No. 03-20-00618-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

POOLE POINT SUBDIVISION HOMEOWNERS' ASSOCIATION AND POOLE POINT ARCHITECTURAL CONTROL COMMITTEE,

Appellants,

v.

SEAN DEGON AND ERIE DEGON,

Appellees.

On Appeal from the County Court at
Law No. 2, Travis County, Texas
Trial Court Cause No. C-1-CV-19-009597

BRIEF OF APPELLEES

J. Patrick Sutton
SBOT 24058143
1706 W. 10th Street
Austin Texas 78703
(512) 417-5903
jpatricksutton@jpatricksuttonlaw.com

Counsel for Appellees

Oral Argument Requested

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ORAL ARGUMENT IS REQUESTED

This case presents a novel, important question of property rights law. The question is arising in multiple appellate districts. Oral argument is warranted.

ISSUE PRESENTED

Can a majority of owners in a subdivision, by adopting new deed restrictions, deprive existing owners of the bundle of rights they purchased under prior restrictions?

INTRODUCTION

This case and others like it across the state arise specifically in the context of short-term home leasing, but the implications go far beyond that. At stake is whether the traditional "bundle of sticks" and other important property rights can be summarily taken away from existing owners by a majority of property owners in a subdivision. Thomas Ross, *Metaphor and Paradox*, 23 Ga. L. Rev. 1053, 1056 (1989) (noting that "rights to sell, lease, give, and possess" property "are the sticks which together constitute" the metaphorical bundle); *see Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S.W. 453, 454 (1890) ("The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others; and the right to lease it to others, and therefore derive profit, is an incident of such ownership.").

These cases are arising now because the Texas Supreme Court held in 2018 that short-term leasing is an ordinary "residential use" under common deed restriction wordings going back decades, to the dawn of mass subdivision development after WWII. *See Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274 (Tex. 2018); Foundation for Community Assoc. Research, *2017 Community Assoc. Fact Book* ("CAI 2017 Fact Book").[1] As short-term leasing became more popular with the advent of the Web, opponents of short-term rentals pursued a theory that short-term leasing had always been banned in

[1] Accessed 1/18/21 at: https://foundation.caionline.org/wp-content/uploads/2018/08/TX2017.pdf

subdivisions. *See*, *e.g.*, *Benard v. Humble*, 990 S.W.2d 929 (Tex. App.—Beaumont 1999, pet. denied) (abrogated by *Tarr*). When *Tarr* rejected that troubling, logically insupportable notion in 2018,[2] opponents of short-term leasing turned their attention to adopting new restrictions in the guise of "amendment." They seek to enforce those new restrictions against owners who bought and expected to keep wide-open leasing rights.

At the heart of this case, therefore, lies a simple, profound question: if someone buys land in reliance on a particular bundle of rights endowed by restrictive covenants, can the other owners in the subdivision summarily take those rights away? A few examples illustrate why that cannot be the law and, indeed, has never been the law in Texas:

> A family buys property on acreage to keep horses. After the family builds the barn and fencing, and buys two horses, a majority in the subdivision votes to ban horses, horizontal wood fencing, and barns.
>
> After an owner purchases a home with unrestricted leasing rights, a majority in the subdivision votes to ban 90% of all owners from leasing and imposes fines for doing so, the nonpayment of which allows foreclosure.[3]

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[2] Opponents of short-term leasing made interrelated arguments that (1) "transient persons" do not qualify as "residents" if they do not continuously and permanently occupy a home, and (2) a lease for a short term transforms a home into a commercial establishment.

[3] *See*, *e.g.*, *Treadway v. Enclave on Cedar Creek Homeowners' Assoc.*, No. 00064-CCL2-20 (Henderson County Court at Law 2). The foreclosure provision there flatly contravenes Tex. Prop. Code § 209.009, barring foreclosure for fines.

After an owner purchases a home as an investment rental home, a majority votes to require owner occupancy.[4]

An airline pilot purchases a home near an international hub, relying on the rental income from other short-term users like herself. Her neighbors then vote to bar short-term rentals.[5]

An owner buys one of the few lots in a subdivision which allows commercial uses. Later, a majority votes to limit those lots to residential use only.

Examples from the deed restrictions at issue in this case are equally disturbing:

The deed restrictions here entitle an owner to combine contiguous lots into one, allowing a much larger home to be built given the mandatory boundary-line setbacks. Appellants' Tab 3 at 1-2 (Art. II preamble), 2 (¶ 3), 3 (¶ 12). Could a majority take that right away after someone buys two lots in reliance on the restriction?

A couple buys a small patch of land to build a small, affordable home using all their resources. A month later, a majority of their neighbors increase the minimum square footage requirement for homes from 1500 square feet to 5000 square feet, making it effectively impossible for the

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[4] *See*, *e.g.*, *Nguyen v. Breckinridge Farms Homeowners' Assoc., Inc.*, No. 429-04280-2020 (Collin County 429th Dist.). The new restriction includes a bar on leasing to anyone ever convicted of a felony, a blatantly discriminatory provision which presumptively violates the Texas and federal fair housing laws. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 1999) at 1, *https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF*.

[5] *See*, *e.g.*, *Tarr v. Timberwood Park*, No. 16-1005 (oral arg., question by Green, J., at 20:10-20:30 re: traveling salesman).

couple to build their home. Appellants' Brief Tab 3 at 3 (¶ 7).

The examples are legion, but the pattern is the same: an abrupt new restriction defeats the reasonable expectations of owners who purchased under prior restrictions.

The contentious short-term rental issue is what has brought this issue to the fore, but it could be any vital property right. For that matter, it could be a new restriction which requires all homes to be painted purple. As a result of *Tarr*, subdivisions across the state are racing to block owners from renting out their properties the way they were always entitled to do. And as subdivisions test how far they can go with "amendments," they are testing the limits of how they may exclude whole classes of persons from staying in homes in the subdivision.[6] If such "amendments" are enforceable, no property rights are safe.

While no Texas court has squarely addressed the issue presented by this case, of the fourteen states which have, eleven do not allow a new restriction to deprive existing owners of the rights they purchased. The three states which go the other way rely on a pure contract approach, holding that buyers cannot complain of an amendment clause they had notice of at the time of purchase. But

[6] In a pending case involving rulemaking rather than amendment, the HOA's board forbade 75% of all leasing, required owner-occupancy for a year after purchase, and endowed itself with power to approve and evict tenants, the last of which is flatly in violation of Chapter 209. *See* Tex. Prop. Code § 209.016; *Kiiru v. Kings Crossing (Little Elm) Homeowners' Assoc., Inc.*, No. 20-10580-362 (Denton 362nd Dist. 2021).

because Texas law allows deed restrictions to be amended with or without an amendment clause, buyers have no real choice in the matter. This court should adopt the majority view that protects settled expectations.

STATEMENT OF FACTS[7]

A. The DeGons buy a home with full leasing rights.

The facts were stipulated. Appellants' Brief Tab 5 (CR65-67). The Poole Pointe subdivision lies on Lake Travis. Tab 3 at 3 (¶ 1) (Lake Travis easement), 3 (¶ 3) (boat docks). Wide-open leasing rights were important to the DeGons when they bought their lakefront home and invested more money to improve it for short-term rentals. Appellants' Brief Tab 5 (¶6).

The HOA's brief tries to downplay the significance of the deed restrictions' leasing rights – so much so that the HOA actually contends that restricting leasing is "consistent with, improves, and strengthens the original Declaration's plan of development." That is demonstrably false. The developer[8] not only made the right to lease express, but went out of the way to describe the narrow limitations on that right. The main grant of leasing rights reads as follows:

> 1. All property . . . shall be used, devoted, improved and occupied exclusively to Single Family Residential Use.[9]
>
> 2. No business and/or commercial activity to which the

[7] The stipulations for the agreed case are at Appellants' Appellants' Tab 5 (CR67).

[8] Aka, "Declarant." **Appellants' Tab 3** at 1.

[9] Appellants' Tab 3 at 2 (¶¶ 1-2), 3 (¶ 1).

> general public is invited shall be conducted within Poole Point; except that this shall not be read to prevent the leasing of a single family dwelling unit by the Owner thereof, subject to all the provisions of this Declaration.[10]

In two additional provisions, the developer set out the limitations on leasing. While expressly allowing leasing of the main dwelling, the developer forbade it in ancillary buildings. Appellants' Brief Tab 3 at 3 (¶ 2).[11] And while allowing "temporary" residency in the main dwelling, the developer expressly barred it anywhere else on a lot. Appellants' Brief Tab 3 at 2 (¶ 13).

