" language, unilaterally declared such rentals invalid, asserting that silence as to leasing or duration of use requires "permanent occupancy." Tab B at 2; CR391-93. No effort was made to amend the deed restrictions. CR388, 398. The homeowner then sued to declare that "residential purposes" does not impose a minimum duration on owner or tenant occupancy. CR8, 299.

At summary judgment, the trial court held that "residential purposes" clearly and unambiguously means that a home is not residential unless and until someone intends to remain there physically and permanently.[1] The Fourth Court affirmed. Tab B. Its decision generally accords with a 1999 Ninth Court decision. *See Benard v. Humble*, 990 S.W.2d 929, 932 (Tex. App.–Beaumont 1999, pet. denied) (court imposed 90-day lease term) (Tab F). The Fourth Court rejected a 2015 Third Court decision on the same

[1] The trial court also forbade "multi-family" use. The homeowner preserved procedural (waiver) and substantive arguments 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)

facts that refused to impose duration limits. *See Zgabay*[2] *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.).

SUMMARY OF ARGUMENT

Subdivisions control their own destinies through the democratic process of deed restriction amendment. Successive generations of homeowners can craft whatever restrictions fit their needs. Courts should be wary about short-circuiting that process.

At common law, conspicuous silence meant freedom. However, since 1987 the courts have struggled to reconcile the common-law rule with a statute requiring that a deed restriction be interpreted "liberally to effect its purposes and intent." The short-term rental cases have generated direct conflict over how the 1987 statute applies. If the Fourth and Ninth Courts are correct, Texas property owners have been violating their deed restrictions unwittingly for decades and now stand to be sued. If the Third Court is right, no harm is done: aggrieved persons remain free to sue for nuisances, and subdivisions remain free to amend their restrictions to regulate leasing in detail.

The century-old "residential purposes" restriction simply means that the person in possession cannot operate a business on the property. The fact that a property is leased does not render the

[2] Pronounced "sky-bye."

tenant's occupation non-residential: if that were so, all leasing would be prohibited. Nor can "residential purposes" be a long-term occupancy requirement: if that were so, no one could use their second homes as vacation homes or do post-sale rent-backs.

Nevertheless, the Fourth and Ninth Courts interpret silence as *clearly and unambiguously* requiring *mandatory*, *physical* permanent occupancy or an "intention to remain." Thus, a property is presumptively a business until it "qualifies" as a residence. These courts went astray in relying on unrelated laws requiring someone to "qualify" for a government-granted right or benefit. The legislature has imposed minimum residency periods in many contexts, but those public policy choices scattered throughout the statute book are irrelevant to the interpretation of private deed restrictions. No one has to "qualify" for the possessory interest in a home; they just have to pay for it.

The short-term rental cases force a resolution of which maxim the Texas courts will follow: *"what is not expressly forbidden is allowed,"* or *"what is not expressly allowed is forbidden."* The former puts detailed regulation in the hands of the owners through their power of amendment. The latter puts the courts in the business of writing private deed restrictions: each time the subdivision owners fail to govern themselves, the courts will have to fill in silences with external standards from unrelated statutes or with rules cut from whole cloth.

Short-term rentals have been occurring for decades. The demonization of STR's mistakenly focuses on duration rather than behavior. Nuisance and maximum-occupancy violations are readily remedied in ways other than the confiscation of property rights.

ARGUMENT

I. Deed Restrictions Are Long-Lived, Local Constitutions

Deed restrictions (restrictive covenants) are private agreements that restrict property uses. *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.). A restrictive covenant is "any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative." Tex. Prop. Code § 202.001(4).

Deed restrictions apply to land subdivided into housing developments -- i.e., subdivisions. Deed restrictions are the bundle of rights and obligations that each buyer must evaluate and price as part of a land deal. Every buyer has a choice of which among many subdivision deed restrictions to buy into. On closing a deal, the buyer becomes bound by particular deed restrictions until those restrictions are validly amended.

Deed restrictions are mini-constitutions that establish the smallest form of local government. *See generally* Gregory S. Cagle, *Texas Homeowners Association Law* §§ 1.4.1, 9.1 (2d. Ed. 2013). Some deed restrictions create mandatory homeowners' associations

that govern the subdivision and enforce the restrictions; some do not, leaving it up to individual owners to enforce deed restrictions. Either way, the owners control their shared destiny as a community through the mechanisms of enforcement and amendment contained in the deed restrictions.

Deed restrictions, being foundational and constitutional in nature, must evolve. Changes in society, such as racial integration, invalidate repugnant restrictions. Changes in mores, such as marital relations, alter norms and community standards. Changes in public policy, such as conservation, override bans on systems such as solar panels and water tanks. *See* Tex. Prop. Code § 202.007 *et seq*. Statutes regularly supersede existing restrictions or impose mandatory new requirements that require community action to update existing deed restrictions. *See*, *e.g.*, Tex. Prop. Code Ch. 209 (various statutory overrides, 2002-2015). Complacency by the owners results in ossified and outdated restrictions, creating ticking litigation bombs.

That is why the subdivision scheme allows the owners to respond collectively, amending and updating deed restrictions to state *clearly* what is prohibited. Most deed restrictions, like those at issue here, contain an express amendment clause allowing a majority or supermajority to change the restrictions. Tab C (¶ 17, CR415). The Property Code caps the required vote at 67% in HOA-governed subdivisions. *See* Tex. Prop. Code § 209.0041.

In the nature of things, the owners do not always keep their governing documents up to date. Disputes then get shoehorned into decades-old provisions. Instead of pursuing amendment, however, one side digs in based on ill-suited wording, and litigation ensues.

It is not supposed to happen that way. Litigation is a clumsy, incomplete way of amending deed restrictions. Owners acting collectively through the amendment process control the destinies of their subdivisions and can impose detailed new restrictions with the contemplated degree of consensus. The courts should not be writing restrictions since doing so usurps the role of the owners and the democratic process set out by the restriction framers and the legislature. *See* Tex. Prop. Code § 209.0041.

II. Texas Law has always favored Property Rights

Texas common law has always resolved any lack of clarity in deed restrictions to favor the rights of property owners, protecting owners from the unfair, surprise enforcement of unwritten rules:

> [C]ovenants restricting the free use of land are not favored by the courts . . . . 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).

The common-law rule applied uniquely to deed restrictions, as opposed to ordinary contracts where the somewhat different "rule against the drafter" is a last resort. *Cf. Smith v. Davis,* 453

S.W.2d 340, 344–45 (Tex. Civ. App. — Fort Worth 1970, writ ref'd n.r.e.). Since the drafter of decades-old deed restrictions is usually not available to testify, a court must determine original intent from context. *See, e.g.*, *Wilmoth*, 734 S.Wd.2d at 658. Conspicuous silences are not an occasion for confiscating property rights. *See State Farm v. Pan Am*, 437 S.W.2d 542, 545 (Tex. 1969) (conspicuous omission denotes intent to exclude).

In 1987, the legislature decreed that "[a] restrictive covenant shall be liberally construed to give effect to its purposes and intent." Tex. Prop. Code § 202.003. The courts cannot agree what that rule means or how it relates to the common-law rule.

- This Court has only noted in passing the common-law rule since § 202.003 was enacted. *See Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998).
- The Fourth and Ninth Courts hold that a "liberal" interpretation means the *opposite* of the common-law rule, such that a party challenging a property use always wins, or that silence equates to a prohibition. Tab B at 6; *see Benard*, 990 S.W.2d at 932. But since the statute itself focuses on the "purposes and intent" behind a given deed restriction, the overall intent could favor property rights in a given case. In a case like this one, where deed restrictions place no restrictions on leasing or duration of occupancy, property rights ought to be favored.

- The Third Court follows the rule that the 1987 statute does not apply if deed restrictions are silent concerning the conduct in question, since silence renders restrictions "at best" ambiguous. *See Zgabay*, 2015 WL 5097116, at *3. But since the Third Court was deciding the same "residential purposes" wording as the San Antonio and Beaumont courts, declaring the wording ambiguous still begs the question.

