No. 20-0857

# IN THE SUPREME COURT OF TEXAS

JBRICE HOLDINGS, L.L.C., AND 231 W. TRIOAKS LANE, an individual series of JBRICE HOLDINGS, L.L.C.,

Petitioners,

v.

WILCREST WALK TOWNHOMES ASSOCIATION, INC.,

Respondent.

On Petition for Review From the Fourteenth Court of Appeals at Houston, No. 14-17-00790-CV

## BRIEF OF PETITIONERS

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## PARTIES AND COUNSEL

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**Respondent:** Wilcrest Walk Townhomes Association, Inc., a Texas nonprofit corporation.

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**Trial Court:** 125th District Court, Harris County, Texas, Hon. Kyle Carter

**Appeals Court:** Fourteenth Court at Houston, Justices Wise, Jewell, and Poissant. Memorandum Opinion by Justice Poissant.

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## STATEMENT OF THE CASE

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| *Nature of the case:* | An investor in residential rental houses sued his HOA for a declaratory judgment that the subdivision's restrictive covenants allow leasing for short terms. The HOA counterclaimed for breach of restrictive covenant. |
| *Trial court:* | Hon. Kyle Carter, 125th Civil District Court, Harris County, Texas. |
| *Trial court disposition:* | In an interlocutory summary judgment order, the trial court granted summary judgment to the HOA for breach of restrictive covenant and denied summary judgment to the homeowner. CR49. At trial on the homeowner's remaining declaratory judgment claims and the HOA's request for a permanent injunction, the trial court entered a permanent injunction barring short-term rentals and dismissed the homeowner's claims. The trial court awarded the HOA its attorney's fees. CR65; 2RR71-73. |
| *Parties on appeal:* | Appellants JBrice Holdings, L.L.C., and 231 W. Trioaks Lane, an individual series of JBrice Holdings, L.L.C.<br><br>Appellee Wilcrest Walk Townhomes Association, Inc., a Texas nonprofit corporation. |
| *Appeals Court:* | Fourteenth Court at Houston |
| *Justices:* | Poissant, J., with Wise and Jewell, JJ. |
| *Disposition on appeal:* | Affirmed. 2020 WL 4759947. The court of appeals concluded that the HOA board could adopt rules barring short-term rentals under its statutory rulemaking powers.<br><br>Panel and en banc rehearing were denied. |

## STATEMENT OF JURISDICTION

This case presents a legal question important to the jurisdiction of the state. The court of appeals held that rules adopted by an HOA's board of directors can negate property rights expressly granted by restrictive covenants. Because of the decision below, owners and purchasers of real property have no assurance that the rights they thought they were buying will continue to exist after closing.

The decision of the court of appeals conflicts with decisions of this Court. In *Tarr v. Timberwood Park Owners Assoc., Inc.*, 556 S.W.3d 274 (Tex. 2018), this Court held that even if residential subdivision restrictive covenants are silent concerning leasing, leasing for short terms is allowed as a "residential use." By that standard, express property rights are only more compelling.

In *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004), this Court held that restrictive covenants control over rules adopted by an HOA board under the statute at issue here. The court of appeals below, however, held that an express grant of property rights in restrictive covenants is readily circumvented by rules which use different words.

The decision below is a calamity for owners of real property, who have long relied on restrictive covenants to mean what they say and be enforceable as written. HOA boards, which come and go each year, should not be allowed to defeat the clear import of restrictive covenants through rulemaking. No owner's rights are safe when that happens.

## ISSUES PRESENTED

If subdivision restrictive covenants require "residential use" and grant homeowners a "right to lease with no restriction":

1. Is leasing for an unspecified minimum duration prohibited because it is not a "residential use," despite the plain "no restriction" wording and this Court's decision in *Tarr v. Timberwood Park* that leasing for short terms is a residential use?
2. Can an HOA's board of directors undermine clear restrictive covenants through rulemaking, despite this Court's decision in *Brooks v. Northglen Ass'n*?

## INTRODUCTION

Free enterprise was founded on the landlord-tenant relationship.[1] Landlords have been setting the lease term, without interference, for centuries. That right is part of the traditional "bundle of sticks" which conveys with title.[2]

In the last twenty years, the internet has made it easier for landlords and tenants to connect. That has allowed short-term leasing, which has been occurring time out of mind,[3] to become more widely prevalent. That, in turn, has created friction between: (1) homeowners who occupy their homes full-time and dislike – in what they deem "their" neighborhood – "strangers" who rent for short terms; and (2) homeowners who, for any number of good reasons, convey the possessory interest in their homes for less than a year – aka, *landlords*.

Older restrictive covenants typically say little or nothing about leasing; the right is implicit and unrestricted.[4] Sometimes, as in this

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[1] *See generally* Thomas Piketty, *Capital in the Twenty-First Century* Ch. 1 (2014) (the traditional basis of social organization and industrial development in Western societies is those who pay land rents and those who receive them).

[2] 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.").

[3] *See Zaatari v. City of Austin*, 615 S.W.3d 172, 191 (Tex. App. – Austin 2019, pet. denied) (short-term rentals are a "historically-allowable use.").

[4] *See*, *e.g.*, *Tarr*, 556 S.W.3d at 285 (Where restrictions are silent, "[n]o construction, no matter how liberal, can construe a property restriction into

case, restrictive covenants allow leasing expressly, but simply to emphasize that it is unrestricted. This Court held in *Tarr v. Timberwood Park*,[5] as have most jurisdictions which have addressed the issue,[6] that common restrictive covenant wordings which say little or nothing about leasing allow short-term leasing as a residential use. Presumably, if deed restrictions which are silent as to leasing do not bar short-term leasing, then restrictive covenants which *expressly* allow unrestricted leasing must also allow short-term leasing.

Or so one would think. HOA boards in subdivisions whose deed restrictions do not bar short-term leasing have turned to banning short-term leasing through backdoor means. One tactic is for boards to adopt – with all the bells and whistles of an official-looking subdivision governing document – mere *rules* which take away what the restrictive covenants give. This leads to a situation where HOA boards charged with enforcing restrictive covenants seek to thwart and undermine them through rulemaking.

