No. 22-0316

IN THE SUPREME COURT OF TEXAS

CHARMAIN ADLONG AND CHARLES KENNEDY,

Petitioners,

v.

TWIN SHORES PROPERTY OWNERS ASSOCIATION,

Respondent.

On Petition for Review From the Ninth Court of Appeals
at Beaumont, No. 09-21-00166-CV

SEAN DEGON AND ERIE DEGON,

Petitioners,

v.

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

Respondent.

On Petition for Review From the Third Court of Appeals
at Austin, No. 03-20-00618-CV

PETITION FOR REVIEW

IDENTITY OF PARTIES AND COUNSEL

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Adlong Trial Court:	284th District Court, Montgomery County, Texas, Hon. Kristin Bays
Adlong Court of Appeals:	Ninth Court of Appeals at Beaumont, CJ Golemon and JJ Horton and Johnson

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DeGon Respondents:	Poole Point Subdivision Homeowners' Association, a Texas nonprofit corporation
	Poole Point Subdivision Architectural Control Committee

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Degon Court Appeals:	Third Court of Appeals at Austin; CJ Byrne and JJ Baker and Smith

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STATEMENT OF THE CASE

Nature of the case:	Homeowners sued homeowners' associations for declaratory judgment, contending that newly-recorded restrictive covenants which deprive the homeowners of existing leasing rights cannot be enforced.
Trial court dispositions:	The *DeGon* trial court summarily declared the new restrictions unenforceable and awarded the DeGons attorney's fees in a stipulated amount. **Tab A**. The *Adlong* trial court, in a reasoned opinion and judgment, declared the new restrictions enforceable but declined to award attorney's fees because "the issues in this case are so important and so reasonably disputed . . . that it is neither equitable nor just that the POA be awarded its attorney's fees against Plaintiffs or that Plaintiffs be awarded their attorney's fees against the POA." **Tab B**.
Court of Appeals' Dispositions:	The Austin Third Court of Appeals reversed the *DeGon* trial court without oral argument in an opinion by Justice Baker. *Poole Point Subdiv. Homeowners' Ass'n v. DeGon*, No. 03-20-00618-CV, 2022 WL 869809 (Tex. App. – Austin March 24, 2022, pet. filed). **Tab C**. The Beaumont Ninth Court of Appeals affirmed the *Adlong* trial court following oral argument in an opinion by Justice Johnson. *Adlong v. Twin Shores Prop. Owners' Ass'n*, No. 09-21-00166-CV, 2022 WL 869801 (Tex. App. – Beaumont March 24, 2022, pet. filed). **Tab D**.
Rehearing:	Rehearing was not sought in either case.

STATEMENT OF JURISDICTION

The Court has importance jurisdiction. Tex. Gov't Code § 22.001. The courts below decided a legal question which should be, but has not been, resolved by this Court. Tex. R. App. P. 56.1(6).

ISSUE PRESENTED

After someone buys land in a subdivision, can a majority of the other owners, using the restrictive covenant amendment process, take away the buyer's property rights?

> Specific to this case, if the original scheme of development contemplates unrestricted leasing, can an owner's right to decide the lease term be taken away after purchase?

INTRODUCTION

Real-life examples illustrate what happens when a majority of owners in a subdivision impose new restrictive covenants on owners who relied on rights in effect at purchase:

Trudy and the Snowden Acreage

- A veterinarian buys a home in a subdivision whose restrictive covenants allow large animals. After the owner builds a barn and buys four Mammoth Jackstock donkeys (including Trudy, above), a majority votes to ban large animals.
- A five-acre lot has an express resubdivision right. Later, a majority votes to prohibit resubdividing.
- A home has unrestricted leasing rights. A majority votes to ban leasing or require a minimum duration of leasing and physical, continuous occupancy.
- A buyer of a commercial lot in a residential subdivision builds a successful business. The subdivision largely fails to sell, and most lots are empty. The developer and the several residential owners vote to shift nearly all road costs onto the business owner.
- After an owner buys in a subdivision with no HOA and no assessments, a majority of owners votes to create a mandatory HOA with unlimited assessment power.
- After a buyer purchases a vacant lot with certain minimum architectural standards, a majority votes to impose more onerous standards.

The examples are legion, but the underlying problem is the same: someone who purchased important property rights under an original scheme of development is forced into a more restrictive scheme of development.

The cases at issue involve restrictions on leasing where the original scheme of development had none or expressly protected leasing. The implications go beyond leasing rights, however. At stake are the reasonable expectations of buyers as well as their

exercise of fundamental liberties on and concerning their land. Important rights and liberties are dying in the crucible of subdivision discord. Were these true local governments subject to the Local Government Code, there would be well-trodden constitutional and statutory avenues for relief. Relief from abusive restrictive covenants, however, is in the first instance the common law, and on the question presented, that is unsettled. Privatized local government is failing to protect its residents, so this Court ought to take up this case to address how the common law should respond.