Other decisions do pirouettes. *See City of Pasadena v. Gennedy*, 125 S.W.3d 687, 694-95 (Tex. App. - Houston [1st Dist.] 2003, pet. denied) (surveying cases); *see, e.g.*, *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 309 (Tex. App. - Fort Worth 2001, no pet.) (statute does not trump the common law rule, but contested term had a clear meaning when restrictions "as a whole" were considered). The First Court in *Gennedy*, surveying cases as of 2003, urged this Court to step in. 125 S.W.3d at 694-95.

It is time for this Court to step in. The lower courts' struggles in various factual contexts with the statutory and common-law rules have come to a head with STR's, one of the most important property-rights issues of our time. More such cases are in the pipeline. *See*, *e.g.*, *McGrath v. Ridgepoint Rentals, LLC*, No. 09-16-00393-CV (Tex. App. -- Beaumont 2016) (at issue); *Boatner v. Reitz*, No. 03-16-00817-CV (Tex. App. -- Austin 2016) (briefing stage). Millions of Texans are left uncertain as to basic property

rights. That includes, by virtue of the reasoning of the Fourth Court, whether owners of second homes are allowed to use those properties as their own weekend or vacation homes, a right the panel opinion imperils by requiring permanent stays. And without question, seller leasebacks after a closing are now widely disallowed in the San Antonio and Beaumont districts since a departing owner by definition does not intend to remain permanently. A clear decision of this Court returning the regulation of leasing to the homeowners acting collectively is vital to preserving basic property rights.

III. The substantive conflict between this case and *Zgabay* is irreconcilable

The substantive issue is whether the oldest, most common deed restriction extant imposes duration-of-occupancy requirements through silence. *See, e.g.*, *Curlee v. Walker*, 112 Tex. 40, 42, 244 S.W. 497, 497 (Tex. 1922) (1909 instance of the deed restriction). Most deed restrictions set off "residential purposes" as the opposite of "business purposes," as those here do. Tab B at 4. Facially, "residential purposes" does not differentiate owner-occupancy from leasing occupancy, much less imply duration limits. It simply asks: *what is the person in possession doing on the land? 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).

Landlords convey their possessory rights for profit; they are in the *business* of providing *residential use*. That does not render leased homes businesses or else leasing would be forbidden everywhere. The HOA in this case conceded as much, recognizing that silence concerning leasing equates to freedom. CR389, 393-94; 421-23; 494-95.

The opposite of "residential" is "business" or "commercial," not "transient" or "temporary" as the Fourth Court held. Duration cannot logically be the determining factor whether a use is residential vs. business in character since any activity on a property can be long or short in duration. Merely staying at the property can be long or short, episodic or continuous. So can operating a lemonade stand, hair salon, distillery, or farmer's market. What renders one such use valid and the other invalid is the nature of the occupant's activity, not its duration. The Fourth and Ninth Courts, however, focused solely on duration as determining the character of the use. They never analyzed what the occupants are doing, such as eating, sleeping, loving, making merry, and watching TV.

The signal failure to consider the nature of an occupant's activity sent the Fourth and Ninth courts trolling for duration standards in the statute books, with each court landing in different spots. The Ninth Court, reviewing various statutes with conflicting residency requirements, finally imposed a minimum

lease duration of 90 days based on a divorce statute. *See*, *e.g.*, *Benard*, 990 S.W.2d at 931-32. The panel below barred "transient" or "temporary" occupation based on both venue rules and a statute regulating security devices for leased premises. Tab A at 6-7.[3]

The Fourth and Ninth Courts' disagreement over *which* statute to import into private deed restrictions is itself telling: there is no reasoned basis for picking and choosing amongst the many statutes that define "residential" in different policy contexts. Many statutes contain minimum residency periods, anything from zero to a year. *Compare, e.g.*, Tex. Educ. Code § 25.001(d), (f) (no minimum residency requirement for K-12 public schools) *and* Tex. Election Code § 11.001 (no minimum time for eligibility to vote) *with* Tex. Fam. Code § 6.301 (6 mos. in Texas plus 90 days in county to divorce) *and* Texas Educ. Code § 54.052(a) (one year to qualify for in-state college tuition rates). A statute specifically targeted at HOA's defines "residential purpose" expressly, with no reference to duration. *See* Tex. Prop. Code § 209.015(a)(2). The Hotel Tax, relied on by the Fourth as a basis for barring the very rentals being taxed to generate revenue, is based on 30-day stays. Tex. Tax Code Ch. 156 (amended in 2015 to add STR's). In the end, none of these statutes are relevant.

The upshot of the panel decision is that *what is not expressly*

[3] The Austin Court of Appeals had faulted the trial court in that case precisely for that same failure. *Zgabay*, 2015 WL 5097116, at *2, n. 3. If the courts are going to declare the existence of an unwritten duration restriction, they should at least tell property owners what it is.

allowed is forbidden. Citing the statutory rule of "liberal" construction, the panel concluded that "residential purposes" plainly and unambiguously requires a home to be physically and permanently occupied, thereby ruling out short-term leasing but necessarily roping in owner-occupancy as well. Extending its precedent in *Munson v. Milton*, 948 S.W.2d 813, 815 (Tex. App. – San Antonio 1997, pet. denied) (Tab G), the panel reasoned as follows:

> . . . [T]his Court emphasized [in *Munson*] that the "[Tex. Prop. Code § 92.152's requirement that leased dwellings have door locks] draws a distinction between a permanent residence and transient housing, which includes rooms at hotels, motels, inns and the like."
>
> 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."
>
> * * *
>
> [W]e apply section 202.003 of the Texas Property Code and liberally construe the restrictive covenant to give effect to its purpose and intent. We also agree with [*Munson*] that the term "residence" "generally requires both physical presence and an intention to remain." 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." Instead, those persons are using a home for transient purposes. And, as in *Munson*, we draw a distinction between "residential" purposes and "transient" purposes. 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.

(internal citations omitted).

The Fourth Court openly acknowledged its disagreement with the Third Court. Tab B at 8. The upshot of *Zgabay* is that *what is not expressly forbidden is allowed*. "Residential purposes" was held to be ambiguous as regards short-term leasing because it contains no express duration requirement. *Zgabay*, 2015 WL 5097116, at *3. That ambiguity rendered inapplicable the statutory rule of "liberal" construction. *Id.*; Tex. Prop. Code § 202.003. Therefore, "residential purposes" must be construed in the traditional common-law manner to favor property rights:

> . . . [T]he absence of a specific minimum duration for leasing *at best* renders the restrictive covenants ambiguous. Therefore, the requirement of section 202.003 that we liberally construe a restrictive covenant to effectuate its intent does not apply, *see* Tex. Prop. Code § 202.003, and instead, we must resolve the ambiguity against the Association and in favor of the Zgabays' free and unrestricted use of their property.

Zgabay, 2015 WL 5097116, at *3 (emphasis supplied). What is so important about the *Zgabay* result is that it emphatically *did no harm*: it handed a complicated issue back to the owners to address by amendment.

In summary, the Third Court *Zgabay* case reads silence as freedom from unwritten rules and arbitrary line-drawing by the courts. The Fourth Court *Tarr* and Ninth Court *Benard* cases read

silence as the courts' prerogative whether to bar an activity or not (leasing is allowed, but short-term use is not) and impose detailed regulation or not (90 days vs. "intent to remain"). With this split of authority and the uncertain duration standards, no Texas property owner outside of the Third appellate district can feel secure in renting out a home for a duration less than "permanently."[4] Owners of second homes cannot feel secure in using their own homes on weekends, or not using them at all. Sellers must move out at closing, with no possibility of a lease-back. According to the panel decision, someone has to "qualify" a home as residential by staying in it permanently, rendering many ordinary property owners in routine violation of deed restrictions by not staying in their own homes long enough. Only this Court can resolve whether "residential purposes only" shuts down the short-term rental market in Texas and requires physical, permanent occupancy.

[4] And even there, any sense of security is questionable. Undersigned counsel is defending other cases against homeowners in the Third District involving direct challenges to *Zgabay* on identical facts. *See, e.g.*, *Boatner v. Reitz*, No. 03-16-00817 (Tex. App. - Austin 2016).