With broad leasing rights as the backdrop, the developer reassured buyers that their investment was protected. In language the HOA itself points to (Brief of Appellants at 1), the developer assured buyers that the broad grant of leasing rights was foundational:

> The property described above is encumbered by the terms of this Declaration to ensure, in Declarant's opinion, the best use and most appropriate development and improvement of each lot within Poole Point; to prevent haphazard or inharmonious improvements; . . . and in general, to provide for development meant to enhance the value of investments made by Owners.

Most certainly there is, as the HOA contends, a uniform scheme of development, but it is premised on unrestricted leasing rights and a welcome mat for tenants.

The DeGons' reliance on the broad grant of leasing rights was

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[10] Appellants' Tab 3 at 2 (¶2).

[11] Other wording touching upon leasing has to do with the size of "for rent" signs. **Appellants' Tab 3** at 2 (¶ 14).

vindicated in 2018, when the Texas Supreme Court, resolving a split of authority, held that short-term rentals, in the absence of clear restrictions to the contrary, are an ordinary residential use. *Tarr*, 556 S.W.3d at 276. Further, that when restrictive covenants do not expressly restrict leasing, courts may not "inject restrictions into covenants under the guise of judicial interpretation." *Id.* at 276. Opponents of short-term leasing, who had for years contended that such rentals are a "business use," saw their central contention fail.

Not that that changed everyone's mind, however. The HOA here, for example, still insists, in an obvious attempt to keep litigating *Tarr*, that a home becomes a business establishment if leased for less than some magic number of days.[12] But deeds matter more than words: in 2019, a majority of the owners in the Poole Pointe subdivision turned to the amendment process rather than renew the *Tarr* fight.[13] The new restrictions bar leasing for less than 180 days and require physical, continuous occupancy by tenants. Appellants' Brief Tabs 4, 5. Owners, it bears pointing out, need not satisfy any continuing occupancy requirement and thus remain free to use their own lakefront vacation homes intermittently or on weekends, or to loan them to whomever they wish. It is, precisely, *tenants* who must pass the new residency

[12] Brief of Appellants at 1 (reciting prohibition on business use), 3 n. 1 (canard rejected in *Tarr* and *Boatner v. Reitz*, No. 03-16-00817-CV, 2017 WL 3902614 (Tex. App. – Austin 2017, no pet.) that "residence" requires intention to remain long-term), 5 ("The Amendment . . . prevent[s] commercial use."), 6 ("residential atmosphere" requires long-term, physical occupancy by tenants), 8 (entire page).

[13] Joint Exhibit 2.

test by staying put in their homes for six months.

After recording the new restrictions, the HOA threatened the DeGons with suit. Appellants' Brief Tab 5 (¶ 9). The DeGons filed suit first, for a declaratory judgment that the 2019 Amendment cannot be enforced against them. The HOA counterclaimed for breach of the new restrictions. Following briefing and arguments of counsel on the Rule 263 agreed case, the trial court declared that the new leasing restrictions could not be enforced against the DeGons. Appellants' Brief Tab 1.[14]

B. This case is the first of many.

Undersigned counsel represents the homeowners in at least 15 active cases like this across the state. In a case proceeding along the same appellate timeline in Houston, it was the HOA which prevailed at trial. *See Chu v. Windermere Lakes Homeowners' Association, Inc.*, No. 14-21-00001-CV (Tex. App. – Houston [14th] Dist.) (opening brief filed).

The trial court below recently tried another case like this one, and multiple other such cases are pending in the same court as well as elsewhere in this appellate district.[15]

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[14] It is not clear from the new instrument that all the owners who signed it intended it to apply to existing owners. It says it is binding "on all persons *acquiring* property in the Subdivision" as opposed to "all owners who *have acquired or may acquire* property in the Subdivision."

[15] An earlier attempt by undersigned counsel for plaintiffs in all these cases to consolidate them statewide was denied. *See In re Restrictive Covenant Amendment Litigation*, No. 20-0767 (Texas MDL Panel Dec. 29, 2020).

SUMMARY OF ARGUMENT

Restrictive covenants bind purchasers who are on notice. Covenants are enforceable if both consistent with the development scheme and unambiguous. The law historically disfavors restrictions on the use of land, so silence or ambiguity cannot be interpreted to restrict property use.

Nearly all restrictive covenants in Texas are subject to amendment, whether by statute or recorded deed restrictions, so home buyers have no meaningful way to avoid amendment. The common-law solution for protecting the reasonable expectations of buyers from the effect of new restrictions which eliminate property rights is grandfathering – or in less freighted terminology, *legacying* buyers into the rights they purchased.

Under the common law, Texas enforces amendments which (1) remove restrictions or (2) further the original developer's overall scheme. No Texas case has addressed whether a new restriction adopted by amendment can deprive existing owners of the bundle of rights they purchased.

The large majority of other states which have addressed the issue do not allow a new restriction adopted by amendment to deprive existing owners of the bundle of rights they purchased. A minority "pure contract" approach holds that a buyer on notice of an amendment provision is bound by any amendment. This does not accord with Texas law in letter or spirit. It also does not account for the fact that, in Texas uniquely, buyers are subject to amendment

whether they agreed to it or not.

Based on the foregoing, the new restrictions which a majority of owners in the DeGons' subdivision adopted by amendment cannot be enforced against them.

In addition, among the new restrictions in this case are physical occupancy and residency requirements imposed solely on tenants. These trample on constitutional rights and are thus void as against public policy.

ARGUMENT

I. Restrictive covenants are not enforceable against buyers who are not on notice.

In subdivisions, a developer plats home lots and records restrictive covenants to create a uniform scheme of development. *See generally* Gregory S. Cagle, *Texas Homeowners Association Law* § 9.1 (3rd Ed. 2017) ("Cagle"); Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L.Rev. 273, 277 (1997).

Restrictive covenants, in essence, are private agreements which limit how land may be used. *See Tarr*, 556 S.W.3d at 279; Tex. Prop. Code § 202.001(4). When clear, they are enforced like contracts between and among the involved parties. *Tarr* at 280.

The *Tarr* decision provides a comprehensive summary of the history and law surrounding the interpretation of restrictive covenants. *Id.* at 279-284. *Tarr* noted three important limitations which apply specifically to the enforcement of restrictive covenants:

1. Silence is not a restriction: "No construction, no matter how

liberal, can construe a property restriction into existence when the covenant is silent as to that limitation." *Id.* at 285.

2. Restrictive covenants are enforceable to the extent they further "a general building scheme or plan for the development of a tract of land." *Id.* at 280 (cleaned up).

3. Restrictive covenants are disfavored in the law because they prevent property from being used to its fullest, so they cannot be foisted on someone who purchased without notice:

> Covenants restricting the free use of property are not favored because the right of individuals to use their own property as they wish remains one of the most fundamental rights that individual property owners possess. As such, we have limited this mandate to enforce restrictive covenants to instances where purchasers of real property buy with actual or constructive knowledge of the scheme, and the covenant was part of the subject-matter of his purchase. If, however, one purchases for value and without notice, he takes the land free from the restriction. Whether the purchaser had notice is determined at the date of the inception of the general plan or scheme, which is the time at which the restrictions were filed in the county's property records.

Id. at 280–81 (cleaned up).

In this case, the words on the page and the silences are equally important. The developer created a lakefront subdivision premised on leasing. *That* is the original, uniform scheme. The developer took pains to be clear that there were no restrictions on the leasing of the main dwelling, and the developer set out clearly the narrow

restrictions which were intended. The only leasing restriction applies to ancillary structures, which cannot be leased at all, and the only restriction on *duration* of occupancy likewise applies only to ancillary structures, which cannot be lived in for short terms. *See Zgabay v. NBRC Prop. Owners Ass'n*, No. 03-14-00660-CV, 2015 WL 5097116, at *2-3 (Tex. App. – Austin Aug. 28, 2015, pet. denied) (mem. op.) (where restrictions excluded temporary residency in structures other than the main dwelling, short-term leasing was allowed as a residential use). Thus, the express leasing rights are broad and the express limitations narrow. The developer's original scheme contemplated leasing of the main dwelling for whatever duration an owner wished, which is not surprising in a lakefront community. *Id.*; *see also Boatner v. Reitz*, No. 03-16-00817-CV, 2017 WL 3902614, at *1 (Tex. App. – Austin Aug. 22, 2017, no pet.) (reaffirming *Zgabay*).