STATEMENT OF FACTS

I. The subdivisions adopted new restrictions after the homeowners bought their land.

The courts below correctly stated the nature of the cases. Both were tried on stipulations under Rule 263. Summarized, homeowners who bought homes in subdivisions whose original scheme of development contemplated unrestricted leasing had leasing rights right taken away after purchase.[1]

II. The courts below hold that the existence of an amendment clause ends the analysis.

The courts below concluded that because the restrictive covenants under which the homeowners purchased allowed amendment, the analysis is done with: the homeowners were on notice as of the purchase date that new restrictions could be imposed

[1] The implicated restrictive covenant provisions are at **Tab E** (table).

on their land, so they cannot contend that the basis of the bargain has been dashed.[2]

The courts below also relied on this Court's decision in *Tarr v Timberwood Park*.[3] *Tarr*, however, did not involve any amendment, and the issue was not briefed or argued. The *Tarr* opinion merely noted that amendment could have been pursued but was not.[4] The Court's new *Jbrice* decision – which, like *Tarr*, did not involve new restrictions imposed after purchase – noted the same thing.[5] Those are not precedent on the issue presented.

Finally, the courts below rejected the homeowners' contention that the original scheme of development contemplated unrestricted residential leasing. The Ninth Court concluded that no evidence in the record proved that the new restrictions on leasing did not promote goals stated in the restrictive covenants, such as harmony and enhanced property values.[6] The Third Court, in a different vein, concluded that "[t]he minimum duration requirement created by the Amendment reinforced the existing residential use and occupancy

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[2] *Adlong v. Twin Shores Prop. Owners' Ass'n*, No. 09-21-00166-CV, 2022 WL 869801, at *9-10 (Tex. App. – Beaumont March 24, 2022, pet. filed); *Poole Point Subdiv. Homeowners' Ass'n v. DeGon*, No. 03-20-00618-CV, 2022 WL 869809, at *3 (Tex. App. – Austin March 24, 2022, pet. filed).

[3] *See Tarr v. Timberwood Park Owners' Ass'n, Inc.*, 556 S.W.3d 274 (Tex. 2018).

[4] *Adlong*, 2022 WL 869801, at *8 and n. 22; *DeGon*, 2022 WL 869809, at *4 (citing *Tarr*, 556 S.W.3d at 277).

[5] *Jbrice v. Wilcrest Walk Townhomes Ass'n, Inc.*, No. 20-0857, 2022 WL 1194364, at *7 (Tex. April 22, 2022).

[6] *Adlong*, 2022 WL 869801, at *11.

restriction and the prohibition against commercial activities."[7] That is a surprising conclusion because *Tarr*, *Jbrice*, and the Third Court's own precedent hold that leasing for short terms *is* a residential use.[8]

III. Dozens of cases like these are waiting in the wings.

Dozens of these cases are being litigated.[9] Undersigned counsel represents homeowners in 14 such cases, four of which have gone to intermediate appeal, the present two having been decided. Of the remaining 10, four have been abated pending the outcome of these cases, with more abatements expected. The remaining cases are at various stages of pre-trial or post-trial.

Undersigned counsel also represents an owner in a case where a majority of residential-lot owners singled out a commercial-lot owner for new restrictions which: (1) bar the commercial-lot owner from leasing out residential homes he owns, and (2) single out that same owner for an $800,000 special assessment despite the original restrictions' guarantee of uniform assessments.[10]

Finally, there are at least two other leasing-type cases brought by other counsel.[11]

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[7] *DeGon*, 2022 WL 869809, at *4.

[8] *See also*, *e.g.*, *Zaatari v. City of Austin*, 615 S.W.3d 172, 190 (Tex. App. – Austin 2019, pet. denied) (citing *Tarr* for the proposition that "a ban on type-2 [owner-occupied] short-term rentals does not advance a zoning interest because both short-term rentals and owner-occupied homes are residential in nature").

[9] **Tabs F, G** (tables).

[10] **Tab G** (*Martin*).

[11] **Tab G** (*Mendoza*, *Park City Quit'n Time*).

Other rights are under assault too. There is the *Martin* case noted above where an amendment targets one owner for a large special assessment even though the original restrictions required uniform assessments. In other extant cases –

- an owner's right to keep horses and right to subdivide her acreage were taken away;
- an owner's right to build aircraft hangars was eliminated;[12] and
- an owner was trapped post-purchase with a new minimum home size which the lot won't accommodate.[13]

A new decision of the Arizona Supreme Court illustrates these and still other new restrictions imposed after purchase.[14] The high-level summary is, the reasoning of the courts below allows any valuable right purchased at closing to be taken away after closing.

IV. The local ordinance cases are also percolating, establishing leasing and short-term leasing as constitutional rights.

This Court is currently considering a city's petition for review of a decision upholding constitutional challenges to an ordinance banning short-term leasing. The Fort Worth Court of Appeals held in late 2021 that due course of law and retroactivity constitutional claims are valid because of the historically-vital nature of the right

[12] **Tab G** (*Geiger*)

[13] **Tab G** (*Lamb*).