IV. Deed Restriction Comparison Table

Zgabay (3rd Court)	*Tarr* (4th Court)	*Benard* (9th Court)
Deed restrictions require "single family residential purposes"	Deed restrictions require "solely residential purposes" as distinguished from "business purposes"; "single family residence" is a separate construction requirement.	Deed restrictions require "solely residential, camping or picnicing purposes" as distinguished from "business purposes"; "Motel, tourist courts, and trailer parks shall be deemed to be a business use."
Deed restrictions allow "for rent" signs	Deed restrictions do not mention leasing	Deed restrictions do not mention leasing

V. Importance

There were short-term rentals long before "google" was a verb and the internet globalized markets: summer in the Ozarks; weekends at the beach; family reunions at an aunt's best friend's second home in the country. Short-term property rental for residential purposes has been part of American life for decades.

What is new is *access to information*. Short-term rentals are a flashpoint of the sharing economy. Websites like HomeAway and VRBO make it possible to find rental houses anywhere in the world. All sorts of people seek different kinds of short-term housing for all sorts of reasons -- post-sale rent-backs for owners who cannot move out immediately upon closing; the families of servicemembers wishing to be near loved ones; families on vacation who need the amenities of a home for special needs;

extended families gathering to reminisce or convalesce; people supporting their friends getting cancer treatments in nearby hospitals; persons vetting neighborhoods to live in. The internet has democratized a rental market that has always existed but was difficult to navigate. Short-term rentals are not new, but their ubiquity is, and that is causing frictions as more people from more places come into more neighborhoods whose owners haven't updated their restrictions to regulate leasing in detail.

The problem people have with short-term rentals is not, in fact, duration; the problem is behavior. Any owner, guest, family member, or tenant can be a bad neighbor, no matter the duration of stay. Opponents of short-term rentals typically object to noise, nuisance, trash, parking, and maximum occupancy.[5] None of those hinge on the duration of stay, and all can be remedied with traditional enforcement tools without confiscating property rights. *See*, *e.g.*, *Crosstex N. Texas Pipeline, L.P. v. Gardiner*, No. 15-0049, 2016 WL 3483165 (Tex. 2016) (nuisance remedy). No owner should lease serially to people who behave badly, whether for days or months; no owner should party all the time or rev a Harley at 3:00 a.m.; no person in possession should turn a home into a dollar store or daycare center, whether for a day or a year. Those are problems, but they are not problems of duration, and they are remedied with injunctions and damages tied to the violations.

[5] Texas regulates maximum lease occupancy by statute. *See* Tex. Prop. Code § 92.010 (max. 3 persons per bedroom, cause of action, penalties, attorney's fees).

Even if the problem *were* duration, the answer still would not be court-imposed regulation, but deed restriction amendment. Subdivisions across the state are already amending their deed restrictions to address short-term rentals. The amendments sometimes moot mid-stream lawsuits just like this one. The amendment process gives the community the precise tools it needs for writing detailed rules that reflect community values. The process also ensures that buyers of real estate get fair notice of the recorded bundle of rights they are buying into.

Even more importantly, buyers are on notice of the amendment process itself and therefore must factor into their decision whether a given set of deed restrictions may be changed to regulate leasing. *See Couch v. Southern Methodist Univ.*, 10 S.W.2d 973, 974 (Tex. Comm'n App. 1928, judgm't adopted) (deed restrictions contain their own seeds of change); *Hanchett v. East Sunnyside Civic League*, 696 S.W.2d 613, 615 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (same, but rejecting effective destruction by majority vote). *Loving v. Clem*, 30 S.W.2d 590 (Tex. Civ. App. — Dallas 1930, writ ref'd) (buyer has no guarantee that restrictions will not be amended).[6] Though not widely appreciated, knowing what deed restrictions say today is no guarantee what they will say tomorrow. But at least what they say today ought to

[6] These cases suggest that a subdivision could not bar leasing altogether. The Texas Uniform Condominium Act requires a 100% owner vote to bar leasing. *See* Tex. Prop. Code § 82.067.

be clear enough for an owner to avoid violating them!

In a nutshell, the panel below short-circuited the democratic process that Mr. Tarr and all the other owners in his subdivision bought into. No one knows what Tarr's community would vote to do since there has been no vote. *Zgabay* preserved that democratic process by kicking leasing regulation back to the community of owners. This Court should take the matter up and likewise return that power to subdivision communities.

VI. Courts should not write deed restrictions

A court-imposed minimum duration on leasing raises knotty problems that are better dealt with through detailed amendment to the deed restrictions, not judicial fiat. For example:

- The family vacation-home LLC problem: Groups of persons who own a home through an LLC are all owners. Does a minimum duration of use apply to these fractional owners, gutting their right to enter into LLC company agreements designed to avoid intra-family possession disputes?
- The multiple-lessee possession problem: Several persons sign a 60-day lease with the owner. As among the lessees solely, the tenants decide to carve out exclusive occupancy periods (days or weeks at a time) even though in their collective lease with the owner, each has a full possessory interest and is responsible for the full rent. Will the courts now require all tenants to physically

occupy a dwelling for the entire duration of a lease?

- Temporary hardships: Property owners have all sorts of reasons for needing to lease out a home for a period of under 90 days -- military call-ups, hospital stays, vocational retraining programs. Are these presumptively invalid as a business use?
- The post-sale lease-back problem: It is routine for owners who sell their homes to do short lease-back periods to resolve normal post-sale move-out issues. Are such arrangements barred since they are plainly short-term leases where the lessee has no intent to remain permanently?

The courts should not be writing detailed deed restrictions to address issues like these. That's the purpose of the amendment process that the HOA board below subverted by fining Tarr and presuming to declare his leasing invalid based on nothing more than conspicuous silence. *Zgabay* got it right in deferring to the homeowners to enact their collective will through the power of amendment. This Court should back up the Third Court and uphold Texas property rights traditions.

PRAYER FOR RELIEF

The Court should grant review, reverse the court of appeals, and remand as to attorney's fees.

Respectfully submitted,
/s/ JPS
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CERTIFICATE OF SERVICE

I certify that on December 29, 2016, per T.R.A.P. 6.3(b), a true and correct copy of this brief was served by efiling on:

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/s/ *J. Patrick Sutton*
Attorney for Plaintiffs-Appellants

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 **4378** words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

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

No. 16-1005

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TIMBERWOOD PARK OWNERS ASSOCIATION, INC.,

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APPENDIX TO PETITION FOR REVIEW

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

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[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.

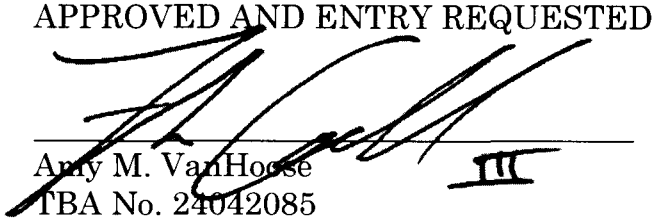
It is further, ORDERED that Defendant recover from Plaintiff reasonable and necessary attorney's fees to be determined at a later hearing.

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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ASSOCIATION, INC.

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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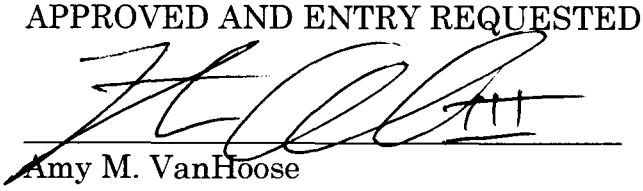
APPROVED AND ENTRY REQUESTED:



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APPENDIX TAB B

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

Fourth Court of Appeals
San Antonio, Texas

OPINION

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

Opinion by: Karen Angelini, Justice

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

Delivered and Filed: November 16, 2016

AFFIRMED AS MODIFIED

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 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

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).

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.).

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.*

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. *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 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.*

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).

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").

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 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.

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.

"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]

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.

Karen Angelini, Justice

[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.