II. Nearly all restrictive covenants are subject to amendment.

What happens after a developer leaves the scene? Are rights fixed forever? No: the vast majority of subdivision deed restrictions can be amended through one procedure or another.

1. In most subdivisions, like the one at issue here where a mandatory homeowners' association has the power to levy assessments,[16] Chapter 209 of the Property Code allows amendment no matter what the restrictions say. *See* Tex.

[16] *See* Tex. Prop. Code §§ 202.001(1), 209.002(4), (4-a), (8)-(9), 209.003

Prop. Code § 209.0041 (West 2015).[17]

2. If the deed restrictions do contain an amendment provision, it is enforceable subject to the limitations imposed by Chapter 209 and the common law. *See id.*; Cagle § 11.5 (survey of amendment routes); *Couch v. Southern Methodist Univ.*, 10 S.W.2d 973, 974 (Tex. Comm'n App.1928, judgm't adopted) (setting out common law limitations)). Nearly all modern deed restrictions, from about the mid-1970's onward, contain an amendment clause. *See* Cagle § 11.1 ("The procedures for amending . . . will almost always be found within the . . . document.").
3. In subdivisions in and around most urban areas, large and small, there are alternative statutory procedures for amendment irrespective of any amendment clauses in the deed restrictions. *See* Tex. Prop. Code Chs. 201, 204, 210; *see generally* Cagle Ch. 11.

The upshot is that only in rural areas or very small subdivisions to which no restrictive covenant amendment clause or statutory scheme applies does every owner have to approve an amendment.

Certainly, the DeGons had notice when they purchased their

[17] As of 2018, some 5,657,000 Texans lived in 1,552,000 homes in more than 20,000 HOA's. Commun. Assocs. Inst., *Commun. Assocs. Fact Book 2018*, Texas Facts & Figures Infographic (accessed 1/18/21 at: *https://www.caionline.org/Advocacy/Resources/Documents/Infographics/TX_FactsFigures_Info.pdf*). That represents a majority of all Texas homes. *See* CAI 2017 Fact Book, *supra* at 1-2.

home in late 2013 that their deed restrictions could be amended. But they were never on notice that an amendment could operate retroactively to deprive them of rights they already purchased. It strains credulity, given the importance of leasing rights historically, to suggest that people who buy land with broad leasing rights understand "amendment" to mean that those rights can disappear tomorrow. Leasing is one of the most important rights in the traditional bundle of sticks, a *sine qua non* of what it means to own real property and a foundation of liberty. A law, ordinance, or restriction which seeks to deprive someone of that right after they purchased it is inherently suspect. *See Zaatari v. City of Austin*, 615 S.W.3d 172, 188-91 (Tex. App. – Austin Nov. 27, 2019, pet. filed) (invalidating ordinance which took away historical right to lease for short durations).

And now, even express amendment provisions are largely irrelevant because few buyers can escape them. In 2015, the Legislature put all home buyers in subdivisions with mandatory HOA's (which, as noted above, is most subdivisions) on notice that their deed restrictions can be amended. The question therefore becomes, given that:

> (a) the vast majority of deed restrictions allow amendment in the first place; and
>
> (b) by statute, most Texans cannot avoid having their restrictions amended:

What, exactly, is a purchaser on notice <u>of</u> when covenants do not restrict

a property use yet can be amended at any time?

The DeGons contend that ordinary purchasers are not fairly on notice of a completely new restriction, particularly one which takes away important property rights endowed by prior restrictions.

III. New restrictions cannot be imposed on existing owners.

Courts around the country pursue two formal approaches to deciding whether a new restriction can be imposed on an existing owner by amendment procedures. One approach focuses on the definition of "amendment" and whether that term encompasses new restrictions. The other focuses on what is fair and reasonable when a majority seizes on the amendment process to take away property rights.[18] The two formal approaches can be merged for purposes of analyzing Texas law because the Legislature has decreed that deed restrictions can be "amended." The question thus boils down to whether existing owners can be subjected to new restrictions – whether "amendment" encompasses changes owners would not have expected to apply retroactively.

The DeGons first address the Texas jurisprudence, which has not squarely addressed the question. They then turn to the cases nationwide, which overwhelmingly favor protecting owners from new

[18] There are deed restrictions which lack an amending clause but which allow a vote to, for example, "nullify" existing restrictions. Such clauses should be enforced as written, but in many cases the new provisions at Chapter 209 would still allow amendment.

restrictions which take away existing rights.[19]

A. Texas common law allows amendments which remove restrictions on property use or further the purposes of existing covenants.

Texas cases are readily summarized: a restrictive covenant adopted by amendment may: (1) remove restrictions, or (2) further the purposes of existing restrictions. No Texas case to date has allowed a majority to take away important property rights from owners who purchased in reliance on those rights.

1. Existing restrictions can be removed by amendment.

The seminal Texas case from 1928 allowed a supermajority of owners in a subdivision to free up property use by removing a "residential use only" restriction for a subset of homes in the subdivision. *Couch v. S. Methodist Univ.*, 10 S.W.2d at 974 (reversing 290 S.W. 256, 259 (Tex. Civ. App. – Dallas 1926) (underlying case reciting facts in more detail)). The homes at issue bordered increasing traffic and development. That, concluded the court, allowed a relaxation of the original restrictions since affected owners would otherwise be stuck with properties whose values would be "materially impaired." *Id*.

The *Couch* court recited the rule that, "generally speaking, the right to amend a contract implies only those changes contemplating a correction, improvement, or reformation of the agreement rather than

[19] The table in the attached Appendix sets out and condenses the cases.

a complete destruction of it." *Id.*; *see also Scoville v. SpringPark Homeowner's Ass'n, Inc.*, 784 S.W.2d 498, 504 (Tex. App. – Dallas 1990, writ denied) ("the plain meaning of the term 'amend' is to change, correct or revise."). However, said the court,

> The universal rule of construction of deeds, where there is uncertainty, is to adopt that construction most favorable to the grantee [buyer], for the grantor selects his own language, and the policy of the law frowns upon forfeitures, conditions, and limitations, and favors the utmost freedom of titles.

Id.

The *Couch* court ultimately concluded that the "public policy which favors the utmost liberty of contract and freedom of land titles" allowed restrictions to be removed to make room for new uses. *Id.*; *accord French v. Diamond Hill-Jarvis Civic League*, 724 S.W.2d 921, 924 (Tex. App. 1987, writ refused n.r.e.) (relying on *Couch* to allow majority to abolish restrictions); *McMillan v. Iserman*, 120 Mich. App. 785, 791, 327 N.W.2d 559, 561 (1982) (citing *Couch* for the proposition that "other cases dealing with challenges to amended deed restrictions usually involved an amendment which is less restrictive").

Other cases, in Texas and elsewhere, have also allowed restrictions to be "improved" by removing use restrictions. *See*, *e.g.*, *Baldwin v. Barbon Corp.,* 773 S.W.2d 681, 686 (Tex. App. – San Antonio 1989, writ denied) (restriction which required ranchland to have a house could be removed); *French v. Diamond Hill-Jarvis Civic League*, 724 S.W.2d at 924 (owners had the power to remove restrictive

covenants); *Bryant v. Lake Highlands Dev. Co. of Texas*, 618 S.W.2d 921, 923 (Tex. Civ. App. – Fort Worth 1981, no pet.) (amendment removed undeveloped lots from subdivision, allowing the developer more rights); *Valdes v. Moore*, 476 S.W.2d 936, 938 (Tex. Civ. App. 1972, writ refused n.r.e.) (amendment removed prohibition on commercial uses for some properties and allowed multi-family homes for the rest); *see also, e.g.*, *Miller v. Miller's Landing, L.L.C.*, 29 So. 3d 228, 234 (Ala. Civ. App. 2009) (where original restrictions required large houses, resulting in deserted subdivision, amendment could remove onerous building restrictions); *Brockway v. Harkleroad*, 273 Ga. App. 339, 339, 615 S.E.2d 182, 183 (2005) (90% of owners voted to terminate restrictions).

2. An enforceable amendment is one which furthers the purposes of existing restrictions.

Another line of Texas cases allows amendments which further the purposes of the original restrictions.