[14] *See Kalway v. Calabria Ranch HOA, LLC*, 5 P.3d 18 (Az. 2022) (included in table at **Tab H**).

to lease.[15] The Fort Worth decision comes on the heels of a 2019 decision of the Austin Court of Appeals invalidating Austin's short-term rental ban on retroactivity grounds.[16] If this Court recognizes the lease term as a protected landowner right, that may inform (or at least dovetail with) the Court's analysis of contract-based rights in the restrictive covenant context.

V. Nationwide, courts strongly favor settled homeowner rights against new restrictions.

This Court has never decided the issue presented. The decisions below are in the minority nationally. Ten states do not enforce new restrictions against owners who purchased under prior restrictions; three do.[17]

The majority approach protects buyer expectations. The new *Kalway* decision of the Arizona Supreme Court is the most recent. It is notable in that it involves an extensive rewriting of the original bargain. The 2014 Washington State *Wilkinson* case is on all-fours with the cases here in invalidating an amendment banning short-term leasing.[18] The *Armstrong* case from North Carolina presents the same leasing issue and, in addition, other post-purchase

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[15] *See City of Grapevine v. Muns*, No. 02-19-00257-CV, 2021 WL 6068952, at *16-18 (Tex. App. – Fort Worth Dec. 23, 2021, pet. filed) (No. 22-0044) (response to pet'n filed). A takings claim was also upheld on a showing of economic harm.

[16] *See Zaatari v. City of Austin*, 615 S.W.3d at 189-91.

[17] Tab H (table).

[18] Later, the Washington State Legislature passed a law governing subdivisions and condominiums which includes the provision: "An amendment approved under this subsection must provide reasonable protection for a use permitted at the time the amendment was adopted." RCWA 64.90.285(6) (West).

changes similar to those in cases now under review by this Court in different contexts.[19] The new restrictions in *Armstrong* not only barred short-term leasing, but also imposed new assessments which the court determined purchasers could not reasonably have anticipated.[20]

The Washington State Supreme Court's *Wilkinson* holding is a counterweight to the decisions below. The court differentiates restrictive covenants which expressly authorize *new* restrictions from those which merely authorize *amendments* to existing ones:

> 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

[19] *See Myers v. Tahitian Vill. Prop. Owners' Ass'n, Inc.*, No. 03-21-00105-CV, 2022 WL 91660 (Tex. App. – Austin Jan. 6, 2022, pet. filed) (mem. op.) (HOA board gave itself broad new assessment and architectural control powers without amending restrictive covenants); *In re Kappmeyer*, No. 21-1063 (Tex. 2021) (orig. proceeding) (merits briefing ongoing) (in joinder dispute, it is undisputed that HOA board gave itself broad new assessment and architectural control powers by amending restrictive covenants without any owner vote).

[20] *Armstrong v. Ledges Homeowners' Ass'n, Inc.*, 360 N.C. 547, 553, 558-59 (2006).

> 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.[21]

As this and the other cases in the majority show, the homeowners in the present cases are not pursuing a novel, untested claim; they are trying to shepherd Texas into the majority fold.

SUMMARY OF THE ARGUMENT

The question whether new restrictive covenants can be enforced against existing owners has become an urgent issue statewide. Not only unrestricted leasing, but also other vital rights purchased at closing, are increasingly the targets of subdivision majorities seeking to rewrite the original scheme of development. That not only harms people's investments and expectations, but it makes pricing land impossible.

This Court has never addressed the issue. The 1928 *Couch* decision approved of an amendment which *removed* restrictions on land, but it did not address what happens when a majority imposes *new* restrictions. *Couch* sets out a standard for evaluating

[21] *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash. 2d 241, 255–57, 327 P.3d 614, 622 (2014) (cleaned up).

amendments under which "correction, improvement, or reformation" of existing restrictions is allowed, while "complete destruction" of existing restrictions is not. The question asked by the consolidated cases is whether new restrictions are evaluated under the *Couch* standard, and if so where they fall on the *Couch* spectrum.

The issue presented does not require more percolation because the present two cases are like all the others and present everything required for decision. Several pending cases are abated until a decision in these cases, and many other similar cases are being litigated.

Leasing rights are special because they are (1) historically intrinsic to fee ownership and (2) intimately bound up with individual liberties such as privacy in the home, movement, travel, and assembly. The duration of leasing cannot be separated from the right to lease because owners have always been free to decide when and to whom to lease out their land. Taking away that right will not only dash economic expectations but also allow an intrusive monitoring and surveillance regime controlled by HOA's and prying neighbors.

Should this Court not take up the issue and reverse, courts will commence enforcing new restrictions which take away vital preexisting rights. That presents a constitutional question whether

the courts, as an instrumentality of the state, are impairing existing contract rights.

ARGUMENT

I. The issue presented is the most important unresolved issue of restrictive covenant law.

Three factors have brought the issue to the fore statewide:

1. After *Tarr* closed the door to arguments that leasing for short terms is not a "residential use" under ubiquitous restrictive covenant wordings, those thwarted by the *Tarr* result turned to the amendment process to seize control of their neighbors' lease term.

2. Explosive growth and the accompanying demographic shifts in Texas have generated dissension in subdivisions.

3. Tech and the internet have transformed the housing market while at the same time they have made it easier to monitor and surveil people.