APPENDIX TAB C

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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 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

Appendix Tab E

2015 WL 5097116
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,
Austin.

Craig Zgabay and Tammy Zgabay, Appellants
v.
NBRC Property Owners Association, Appellee

NO. 03–14–00660–CV
|
Filed: August 28, 2015

FROM THE DISTRICT COURT OF COMAL COUNTY, 433RD JUDICIAL DISTRICT, NO. C2014–0501C, HONORABLE DIB WALDRIP, JUDGE PRESIDING

Attorneys and Law Firms

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

Wade C. Crosnoe, Brian Douglas Hensley, Thompson Coe Cousins & Irons, LLP, Austin, TX, Tom L. Newton Junior, Allen, Stein & Dubrin, PC, San Antonio, TX, for Appellee.

Before Justices Puryear, Pemberton, and Bourland

MEMORANDUM OPINION

David Puryear, Justice

***1** Appellants Craig and Tammy Zgabay appeal from the trial court's order granting summary judgment in favor of appellee NBRC Property Owners Association, the homeowners association in the River Chase subdivision, and denying their motion for summary judgment. Because the restrictive covenants on which the Association relies allow for the leasing of a home but do not impose any term of duration, we reverse the trial court's

order in favor of the Association, render judgment in favor of the Zgabays, and remand the cause for consideration of attorney's fees.

Factual and Procedural Background

Properties in the subdivision are subject to a Declaration of Covenants, Conditions, and Restrictions (the "restrictive covenants"), which provide that properties in the subdivision are only to be used "for single family residential purposes." The Zgabays bought land in the subdivision in 2000, built a house on it, and lived there for a number of years. In 2014, they began to rent the house when they were not in occupancy, for terms of fewer than thirty days. They later moved to a different home, retaining their house in the subdivision as a rental property. At the time of trial, the house was rented under a one-year lease, and the Zgabays intend to continue advertising and renting the house for varying lengths of time, paying hotel and lodging taxes when the house is rented for fewer than thirty days. In 2014, the Association demanded that the Zgabays cease short-term and vacation rentals and online advertising of their property, asserting that such use was in violation of the restrictive covenants.

The Zgabays responded by filing suit seeking declaratory relief that the restrictive covenants do not prohibit short-term rentals or restrict rentals based on duration and that renting the house to an individual or single family for residential use is considered a "single family residential purpose" that is allowed under the restrictive covenants. The Association counterclaimed, seeking injunctive relief and statutory damages under the property code. [1] Both the Zgabays and the Association moved for traditional summary judgment, and the trial court granted summary judgment in favor of the Association, denying the Zgabays' motion.

1 A trial court "may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation." Tex. Prop.Code § 202.004(c).

Standard of Review

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. Tex.R. Civ. P. 166a(c); *Joe,* 145 S.W.3d at 156. 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).

***2** When interpreting restrictive covenants, we apply the general rules of contract construction. *Pilarcik v. Emmons,* 966 S.W.2d 474, 478 (Tex. 1998). We construe the covenants "as a whole in light of the circumstances at the time the parties entered into the agreement, giving effect to every sentence, clause, and word of a covenant, and avoiding constructions that would render parts of the covenant superfluous or inoperative." *Sharp v. deVarga,* No. 03–05–00550–CV, 2010 WL 45871, at *3 (Tex.App.–Austin Jan. 8, 2010, pet. denied) (mem.op.) (citing *Pilarcik,* 966 S.W.2d at 478; *Owens v. Ousey,* 241 S.W.3d 124, 129 (Tex.App.–Austin 2007, pet. denied)). In construing restrictive covenants, we seek to give effect to the parties' true intention, *Owens,* 241 S.W.3d at 129, and our focus is on "their objective intent, as it is reflected in the written contract," *Sharp,* 2010 WL 45871, at *3 (citing *Tien Tao Ass'n v. Kingsbridge Park Cmty. Ass'n,* 953 S.W.2d 525, 528 (Tex.App.–Houston [1st Dist.] 1997, no pet.); *Travis Heights Improvement Ass'n v. Small,* 662 S.W.2d 406, 410 (Tex.App.–Austin 1983, no writ)).

If a restrictive covenant can be given definite legal meaning, it is unambiguous and should be construed liberally to effectuate its intent.[2] *See* Tex. Prop.Code § 202.003; *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 v. Wilcox,* 734 S.W.2d 656, 657 (Tex. 1987); *Hicks v. Falcon Wood Prop. Owners Ass'n,* No. 03–09–00238–CV, 2010 WL 3271723, at *7 (Tex.App.–Austin Aug. 19, 2010, no pet.) (mem.op.); *Sharp,* 2010 WL 45871, at *3; *Jennings,* 258 S.W.3d at 195; *Dyegard Land P'ship v. Hoover,* 39 S.W.3d 300, 308–09 (Tex.App.–Fort Worth 2001, no pet.); *Pebble Beach Prop. Owners' Ass'n v. Sherer,* 2 S.W.3d 283, 288 (Tex.App.–San Antonio 1999, pet. denied). The party seeking to enforce a restrictive covenant has the burden of showing that the restriction is valid and enforceable. *Sharp,* 2010 WL 45871, at *3; *Gillebaard v. Bayview Acres Ass'n,* 263 S.W.3d 342, 347 (Tex.App.–Houston [1st Dist.] 2007, pet. denied).

2 Although neither the Association nor the Zgabays assert that the covenants are ambiguous, we are not bound by those conclusions. "Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered." *Coker v. Coker,* 650 S.W.2d 391, 394 (Tex. 1983).

Discussion

Under the restrictive covenants, the Zgabays' house may be used "for single family residential purposes." The Association asserts that short-term rental of a property is not single family residential use; the Zgabays assert that rental of the property by an individual or a family, regardless of the term of the lease, is a single family residential purpose.[3]

3 The trial court, in considering the parties' motions for summary judgment, determined that in using the term "residential," the restrictive covenants meant "to occupy a place over a substantial period" without explaining exactly what a "substantial period" would be, thus injecting ambiguity into its ruling.

The restrictive covenants do not define "single family residential purposes."[4] They do, however, permit signs advertising a property for sale or rent, subject to specific limitations. This informs the meaning of "single family residential use" in that we know that leasing of homes was contemplated by the drafters and is permissible under the covenants. As for whether the covenants state a minimum permissible duration for the leasing of homes, the covenants do not provide any minimum term for which a property may be leased but do address the use of a temporary structure such as a mobile home, a barn, or a garage as a residence, stating that such a structure may never be used as a residence except for up to six months while the permanent house is under construction. Therefore, it is clear that the drafters of the covenants considered and knew how to impose a duration on particular uses or types of structures.

4 Reference to common usage does not lead to a definitive answer of what was intended by the phrase "single family residential purposes." For example, *Merriam–Webster* defines "residential" as "used as a residence," "restricted to or occupied by residences"; "residence" is defined as "a building used as a home." *Merriam–Webster's Collegiate Dictionary* (11th ed.) (http://www.merriam-webster.com/dictionary/residential). *Webster's* defines "residential" as "used, serving, or designed as a residence" or "restricted to or occupied by residences," and defines "residence" as "the act or fact of abiding or dwelling in a place for some time" or "the place where one actually lives or has his home as distinguished from his technical domicile." *Webster's Third New Int'l Dictionary* 1931 (2002) (synonyms include "dwell," "sojourn," "lodge," "stay," and "put up"). *Black's* defines "residence" as "living in a given place for some time" or as a "house or other fixed abode; a dwelling," and notes that it usually "just means bodily presence as an inhabitant," whereas "domicile" usually "requires bodily presence plus an intention to make the place one's home." *Black's Law Dictionary* 1423 (9th ed. 2009).

***3** Looking at the restrictive covenants as a whole, we conclude: (1) that the leasing or renting of residences in the subdivision is permissible, (2) that the covenants themselves do not place any limit on the duration of the leasing of a residence, and (3) that the drafters were familiar with the concept of time limits with regard to uses that may be made of structures in the subdivision and did not impose any duration limits with regard to the leasing of homes. Under these circumstances, the absence of a specific minimum duration for leasing at best renders the restrictive covenants ambiguous. Therefore, the requirement of section 202.003 that we liberally construe a restrictive covenant to effectuate its intent does not apply, *see* Tex. Prop.Code § 202.003, and instead, we must resolve the ambiguity against the Association and in favor of the Zgabays' free and unrestricted use of their property. *See Wilmoth,* 734 S.W.2d at 657; *Hicks,* 2010 WL 3271723, at *7; *Sharp,* 2010 WL 45871, at *3; *Jennings,* 258 S.W.3d at 195; *Hoover,* 39 S.W.3d at 308–09.