In *Winter v. Bean*, No. 01-00-00417-CV, 2002 WL 188832 (Tex. App. – Houston [1st Dist.] Feb. 7, 2002, no pet.), the court enforced an amendment which barred one owner from re-subdividing a lot originally platted by the developer. *Id.* at *1-2.[20] This is no surprise. The size of lots in a development is a central feature of the general

[20] When a developer plats a subdivision, an official plat gets approved by local authorities and then recorded in the county plat records.[20] The plat shows the legal lots, and then the deed restrictions set out the rules for the use of those lots.[20] If the lots were re-subdivided, the plat and the deed restrictions would then have to be amended and re-recorded to reflect the existence of new lots.

scheme or plan of development, indeed a *sine qua non* equivalent to a restriction. If owners willy-nilly began subdividing, the physical characteristics of the subdivision would change radically, to say nothing of the character. Obviously, the developer did not intend the platted lots to be smaller by half; that would be a different subdivision. The purchaser of a lot in a typical, platted residential subdivision cannot be surprised that cutting the lot in half to build two houses where only one was previously allowed would undermine the original scheme.[21]

In *Sunday Canyon Prop. Owners Ass'n v. Annett*, 978 S.W.2d 654, 656 (Tex. App. – Amarillo 1998, no pet.), the court allowed a majority of owners to force a minority to pay assessments to maintain common elements (including roads) which had fallen into severe disrepair, threatening everyone with the loss of vital services. Again, no surprise here. This is basically a tax protest. An owner who purchased in that subdivision could not reasonably have expected to avoid paying for the upkeep of the physical infrastructure. Everyone who bought relied on the existence of the roads and common elements for the perpetuation of the subdivision. *Accord Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo. 2003) (where owner purchased with notice that HOA owned a

[21] A subdivision with uniform lot sizes clearly expresses the developer's intent. Subdivisions with wild variation in lot size could present more difficulty, but in such subdivisions, developers typically address resubdivision – for example, a restriction which forbids any resubdivision which would reduce a lot size to below an acre. The developer in this case forbade resubdivision entirely. Appellants' Tab 3 at 2 (¶ 3).

park and facilities, it was foreseeable that majority would adopt an amendment requiring mandatory assessments to pay property taxes, insurance, and upkeep; and there was also implicit authority for assessments already).

Finally, one Texas case allowed a majority to tinker with an existing restriction concerning the order in which improvements could be built so that the original conception of the subdivision could be preserved. In *Harrison v. Air Park Estates Zoning Comm.*, 533 S.W.2d 108 (Tex. Civ. App. – Dallas 1976, no writ), the subdivision was conceived as a residential community for people who loved airplanes. *Id*. at 110. The original restrictions allowed each owner's airplane hangar to be built before the home. The problem was, an owner might then avoid actually building a house, thwarting the express plan – "*homesites* for people who like airplanes." The challenged amendment, in order to further the original scheme, required the home to be built first, ensuring that owners did not shirk their obligation. That, concluded the court, was a reasonable extension of the original restrictions and was indeed necessary to carry out the clearly stated scheme of development.

In the present case, unlike any of the above cases, the original restrictions contemplated wide-open leasing and occupancy. *Free use and occupancy with wide-open leasing rights* was the original scheme. Ordinary purchasers of real estate do not believe that such important rights can be taken away summarily after purchase. The DeGons, for

their part, and unlike the complainants in *Winter*, *Sunday Canyon*, and *Harrison*, have no wish to change the original plat, expand their original rights, or undermine the scheme of development. To the contrary, it is the HOA and a tyrannical majority which seek to do that, changing a community originally conceived as open to all tenants as a high-walled community closed to many.

B. Most states do not enforce new restrictions against existing owners.

The great majority of cases in other states do not allow a new restriction to be enforced against owners who purchased under prior restrictions. Appellees' App. (updated table from CR45-47). These cases employ one variety or another of a fairness analysis which asks whether, when compared to the original restrictions, an amendment is new and unexpected. A trio of important cases from North Carolina, Washington, and Michigan represent the range of approaches for protecting the reasonable expectations of purchasers of real property.

1. Armstrong (NC).

In 2006, the North Carolina Supreme Court refused to enforce a new restriction imposing leasing restrictions and dues assessments where none had been imposed before. *See Armstrong v. Ledges Homeowners Assoc., Inc.*, 360 N.C. 547, 560, 633 S.E.2d 78, 88 (2006). There, new restrictions imposed –

> substantially different covenants from the originally recorded Declaration, including a clause requiring Association membership, a clause restricting rentals to terms of six months or greater, and clauses conferring powers and duties on the Association which correspond to

> the powers and duties previously adopted in the Association's amended by-laws.

Id. at 83.

In rejecting the amendment, the court protected the minority from unreasonable new restrictions, while allowing the community to change over time as new purchasers buy in. The decision merits quoting at length:

> [R]estrictions are generally enforceable when clearly set forth in the original declaration. Thus, rentals may be prohibited by the original declaration. In this way, the declaration may prevent a simple majority of association members from turning established non-rental property into a rental complex, and vice-versa.
>
> In all such cases, a court reviewing the disputed declaration amendment must consider both the legitimate needs of the homeowners' association and the legitimate expectations of lot owners. A court may determine that an amendment is unreasonable, and, therefore, invalid and unenforceable against existing owners who purchased their property before the amendment was passed; however, the same court may also find that the amendment is binding as to subsequent purchasers who buy their property with notice of a recorded amended declaration.
>
> . . . Here, petitioners purchased lots in a small residential neighborhood with public roads, no common areas, and no amenities. The neighborhood consists simply of forty-nine private lots set out along two main roads and four *cul de sacs*. Given the nature of this community, it makes sense that the Declaration itself did not contain any affirmative covenants authorizing assessments . . . .
>
> . . . [I]t is clear from the [governing documents] and the circumstances . . . that the parties did not intend . . . to confer *unlimited* powers of assessment on the Association
>
> . . . For these reasons, we determine that the Association's amendment to the Declaration which authorizes broad

> assessments "for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of Lots in The Ledges as may be more specifically authorized from time to time by the Board" is unreasonable. The amendment grants the Association practically unlimited power to assess lot owners and is contrary to the original intent of the contracting parties.
>
> . . . [W]e echo the rationale of the Supreme Court of Nebraska in *Boyles v. Hausmann,* 246 Neb. 181, 191, 517 N.W.2d 610, 617 (1994): "The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes in existing covenants." Here, petitioners purchased their lots without notice that they would be subjected to additional restrictions on use of the lots and responsible for additional affirmative monetary obligations imposed by a homeowners' association. This Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties.

Id. at 87-89; *see also Boyles v. Hausmann*, 246 Neb. 181, 190, 517 N.W.2d 610, 617 (1994) (not allowing "a majority to add new and different covenants" against the minority); *Caughlin Ranch Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 267, 849 P.2d 310, 312 (1993) (not enforcing new covenant imposing assessments on commercial lot which had not been subject to restrictions previously).

2. Wilkinson (WA).

Wilkinson v. Chiwawa Communities Ass'n, 180 Wash. 2d 241, 255–57, 327 P.3d 614, 622 (2014). In this case, on all-fours with this case, the Supreme Court of Washington refused to enforce an

amendment prohibiting short-term rentals. The original deed restrictions, like those here and in *Tarr*, did not restrict leasing. The Washington court held as follows:

> When the governing covenants authorize a majority of homeowners to *create* new restrictions unrelated to existing ones, majority rule prevails "provided that such power is exercised in a reasonable manner consistent with the general plan of the development." However, when the general plan of development permits a majority to *change* the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants. This rule protects the reasonable, settled expectation of landowners by giving them the power to block " 'new covenants which have no relation to existing ones' " and deprive them of their property rights. The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land.
>
> . . .
>
> [T]he Chiwawa general plan did not authorize a majority of owners to adopt new covenants. The Chiwawa general plan of development merely authorized a majority of owners "to change these protective restrictions and covenants in whole or in part." Thus, for amendments by majority vote to be valid in Chiwawa, such amendments must be consistent with the general plan of development *and* related to an existing covenant.

Id. (Cleaned up).