Short-term leasing implicates all three factors, while other issues implicate one or two:

- Short-term leasing has been occurring time out of mind, but technology has greased the skids. Owners pursuing economic self-interest using new means to reach tenants clash with neighbors who seek to control who lives next door.

- Disputes over things like agricultural and commercial uses are attributable to economic growth and its resulting pressures. In the *Snowden* donkey case, for example, increasing urbanization led owners unhappy with the original scheme of development to object to animal sounds and odors. Chickens are another flash point, whether for home-grown eggs, as therapy animals,

or just to cuddle with.[22] In other kinds of cases, subdivisions with fronting commercial lots on older, smaller roads face a dilemma when the roadway gets widened to accommodate new development.

- In cases where HOA boards assert broad new governing powers, demographics are at work. Residents with the time and desire to serve on subdivision governing boards want to expand their control; working people or part-time residents can't meaningfully participate.

The fact that many cases like these are pending, with more filed regularly, points up the need for the Court take up the issue now. Existing owners are losing rights and invested capital as subdivision majorities vote to alter the original bargain by imposing new restrictions on land. If buyers of real property cannot be assured that the rights they buy today will exist tomorrow, they need to know that – and as soon as possible. After all, buyers can't set the price on land whose permissible uses cannot be determined.

II. This Court has never addressed the issue, though a 1928 case sets out an oft-used standard.

In *Couch v. SMU* – a case whose result but not opinion was adopted by this Court – the Texas Commission of Appeals allowed an amendment which removed a restriction on property use.[23] Several homes in a subdivision near SMU bordered increasing

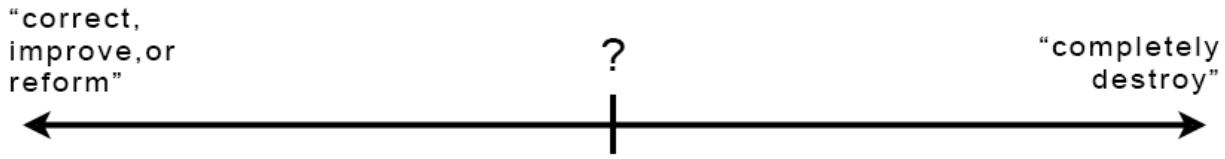
[22] *See, e.g.*, *Bryan v. Kittinger*, 2022-NCCOA-201, ¶ 13, 2022 WL 1009846, at *2 (N.C. App. April 5, 2022) (holding that restrictive covenants barred chickens as poultry but allowed them as pets) (citing similar Nigerian Dwarf goat case).

[23] *Couch v. S. Methodist Univ.*, 10 S.W.2d 973, 974 (Tex. Comm'n App. 1928, judgm't adopted) (reversing 290 S.W. 256, 259 (Tex. Civ. App. – Dallas 1926) (underlying case reciting facts in more detail)).

development. The holding is that a majority of owners in a subdivision can use the amendment process to free up land for new uses.[24] *Couch* 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 a complete destruction of it."[25] The court went on to say:

> 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.

Thus, in the *Couch* formulation, "complete destruction" lies at one end of the scale, while "correction, improvement, or reformation" at the other:



The question presented here, however, is whether a new restriction falls under the *Couch* standard at all, and if so, where a given change falls between the two poles. The *Couch* court ultimately concluded that the "public policy which favors the utmost

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[24] *Id.*

[25] *Id.*; *see also Scoville v. Spring Park 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.").

liberty of contract and freedom of land titles" allowed old restrictions to be removed by majority vote to make room for new uses.[26] What *Couch* did not address was how to evaluate new restrictions. This Court has never addressed that; this case squarely and cleanly presents the question now.

III. More percolation is not necessary.

It's unlikely there will be any surprises as additional cases and decisions come down the pike. The consolidated cases encompass everything required for decision. The briefing has been exhaustive following a pattern common to all the other cases. The parties have turned up most of the authority and contentions in Texas and nationwide. The courts below made the same holdings on similar facts; the other cases are reruns. Examples of variant cases are widely extant and not merely hypothetical. A decision in the *Chu* case under submission in the 14th Court could go either way, but it would probably do so on a basis either already briefed or else already held in other states. While a decision in the homeowner's favor in the 14th Court would provide a conflicts basis for jurisdiction, that does not change the fact that litigants statewide on both sides of this issue need certainty on what is, by now, a

[26] *Id.*; *accord French v. Diamond Hill-Jarvis Civic League*, 724 S.W.2d 921, 924 (Tex. App. 1987, writ ref'd 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").

fleshed-out issue with enormous ramifications statewide.

IV. Leasing is the foundation of free enterprise and a cornerstone of liberty.

Some property rights are special. The right to keep horses on acreage. The right to run a business in an otherwise residential subdivision. The right to build a home in any style the owner desires. Caps on property assessments – taxes by another name – which protect people from unpredictable financial burdens.