The drafters of the restrictive covenants recognized and permitted the leasing of homes. They recognized and disallowed most temporary residencies in the context of temporary structures. They did not define "single family residential purposes" to exclude temporary or transitory use of permanent homes as dwellings.[5] Thus, the restrictive covenants are

ambiguous and should be interpreted in favor of the Zgabays. *See Hicks,* 2010 WL 3271723, at *7; *Sharp,* 2010 WL 45871, at *3; *Jennings,* 258 S.W.3d at 195; *Hoover,* 39 S.W.3d at 308–09; *Sherer,* 2 S.W.3d at 288. The trial court erred in granting summary judgment in favor of the Association.

5 In *Munson v. Milton,* the restrictions specifically barred the use of properties for business purposes, stating that tracts in the subdivision could be used 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." 948 S.W.2d 813, 815 (Tex.App.–San Antonio 1997, pet. denied). As observed by Justice Burgess in his dissent in *Benard v. Humble,* by specifying that use of a property as a motel or the like was a business use, the subdivision showed some intent to bar the short-term renting of properties. 990 S.W.2d 929, 932 (Tex.App.–Beaumont 1999, pet. denied) (Burgess, J., dissenting) (further observing that although covenants in *Benard* barred use of property for anything other than "single-family residential purposes," they contained no additional covenants to discern whether drafters intended to bar short-term rentals). The restrictions in this case do not include such an absolute bar. They merely prohibit structures other than dwellings "to be used for single family residential purposes" and go on to state that:

> No Activity, whether for profit or not, shall be conducted on any Tract which is not related to single family residential purposes, unless said activity meets the following criteria: (1) no additional exterior sign of activity is present, (b) it is the type of action that usually happens in a home, (c) no additional traffic, that would not be there normally, is created, and (d) nothing dangerous is present that should not be there.

That provision can be read as stating that a for-profit activity related to single family residential purposes may be conducted.

Conclusion

The restrictive covenants the Association sought to enforce against the Zgabays lack any unambiguous minimum duration for rentals. We therefore reverse the trial court's order granting summary judgment in favor of the Association, render judgment in favor of the Zgabays, dissolve the injunction imposed by the trial court, and remand the cause to the trial court for consideration of the issue of attorney's fees.

All Citations

Not Reported in S.W.3d, 2015 WL 5097116

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Appendix Tab F

990 S.W.2d 929
Court of Appeals of Texas,
Beaumont.

Gerald John BENARD and Jennie Attaway Benard, Appellants,
v.
Asa Henry HUMBLE and Point Lookout Owners' Association, Inc., Appellees.

No. 09–98–239CV.
|
Submitted Feb. 11, 1999.
|
Decided April 22, 1999.

Three civil actions concerning homeowners' violation of deed restrictions were consolidated. The 258th District Court, San Jacinto County, Joe Ned Dean, J., held that use of property by homeowner as vacation rentals was violation of deed restriction. Homeowner appealed. The Court of Appeals, Walker, C.J., held that homeowners' weekly and/or weekend rentals of property violated deed restriction that property could only be used for single-family residence purposes.

Affirmed.

Burgess, J., dissented and filed separate opinion.

Attorneys and Law Firms

***929** Kenna M. Seiler, Hope & Causey, Conroe, for appellants.

Travis E. Kitchens, Jr., Evans and Kitchens, Groveton, for appellees.

Before WALKER, C.J., BURGESS and STOVER, JJ.

***930 OPINION**

RONALD L. WALKER, Chief Justice.

This case involves alleged violations of the Deed Restriction of Point Lookout Estates. Appellants, Gerald John Benard and Jennie Attaway Benard, rented their homes to various families and individuals on a weekly or weekend basis. Appellee, Asa Henry Humble, originally filed suit against Appellants alleging several causes of action which included Deed Restriction violations. Appellants filed a separate suit against Humble and Point Lookout Owners' Association, Inc. alleging multiple causes of action. Point Lookout also brought suit against Appellants. These three lawsuits were consolidated into the original suit from which this appeal is taken.

All claims, with the exception of whether there was a violation of the Deed Restrictions were settled and compromised between the parties. The parties filed an Agreed Motion to Dismiss which was granted by the trial court. The case was submitted to the trial court on stipulated facts. The trial court held that the use of the property in question "as a vacation rental for weekends and/or weekly rentals to different groups of people by JENNIE ATTAWAY BENARD is a violation of Deed Restriction No. 1" for Point Lookout Estates. The trial court further held that any renting for a period of less than ninety days would also be a violation of Deed Restriction No. 1. Appellants lone appellate issue for review asks:

> Whether the trial court erred in holding that the Restriction that states: "No lot shall be used except for single-family residence purposes" prohibits renting for a period of less than ninety days and prohibits renting to anyone other than a single family.

[1] We find no need to set forth details from the stipulated facts, choosing to focus solely upon whether the trial court erred in its interpretation of the "single-family residence purposes" language.

[2] [3] [4] [5] It is the duty of this Court, as it was the duty of the trial court, to review the wording of the restrictive language and determine therefrom, the intent of the drafter. *See Wilmoth v. Wilcox,* 734 S.W.2d 656, 658 (Tex.1987). Most importantly however, in our effort to determine such intent, we must give liberal construction to the covenant's language, seeking to insure that its provisions are given effect. TEX. PROP.CODE ANN. § 202.003(a) (Vernon 1995); *see Crispin v. Paragon Homes, Inc.,* 888 S.W.2d 78, 81 (Tex.App.—Houston [1st Dist.] 1994, writ denied). Though statutorily we are to liberally construe the questioned language, liberality must be toned to the given facts. For example, our Texas Supreme Court has stated: "Restrictive clauses in instruments concerning real estate must be construed strictly, favoring the grantee and against the grantor, and all doubt should be resolved in favor of the free and unrestrictive use of the premises." *Davis v. Huey,* 620 S.W.2d 561, 565 (Tex.1981). Words used in restrictions and the restriction as a whole, may not be enlarged, extended, stretched, or changed by construction; rather, the words must be given their commonly accepted meaning at the time the covenant was written. *Wilmoth,* 734 S.W.2d at 657–58. Further, should there exist ambiguity or doubt as to intent or meaning, the

covenant is to be strictly construed against the party seeking to enforce same, and favorably toward the free and unrestricted use of the premises. *Id.* at 657.

[6] This judicial toning however, must never lose sight of legislative intent. We believe that the legislature, in its enactment of § 202.003(a) intended that restrictive covenants be construed in a manner which may occasionally run hard afoul of strict common law requirements, i.e., strict construction favoring grantee, and strict construction against the drafter. Invariably, the strong but clear statutory language of § 202.003(a) does not mesh with established common law contract principles, ***931** creating a perpetual need for reconciliation.

The present case is a prime example of the dilemma: The deed restrictions in question do not explicitly contain language covering temporary renting of property. Were we to give construction against the drafter of the covenant, we would be required to reverse the trial court's judgment. However, understanding the mandate of § 200.003(a), and paragraph II, § 1 of the deed restrictions, which provides that, "No lot shall be used except for single-family residence purposes," we must attempt to give purpose to the intended meaning of "single-family residence purposes."

In the present case, Appellants were "renting" subdivision property on a weekly and/or weekend basis. Appellants use of their property as rental property could be more aptly described as temporary, or for retreat purposes, or transient housing, rather than for residential purposes. The trial court made nineteen findings of fact and four conclusions of law supportive of its declaratory judgment. This Court in *Sargent v. Smith,* 863 S.W.2d 242, 250 (Tex.App.—Beaumont 1993, no writ), provided the following observation:

> Therefore, in construing the pertinent and relevant covenants so that their purposes, intents, intendments, and intentions be made effective, it is mandatory that the fact-finder ascertain such element as the purposes, intents, and intentions of the developers in preparing and making a public record of the restrictive covenants, restrictions, and other limitations governing Lake Renee Subdivisions. *See and compare Travis Heights Imp. Ass'n v. Small,* 662 S.W.2d 406 (Tex.App.—Austin 1983, no writ).