3. McMillan (MI)

In *McMillan v. Iserman*, 120 Mich. App. 785, 792–93, 327 N.W.2d 559, 562 (1982), a majority tried to retroactively bar a group

home, and the court pushed back hard:

> Here we have lot owners who, in the absence of a deed restriction to the contrary, bind themselves by contract to a particular use of their land. After making this commitment, they are suddenly faced with an amendment to the deed restrictions, passed after they had bound themselves by contract, prohibiting such use of their land. To comply with the amended restriction would force them to be in breach of contract. We find this result to be manifestly unfair. Even with the knowledge that deed restrictions can be amended, lot owners have a right to rely on those restrictions in effect at the time they embark on a particular course of action regarding the use of their land, and subsequent amended deed restrictions should not be able to frustrate such action already begun.
>
> For example, it certainly would be manifestly unfair to permit a subsequent amended deed restriction to force a lot owner to modify a preexisting use or structure which does not conform to the amendment. If a lot owner builds a garage, a subsequent amended deed restriction prohibiting garages could not force the owner to tear down his or her garage, which had been built when the owner relied on the absence of any such deed restriction. We see only a difference in degree between an amendment which seeks to affect a lot owner with a completed garage, a partially completed garage, or a contract to build a garage. In each case the lot owner would have, without notice to the contrary, relied on existing deed restrictions when embarking on the particular course of action, and a subsequent amendment should not be permitted to impose a hardship on such reliance.
>
> We thus hold that an amended deed restriction does not apply to a lot owner who has, prior to the amendment,

> committed himself or herself to a certain land use which the amendment seeks to prohibit, providing: (1) the lot owner justifiably relied on the existing restrictions (*i.e.,* had no notice of the proposed amendment), and (2) the lot owner will be prejudiced if the amendment is enforced as to his or her lot. Since we find that defendants Iserman justifiably relied on existing deed restrictions when they contracted with defendant Alternate Living Programs and Health Assistance, Inc., and since to enforce the amended deed restriction would result in forcing defendants Iserman to breach that contract, we hold that plaintiffs are estopped from asserting that the amended deed restriction applies to the lot owned by defendants Iserman.

4. Other significant decisions.

Grace Fellowship Church, Inc. v. Harned, 2013-Ohio-5852, ¶ 32, 5 N.E.3d 1108, 1115 (Ohio App. 2013). After a church bought unrestricted commercial property in a subdivision, a majority of the subdivision residents voted to forbid commercial uses and driveways. The court held the new and unexpected restriction unenforceable, and in the process echoed Texas cases which analogize the situation to unconstitutional takings:

> Applying amendments to existing landowners could completely alter a landowner's ability to use his property for the purposes for which it was intended. This would be similar to a governmental taking by a private entity and is not an equitable policy. . . . [I]t was not clear from the 1989 restrictive covenants that they would allow for a major modification that would retroactively remove a landowner's right to use his property as intended, especially given that they provided only that the "covenants herein" could be changed or modified. If the appellants' interpretation was

> accepted, it would create complete uncertainty and buyers would not be able to purchase a property with existing covenants for fear of what changes may eventually be made.

This evokes deep property rights and liberty concerns. A recent decision by the Austin Court of Appeals similarly cited the *Tarr* holding, which concerned private restrictive covenants, in the course of declaring unconstitutional a city ordinance barring short-term rentals. *See Zaatari*, 615 S.W.3d at 189-91. From a property owners' perspective, there is little real difference between a new deed restriction which summarily cuts off property rights and a new ordinance which does the same thing.

Lakeland Prop. Owners Ass'n v. Larson, 121 Ill. App. 3d 805, 810, 459 N.E.2d 1164, 1169 (1984). The HOA tried to impose assessments without any rationale, a naked money-grab. The court disallowed it: "The provision permitting the change of covenants found in the instant deed clearly directs itself to changes of existing covenants, not the adding of new covenants which have no relation to existing ones."

Caughlin Ranch Homeowners Association v. Caughlin Club, 109 Nev. 264, 849 P.2d 310, 312 (1993). A subdivision's original covenants imposed assessments only on residential parcels. The amending clause provided for amendment of the rates. After a commercial club began operations on the property, the homeowners association amended the covenants to levy assessments against the commercial parcel. The Nevada Supreme Court disallowed the amendment because it was a "new [covenant] unrelated to the original covenants."

Boyles v. Hausmann, 246 Neb. 181, 517 N.W.2d 610, 616 (1994). A majority increased the building setback requirements, rendering plaintiffs' lot unbuildable. The amendment, being "new and different," could not be enforced against the plaintiff.

Dreamland Villa Cmty. Club, Inc. v. Raimey, 224 Ariz. 42, 51, 226 P.3d 411, 420 (Ariz. Ct. App. 2010). The court held that 51% of the lot owners could not force the other 49% to join a club or pay assessments to a homeowners' association, saying: "It is not reasonable to use the amendment provision to direct that one group of lot owners may, in effect, take the property of another group in order to fund activities that do not universally benefit each homeowner's property or areas owned in common by all." *Compare Kalway v. Calabria Ranch HOA, LLC*, No. 2 CA-CV 2019-0106, 2020 WL 1239831, at *4 (Ariz. Ct. App. Mar. 13, 2020) (distinguishing *Dreamland Villa* because "[t]he definitions for "Dwelling," "Garage," and "Improvement" in the amended declaration add clarity to the provisions in the original, and they neither altered the nature of the covenant nor were unforeseen.").

Stop & Shop Supermarket Co. v. Urstadt Biddle Props., 433 Mass. 285, 291 (2001) ("The Declaration is an encumbrance, and thus must be listed on the parties' certificates of title to be binding on them, as must any amendment to it").

C. Assessment (tax) protest cases do not inform this case.

There are assessment-protest cases in other states similar to the

Texas *Sunday Canyon* case, where owners were required to pay for the upkeep of common elements they knew they were buying into and benefitting from. *See*, *e.g.*, *Zito v. Gerken,* 225 Ill.App.3d 79, 167 Ill.Dec. 433, 587 N.E.2d 1048, 1050 (1992); *Evergreen Highlands Ass'n v. West*, 73 P.3d 1, 4 (Colo. 2003). Such sour-grapes cases, about the need to pay what amount to local taxes to support infrastructure, do not inform this case.

D. The pure contract case are wrong, but also irrelevant in Texas.

The HOA takes a pure contract approach to this case. Its contention is that the DeGons were on notice that the deed restrictions could be amended, so every amendment is immediately enforceable against all owners and no matter the impact on settled expectations. Three states agree with the HOA unequivocally:

Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 476 (Tenn. 2012). Said that court:

> [C]ontract principles, applied in the context of a private residential development with covenants that are expressly subject to amendment without substantive limitation, yield the conclusion that a homeowner should not be heard to complain when, as anticipated by the recorded declaration of covenants, the homeowners' association amends the declaration. When a purchaser buys into such a community, the purchaser buys not only subject to the express covenants in the declaration, but also subject to the amendment provisions of the declaration. And, of course, a potential homeowner concerned about community association governance has the option to purchase a home not subject to association governance. As one commentator

> has noted, people who live in private developments "are not just opting for private ordering in the form of covenants, but also are opting for a privatized form of collective decision making that can undo, replace, modify, or augment the private ordering already achieved."
>
> For this reason, we decline to subject the amendments to the Declaration in this case, adopted by the requisite 75% super-majority, to the "reasonableness" test as announced by the Court of Appeals. We acknowledge that a homeowner's Lockean exchange of personal rights for the advantages afforded by private residential communities does not operate to wholly preclude judicial review of the majority's decision. However, because of the respect Tennessee law affords private contracting parties, we are reticent to inject the courts too deeply into the affairs of a majoritarian association that parties freely choose to enter.

(internal cites omitted).

Adams v. Kimberley One Townhouse Owner's Ass'n, Inc., 158 Idaho 770, 774, 352 P.3d 492, 496-98 (2015). The court enforced a detailed new regime of lease restrictions, including a ban on short-term leasing, reasoning:

> Under the 1980 Declaration, ten percent of the homeowners could be bound by an amendment they did not want if the majority had the requisite ninety percent of the vote to support the change. This fact is obvious and unambiguous on the face of the agreement, and if Adams was not willing to agree to the amendment term, he was free to walk away from the transaction.

Trustees of Clayton Terrace Subdivision v. 6 Clayton Terrace, LLC, 585 S.W.3d 269, 282 (Mo. 2019). So long as the procedures for amendment were followed, "[w]hen a contract unambiguously permits

amendment or alteration, there is nothing to construe; the contract may be altered or amended."

The pure-contract approach fails in this case for three reasons:

1. No Texas case supports a pure-contract approach.

No Texas case has held that all amendments are enforceable, nor that a new restriction can be enforced against an owner who purchased a prior bundle of rights. The HOA points to the *Winter* and *Harrison* cases, but those are distinguishable as already discussed. Other, non-amendment cases relied on by the HOA, being too far afield, are discussed in a separate section, below.

2. Buyers in Texas do not have a choice.

Buyers in Texas do not have a meaningful choice whether to avoid restrictions subject to amendment. Chapter 209 imposes an amendment procedure in subdivisions like the DeGons', which is a majority of subdivisions in Texas. But even before that was adopted in 2015, most buyers had little choice but to buy into deed restrictions with an amending clause since such clauses were the rule, not the exception. *See* Cagle § 11.1.