That, in a nutshell, is this case, and it is being repeated all across the state as vocal minorities of subdivision homeowners champ at the bit of *Tarr v. Timberwood Park*.[7] This Court needs to bolster *Tarr* by

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existence when the covenant is silent as to that limitation."), 291; *Boatner v. Reitz*, No. 03-16-00817-CV, 2017 WL 3902614, at *1 (Tex. App. – Austin Aug. 22, 2017, no pet.) (restrictions silent as to leasing).

[5] *Id.* at 291 n. 14 (citing leading cases from other states).

[6] *See Wilson v. Maynard*, 2021 S.D. 37 (S.D. June 16, 2021) (surveying and following majority of states, including Texas).

[7] *See*, *e.g.*, *Kiiru v. Kings Crossing (Little Elm) Homeowners' Assoc., Inc.*, No. 20-10580-362 (Denton 362nd Dist.) (HOA board adopted rules forbidding leasing for 75% of owners and banning leases of less than 12 mos. where

declaring that restrictive covenants not only do not mean what they do not say (the holding in *Tarr*), but *do* mean what they *do* say. Buyers of real estate need certainty that what they read on the page is what they may do with their land. By the same token, they need certainty that other owners cannot do what is clearly prohibited. If the decision below stands, no buyer is secure in the rights he or she paid for at closing. Property rights will be as mutable as the composition of a given year's board.

## STATEMENT OF FACTS

### I. Brice bought townhomes in a subdivision whose restrictive covenants allow leasing with "no restriction."

Investor Jerry Brice, through entities he formed,[8] bought two townhomes in the Wilcrest Walk subdivision to serve as short-term rental properties. He was reassured by the clear leasing language of the restrictive covenants:

> Section 9. Leases. The Association shall require that all leases of any townhouse units must: (i) be in writing, and (ii) provide that such leases are specifically subject in all respects to the provisions of the [restrictive covenants], Articles of Incorporation, and By-laws of the Association, and that any failure by the lessee to comply with the terms and conditions of such documents shall be a default under such leases. ***Other than the foregoing, there***

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restrictive covenants contain no restrictions on leasing); *Sheffield v. Forest Creek Section 23 Homeowners' Assoc., Inc.*, No. 21-0518-C368 (Williamson 368th Dist.) (HOA board adopted rules barring leases of less than 92 days where restrictive covenants contain no restrictions on leasing).

[8] The restrictive covenants allow entities to own properties in the subdivision. Supp.CR85 (Art. I, § 2).

> ***shall be no restriction on the right of any townhome owner to lease his unit.***

Supp.CR105 (Art. XI, § 9) ("the leasing clause") (emphasis added).[9]

Only one of Brice's leases for each home was in force at a given time, and each tenant under each lease had sole and exclusive possession. Brice paid state and local occupancy taxes which apply to leases of less than 30 days. Brice did not have a business office or engage in any business activity in the homes; nor did he allow the tenants to operate businesses in the homes. Supp.CR322-23.[10]

Wilcrest Walk's restrictive covenants also contain a general provision requiring that all homes be used as residences by all types of occupants:

> No Owner shall occupy or use his Building Plot or building thereon, or permit the same or any part thereof to be occupied or used for any purpose other than as a private single family residence for the Owner, his family, guests and tenants . . . . No Building Plot shall be used or occupied for any business, commercial, trade or professional purposes either apart from or in connection with the use thereof as a residence.

Supp.CR99 (Art. IX, § 1) ("the residential use clause").

In another provision, the restrictive covenants regulate duration of occupancy:

> No structures of a temporary character, trailer, basement, tent, shack, barn, servants quarters or other out buildings shall be used on any Building Plot at any time as a residence either temporarily or permanently….

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[9] The restrictive covenants allow "for rent" signs. Supp.CR100 (Art. IX, § 6).

[10] The vice president of the HOA leases out her townhome. 2RR23-24.

Supp.CR100 (Art. IX, § 5) ("the temporary residence clause").

### II. The HOA demanded that Brice cease leasing for short terms, and the trial court agreed.

Wilcrest Walk has a mandatory homeowners' association with authority to enforce the restrictive covenants. Supp.CR88 (Art. IV), 107 (Art. XII, § 1). The HOA board threatened to sue Brice for renting out his home for short terms, asserting that his rentals were a prohibited "short term hotel, vacation rental, and/or transient use." Supp.CR324.

Brice sued first, seeking a declaratory judgment that the restrictive covenants allow short-term residential leasing. CR4. The HOA counterclaimed for breach of restrictive covenant and "private nuisance." CR12, 16. It sought a permanent injunction to bar Brice's short-term leasing. CR17-18.[11]

The parties filed competing motions for summary judgment on the issue whether short-term leasing is allowed. Supp.CR4, 58, 171, 284.[12] Brice argued that the restrictive covenants mean exactly what they say in allowing leasing "with no restriction." The HOA relied on the intermediate appellate decision in *Tarr v. Timberwood Park*,[13] along with earlier precedent to the same effect, to contend

[11] The restrictive covenants contain provisions barring "nuisances," Supp.CR 99 (Art. IX, § 4) and "annoyances," Supp.CR 102 (Art. IX, § 14). The HOA's counterclaim quoted these provisions. CR15. They are treated together herein.

[12] There were HOA board-adopted rules in effect at that time, but they simply parroted the restrictive covenants. CR173 (reciting rule prior to 2017 which forbade business purposes).

[13] *Tarr v. Timberwood Park Owners Ass'n*, 510 S.W.3d 725 (Tex. App. – San

that leasing for short terms is not a residential use and that tenants must establish permanent residency. Supp.CR65-68.

After the hearing, but before the trial court ruled, the HOA's board adopted new rules which, among other things, banned *anyone* from staying in a home for less than 30 days:

> A "lease" and "leasing" as provided in the Declaration and these Rules shall not include any use of the townhome for hotel, motel, or transient use by individuals who do not utilize such townhome as a bona-fide primary or secondary residence. The use of any townhome for hotel, motel, or transient use shall be and is strictly prohibited. "Hotel, motel, or transient use" shall be defined so as to include any use for which the payment of a hotel or motel tax to the State of Texas or the City of Houston would be applicable . . . .