Ostensibly, Appellants argue that the restrictive covenant does not exclude renting as an owner's option for use of his or her property for "residential purposes." We believe such perspective to be overbroad. Renting per se is certainly non-violative of the restrictions in question. However, we agree with the trial court that the types of rental use runs afoul of the single-family residential purposes provision. Our trial court having no definitive case law guidance covering this particular fact situation apparently resorted to good common

sense in its application of existing case law and statutory law. Judge Dean, in attempting to give liberal protection to the single-family residential purpose provisions, considered TEX. FAM.CODE ANN. § 6.301 (Vernon 1998), which requires ninety days to establish residency for the purposes of filing a divorce action. In *Slusher v. Streater,* 896 S.W.2d 239, 243–44 (Tex.App.—Houston [1st Dist.] 1995, no writ), the Houston Court dealt with the issue of residency in the context of voting and the Texas Election Code:

> Section 1.015 provides that " 'residence' means domicile, that is, one's home and fixed place of habitation to which he intends to return after any temporary absence." TEX. ELEC.CODE ANN. § 1.015 (Vernon 1986). Residency is determined in accordance with the common law, except as otherwise provided by the Code. TEX. ELEC.CODE ANN. § 1.015(b) (Vernon 1986). A person does not lose his or her residence by leaving home temporarily. TEX. ELEC.CODE ANN. § 1.015(c) (Vernon 1986). A person does not acquire a residence in a place to which he or she has come temporarily and without the intention of making that place his or her home. TEX. ELEC.CODE ANN. § 1.015(d) (Vernon 1986).
>
> The term "residence" is an elastic one and is extremely difficult to define. *Mills v. Bartlett,* 377 S.W.2d 636, 637 (Tex.1964). The meaning that must be given to it depends on the circumstances surrounding the person involved and largely depends upon the present intention of the individual. *Id.* Volition, intention, and action are all elements to be considered in determining where a person resides, and such elements are equally pertinent in denoting the permanent ***932** residence or domicile. *Id.* "Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined." *Id.* There is no specific length of time for the bodily presence to continue. *Id.*
>
> Thus the focus in determining the residence of a voter is on the voter's home and fixed place of habitation. *Espinoza,* 844 S.W.2d at 247. "Intention and residence are important evidentiary factors, and a temporary move from one place to another will neither create a new residence nor lose an old one." *Id.* In assessing presence, the cases have considered such conduct as where the voter sleeps and keeps clothes and furniture, and the length of time spent in the alleged residence. *Id.*

It is apparent to this Court that Judge Dean went to great lengths to reconcile statutory and common law principles with this given fact situation. We cannot say that the trial court abused its discretion in declaring that Appellants use of their property violated the deed restrictions in question. We affirm the trial court's declaratory judgment.

AFFIRMED.

DON BURGESS, Justice, dissenting.

I reluctantly dissent. My dissent is reluctant because it is clear the trial judge approached the matter with great care and fashioned what he believed to be a just result. The majority places some emphasis on the language of TEX. PROP.CODE ANN. § 202.003(a) (Vernon 1995). However, two cases have determined there is no meaningful distinction between the statute and the rule announced in *Wilmoth v. Wilcox,* 734 S.W.2d 656, 657 (Tex.1987) that "[a]ll 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." *See Ashcreek Homeowner's Ass'n, Inc. v. Smith,* 902 S.W.2d 586, 588–89 (Tex.App.—Houston [1st Dist.] 1995, no writ); *Crispin v. Paragon Homes, Inc.,* 888 S.W.2d 78, 81 n. 1 (Tex.App.—Houston [1st Dist.] 1994, writ denied).

The majority and the trial court are quite correct in holding that the covenant in question does not prohibit the renting of the residences. Furthermore, a residential use restriction generally does not prohibit the use of property for duplexes, apartments or condominiums. *See MacDonald v. Painter,* 441 S.W.2d 179, 182 (Tex.1969); *Stephenson v. Perlitz,* 532 S.W.2d 954, 955 (Tex.1976).

While the majority is technically correct when they state the trial court had no *definitive* case law covering this particular situation, *Munson v. Milton,* 948 S.W.2d 813, 816–17 (Tex.App.—San Antonio 1997, writ denied) is somewhat similar. In that case the use of a residence for transient housing was deemed to be prohibited by the restrictive covenants only because those covenants specifically declared that "[m]otel, tourist courts, and trailer parks shall be deemed to be a business use" and the restrictive covenants allowed only residential use. The court read the provisions together in determining the intent of the covenants.

Here there is no additional covenant to discern the intent of the drafter. Therefore, I believe the still viable rule that allows for the free and unrestricted use of property should control. Therefore, I would reverse the judgment and render in favor of appellants.

All Citations

990 S.W.2d 929

Appendix Tab G

948 S.W.2d 813
Court of Appeals of Texas,
San Antonio.

James S. MUNSON, Marilyn A. Munson, and Dora E. Colley, Appellants,
v.
Frank MILTON, Lucille Milton, C.F. Morse, J.M. Hardwick, Sr., Frances Hardwick, Ken Hardcastle, Sandy Hardcastle, Dewey Pinegar, Jack Harlan, Arnell Harlan, F.H. Cherrington, Virginia Cherrington, William Aymes, Mary Jo Aymes, Curtis & Carrie Boyles, Appellees.

No. 04–96–00694–CV.
|
April 30, 1997.
|
Rehearing Overruled Aug. 6, 1997.

Residents of subdivision sought temporary and permanent injunctions against homeowners who rented their house to third parties for short periods of time, allegedly in violation of "residential use" restrictive covenant. The 38th Judicial District Court, Uvalde County, Herb Marsh, J., granted temporary injunction enjoining homeowners from renting their property to the public for "lodging, vacation and recreation purposes." Homeowners appealed. On accelerated appeal, the Court of Appeals, Stone, J., held that: (1) residents were not required to show proof of irreparable injury to obtain temporary injunction; (2) residents established probable violation of restrictive covenant; (3) scope of temporary injunction was overbroad, and it would be modified to restrain only rental activity that resulted in property being used for transient-type housing; and (4) as modified, temporary injunction did not impose unreasonable restraint on alienation.

Affirmed as modified.

Duncan, J., filed dissenting opinion.

Attorneys and Law Firms

***815** Phillip M. Hughes, Crawford, Crawford & Hughes, Uvalde, James S. Munson, Wharton, Michael C. Boyle, Matthews & Branscomb, P.C., Uvalde, for Appellants.

W. Patrick Dodson, Dodson, & Lowe, Uvalde, Joe M. Davis, Nunley & Jolley, L.L.P., Boerne, Thomas B. Black, San Antonio, for Appellees.

Before STONE, DUNCAN and ANGELINI, JJ.

OPINION

STONE, Justice.

This is an accelerated appeal of an order granting a temporary injunction. Appellants own one lot in the Chisum's Subdivision located in Uvalde, Texas. The remaining lots are owned by appellees. Since the fall of 1995, appellants have rented the house located on their lot to third parties through "Rio Frio Bed n Breakfast and Lodging," a professional rental agent. The third parties are generally vacationers who use the property for short periods of time, generally two to five days.

Paragraph six of the Reservations, Restrictions and Covenants Pertaining to Chisum's Subdivision restricts the use of the lots as follows:

> 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.

Appellees filed suit seeking a temporary and permanent injunction to prohibit appellants from renting their house in violation of the foregoing restriction.

The trial court granted appellees a temporary injunction enjoining appellants from "renting and/or leasing said property to the public for lodging, vacation and recreation purposes." Appellants now appeal the trial court's order, contending the trial court abused its discretion in granting the temporary injunction because appellees failed to establish a probable right of recovery or the possibility of irreparable injury in the absence of temporary relief. Appellants also contend the temporary injunction imposes an unlawful restraint on the alienation of the appellants' property.