Leasing is special. The right to lease implicates a thousand years of Anglo-American tradition and jurisprudence.[27] Leasing is an integral part of the "bundle of sticks" which conveys with land title.[28] Leasing is a cornerstone of freedom in a capitalist society: the vital moment of exchange where *money* buys the *possessory interest in land for a specified term* is the ground upon which capitalism is built and renewed as people pursue enlightened self-

[27] *See generally Bellikka v. Green*, 306 Or. 630, 641, 762 P.2d 997, 1004 (1988) ("After the Norman Conquest, land was held by persons as "tenants" of William the Conqueror, who held title to all land in England.").

[28] 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.").

interest.[29] That is why this and other courts have recognized leasing as, variously, a natural, fundamental, settled, and vested right.[30]

Taking away from landowners the decision how long to lease is the thin end of a very big wedge. Leasing for short terms cannot be separated from the right to lease.[31] The bargained-for exchange of *money* for *time of occupancy* is the essence of leasing, and limiting either parameter undermines the right. Rent controls[32] are controversial and sharply limited for that reason.[33] Duration limits on leasing are at least as troubling because they also implicate

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[29] *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).

[30] *See generally City of Grapevine v. Muns*, 2021 WL 6068952, at *18-19 (citing cases going back to the 19th C.); *Zaatari*, 615 S.W.3d at 200-201.

[31] *Zaatari*, 615 S.W.3d at 191 (retroactivity analysis), 200-201 (assembly on private land analysis).

[32] Texas allow rental control only in emergencies. *See*, *e.g.*, Tex. Prop. Code § 214.902 (municipal emergency rent control).

[33] *See*, *e.g.*, *Cmty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 52 (E.D.N.Y. 2020). The Cato Institute's amicus in the appeal argues:

> Blackstone described the "right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." William Blackstone, *Commentaries on the Laws of England* (1768). Blackstone's definition traces its lineage to Roman conceptions of the right. *See* Juan Javier Del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 San Diego Int'l L.J. 301, 316 (2011) ("Roman property law typically gives a single property holder a bundle of rights with respect to everything in his domain, to the exclusion of the rest of the world."). This ancient understanding of the "right to property" as, essentially, the right to exclude others from possession or use carries to the present day. As Richard Epstein put it, "[t]he notion of exclusive possession" is "implicit in the basic conception of private property." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 63 (1985).

human behavior in and around private homes. Owners of second- or vacation-homes are effectively denied the right to lease if they cannot do so when not using their land themselves.[34] Investors are deprived of the decision how best to employ their asset to maximize revenue – the essence of free enterprise. Owners who have personal motivations for providing short-term housing are thwarted in pursuing those.[35] Finally, duration restrictions are uniquely scary and dangerous because they require a monitoring and surveillance apparatus which pries into private lives, movement, assembly on private land, and travel.

Thus, when the lease term is taken away from a landowner and given to the neighbors, or the HOA, or the government, that is not a mere economic restriction; freedom itself has been taken away. Opponents of the leasing of private homes for short terms wish to replace an owner's right to set the lease term with a monitoring and surveillance regime which controls individuals' comings, goings, and assemblies on private land.

V. Imposing new restrictions on existing owners violates the Constitution if enforced in court.

It would seem obvious that buyers of real property do not expect important property rights to evaporate after purchase.

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[34] *See*, *e.g.*, *City of Grapevine v. Muns*, 2021 WL 6068952, at *18 (noting owner contention that a part-time occupying owner is deprived of all leasing by a short-term leasing ban).

[35] *See*, *e.g.*, *id.* (response to pet'n cites record showing that one homeowner rents out a home to families of cancer patients).

Ordinary people do not think that an amendment clause allows the destruction of rights. Why would they buy in the first place? How would they know how much to pay? Yet the courts below held, precisely, that an amendment provision puts buyers on notice that any rights in effect at closing are in jeopardy; property rights are ephemeral.

If Texas courts ultimately enjoin property owners from uses implicit or explicit in restrictive covenants at the time of purchase,[36] a constitutional problem arises. The U.S. and Texas Constitutions forbid laws impairing the obligation of contracts.[37] Restrictive covenants are treated under the law like contracts.[38] Buyers cannot be bound by restrictions of which they were not on notice at the time of purchase.[39] Constitutional jurisprudence applies to private restrictive covenants when a court, as an instrumentality of the state, enforces a restriction which violates constitutional rights.[40]

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[36] *See*, *e.g.*, *Tarr*, 556 S.W.3d at 277, 285 (restrictions were silent about leasing); *JBrice*, 2022 WL 1194364, at *2 (restrictions expressly afforded owner a right to lease without restriction).

[37] U.S. Const. art. I, § 10, cl. 1; Tex. Const. art. I, § 16; *see generally U.S. Tr. Co. of N.Y. v. New Jersey,* 431 U.S. 1, 25 (1977); *Liberty Mut. Ins. v. Tex. Dep't of Ins.*, 187 S.W.3d 808, 824 (Tex. App.—Austin 2006, pet. denied).

[38] *Tarr* , 556 S.W.3d at 280 (quoting precedent).

[39] *Id*. at 280-81; *see Kalway*, 506 P.3d at *24-25 (holding that a general amendment clause does not give fair notice of "entirely new and different" restrictions).