Brief of Appellants Tab D.[14]

Brice then amended his lawsuit to have the new rules declared invalid, asserting that they: (1) conflict with the restrictive covenants; and (2) fall outside the subject matter the restrictive covenants authorize. CR25.

The trial court thereafter granted partial summary judgment to the HOA for breach of restrictive covenant for Brice's short-term leasing. CR52.

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Antonio 2016), *rev'd,* 556 S.W.3d 274 (Tex. 2018).

[14] The court reporter could not locate the trial exhibits. The parties stipulated Tab D of the Brief of Appellants is a true and correct copy of the HOA's rules adopted in 2017.

### III. At trial, the HOA obtained a permanent injunction barring short-term leasing.

At trial on remaining issues, the HOA stated it was nonsuiting "our claim for nuisance." 2RR7. The remaining issues were tried to the court. The HOA did not dispute that the issue to be tried was whether a permanent injunction should be entered barring short-term leasing:

> *THE COURT:* This is a short-term rental situation through the website known as Airbnb that I think everybody is familiar with at this point in time and the question is whether or not it's permissible under the restrictions and the rules and regulations for somebody in the community to use and utilize their property for purposes of, call it, a short-term rental.
>
> . . . That's the issue in this case. That's what we are here for. The plaintiff has sued for declaratory relief to suggest that yes they can and the defense is saying no they can't and that's essentially what this case boils down to.
>
> * * *
>
> Q. [by HOA counsel to HOA representative]: Are you seeking . . . from this court to enjoin Mr. Brice from henceforth renting his two units on a short-term bases and conducting a business out of those two units on a permanent basis?
>
> A. [HOA board member Christiansen]: Yes.
>
> Q. [HOA counsel passes the witness].

2RR14, 22-23.

The new rules were admitted into evidence. 2RR12; Brief of Appellants Tab D. Brice, in support of his declaratory judgment claim concerning the new rules, contended that as a matter of law

the rules conflict with the restrictive covenants and should thus be declared unenforceable. 2RR13, 63-64. The trial court concluded that it had already decided at summary judgment that short-term rentals were not allowed under the restrictive covenants, rendering it unnecessary to address the rules. 2RR64.

At the conclusion of trial, the HOA drafted, and the trial court signed, a final judgment reciting that the HOA had "non-suited its nuisance claim***s***." CR65 (emphasis added). On the issue of the permissibility of short-term rentals, the trial court determined that the restrictive covenants impose a minimum rental term of 7 days, and the court entered a permanent injunction to that effect. CR66; 2RR71-72. The HOA was awarded attorney's fees in an amount stipulated by the parties. CR66; 2RR68-72.[15] The trial court dismissed Brice's declaratory judgment claims and denied all other relief not expressly granted. CR67.

Brice appealed. CR73. The HOA did not cross-appeal or seek to correct or modify the judgment concerning nuisance/annoyance.

### IV. On appeal, the parties clashed over the meaning of the new *Tarr* precedent.

After Brice noticed appeal, this Court decided *Tarr v. Timberwood Park*, declaring that if restrictive covenants requiring "residential use" do not expressly restrict leasing, then

[15] The HOA's reasonable and necessary fees were stipulated as $32,500 at the trial court level, $10,000 on appeal, and $7,500 to the Supreme Court. 2RR63. Brice's reasonable and necessary fees were stipulated as $19,808 at the trial level, $10,000 on appeal, and $7,500 in the Supreme Court. 2RR69.

leasing for short terms is a permissible residential use.[16]

On appeal, Brice relied chiefly on this Court's decision in *Tarr* and on the restrictive covenants' express right to lease with no restriction. Brief of Appellants at 10-18. Brice contended, relatedly, that the board's new rules were unenforceable because they conflict with the restrictive covenants, or else because they exceed the rulemaking power afforded the HOA. Brief of Appellants at 20-23.

The HOA argued on appeal that *Tarr* did not control this case. Brief of Appellee at 28. It also contended that § 202.003 of the Property Code, which mandates a "liberal" construction of restrictive covenants – but which *Tarr* declined to interpret definitively – required ignoring the leasing rights expressly afforded by the restrictive covenants. Brief of Appellee at 29. It argued that "residential use" in this case encompasses Brice's "own conduct in using, occupying, or permitting another to use or occupy" property. Brief of Appellee at 34. In support of that contention, the HOA argued that Brice was not engaging in a residential use because of "the constant rotation of various renters" in Brice's homes. Brief of Appellee at 35.

The HOA also contended that renting to tenants who are members of the public is not a "private" use of a home. Brief of Appellee at 36.

The HOA further argued that Brice was operating a prohibited

[16] 556 S.W.3d at 290-91.

business by engaging in the incidents of leasing, such as not occupying the home himself, earning rent, and owning the homes through entities. Brief of Appellee at 43-45.

Finally, the HOA defended its rules as expressly authorized by § 204.010(a) of the Property Code. Brief of Appellee at 46.

Though it did not argue the matter, the HOA framed as an issue on appeal whether Brice caused a nuisance. Brief of Appellee at xv (issue 3). It would continue with that assertion in its response to the petition for review.

### V. The court of appeals affirmed, declaring that the board can adopt rules barring "transient, hotel, and motel" use because the restrictive covenants do not use the exact words "transient," "hotel," and "motel."

The court of appeals did not address the restrictive covenants' express "right to lease with no restriction." Instead, it held that because the board had the power to adopt rules, and because the restrictive covenants are silent concerning "transient use" and "hotel or motel use," the board could adopt rules barring such uses.[17] Further, that Brice in fact operated hotels (or motels) by virtue of having paid state and local "hotel" occupancy taxes.[18] The trial court judgment was affirmed.

Brice sought panel and en banc rehearing; both were denied.

[17] 2020 WL 4759947, at *4-5.

[18] *Id.* at *4.

## SUMMARY OF ARGUMENT

The specific restrictive covenant allowing leasing with "no restriction," combined with the restrictive covenant allowing temporary residency in the main dwelling, shows that the drafter contemplated and allowed short-term leasing of the main dwelling. Such specific provisions control over the general "residential use" provision.