STANDARD OF REVIEW

[1] [2] [3] [4] At a temporary injunction hearing, the only issue before the trial court is whether the status quo should be preserved pending trial on the merits. *Camp v. Shannon,* 162 Tex. 515, 348 S.W.2d 517, 519 (1961); *Ramsey v. Lewis,* 874 S.W.2d 320, 322 (Tex.App.—El Paso 1994, no writ). The only issue on appeal is whether the trial court clearly abused its discretion in resolving that issue by granting or denying the temporary injunction. *City of San Antonio v. Rankin,* 905 S.W.2d 427, 430 (Tex.App.—San Antonio 1995, no writ); *Ramsey v. Lewis,* 874 S.W.2d at 323. The trial court abuses its discretion when it "misapplies the law to the established facts or when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery." *City of San Antonio v. Rankin,* 905 S.W.2d at 430. All legitimate inferences from the evidence are drawn in favor of the trial court's judgment, and the trial court does not abuse its discretion where the evidence "tends to sustain the cause of action as alleged." *Id.*

PROOF OF IRREPARABLE INJURY

[5] [6] Generally, a movant qualifies for temporary injunctive relief by showing: (1) a probable right of recovery; (2) imminent, irreparable harm will occur in the interim if the request is denied; and (3) no adequate remedy at law exists. *Id.* Despite this general rule, however, a movant seeking a temporary injunction to enforce a restrictive covenant is not required to show proof of irreparable injury. *Guajardo v. Neece,* 758 S.W.2d 696, 698 (Tex.App.—Fort Worth 1988, no writ). Instead, the movant is only required to prove that the defendant intends to do an act that would breach the covenant. *Id.*

Appellants contend the trial court abused its discretion in granting the temporary injunction because the evidence fails to establish ***816** that appellees would suffer irreparable injury if the relief were not granted. This contention has no effect on the trial court's ability to grant temporary relief in the instant case. As previously noted, appellees were not required to show proof of irreparable injury because they were seeking a temporary injunction to enforce a restrictive covenant. *Guajardo v. Neece,* 758 S.W.2d at 698. Therefore, this contention is without merit.

VIOLATION OF RESTRICTIVE COVENANT

Appellants also contend that appellees failed to establish a probable right of recovery because there was no showing that the action undertaken by appellants violated the restrictive covenant. Appellants then cite various cases to support the proposition that the rental of property used for living purposes does not violate a residential use restriction. Appellees

counter with cases that suggest that the rental of property may violate a residential use restriction under certain circumstances.

[7] [8] [9] In construing a restrictive covenant, a court's primary task is to determine the intent of the framers of the restrictive covenant. *Wilmoth v. Wilcox,* 734 S.W.2d 656, 658 (Tex.1987). In determining this intent, the court must liberally construe the covenant's language and must ensure that every provision is given effect. TEX. PROP.CODE ANN. § 202.003(a) (Vernon 1995); *Crispin v. Paragon Homes, Inc.,* 888 S.W.2d 78, 81 (Tex.App.—Houston [1st Dist.] 1994, writ denied)(entire instrument must be examined and considered); *Imperial Interplaza II, Inc. v. Corrections Corp. of America, Inc.,* 717 S.W.2d 422, 424 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(none of instrument's provisions should be rendered meaningless). If there is ambiguity or doubt as to the intent, the covenant is to be strictly construed against the party seeking to enforce it in favor of the free and unrestricted use of the premises. *See, e.g., Wilmoth,* 734 S.W.2d at 657; *Silver Spur Addition Homeowners v. Clarksville Seniors Apartments,* 848 S.W.2d 772, 774 (Tex.App.—Texarkana 1993, writ denied) (ambiguity resolved in favor of least restrictive interpretation); *Dempsey v. Apache Shores Property Owners Ass'n, Inc.,* 737 S.W.2d 589, 592 (Tex.App.—Austin 1987, no writ)(covenant construed in favor of grantee only when intent not ascertainable); *Covered Bridge Condominium Ass'n, Inc. v. Chambliss,* 705 S.W.2d 211, 214 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

Neither party to this appeal asserts that the restrictive covenant at issue is ambiguous. Therefore, our goal is to determine whether the trial court was correct in finding that the objective intent of the covenant, or the intent expressed in the writing, was probably violated by the appellants' actions. *Silver Spur Addition Homeowners,* 848 S.W.2d at 774; *Candlelight Hills Civic Ass'n, Inc. v. Goodwin,* 763 S.W.2d 474, 477 (Tex.App.—Houston [14th Dist.] 1988, writ denied).

[10] A residential use restriction generally does not prohibit the use of property for duplexes, apartments or condominiums. *See MacDonald v. Painter,* 441 S.W.2d 179, 182 (Tex.1969); *Travis Heights Improvement Ass'n v. Small,* 662 S.W.2d 406, 408 (Tex.App.—Austin 1983, no writ); *Stephenson v. Perlitz,* 537 S.W.2d 287, 289 (Tex.Civ.App.—Beaumont 1976, writ ref'd n.r.e.); *Cuiper v. Wolf,* 242 S.W.2d 830, 831 (Tex.Civ.App.—San Antonio 1951, no writ). The covenant at issue here, however, contains an additional sentence that clarifies the framers' intent in distinguishing between "residential" and "business" use for purposes of the covenant. This additional sentence provides that "[m]otel, tourist courts, and trailer parks shall be deemed to be a business use." In determining what the framers intended by adding this sentence, we look to the law defining residence.

[11] **[12]** Although the term "residence" is given a variety of meanings, residence generally requires both physical presence and an intention to remain. *See Smith v. Board of Regents of the University of Houston System,* 874 S.W.2d 706, 712 (Tex.App.—Houston [1st Dist.] 1994, writ denied)(citing *Martinez v. Bynum,* 461 U.S. 321, 330, 103 S.Ct. 1838, 1843, 75 L.Ed.2d 879 (1983)), *cert. denied,* ***817** 514 U.S. 1111, 115 S.Ct. 1964, 131 L.Ed.2d 855 (1995). 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. *Slusher v. Streater,* 896 S.W.2d 239, 243 (Tex.App.—Houston [1st Dist.] 1995, no writ).

[13] The Texas Property Code draws a distinction between a permanent residence and transient housing, which includes rooms at hotels, motels, inns and the like. *See Warehouse Partners v. Gardner,* 910 S.W.2d 19, 23 (Tex.App.—Dallas 1995, writ denied); *see also* TEX. PROP.CODE ANN. § 92.152(a) (Vernon 1995). For purposes of the hotel occupancy tax, the Texas Tax Code defines hotel to include "a hotel, motel, tourist home, tourist house, tourist court, lodging house, inn, rooming house, or bed and breakfast." TEX. TAX CODE ANN. § 156.001 (Vernon Supp.1997). Although 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. *Howell v. Mauzy,* 899 S.W.2d 690, 697 (Tex.App.—Austin 1994, writ denied).

[14] Just as the foregoing cases and statutory provisions draw distinctions between temporary or transient housing and a residence, we believe the framers of the restrictive covenant intended to draw a similar distinction between residential and business use by adding the third sentence to paragraph six of the Reservations, Restrictions and Covenants. At least two of the activities listed as business uses in this sentence are directed at transient-type housing, and in order to give effect to this sentence, we believe the covenant must be read to prohibit the use of the restricted property for this type of housing. We further believe that the nature of the rental activity in which appellants have been engaged results in the property being used for the type of transient housing that the third sentence of paragraph six intended to designate as a business use. For this reason, we agree with the trial court that the appellees have established a probable violation of the restrictive covenant.

Despite our agreement with the trial court that a probable violation of the restrictive covenant has been demonstrated, we believe that the scope of the temporary injunction is overbroad. *See Keystone Life Ins. Co. v. Marketing Management, Inc.,* 687 S.W.2d 89, 93 (Tex.App.—Dallas 1985, no writ) (modifying overbroad injunction). Only rental activity that results in the property being used for transient-type housing should be restrained. Therefore, we modify the temporary injunction to enjoin appellants from "renting and/or leasing said property to the public for temporary or transient housing purposes."