Furthermore, a home buyer has no power to negotiate away restrictive covenants; it's take-it-or-leave-it. The idyll of a pure free market in property rights, where the buyer has a choice between, say, restricted and unrestricted properties, or restrictive covenants with an amending clause or restrictive covenants without, does not exist for the vast majority of home buyers.

In any event, typical buyers of real estate do not believe that

"amendment" means "my property rights can be taken away summarily by my neighbors." Why would they? No Texas case has ever said that.

The pure contract approach, if adopted by the court in this case, will have broader repercussions than just banning short-term leasing. Today it's leasing, but tomorrow it will be some other property right. If the historically-sacrosanct and vital right to lease is not safe, then nothing is. The HOA has no answer to this except to say "the contract says it." But of course, the contract does not say it, not in the way ordinary people would understand it. People believe, quite reasonably, that they get to keep the bundle of rights they bought even if the next buyer buys a different bundle of rights. That, in a nutshell, is the majority view in the common law jurisprudence in the United States.

IV. The HOA's case authorities are unpersuasive.

A. JBrice is not analogous and is wrongly decided.

The recent *JBrice Holdings* case relied on by the HOA (Brief of Appellants at 10, 13) has no bearing on this case for several reasons:

1. The case does not involve an amendment to deed restrictions, but mere rulemaking by an HOA board. The court expressly *declined* to construe the deed restrictions.
2. The holding turns entirely on a statute authorizing HOA board rulemaking which only applies in the Houston area.[22]

[22] 2020 WL 4759947, at * 4-5 (relying on Tex. Prop. Code § 204.010, applicable to the Houston area by virtue of § 204.002 (counties with a population of 3.3 million or more and counties surrounding same).

3. The case is wrongly decided. Review is being sought in the Texas Supreme Court.

4. The 14th Court's decision is not controlling on this court.

A thumbnail sketch shows why *JBrice* has no bearing on this case and is grievously in error. An investor bought two townhomes. The deed restrictions, which were never amended, provided that ***"there shall be no restriction on an owner's right to lease."*** The HOA argued, in defiance of *Tarr*, that short-term rentals are not a residential use, so the broad grant of leasing rights was irrelevant. The trial court agreed and declared that "transient" leases for less than seven days were barred by the "residential use only" requirement. Later still, the HOA's board adopted new leasing rules providing that any "use" which triggered payment of the Texas Hotel Tax was barred, in effect a ban on short-term rentals.

The court of appeals affirmed the trial court without addressing the unrestricted right to lease. Instead, the court addressed the HOA board's new rules adopted after the HOA obtained a summary judgment declaring that leasing was restricted to seven days or more.[23] The court of appeals reasoned that since an HOA board in the Houston area, by special statute, has broad rulemaking power, the "right to lease without restriction" did not prevent the HOA's board from restricting leasing by duration, particularly since, that court

[23] The trial court never explained its basis for settling on 7 days as a "residential use." No authority extant references that number as relevant to anything.

concluded, the board's new rules defined what was barred as "transient" use. Said the court, "transient" use is not encompassed within the original restrictions' requirement of "residential" use.

Setting aside the *JBrice* decision's obvious but unacknowledged conflict with *Tarr*, Section 204.010 of the Texas Property Code, upon which the *JBrice* case turns, does not apply to this case. No statutory authority exists for the appellants in this case to make any rules, much less ones which conflict with the deed restrictions. In addition, the deed restrictions in this case do not endow the appellants (HOA or ACC) with the power to adopt rules in the first place. Nothing less than an amendment to the 1987 restrictions could alter the leasing rights granted by the restrictions.

The issue in this case is whether an amendment can take away existing rights. Were this court to follow *JBrice*, it would have to hold that the 1987 restrictions already barred short-term leasing. If that were the holding, then the restrictions adopted in 2019 would not be new at all. But such a result would defy *Tarr*, and besides which, this court held short-term leasing to be a residential use years before *Tarr* did. *See Zgabay v. NBRC Prop. Owners Ass'n*, No. 03-14-00660-CV, 2015 WL 5097116, at *2 (Tex. App. – Austin Aug. 28, 2015, pet. denied).

B. Condominium cases do not inform subdivision cases.

The HOA also relies on a case involving an amendment to a condominium declaration (Brief of Appellants at 10, 13-14) but

condominium law does not control or inform the law for subdivisions. *See Board of Directors of By the Sea Council of Co-Owners, Inc. v. Sondock*, 644 S.W.2d 774, 776 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); *Allan v. Nersesova*, 307 S.W.3d 564, 570 (Tex. App. – Dallas 2010, no pet.) (condo owner could not rely on law pertaining to subdivisions). "The concept of the condominium comes not from the common law but is a statutory creation." *Id.* As noted in *Sondock*, condominiums are subject to detailed statutory regimes. *Id.* at 780 (because condos have "unique problems" and require "greater degree of control," amendments can be broader in scope). The very case relied on by the HOA quotes *Sondock* for the same point. *Cavazos v. Board of Governors of the Council of Co-Owners of the Summit Condominiums,* No. 13-12-00524-CV, 2013 WL 5305237, at *3 (Tex. App. – Corpus Christi-Edinburg Sept. 19, 2013, no pet.) (mem. op.).

While *Sondock*, declaring the inapplicability of condominium law to subdivisions, was decided under the older Texas Condominium Act (Tex. Prop. Code Ch. 81), the newer Uniform Condominium Act provides even less support for the HOA's position and, if anything, supports the DeGons. For all condominiums created after 1994, a 100% vote of the owners is necessary to change use restrictions such as leasing restrictions. *See* Tex. Prop. Code § 82.067(e). Thus, in an area where modern statutory law, rather than common law, defines reciprocal property rights and obligations, a majority of owners cannot take away fundamental property rights from an objecting minority.

There is another, related problem with the HOA's reliance on the *Cavazos* condominium case. Precisely because it is a case governed by a detailed statutory regime, the homeowner there could not – and in fact did not – argue the common-law rights relied upon by the DeGons in this case and upheld in most other states. The contentions made here were never raised or addressed in *Cavazos*.

V. The DeGons never agreed to unknowable future amendments.

The HOA misreads the deed restrictions to construct an argument that the DeGons agreed to any new restrictions which might get imposed after purchase. In fact, the provision relied on by the HOA supports the DeGons since it dictates *exactly* what they were on notice of when they purchased.

The HOA relies on the following language of the restrictions:

> Deeds of conveyance to any lot may contain the provisions, restrictions, covenants and conditions herein by reference to this Declaration; however, whether reference is made in any or all of said deeds, by acceptance of a deed to a lot in Poole Point each Owner for himself, his heirs, personal representatives, successors and assigns, binds himself and such heirs, personal representatives, successors and assigns to all the terms and provisions of this Declaration and any amendments thereto.

Appellants' Tab 3 at 5 (¶ 7).

This provision says nothing about new restrictions recorded after someone purchases. It describes what happens at the time of purchase if a deed does not itself recite the restrictive covenants: the declaration and any amendments thereto still bind the buyer because they are

recorded instruments in the chain of title. The drafter used "acceptance" and "binds" in the present-simple tense to refer to the act of purchase, at which time the buyer "binds himself" to "this Declaration and any amendments thereto." Everything is in the same tense and describes a moment in time. This provision makes clear that the purchaser takes with notice of all recorded restrictions as of the purchase date.

The DeGons agree wholeheartedly. When they purchased their home in 2013, they were legally on notice that they were buying a home in a subdivision with wide-open leasing rights. That was the basis of the bargain with their new neighbors. The shared understanding at the time was that the subdivision welcomed tenants for all durations. The DeGons, therefore, by operation of this paragraph, purchased with notice of the 1987 restrictive covenants and all the rights and obligations accorded them thereunder. It was not they who sought to change the tenor of the place; it was their neighbors who did.

VI. The HOA's real contention is more insidious.

A. The new restrictions destroy the original scheme.

The deeper motivations behind the new restrictions can be discerned from the HOA's swipes at tenants. The HOA's brief dehumanizes and demonizes people who rent homes for short terms. The HOA insinuates that faceless "others" who do not permanently reside in a subdivision cannot qualify as residents, that they are not

wholesome "single families," that they hurt home values by their mere presence, that they wreck the community and its "quality of life." Appellants' Brief at iii, viii, 2, 5-6, 8, 9, 11, 12 n. 7. The implication is that the DeGons should be vilified for doing exactly what the developer intended.