But even without those specific provisions, *Tarr* dictates that the general requirement of "residential use," in and of itself, allows Brice's short-term leasing.

Board-adopted rules which conflict with paramount restrictive covenants are unenforceable. The board's rules barring short-term rentals conflict in substance with the restrictive covenants' "right to lease with no restriction," so the board's rules are unenforceable. The board's expedient of using different words which in substance conflict with restrictive covenants does not render the rules valid. If the law were otherwise, boards could not only take rights away, but allow things that are clearly prohibited.

A homeowner's payment of state and local "hotel" occupancy taxes applicable to leasing for less than 30 days has no bearing on whether someone does, as a factual matter, operate a "hotel." Otherwise, homes all over the state would now be in violation of laws, ordinances, and restrictive covenants.

The final judgment recites that the HOA nonsuited all its nuisance claims. The HOA did not take issue with that finding.

Thus, no nuisance claims exist for adjudication. In any event, there was no evidence of nuisance at trial, or at best any such evidence was legally and factually insufficient.

Because Brice was entitled to lease for short terms, the permanent injunction and award of attorney's fees for breach of restrictive covenant should be reversed and vacated. However, because Brice's claim for attorney's fees under the DJ Act is discretionary with the trial court, the case needs to be remanded to determine what fees are equitable and just.

## ARGUMENT

### I. Standards of Review

#### A. Summary judgment is reviewed de novo.

"Summary judgment is proper if the movant establishes that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law."[19] The appeals court reviews a trial court's ruling on motions for summary judgment *de novo*.[20]

When parties file competing motions for summary judgment on overlapping issues, and the trial court grants one and denies the other, the appeals court considers all of the summary-judgment evidence and issues presented; if the trial court erred, the appeals court renders the judgment the trial court should have rendered.[21]

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[19] *Soledad v. Texas Farm Bureau Mut. Ins. Co.*, 506 S.W.3d 600, 602 (Tex. App.—Austin 2016, pet. denied); *see* Tex. R. Civ. P. 166a(c).

[20] *Southwestern Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 583 (Tex. 2015).

[21] *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Soledad*, 506 S.W.3d at 602.

Each side must carry its own burden both as the movant and the nonmovant.[22]

The partial summary judgment granted to the HOA in this case was merged into a final judgment. In such circumstances, the partial summary judgment is reviewable assuming subsequent events do not render the error in granting partial summary judgment harmless.[23]

**B. Following a bench trial without FFCL's, all necessary findings are implied, and legal determinations are reviewed de novo.**

In a nonjury trial where there are no filed findings of fact and conclusions of law, all necessary findings in support of the trial court's judgment are implied.[24] However, when a reporter's record is filed as in this case, the appellant may challenge implied findings by factual or legal sufficiency points, just as it could challenge jury findings or a trial court's written findings of fact.[25] If the evidence supports the implied findings, the appeals court must uphold the trial court's judgment on any theory of law applicable to the case.[26]

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[22] *Vann v. Homeowners Ass'n for Woodland Park of Georgetown, Inc.*, No. 03-18-00201-CV, 2018 WL 4140443, at *1 (Tex. App. – Austin Aug. 30, 2018, no pet.).

[23] *See Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex. 2005); *Gemini Ins. Co. v. Drilling Risk Mgmt., Inc.*, 513 S.W.3d 15, 27 (Tex. App. – San Antonio 2016, pet. denied); *DeNucci v. Matthews*, 463 S.W.3d 200, 207 n. 4 (Tex. App. – Austin 2015, no pet.).

[24] *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992).

[25] *Id.* at 84.

[26] *In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984) (per curiam); *see also CarMax Bus. Servs., LLC v. Horton*, No. 14-17-00840-CV, 2018 WL 3977962, at *2 (Tex. App. – Houston [14th Dist] Aug. 21, 2018, no pet. h.).

The trial court's conclusions of law at a bench trial are reviewed *de novo*.[27]

## II. The restrictive covenants unambiguously give Brice a right to lease with no restrictions.

Because of the decision below, buyers of land can no longer rely on the plain and ordinary meaning of deed restrictions. This Court needs to revisit and reaffirm the principles announced in *Tarr* as a check on lower courts which refuse to enforce deed restrictions as written. While *Tarr* recited basic contract interpretation principles, what *Tarr* addressed were restrictive covenants which were silent concerning the subject matter: "No construction, no matter how liberal, can construe a property restriction into existence when the covenant is silent as to that limitation."[28] Logically, if silence is not a restriction, then an express property right cannot be. That's not how the trial court saw it. It wrote a minimum lease term into the restrictive covenants. Worse, the court of appeals never even discussed the leasing clause's "right to lease with no restriction."

What restrictive covenant wording is clear enough for an investor to feel secure in the rights she is purchasing?

### A. Restrictive covenants are interpreted like contracts, but favoring the free use of land.

*Tarr* reaffirmed and clarified the jurisprudence surrounding restrictive covenants. The court of appeals gutted it.

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[27] *Smith v. Smith*, 22 S.W.3d 140, 143–44 (Tex. App.–Houston [14th Dist.] 2000, no pet.).

[28] 556 S.W.3d at 285.

Restrictive covenants are interpreted like contracts.[29] When clear, they are enforced as written.[30] The objective intent of the drafter as reflected in the language chosen is paramount:

> Accordingly, "[c]ourts must examine the covenants as a whole in light of the circumstances present when the parties entered the agreement," giving the "words used in the restrictive covenant ... the meaning which they commonly held as of the date the covenant was written, and not as of some subsequent date." Moreover, the words in a covenant "may not be enlarged, extended, stretched or changed by construction." And courts should avoid any "construction that nullifies a restrictive covenant provision."[31]

The words employed "are to be accorded their full and fair scope. They are not to be arbitrarily limited."[32]

Texas courts have historically viewed restrictive covenants with skepticism, so, as *Tarr* reaffirmed, restrictions are construed narrowly to protect individual property rights:

> Covenants or restrictive clauses in instruments concerning real estate must be construed strictly, favoring the grantee and against the grantor, and all doubts should be resolved in favor of the free and unrestricted use of the premises.[33]

More profoundly:

> [C]ovenants restricting the free use of property are not

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[29] *See generally Tarr*, 556 S.W.3d at 279-281 (summarizing Texas law on the interpretation of restrictive covenants).