[40] *See Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948) (court enforcement of discriminatory restrictive covenants violates equal protection). While the case "remains undefined outside of the racial discrimination context," *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995), it appears never to have been raised where vested property rights are threatened.

In the *DeGon* case here, the court of appeals' remand instruction allows the defendant HOA to prosecute its counterclaim for breach of restrictive covenant and obtain equitable relief to enforce the new leasing restrictions.[41] This Court should take up these cases to reverse the decisions below and avoid any potential for constitutional infirmity.

PRAYER FOR RELIEF

The Court should grant review, reverse the courts of appeals, and render judgment for the petitioners on their claims for declaratory judgment.

Respectfully submitted,
/s/ J. Patrick Sutton
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Attorney for Petitioners

[41] *DeGon*, 2022 WL 869809, at * 5.

CERTIFICATE OF SERVICE

I certify that on May 14, 2022, a true and correct copy of this petition was served by efiling on:

Andrew L. Johnson, *ajohnson@thompsoncoe.com*

Timothy J. Stostad, *tstostad@thompsoncoe.com*

R. Kemp Kasling, *kkasling@kasling.com*

J. Bruce Bennett, *jbb.chblaw@me.com*

/s/ *J. Patrick Sutton*

CERTIFICATE OF COMPLIANCE

This document has been prepared in Century Schoolbook 14-point for text and 12-point for footnotes. Spacing is expanded by .5 point for clarity. This document contains **4,457** words, excluding any parts exempted by Rule 9.4(i)(1).

/s/ *J. Patrick Sutton*

No. 22-0316

IN THE SUPREME COURT OF TEXAS

CHARMAIN ADLONG AND CHARLES KENNEDY,

Petitioners,

v.

TWIN SHORES PROPERTY OWNERS ASSOCIATION,

Respondent.

On Petition for Review From the Ninth Court of Appeals
at Beaumont, No. 09-21-00166-CV

SEAN DEGON AND ERIE DEGON,

Petitioners,

v.

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

Respondent.

On Petition for Review From the Third Court of Appeals
at Austin, No. 03-20-00618-CV

APPENDIX TO PETITION FOR REVIEW

DeGon trial court final judgment	Tab A
Adlong trial court opinion and final judgment	Tab B
Poole Point Subdiv. Homeowners' Ass'n v. DeGon, No. 03-20-00618-CV, 2022 WL 869809 (Tex. App. – Austin March 24, 2022, pet. filed)	Tab C
Adlong v. Twin Shores Prop. Owners' Ass'n, No. 09-21-00166-CV, 2022 WL 869801 (Tex. App. – Beaumont March 24, 2022, pet. filed)	Tab D
Restrictive covenant wordings at issue (table)	Tab E
Similar pending cases brought by counsel for the petitioners (table)	Tab F
Other factually similar or analogous cases, pending or recently nonsuited (table)	Tab G
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Tab A

Filed: 10/1/2020 10:58 AM
Dana DeBeauvoir
Travis County Clerk
C-1-CV-19-009597
Andrea Scott

NO. C-1-CV-19-00009597

SEAN DEGON AND ERIE DEGON,	§	**IN THE COUNTY COURT**
	§	
Plaintiffs,	§	
	§	
V.	§	
	§	
POOLE POINT SUBDIVISION HOMEOWNER' ASSOCATION AND POOLE POINT SUBDIVISION ARCHITECTURAL CONTROL COMMITTEE,	§	**AT LAW NUMBER TWO**
	§	
Defendants.	§	**TRAVIS COUNTY, TEXAS**

FINAL JUDGMENT

On September 23, 2020, the Court tried the agreed case pursuant to Texas Rule of Civil Procedure 263 and the parties' Rule 11 Agreement setting out agreed procedures, exhibits, facts, and other matters.

The parties appeared before the court through their respective counsel. Each side submitted a memorandum of law and response to the other party's memorandum. Owing to COVID-19, the hearing was conducted via electronic means.

After considering the pleadings, the matters set forth in the parties' Rule 11 Agreement, the memoranda of law, and the arguments of counsel; it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

Plaintiffs the DeGons are entitled to declaratory relief that the 2019 Amendment to the Declaration of Covenants, Conditions, and Restrictions at issue, which places a mandatory minimum duration on leasing, is not enforceable against Plaintiffs owing to its deprivation of their settled property rights under the 1987 Declaration of Covenants, Conditions, and Restrictions, under which they purchased his property. The 2019 Amendment represents a new and different restriction which defies the reasonable and

settled expectations of the DeGons, who relied on the 1987 Declaration's grant of the right to lease the main dwelling without duration restriction and physical occupancy requirements.

In addition, the Court has determined that it is equitable and just that the DeGons be awarded attorney's fees that are reasonable and necessary. It is therefore ORDERED, ADJUDGED, AND DECREED that Defendants Poole Point Subdivision Homeowner' Assocation And Poole Point Subdivision Architectural Control Committee shall pay the DeGons attorney's fees in the amount of $12,500.00 within 45 days of the execution of this Order and Final Judgment.