[15] [16] [17] [18] In their amended brief, appellants assert that the trial court abused its discretion in crafting its temporary injunction order as a restraint upon alienation of appellants' property. When restrictions are confined, however, to a lawful purpose and are reasonable, such covenants will be enforced. *Wilmoth,* 734 S.W.2d at 657; *Davis v. Huey,* 620 S.W.2d 561, 565 (Tex.1981). Property owners are permitted to create binding restrictions on the use of their property, *Wiley v. Schorr,* 594 S.W.2d 484, 487 (Tex.Civ.App.—San Antonio 1979, writ ref'd n.r.e.), and restrictions limiting the use of property to residential purposes and prohibiting business use are not unenforceable restraints on alienation. *Moore v. Smith,* 443 S.W.2d 552, 554, 556 (Tex.1969). As modified, the temporary injunction enforces a reasonable restraint on the use of property contractually imposed with the agreement of the property owners. Therefore, it does not impose an unreasonable restraint on alienation.

CONCLUSION

Appellees have established a probable violation of the restrictive covenant at issue by appellants; therefore, they are entitled to a temporary injunction. Nevertheless, the temporary injunction ordered by the trial court is overly broad because it enjoins appellants from activities the restrictive covenant was not intended to prohibit. Therefore, the temporary injunction is modified to enjoin appellants from "renting and/or leasing said property to the public for temporary ***818** or transient housing purposes." As modified, the trial court's order is affirmed.

Dissenting opinion by DUNCAN, J.

DUNCAN, Justice, dissenting.

I respectfully dissent. In my view, the restrictive covenant at issue does not unambiguously prohibit renting single-family homes on a tract within the Chisum Subdivision for living purposes, whether temporary or permanent. At the very least, I would hold the covenant ambiguous and therefore resolve "[a]ll doubts ... in favor of the free and unrestricted use of the premises," as mandated by the Supreme Court of Texas in *Wilmoth v. Wilcox,* 734 S.W.2d 656, 657 (Tex.1987).

STANDARD OF REVIEW

As the majority notes, the sole issue to be determined at a temporary injunction hearing is whether the status quo should be preserved pending a trial on the merits. To make this

determination, the trial court is required to determine "the last peaceable status quo," that is "the status which existed at the time of the filing of the ... suit." *City of Lubbock v. Stubbs,* 160 Tex. 111, 327 S.W.2d 411, 415 (1959). In *Stubbs,* the City of Lubbock sought to enjoin Stubbs from using his land as a mobile trailer home park. At the time suit was filed, Stubbs had placed 48 mobile trailer homes on his property. The parties conceded, and the court held, that the injunction would not apply to these 48 mobile trailer homes because they existed at the time suit was filed. *Id.* 327 S.W.2d at 415.

In this case, the status quo at the time suit was filed was that the appellants were renting the house to third parties. As a preliminary matter, I fail to see how a temporary injunction precluding the use existing at the time suit was filed preserves the status quo.

RESTRICTIVE COVENANT

The rules for construing restrictive covenants were set forth by the Supreme Court of Texas a decade ago. Our essential "task is to determine the intent of the framers of the restrictive covenants." *Wilmoth,* 734 S.W.2d at 658. But in doing so, we must be mindful that "covenants restricting the free use of land are not favored by the courts," and they will be enforced only "when confined to a lawful purpose and are clearly worded." *Id.* at 657. Accordingly, "[a]ll 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." *Id.* "The words used in the restriction, and the restriction as a whole, may not be enlarged, extended, stretched or changed by construction." *Id.* Rather, the words must be given their "commonly accepted meaning" at the time the covenant was written. *Id.* at 657–58. [1]

1 Although the Texas Legislature has mandated that "[a] restrictive covenant shall be liberally construed to give effect to its purposes and intents," TEX. PROP.CODE ANN. § 202.003(a) (Vernon 1995), this mandate does not conflict with the common law rule that covenants are to be construed "either to favor the free and unrestricted use of land or to strictly construe it against the party seeking to enforce it." *Crispin v. Paragon Homes, Inc.,* 888 S.W.2d 78, 81 n. 1 (Tex.App.—Houston [1st Dist.] 1994, writ denied) (citing *Wilmoth v. Wilcox,* 734 S.W.2d 656, 657 (Tex.1987)); *see also Ashcreek Homeowner's Ass'n v. Smith,* 902 S.W.2d 586, 588–89 (Tex.App.—Houston [1st Dist.] 1995, no writ) (following *Crispin*).

As noted by the majority, the covenant at issue states that "[a]ll tracts within the Chisum's subdivision shall be used solely for ***residential,*** camping or picnicing [sic] ***purposes. Motel[s], tourist courts, and trailer parks shall be deemed to be a business use.***" The use sought to be enjoined is renting a residence to third parties. Our task, therefore, is two-fold. First, we must determine whether restricting the use of a tract to "residential purposes" precludes renting a single-family residence. Second, we must determine whether renting a single-family residence is to be deemed a "business purpose," along with "motel[s], tourist courts, and trailer parks."

Residential Purposes

As the majority implicitly recognizes, "[t]he terms 'residence purposes,' and 'residences' require the use of property for living ***819** purposes as distinguished from uses for business or commercial purposes." *MacDonald v. Painter,* 441 S.W.2d 179, 182 (Tex.1969). In *MacDonald,* the court held that "the terms, without other limiting words, do not prohibit duplex living units." *Id.* Indeed, this court has specifically held that restricting lot usage to "residential purposes" does not preclude the construction of a four-unit apartment house, "so long as the building is used exclusively for residential purposes." *Cuiper v. Wolf,* 242 S.W.2d 830, 831 (Tex.Civ.App.—San Antonio 1951, no writ).

From these cases, it is apparent that restricting the use of tracts in the Chisum Subdivision to "residential purposes" precludes using a tract for business or commercial purposes, such as a machine shop, commercial child care facility, florist shop, beauty shop, or an animal clinic;[2] it does not preclude renting one's home to third parties so long as the third parties use the tract for living purposes. To hold otherwise would violate not only the rule of strict construction but also the rule prohibiting this court from "enlarg[ing], extend[ing], stretch[ing] or chang[ing]" the words of the covenant through judicial construction.

2 *Hicks v. Loveless,* 714 S.W.2d 30 (Tex.App.—Dallas 1986, writ ref'd n.r.e.); *Mills v. Kubena,* 685 S.W.2d 395 (Tex.App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Fowler v. Brown,* 535 S.W.2d 46 (Tex.Civ.App.—Waco 1976, no writ); *Vaccaro v. Rougeou,* 397 S.W.2d 501 (Tex.Civ.App.—Houston 1965, writ ref'd n.r.e.); *Brite v. Gray,* 377 S.W.2d 223 (Tex.Civ.App.—Beaumont 1964, no writ).

Motels, Tourist Courts, Trailer Parks

The majority holds, however, that the second sentence in the covenant precludes renting one's home to third parties, because the framers intended this sentence to preclude "transient-type housing." As even the majority recognizes, however, this label at most applies to motels and tourist courts, not trailer parks—which are generally used as permanent, rather than transient, multi-family housing. It is thus not only patently illogical, but contrary to the rule of strict construction, to construe the second sentence as precluding "transient-type housing."

What then is the reach of the second sentence? Plainly, the second sentence of the covenant does not preclude using a tract for financial gain; if that were the framers' intent, they surely would have said so or at least included apartment houses, duplexes, and the incidental renting of a room as prohibited uses. In my view, therefore, the second sentence appears to have been intended to reach the use that has historically been permitted by a "residential purposes" covenant—multi-family use, whether permanent or temporary. Construing the

second sentence of the covenant in this fashion is both logical and consistent with the rule of strict construction. Under this construction, the covenant would not preclude renting a residence to a third party for living purposes. At the very least, however, the covenant is ambiguous, and we must construe it in favor of the freer and less restrictive use of the land and against the party seeking enforcement. In either event, renting one's home to a third party for living purposes, whether temporarily or permanently, would not be precluded by the covenant.

CONCLUSION

The restrictive covenant at issue nowhere speaks to renting a residence to a third party. To the contrary, "residential purposes" is plainly defined by Texas case law to require that land be used for living purposes, whether single or multi-family, temporary or permanent, and to preclude business uses. And the tie binding "motel[s], tourist courts, and trailer parks" is not transient housing, but multi-family housing, both temporary and permanent. I would therefore hold that the restrictive covenant at issue does not preclude renting a single-family residence to a third party for living purposes, regardless of whether that use is temporary or permanent. Accordingly, I respectfully dissent.

All Citations

948 S.W.2d 813