[30] *Id.* at 280, 281, 282.

[31] *Id.* at 280 (internal citations omitted).

[32] *Id.* at 291.

[33] *Id.* at 281 (quoting ancient precedent).

> 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.[34]

In this case, the court of appeals nullified the restrictive covenants by not according them their full and fair scope. It held that because the restrictive covenants do not employ the exact words "transient," "hotel," and "motel," the board has the power to restrict those things – even though the restrictive covenants in express terms permit residential leasing with no restriction. The court of appeals' elevation of form over substance is dangerous precedent. If not corrected, HOA boards will employ word games to undermine restrictive covenants.

### B. The restrictive covenants clearly and unambiguously allow leasing for any duration.

At summary judgment, the HOA argued that the residential use clause bars Brice's short-term rentals, overriding the more specific leasing and temporary residence clauses. Summary judgment on that basis was error in the following two respects.

#### *1. The specific leasing clause controls over any inconsistent general provisions.*

To the extent contract provisions conflict, specific provisions control over general ones.[35]

The residential use clause is a general provision. Headlining

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[34] *Id.* at 280 (quoting precedent, cleaned up).

[35] *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133–34 (Tex. 1994); *NuStar Energy, L.P. v. Diamond Offshore Co.*, 402 S.W.3d 461, 466 (Tex. App. – Houston [14th Dist.] 2013, no pet.).

the "Use Restrictions" article, it defines the two broad, historical categories of property use (residential and commercial) and bars the latter. It expressly includes within its scope all kinds of residential occupants – owners, family members, guests, and tenants – and by doing so covers the field of residential occupancy.

The leasing clause is more specific. Leasing is a subset of residential use. The leasing clause provides in clear terms that leasing is allowed without no restriction other than exceptions expressly listed in the leasing clause itself: "*Other than the foregoing [requirements]*, there shall be no restriction on the right of any townhome owner to lease his unit." (The exceptions are formal requirements which form no part of the dispute in this case.) This is forceful language. This is language an investor is entitled to rely on. It could not be any clearer that Brice has a right to lease for any duration because the drafter listed the sole exceptions to an untrammeled leasing right.

It is likewise plain that the drafter could have, and would have, expressly limited leasing by duration had that been his intention. Duration of occupancy is fully resolved by the temporary residence clause, which expressly bars every kind of occupant – owner, family member, guest, and tenant – from residing "temporarily" in places other than the main dwelling. By logical implication, temporary occupancy in the main dwelling is not restricted by duration.[36]

[36] *Compare 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) (holding

In summary, the leasing and temporary residence clauses are specific provisions which control over general "use" provisions.

***2. The general "residential use" clause allows leasing for short terms in and of itself.***

The HOA relied below on the intermediate appellate opinion in *Tarr*, but after this Court reversed that decision, the HOA refused to concede. Such intransigence has remained a problem in litigation over this issue across the state. Mere handfuls of owners who control HOA boards – but who cannot garner majorities to amend restrictions – refuse to acknowledge the significance of *Tarr* and continue splitting hairs over variant "residential use" wordings which are all synonymous.[37]

This Court held in *Tarr* that "residential use" and its variants, if not defined to exclude leasing or impose a duration limit, allow leasing for short terms: "The terms 'residence purposes' and 'residences' require the use of property for *living* purposes as distinguished from uses for business or commercial purposes."[38] Relatedly, this Court concluded that the normal incidents of

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that nearly identical clause showed that "it is clear that the drafters of the covenants considered and knew how to impose a duration on particular uses or types of structures"), *with Ridgepoint Rentals, LLC v. McGrath*, No. 09-16-00393-CV, 2017 WL 6062290, at *9 (Tex. App. – Beaumont Dec. 7, 2017) (abrogated by *Tarr*) (holding that nearly identical provision demonstrates no intent to allow temporary occupancy of the main dwelling).

[37] *See*, *e.g.*, *Schack v. Prop. Owners Ass'n of Sunset Bay*, 555 S.W.3d 339, 350 (Tex. App. – Corpus Christi 2018, pet. denied) ("living as a household unit" deemed equivalent to "residential purposes"); *Boatner v. Reitz*, 2017 WL 3902614, at *5 (rejecting quibbling about "residence purposes" versus "residential purposes").

[38] *Id*. at 290-91.

residential leasing (earning rent, changing tenants as leases expire, advertising, hiring a third-party property manager) do not transform residential leasing into a business use.[39] As put succinctly by another court: "When property is used for a residence, there simply is no tension between such use and a commercial benefit accruing to someone else."[40] Or stated another way, landlords are in business, but the thing they sell is residential use of dwellings.

This case presents an even clearer case for leasing rights than *Tarr* because, quite apart from the leasing clause here, the residential use clause itself, unlike the one at issue in *Tarr*, expressly allows "tenants." That shows conclusively that leasing (and by implication the normal incidents of leasing) are allowed without further restriction. Given this more robust "residential use" wording, *Tarr* logically must control because its conclusion that silence is not a restriction on leasing represents the harder case.

***3. "Private" use includes leasing without a duration restriction.***

The HOA also contended below that the word "private" in the residential use clause bars short-term leasing because "JBrice rents out both of the Properties through AirBnB to the general public." Brief of Appellees at 36. Stated another way, because all tenants are also members of the public, Brice cannot advertise to them, and the

[39] *Id*. at 290.

[40] *Lowden v. Bosley*, 395 Md. 58, 909 A.2d 261, 268 (2006); *see also*, *Wilson v. Maynard*, 2021 S.D. at *4 (¶ 25).

homes they rent are public places.

Despite the obvious flaw with this argument that it means every home offered for rent is a public place, the argument fails in the context of these specific restrictive covenants because the residential use clause facially equates tenancy with "private" use:

> No Owner shall occupy or use his Building Plot or building thereon, or permit the same or any part thereof to be occupied or used for any purpose other than as a *private single family residence for . . . his . . . tenants*.