The HOA's position, and the seeming motivation behind the 2019 restrictions, is that some people – particularly those who save up to afford a vacation rental but perhaps cannot afford to buy a vacation home of their own – do not belong in Poole Pointe. Some people do not deserve to share in the subdivision's "quality of life and residential atmosphere" even if they pay for leasehold interest to get it. Appellants' Brief at 6. Life in the subdivision, and the use and enjoyment of its situation on the lake, is restricted to (1) owners and their friends, who get all the intermittent-use privileges they want, and (2) tenants who can prove they'll hunker down for six months straight. Owners who do rent out to "weekend" tenants deserve to have their property rights taken away, and their investment ruined. Appellants' Brief at viii. In these expressions of fear and exclusion can be discerned animus against faceless "others," against people who are not from here, against people seeking refuge, respite, shelter, or ease.

This case, no matter the outcome, cannot remedy political and economic schisms. But it can make clear that exclusion is not the principle on which the Poole Pointe subdivision was founded. It is not the principle enshrined in the deed restrictions effective when the

DeGons bought. It is, precisely, the new restrictions adopted in 2019 which would destroy the assumptions on which the Poole Pointe subdivision was founded. A majority in Poole Pointe seek to create a different kind of subdivision, one where owners enjoy freedoms but tenants do not. It would be a new regime imposed abruptly, without orderly transition from a historically wide-open community to one closed to classes of persons whom the majority wishes to keep out. The HOA, in essence, argues that a form of residential use and occupancy deemed normal and unremarkable for centuries – residential leasing for short terms – is now a grievous wrong which must be summarily righted at the expense of property owners like the DeGons.

B. The HOA's specific rationales for the new restrictions are baseless.

The ways in which the HOA contends the new restrictions further the old ones are baseless. To take a few examples:

Short-term use and occupancy is and always has been bad. The subdivision sits on a lake. The DeGons' house is a lake house. The DeGons themselves use the home intermittently. Appellants' Brief Tab 5 (Stips. ¶ 6). People buy second homes as vacation homes all the time, and they use them as they see fit. The developer obviously understood and intended as much when allowing temporary occupancy of the house. Tellingly, the HOA does not suggest that *owners* who stay only intermittently – the definition of a vacation home, after all – pose a threat to the community. According to the HOA, it's *tenants* who pose a threat and who must, therefore, pass a litmus test as neighbors by

physically and continuously residing in the subdivision for at least 6 months.

Short-term tenants behave badly. Another troublesome argument is that because short-term tenants sometimes behave badly,[24] owners should lose the right to lease for short terms. By the same logic, because some shirt-makers have bad labor practices, shirt-making should be banned. *See generally Cox v. State*, 497 S.W.3d 42, 50 (Tex. App. – Fort Worth 2016, pet. ref'd) ("The infamous Triangle Shirtwaist Factory fire of 1911 resulted in a nationwide push toward adopting and enforcing strict building codes."). But there are tailored remedies less onerous than confiscation for people (and shirt-makers) behaving badly, and indeed nuisance is its own, separate breach of the restrictive covenants at issue here, with ordinary remedies for breach. Appellants' Tab 3 at 2 (Restricts. ¶ 9), 4-5 (Gen. Provs. ¶ 2). The HOA's contention that short-term rentals are capable of threatening the peace and should therefore be banned retroactively on those already invested in them was rejected by this court in *Zaatari*. The City of Austin in that case could muster no evidence at all that short-term tenants behaved worse than anyone else, and this court refused to allow settled rights to be summarily taken away from existing property owners. 615 S.W.3d at 189-91 (no evidence of ill effects from STR's, ban unconstitutionally retroactive).

Short-term tenants are not residents. This canard was rejected in

[24] There are no such allegations in this case.

Tarr, and for good reason. The duration of a lease has nothing to do with how human beings use a home. Tenants come and go, live and love, like anyone else who uses and occupies a home. The HOA insinuates that tenants must qualify to be residents by staying in a home long enough, and continuously enough, to be accepted as legitimate. Stated another way, tenants must limit their travel and lifestyle to suit those who can afford to buy properties in Poole Pointe.

Only "single families" are allowed. The HOA uses the requirement of "single family use" to smear short-term tenants as somehow not neighborly, unwholesome, and thus excluded from residency by the original scheme of development. This is obviously false because:(1) short-term use was always contemplated; (2) short-term leasing has been going on for a long time; (3) the duration of a lease and the relationships among tenants have nothing to do with one another; (4) the new restrictions say nothing at all to the single-family requirement.

The point is, the HOA's effort to characterize the DeGons, their tenants, and the short-term use of the property as inconsistent with the original scheme of development is not only false, but pernicious. It is the new restrictions which would upend the assumptions on which the subdivision was founded and which would deny basic property rights and freedoms to owners and tenants.

VII. The 2019 Amendment's physical, continuous occupancy requirement violates public policy.

Short-term rentals are a historically allowable and ordinary

residential use, denial of which rises to the level of a constitutional infirmity. *Zaatari*, 615 S.W.3d at 191. Likewise, denying tenants the right to assemble on the property they rent, or regulating the hours during which they may be present or celebrate birthdays or stand in the yard, is likewise unconstitutional. *Id*. at *10. It is constitutionally suspect for a city to impose a mandatory, physical occupancy requirement on a tenant. *Cf. Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255, at *6 (Tex. App. – Austin Apr. 29, 2020, no pet.) (court stressed that it avoided finding short-term rental ordinance unconstitutional by holding that, as written, it did not require physical occupancy).

The 2019 Amendment goes all-in and requires a tenant to actually, physically occupy a home, and moreover to declare the home a permanent residence:

> [T]he lessee or lessees under any such rental [of 180 days or more] must use the property as the lessee's residence, and must intend to occupy the property as their place of abode for the duration of the 180 consecutive days.

This is analogous to the conduct banned by the City of Austin in *Zaatari*. It implicates the question the *Anding* court sidestepped but found troublesome. It deprives ordinary people – tenants with the possessory leasehold right – of the right to decide their own comings and goings. It forces tenants to declare a permanent home. It forces owners to monitor and surveil tenants. Military servicemembers, snowbirds, members of Congress, airline employees, and anyone who

regularly stays in different places would have their privacy invaded and housing denied merely for disclosing their whereabouts. This tramples liberty. The occupancy requirements in the 2019 Amendment violate fundamental, constitutional rights and privacy of tenants and imposes a harsh and unfair burden on landlords. The 2019 Amendment's physical, continuous occupancy requirements therefore violate public policy and should be declared void and unenforceable.

VIII. The HOA waived the contention that the DeGons should have sought a variance.

After entering into a Rule 11 agreement for an agreed case under Rule 263 and stipulating to the relevant facts for purposes of deciding the central issue in contention, the HOA now, for the first time in this appeal, suggests that the DeGons cannot seek relief because they did not seek a variance from the HOA. Appellants' Brief at 3 n. 2, 6.

This issue has been waived. *See* Tex. R. App. P. 33.1(a); *Carrizales v. Texas Dep't of Protective & Regulatory Servs.*, 5 S.W.3d 922, 925 (Tex. App. – Austin 1999, pet. denied). The HOA didn't argue this below, and its proposed judgment, required by the Rule 11 agreement, said nothing about denying relief to the DeGons based on the possibility they could obtain a variance. CR66, 74-75. Had this been raised below, the DeGons could have either (1) mooted it by seeking the variance while the case was pending; or (2) demonstrated, based on the HOA's take-no-prisoners cease-and-desist demands, that seeking a variance was futile. It is both too late and unfair for this issue to be raised on appeal.

IX. The attorney fee award should be upheld.

The HOA challenges the trial court's attorney-fee award based on the DeGons having prevailed, not on the amount awarded. The parties stipulated to "reasonable and necessary." Therefore, should the DeGons prevail on appeal, the trial court's attorney-fee award should be affirmed.

PRAYER FOR RELIEF

The judgment of the trial court should be affirmed in all respects.

Respectfully submitted,
/s/ J. Patrick Sutton
J. Patrick Sutton
Texas Bar No. 24058143
1706 W. 10th Street
Austin Texas 78703
Tel. (512) 417-5903
jpatricksutton@ jpatricksuttonlaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on April 8, 2021, per T.R.A.P. 6.3(b), a true and correct copy of this brief was served by efiling on J. Bruce Bennett, *jbb.chblaw@me.com*.