It is further ORDERED, ADJUDGED, AND DECREED that if Defendants unsuccessfully appeal this Order and Final Judgment to an intermediate court of appeals, Plaintiffs will additionally recover $12,500.00 for anticipated fees and expenses for the defense of the appeal.

It is finally ORDERED, ADJUDGED, AND DECREED that if Defendants unsuccessfully appeal this Order and Final Judgment to the Texas Supreme Court, Plaintiffs will additionally recover reasonable fees and expenses in the amount of $5,000.00 at the petition stage; $5,000.00 at the merits briefing stage; and $2,500.00 at the argument stage.

Interest shall accrue on all sums awarded at 5% per annum from date of judgment until paid.

This judgment is final and appealable and disposes of all parties and all claims. All relief not expressly granted herein is denied.

SIGNED on October 1, 2020.

TODD T. WONG, JUDGE PRESIDING

Tab B

No. 20-05-05973

CHARMAIN ADLONG and CHARLES KENNEDY, Plaintiffs	§	IN THE DISTRICT COURT OF
V.	§	MONTGOMERY COUNTY, TEXAS
TWIN SHORES PROPERTY OWNERS ASSOCIATION, Defendant	§	284th JUDICIAL DISTRICT

FINAL JUDGMENT

On June 1, 2021, the Court tried the agreed case on submission pursuant to Texas Rule of Civil Procedure 263 and the parties' Rule 11 Agreement setting out agreed procedures, exhibits, facts, and other matters. The parties appeared before the Court through their respective counsel. Each party submitted a memorandum of law and response to the other party's memorandum which the Court considered on submission.

The excellent briefing done in this case sets out the issues succinctly, thoroughly, and well. The Court is presented with two sides both of which implicate important public policy considerations:

- The Plaintiffs Charmain Adlong and Charles Kennedy ("Plaintiffs") present a concern about losing vested property rights via amendments to their community's restrictive covenants (the "Amendments"). The Amendments limit certain activities on their property – namely, short-term rentals ("STR") – in which they were previously free to engage under the restrictive covenants in existence when they purchased their property. Vested property rights are well recognized in Texas as being a matter of important public policy.

- The Defendant Twin Shores Property Owners Association (the "POA") also presents a matter of great significance – namely, the right to contract found in the Texas Constitution. The POA explains that restrictive covenants are contractual in nature under Texas law. The original restrictive covenants to which Plaintiffs subscribed when they purchased their property contain a provision stating that they may be amended and describing the procedure by which they may be amended. That procedure was used in this case, such that

> Plaintiffs' substantive property rights were always subject, at least facially, to being lost or changed upon a vote of the community, which is consistent with the contract terms to which Plaintiffs agreed when they purchased their property.

The POA's arguments carry the weight of much law pertaining to restrictive covenants being treated as contracts. But the Court is troubled that the issues in those cases were not squarely on point with the issues in this case. Here, the question is less about the standard by which restrictive covenants are reviewed and more about what happens when the contract is unilaterally changed against one of the contracting parties without that party's consent? And therein lies the rub.

Restrictive covenants are a private contract between the subdivision developer or the developer's successor and the property owners in it. In this case, the restrictive covenants allow for amendment if certain procedures are followed. Those procedures were followed and the Amendments resulted. The Amendments denied Plaintiffs the right to do STRs with their property, and there is no debate that, prior to the Amendments, they could. Likewise, there is no debate that Plaintiffs are bound by the restrictive covenants, including the provision allowing their amendment. None of those things is at issue in this case. What *is* at issue in this case is whether Plaintiffs are bound by the Amendments. Treatises and courts of other states have tackled this issue. The Restatement addresses this issue by considering the nature of the amendment to determine its validity. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES Chapter 6 *et seq*. In the commentary, the Restatement notes that many restrictive covenants had shelf lives, but the communities governed by them outlived those shelve lives, giving rise to a need to extend the covenants:

> Declarations for common-interest communities created in an earlier era frequently included termination dates. These provisions, sometimes called "drop dead" provisions, were probably included to avoid possible invalidation of affirmative covenants with indefinite duration (a possibility under traditional case law), or for violation of the rule against perpetuities (less likely, but still possible). However, most common-interest communities outlast the specified termination date.

> Termination of the declaration can leave the common-interest community without the means to support the common property or carry out its other functions. Modern declarations either provide for indefinite duration, with provisions for amendment and termination under certain circumstances, or provide for automatic extension unless a specified percentage of owners take action to modify or terminate the declaration. This section provides that a majority of the owners have the power to amend the declaration to extend its term.

Id. at §6.10 cmt. (b). That is an interesting point considering that is *exactly* what prompted the Legislature in 1985 to allow amendments of restrictive covenants:

> **The legislature finds that:**
>
> > (1) **the pending expiration of property restrictions applicable to real estate subdivisions** in municipalities and in the extraterritorial jurisdiction area of municipalities where there is no zoning creates uncertainty in living conditions and discourages investments in affected subdivisions;
> >
> > (2) owners of land in affected subdivisions are reluctant or unable to provide proper maintenance, upkeep, and repairs of structures **because of the pending expiration of the restrictions;**
> >
> > (3) financial institutions cannot or will not lend money for investments, maintenance, upkeep, or repairs in affected subdivisions;
> >
> > (4) these conditions cause dilapidation of housing and other structures and cause unhealthful and unsanitary conditions in affected subdivisions, contrary to the health, safety, and welfare of the citizens...