By stating this equivalence, "private" cannot exclude leasing.

Nor can "private" exclude the ordinary incidents of leasing such as advertising. The deed restrictions allow "for rent" signs, so advertising on the land itself is clearly allowed. It would be all the more absurd for "private" to bar advertising *off* the land, via the web, since physical signage on the property is allowed.

When interpreted in context, then, "private" in these restrictions refers to the exclusive possession by an occupant, whether owner or tenant. By the same logic, the HOA cannot adopt rules allowing the general public to crowd into a tenant's home to watch a Shakespeare play or shop for power tools. The tenant's use is "private" to a tenant, her family, her friends, and her guests.

The HOA relied on a case which holds that a bed-and-breakfast is not "private."[41] No argument there: bed-and-breakfasts are not the exclusive domain of any of their guests. They are commercial

[41] *See Wein v. Jenkins*, No. 03-04-00568-CV, 2005 WL 2170354, at *1–3 (Tex. App. - Austin Sept. 9, 2005, no pet.).

establishments where the owner maintains control and possession of the premises; employs staff in a kitchen to serve guests and make beds; houses multiple unrelated persons in separate rooms; and typically have an office or desk where business is conducted on the premises.[42] Persons who stay in a bed-and-breakfast have no expectation of privacy in the entire building or on the land; they come for the room and some awkward conversation with the innkeeper at breakfast. No such situation is presented here, where individual townhomes are rented out to tenants who have sole and exclusive possession of the home.

Finally, there is no authority and no conceivable basis for concluding that "private" is a duration restriction; otherwise, homeowners themselves could not use their second- and vacation-homes as anything other than their permanent residences.[43]

**C. Rules, no matter their provenance, cannot conflict with restrictive covenants.**

The court of appeals avoided any mention of the leasing clause. It concluded that the HOA board's new rules regulate subject matter not addressed by the restrictive covenants. That was error because: (1) in substance, if not in the exact same words, the rules conflict

[42] *See*, *e.g.*, *Tarr*, 556 S.W.3d at 276-77 ("So unlike what one might expect at a hotel, rental groups were alone in Tarr's house, unaccompanied by employees and without services a hotel stay might provide, such as cooked meals or housekeeping. In addition, no business office, leasing office, signage, or other business activity exists at the home.").

[43] The HOA also relied below on a case abrogated by *Tarr* months later. *See Ridgepoint Rentals, LLC v. McGrath*, 2017 WL 6062290, at *8.

with the restrictive covenants; and (2) the leasing clause, being specific, would still control over any general "use" requirements, including "transient use."

The restrictive covenants provide that the HOA has the power "to make, publish, and enforce reasonable Rules and Regulations for the use of the Common Area and any facilities situated thereon." **Tab C** (Art. II, § 1(a)). Separately, for subdivisions in the Houston area (comprising about 1/5 of the state's population), an HOA board has power to adopt rules governing "uses" in the absence of anything to the contrary in the restrictive covenants:

> Unless otherwise provided by the restrictions or the association's articles of incorporation or bylaws, the property owners' association, acting through its board of directors or trustees, may . . . regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision . . . .[44]

Based on the statute, the court of appeals held that because the restrictive covenants do not address "hotel or transient use," the HOA's board had unbridled authority to ban short-term leasing. That was erroneous factually and legally.

***1. The restrictive covenants, as a factual matter, do address both "transient use" and "hotel use."***

The restrictive covenants do, contrary to what the court of appeals held, clearly and unambiguously address "hotel or transient use" in substance. They simply employ different words to do it.

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[44] Tex. Prop. Code § 204.010(6); *see also* Tex. Prop. Code § 204.002 (geographic scope of Ch. 204).

### a. The restrictive covenants address "transient" both implicitly and explicitly.

The court of appeals circumvented *Tarr* by ignoring *Tarr's* admonition to respect substance over form. *Tarr* holds that short durations of leasing constitute a residential use so long as tenants do what tenants ordinarily do in a home.[45] Therefore, a "transient" use *is* a "residential" use.

The court of appeals elevated form over substance by ignoring that the restrictive covenants expressly address "transient use" in the temporary residence clause. "Transient" and "temporary" are synonymous.[46] The temporary residence clause states that all temporary (transient) residential use is impermissible – for owners, tenants, and guests alike – except in the main dwelling. It is thus permissible in the main dwelling.

In sum, as a factual matter, there was no silence for the board to regulate concerning "transient use."

### b. The restrictive covenants address "hotel" use implicitly by barring "business use."

*Tarr* held that just as "transient use" is subsumed within "residential use," a "hotel" is a commercial use:

> [U]nlike what one might expect at a hotel, rental groups were alone in Tarr's house, unaccompanied by employees

[45] 556 S.W.3d at 290 and n. 14.

[46] *See Burns v. Napier*, 19 S.W.2d 578, 581 (Tex. Civ. App. – Fort Worth 1929) (the word "transient" . . . means ". . . of short duration; not permanent; not lasting; temporary"); s*ee, e.g.*, *Boatner*, 2017 WL 3902614, at *1 (quoting short-term rental injunction reversed); *Garrett v. Sympson*, 523 S.W.3d 862, 864 (Tex. App. – Fort Worth, pet. denied) (quoting short-term rental injunction reversed on appeal).

> and without services a hotel stay might provide, such as cooked meals or housekeeping. In addition, no business office, leasing office, signage, or other business activity exists at the home. But Tarr does remit hotel taxes applicable to home rentals of less than thirty days.[47]

The restrictive covenants in this case unambiguously bar commercial uses, so no one can operate a hotel in a townhome. For that very reason, the HOA could not adopt a rule allowing someone to operate a hotel any more than it could adopt a rule barring short-term leasing. *Yet the court of appeals' decision would allow exactly that*: next year's board could just reverse the rules in place now and allow everyone to run hotels in their townhomes. That is as calamitous as taking away leasing rights; both undermine the restrictive covenants.