/s/ *J. Patrick Sutton*

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e), being in Century Schoolbook 14-point for text and 12-point for footnotes. Spacing is expanded by .5 point. This document complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains **11,015** words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ *J. Patrick Sutton*

No. 03-20-00618-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

POOLE POINT SUBDIVISION HOMEOWNERS' ASSOCIATION AND POOLE POINT ARCHITECTURAL CONTROL COMMITTEE,

Appellants,

v.

SEAN DEGON AND ERIE DEGON,

Appellees.

On Appeal from the County Court at
Law No. 2, Travis County, Texas
Trial Court Cause No. C-1-CV-19-009597

APPENDIX: TABLE OF CASES

Case	State	Amending Clause	Holding	Comments
Baldwin v. Barbon Corp., 773 S.W.2d 681, 686 (Tex. App. – San Antonio 1989, writ denied)	TX	"Amend or alter these restrictions."	The requirement that each lot have a house could be removed.	Consistent with the rule in *Couch* because restrictions were loosened.
Bryant v. Lake Highlands Dev. Co. of Texas, 618 S.W.2d 921, 923 (Tex. Civ. App. – Fort Worth 1981, no pet.)	TX	Unclear, but apparently "amendment."	Majority of owners could remove some properties from the restrictions.	Consistent with the rule in *Couch* because restrictions were loosened.
Couch v. S. Methodist Univ., 10 S.W.2d 973, 974 (Tex. Comm'n App. 1928, judgm't adopted)	TX	"Any of the above conditions . . . may be amended."	The requirement of "residential use only" for some properties in the subdivision could be removed by majority vote.	Seminal Texas case on scope of permissible amendment.
French v. Diamond Hill-Jarvis Civic League, 724 S.W.2d 921, 924 (Tex. App. – Fort Worth 1987, writ refused n.r.e.)	TX	"Change said covenants in whole or in part."	Majority of owners could remove all restrictions.	Consistent with the rule in *Couch* because restrictions were loosened.
Harrison v. Air Park Estates Zoning Comm., 533 S.W.2d 108, 111 (Tex. Civ. App. – Dallas 1976, no writ)	TX	"Modified."	Majority of owners could reverse sequence in which certain improvements were done.	Consistent with the rule in *Couch* because change "improved" existing restrictions.

Case	State	Amending Clause	Holding	Comments
Sunday Canyon Prop. Owners Ass'n v. Annett, 978 S.W.2d 654, 656 (Tex. App. – Amarillo 1998, no pet.)	TX	"Waived, abandoned, terminated, modified, altered or changed as to the whole of said tract or any portion thereof, at any time."	Majority of owners could add requirement that all owners pay assessments to maintain and repair common areas and facilities.	Consistent with DeGon's position because all owners knew there were common elements which someone had to pay to repair and maintain.
Winter v. Bean, No. 01-00-00417-CV, 2002 WL 188832, at *1 (Tex. App. – Houston [1st Dist.] Feb. 7, 2002, no pet.)	TX	"Changed, modified, or omitted."	Majority of owners could bar subdivision of existing lots.	Consistent with the rule in *Couch* because subdividing existing lots to cram in more houses on smaller plots obviously conflicts with the original scheme of development.
Dreamland Villa Cmty. Club, Inc. v. Raimey, 224 Ariz. 42, 51, 226 P.3d 411, 420 (Ariz. Ct. App. 2010)	AZ	"Changed in whole or in part or revoked in their entirety."	Majority of owners could not require assessments or restrict leasing where there were no common areas to maintain or repair.	
Evergreen Highlands Ass'n v. West, 73 P.3d 1 (Colo. 2003)	CO	"Released, *changed, or modified."*	Majority of owners could add requirement that all owners pay assessments to maintain and repair common areas and facilities.	Consistent with DeGon's position because all owners knew there were common elements which someone had to pay to repair and maintain.
Lakeland Prop. Owners Ass'n v. Larson, 121 Ill. App. 3d 805, 810, 459 N.E.2d 1164, 1169 (1984)	IL	"Change in whole or in part."	"Change" does include "the adding of new covenants which have no relation to the existing ones."	

Case	State	Amending Clause	Holding	Comments
McMillan v. Iserman, 120 Mich. App. 785, 792–93, 327 N.W.2d 559, 562 (1982)	MI	Unclear, probably "amend."	Amendment did not apply to a lot owner "who has, prior to the amendment, committed herself to a certain land use which the amendment seeks to prohibit, providing: (1) the lot owner justifiably relied on the existing restrictions (*i.e.,* had no notice of the proposed amendment), and (2) the lot owner will be prejudiced if the amendment is enforced as to his or her lot."	"Although imposing a harsher restriction by amendment in and of itself does not trouble us, we are concerned with such an amendment when it seeks to affect a lot owner who has detrimentally relied on the absence of any such restriction."
Windemere Homeowners Ass'n Inc. v. McCue, 1999 MT 292, ¶ 20, 297 Mont. 77, 82, 990 P.2d 769, 773 (Mont. 1999)	MT	"Waived, abandoned, terminated, modified, altered or changed as to the whole of the said real property or any portion thereof."	Majority of owners could add requirement that all owners pay assessments to maintain and repair common areas and facilities.	Dicta: Amending clause "authorized the creation of new or unexpected restrictions not contained or contemplated in the original covenants."
Se. Jurisdictional Admin. Council, Inc. v. Emerson, 363 N.C. 590, 598, 683 S.E.2d 366, 371 (2009)	NC	"Amendment."	Majority of owners could add requirement that all owners pay assessments to maintain and repair common areas and facilities.	Consistent with DeGon's position because all owners knew there were common elements which someone had to pay to repair and maintain.
Armstrong v. Ledges Homeowners Assoc., Inc., 360 N.C. 547, 560, 633 S.E.2d 78, 88 (2006)	NC	"Amended."	Majority of owners could not require assessments or restrict leasing where there were no common areas to maintain or repair.	Consistent with DeGon's position because all owners knew there were common elements which someone had to pay to repair and maintain.
Boyles v. Hausmann, 246 Neb. 181, 190, 517 N.W.2d 610, 617 (1994)	NE	"Change in whole or in part."	Majority of owners could not impose "new and different" restrictions which increased building setback lines.	

Case	State	Amending Clause	Holding	Comments
Caughlin Ranch Homeowners Ass'n v. Caughlin Club, 109 Nev. 264, 267, 849 P.2d 310, 312 (1993)	NV	Unclear, probably "amend."	Majority of owners of residential lots could not force assessments on commercial lot which had never been subject to any of the restrictions.	
Grace Fellowship Church, Inc. v. Harned, 2013-Ohio-5852, ¶ 32, 5 N.E.3d 1108, 1115 (Ohio App. 2013)	OH	"Modified or changed."	Majority could not take away commercial development rights from buyer of commercial lot.	Analogizes situation to a governmental taking.
Wilkinson v. Chiwawa Communities Ass'n, 180 Wash. 2d 241, 255–57, 327 P.3d 614, 622 (2014)	WA	"Change in whole or in part."	Majority of owners could not bar short-term rentals because such a restriction was new and unexpected.	On all fours with DeGon's case.
Adams v. Kimberley One Townhouse Owner's Ass'n, Inc., 158 Idaho 770, 774, 352 P.3d 492, 496-98 (2015)	ID	"Declaration may be amended ... by an instrument signed by not less than ninety percent (90%) of the Lot Owners."	New restrictions on leasing adopted under amendment clauses are enforceable.	Pure contract theory. Amendments enforced.
Trustees of Clayton Terrace Subdivision v. 6 Clayton Terrace, LLC, 585 S.W.3d 269, 282 (Mo. 2019)	MO	"Amended or extended by two-thirds of the lot owners."	New restrictions adopted under amendment clauses are enforceable.	Pure contract theory. Amendments enforced.
Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 476 (Tenn. 2012)	TN	Unclear, probably just "amend."	New restrictions adopted under amendment clauses are enforceable.	Pure contract theory. Amendments enforced.

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Patrick Sutton on behalf of Patrick Sutton
Bar No. 24058143
jpatricksutton@jpatricksuttonlaw.com
Envelope ID: 52259007
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
James Sutton	24058143	jpatricksutton@jpatricksuttonlaw.com	4/8/2021 11:17:13 AM	SENT
James Bruce Bennett	2145500	jbb.chblaw@me.com	4/8/2021 11:17:13 AM	SENT
Roy Kemp Kasling	11104800	kkasling@kaslinglaw.com	4/8/2021 11:17:13 AM	SENT