Also as a factual matter, the HOA never contended that Brice operated a hotel, and there was no evidence that he did. Nevertheless, the court of appeals concluded, from Brice's payment of state and local "hotel" taxes, that Brice in fact operated a hotel. That, too, was error.

The Texas Hotel Tax defines "hotel" to capture revenue from the short-term rental of ordinary homes:

> Sec. 156.001. Definitions. (a) In this chapter, "hotel" means a building in which members of the public obtain sleeping accommodations for consideration. The term includes a hotel, motel, tourist home, tourist house, tourist court, lodging house, inn, rooming house, or bed and breakfast . . . .
>
> (b) For purposes of the imposition of a hotel occupancy tax under this chapter, Chapter 351 or 352, or other law, "hotel" includes a short-term rental. In this subsection,

[47] *See Tarr*, 556 S.W.3d at 276-77.

> "short-term rental" means the rental of all or part of a residential property to a person who is not a permanent resident under Section 156.101. . . .
>
> * * *
>
> Sec. 156.101. Exception–Permanent Resident. This chapter does not impose a tax on a person who has the right to use or possess a room in a hotel for at least 30 consecutive days, so long as there is no interruption of payment for the period.[48]

This Court concluded in *Tarr* that the payment of such taxes is irrelevant for purposes of determining the meaning of restrictive covenants.[49] Ken Tarr paid such taxes, and this Court, following extensive briefing on the issue, accorded the fact no weight in holding that short-term leasing is a residential use notwithstanding the Tax Code's "hotel" terminology.[50] The court of appeals' decision, however, suggests that property owners wishing to rent for short terms would have to evade occupancy taxes in order to avoid being found to be operating a hotel in violation of deed restrictions and local zoning ordinances. *Tarr* rejected placing homeowners in such a quandary.

In this connection – where complying with one law seems to place someone in jeopardy of violating another – this Court has employed a legal principle that where different laws or rules have opposing aims, identical terms are not interpreted the same.[51] Thus,

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[48] Tex. Tax Code Ch. 156 (2015) (amended to add homes).

[49] 556 S.W.3d at 277, 278, 288, n. 14.

[50] *Id.*

[51] *See, e.g., Fin. Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 587 (Tex. 2013) ("interest" under the usury statute, where the law aims to bar extra charges, means the opposite of what it means under Tex. Const. art. XVI, § 50(a)(6)(E),

a short-term rental of a home is a "hotel" under the tax code because the tax is inclusive to capture revenue, whereas it is not a "hotel" under the common law absent clear wording to that effect in the restrictive covenants.

In sum, the restrictive covenants do address "hotel use" by banning it as a commercial use, and no rulemaking should be allowed to alter that any more than it should be allowed to outlaw leasing for short terms. Furthermore, Brice did not operate a hotel; all he did was rent out his townhomes and pay required occupancy taxes in the manner approved by *Tarr*.

***2. The rules conflict with the restrictive covenants and are therefore invalid.***

The Property Code refers to subdivision governing documents as "dedicatory instruments," covering various kinds of documents in the hierarchy of "properly adopted" documents.[52] This case involves the document at the top of the hierarchy – "restrictive covenants" – and those at the bottom – rules adopted by an HOA board as authorized either by restrictive covenants or section 204.010(6) of the Texas Property Code.

In general, restrictive covenants are paramount over any rules authorized by restrictive covenants.[53] The same is true as to rules

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where the law aims to include extra charges, because the laws have different purposes).

[52] *See* Tex. Prop. Code. § 202.001(1) (applicable broadly to all subdivisions and condos); Tex. Prop. Code § 209.002(4) (applicable to subdivisions with HOA's).

[53] *See* Tex. Prop. Code § 209.0041(i) ("A bylaw may not be amended to conflict with the declaration."); *Cavazos v. Bd. of Governors of Council of Co-Owners*

authorized by § 204.010, applicable to the Houston region, because the prefatory wording there limits rulemaking to things not "otherwise provided by the restrictions."

In *Brooks v. Northglen Ass'n*, this Court provided the roadmap for determining when a board's rules and policies adopted under § 204.010 can coexist with the paramount restrictive covenants.[54] The Court held that the prefatory wording of § 204.010 means what it says: if restrictive covenants say one thing, an HOA board cannot say the opposite.[55] Rules and policies must operate in the interstices of restrictive covenants. That is not surprising – it is nothing more than a continuation of the law applicable generally in Texas.

*Brooks* illustrates two § 204.010 scenarios at the extremes, one where restrictive covenants speak clearly, the other where they do not speak at all:

- The restrictive covenants in *Brooks* expressly limited the

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*of Summit Condominiums*, No. 13-12-00524-CV, 2013 WL 5305237, at *3 (Tex. App. – Corpus Christi 2013, no pet.) (amendment by supermajority was valid to forbid short-term rentals even if rule was not); *Vann v. Homeowners Ass'n for Woodland Park of Georgetown, Inc.*, No. 03-18-00201-CV, 2018 WL 4140443, at *5 (Tex. App. – Austin Aug. 30, 2018, no pet.) ("the Rules and Regulations are subordinate to the Articles of Incorporation and Bylaws"); *see generally* Gregory S. Cagle, *Texas Homeowners Association Law* §§ 1.4.1, 9.1 (2d. Ed. 2013); *See, e.g.*, *McGuire v. Post Oak Lane Townhome Owners Ass'n, Phase II*, No. 01-88-00813-CV, 1989 WL 91519, at *1 (Tex. App. – Houston [1st Dist.] 1989, writ denied) (in pre-TUCA case, HOA could adopt rules because expressly authorized to do so by restrictive covenants); *Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632, 636 (Tex. Civ. App. – San Antonio 1977, no writ) (same).

[54] 141 S.W.3d 158, 164–66 (Tex. 2004).

[55] *Id*. at 167.

board's power to increase assessments. Section 204.010, however, allows a board to freely increase assessments.[56] How to resolve that? The restrictive covenants control. This Court held that the statutory prefatory wording "unless otherwise provided by the restrictions" barred the HOA board from increasing assessments beyond the limits expressly stated in the restrictive covenants.[57]

- The restrictive covenants in *Brooks* also allowed the imposition of interest charges for late payments, but they were conspicuously silent concerning late charges. Section 204.010(10), notably, allows a board to impose *both* interest and late charges, indicating that both are appropriate for unpaid assessments. This Court concluded that the restrictive covenants did not bar the late charges by authorizing solely interest because the two can readily coexist.[58]

In sum, express restrictions speak, but silence where speech is required does not.

The court of appeals misapplied *Brooks*. It noted, correctly, that § 204.010 is an independent source of authority for a board to make rules where deed restrictions do not specifically address a

[56] *Id.* at 167-68.
[57] *Id.* at 168.
[58] *Id.* at 169.

subject.[59] But it then concluded that leasing for short terms is not addressed in these restrictive covenants, which is demonstrably wrong. The restrictive covenants are not silent about either leasing or transient occupancy: they say that leasing is allowed with no restriction, and they address temporary occupancy comprehensively. This case is therefore analogous to the scenario in *Brooks*, where the restrictive covenants said that assessments were capped. *Brooks* therefore dictates that the HOA board's ban on short-term leasing and occupancy conflicts with the restrictive covenants and is therefore not enforceable.[60]

**III. The HOA nonsuited its nuisance claims.**

The HOA argues that the case should be remanded for trial on nuisance, separate from whether short-term leasing is allowed.

The HOA's argument is baseless. The final judgment recites that "[t]he Association . . . non-suited its nuisance claim***s***," a plural indicating all such claims. 1CR65. Consistent with the use of the plural, the permanent injunction says nothing about nuisance but instead enjoins a "commercial business" and "short-term transient hotel occupancy or rental." Thus, because the final judgment by its own terms adjudicated solely the permissibility of short-term

[59] 2020 WL 4759947, at *4.

[60] *Tarr*, however, holds that short-term leasing is allowed where restrictive covenants are silent. Why the difference between *Tarr* and *Brooks*? Because in *Tarr*, leasing was already within the meaning of "residential use." The late fees in *Brooks* were not already subsumed within the meaning of interest charges.

leasing, and because the HOA did not appeal or seek to correct or modify the final judgment, the trial court's recitation of the HOA's nonsuit means, in effect, that the HOA's nuisance claims were never brought.[61]

Nevertheless, the HOA goes on to contend that such things as owner complaints to the board, "a stream of people" going to and from Brice's townhomes, the board's "security concerns," and "parking issues" are evidence of nuisance. Brief of Appellants at 25; 2RR20-21. To the extent that these facts constitute any evidence of nuisance, they are factually[62] and legally insufficient.[63]

- The mere existence of owner complaints to an HOA board does not evidence wrongdoing, much less nuisance specifically.

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[61] *Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011) (holding nonsuit terminates case from the moment it is filed).

[62] When a party attacks the factual sufficiency of an adverse finding on an issue on which the party has the burden of proof, the party must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). If there is some evidence to support the finding, the court of appeals must determine whether "the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or if the great preponderance of the evidence supports its non-existence." *Castillo v. U.S. Fire Ins. Co.*, 953 S.W.2d 470, 473 (Tex. App.—El Paso 1997, no writ); *see also Dow Chem.*, 46 S.W.3d at 242; *see generally* Hall, *Standards of Review in Texas,* 29 St. Mary's L.J. 351 (1998), 42 St. Mary's L.J. 3, 42-43 (2019).

[63] Evidence is legally insufficient when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Bustamante v. Ponte*, 529 S.W.3d 447, 455–56 (Tex. 2017).

- People coming and going is what people do when they live in homes, whether for days, weeks, months, or years.
- An HOA board having "security issues" about tenants and concerns about "overloaded parking" are so tenuous as to be less than a scintilla of evidence of nuisance.

Thus, even if the HOA had not already nonsuited its nuisance claims, there is still no factually or legally sufficient evidence of nuisance in the record.

## IV. The permanent injunction should be vacated or at least clarified.

Because the permanent injunction is premised on an erroneous legal determination that Brice's short-term rentals are impermissible, it must be vacated.[64]

If the Court affirms the judgment on some basis, Brice still needs to know how to comply. The trial court determined that the restrictive covenants impose a seven-day minimum lease term. The court of appeals, however, concluded that the board's rules are valid, and they define impermissible use to "include any use for which the payment of a hotel or motel tax" applies – meaning, presumably, a minimum 30-day lease term. The trial court thought it was unnecessary to address the rules since it had decided at summary judgment what the restrictive covenants required. It is left to this

[64] *See Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845, 849 (Tex. App. – Houston [14th Dist.] 2000) (a permanent injunction is proper only for a "distinct or substantial" breach of a restrictive covenant).

Court to sort out what Brice needs to do to exercise his unrestricted right to lease in the absence of anything in the restrictive covenants imposing a minimum lease term.

**V. The award of attorney's fees should be vacated.**

Because the award of statutorily-mandated attorney's fees to the HOA for breach of restrictive covenant is based on an erroneous legal determination concerning the permissibility of short-term rentals, it should be vacated.

Both the order granting partial summary judgment to the HOA and the final judgment reflect an award of mandatory attorney's fees for breach of restrictive covenant.[65] The trial court did not make a determination of "equitable and just" attorney's fees under the DJ Act as pled by Brice.[66] Accordingly, if Brice prevails before this Court, the award of attorney's fees to the HOA should be reversed and vacated.

The narrow remaining issue – whether and to what extent a party is entitled to discretionary "equitable and just" attorney's fees – should be remanded to the trial court.

[65] *See* Tex. Prop. Code § 5.006.

[66] *See* Tex. Civ. Prac. & Rem. Code § 37.009.

## PRAYER FOR RELIEF

The Supreme Court should reverse the judgment below, vacate the permanent injunction, grant summary judgment to Brice on each of his declaratory judgment claims, and remand the case to the trial court for a determination of what attorney's fees are equitable and just.

Respectfully submitted,
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I certify that on July 6, 2021, a true and correct copy of this brief was served by efiling on:

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/s/ *J. Patrick Sutton*

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/s/ *J. Patrick Sutton*

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