TEX. PROP. CODE §201.002(a)(1)-(4) (emphasis supplied); *see also id.* at §201.002(b) ("The purpose of this chapter is to provide a procedure for extending the term of, creation of, additions to, or modification of restrictions ...").

Even the Restatement characterizes the nature of amending restrictive covenants as being something which must be restricted in scope:

> Well-drafted documents for common-interest communities include amendment provisions that protect both the individual interests of the members against unfair changes and the collective interest in being able to adapt to change over time. Poorly

drafted common-interest-community documents may omit provisions for amendment, impose impractical requirements for amendments, or fail to distinguish among amendments that threaten varying degrees of harm to individual members.

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES at §6.10 cmt. (a). What Section 6.10 of the Restatement focuses on is defining the proper procedure to amend restrictive covenants depending on the purpose and scope of the amendments:

(1) Except as expressly limited by statute or the declaration, the members of a common-interest community have the power to amend the declaration subject to the following requirements:

(a) Unless the declaration specifies a different number, **an amendment adopted by members holding a majority of the voting power is effective**

(i) **to extend the term of the declaration,**

(ii) **to make administrative changes reasonably necessary for management of the common property or administration of the servitude regime,**

(iii) **to prohibit or materially restrict uses of individually owned lots or units that threaten to harm or unreasonably interfere with the reasonable use and enjoyment of other property in the community.**

(b) Unless the declaration specifies a different number, **an amendment adopted by members holding two-thirds of the voting power is effective for all purposes except as stated in subsections (2) and (3).**

(2) **Amendments that do not apply uniformly to similar lots or units and amendments that would otherwise violate the community's duties to its members under § 6.13 are not effective without the approval of members whose interests would be adversely affected unless the declaration fairly apprises purchasers that such amendments may be made.** This subsection does not apply to nonuniform modifications made under circumstances that would justify judicial modification under § 7.10.

(3) Except as otherwise expressly authorized by the declaration, and except as provided in (1), **unanimous approval is required**

(a) **to prohibit or materially restrict the use or occupancy of, or behavior within, individually owned lots or units, or**

(b) **to change the basis for allocating voting rights or assessments among community members.**

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES at §6.10 (emphasis supplied). And this evaluation of the scope of the amendments is the approach used in many jurisdictions. *See* "Plaintiff's Trial Brief", filed May 11, 2021, at 15-22 (citing cases from North Carolina, Washington, Michigan, Ohio, Illinois, Nevada, Nebraska, Arizona, and Massachusetts).

One Michigan court ruled that amendments cannot undo what is already underway. *McMillan v. Iserman*, 120 Mich. App. 785, 793, 327 N.W.2d 559, 562 (1982). In *McMillan*, the court considered an amended restrictive covenant which forbade "state-licensed group residential facility", a use permitted under the original 1958 restrictive covenants which also stated that they could be amended upon the vote of three-fourths of the property owners. *Id.* at 560. The *McMillan* court held that the amended deed restriction did not apply to the lot owner who had, prior to the amendment, committed to a certain land use which the amendment seeks to prohibit because (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. *Id.* at 562. This decision was based on the "manifest unfairness" of the situation and rule applies even though the property owner was aware that the restrictive covenants could be amended:

> 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.

Id.

A case similar to *McMillan* is *Grace Fellowship Church, Inc. v. Harned*, 2013-Ohio-5852,

P28, 5 N.E.3d 1108, 1114 (2013) in which the 't'aint-fair' rule[1] was applied to a church that bought an adjoining tract with the intention of constructing a driveway and the restrictive covenants were amended to prohibit driveways. This case provides additional support for the notion that a restriction depriving one of a vested property right should be applied only to persons purchasing subsequent to and with notice of the amendment, and for the proposition that it matters not whether the covenants say they are subject to being amended.

Texas follows this general conceptual approach, *albeit* in other contexts. In *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. App. – Austin 2019, pet. filed), the state intervened and challenged a city ordinance banning certain short-term rentals of residential properties on grounds that it was unconstitutionally retroactive and that it was an unconstitutional taking. The court of appeals ruled that the ordinance was unconstitutionally retroactive and did not reach the takings issue. The discussion of retroactivity included the fact that short-term leasing, and the right to lease in general, were reasonable, settled expectations. Were the POA a city, county or state, its action in the case at bar could well be considered unconstitutionally retroactive.

Likewise, a recent Texas case says Section 204.010 of the Texas Property Code, which grants the Association authority to regulate the use of townhomes, allowed the Association to amend rules and regulations to prohibit use of a townhome for hotel, motel, or transient use where the restrictions or the association's articles of incorporation or bylaws, did not otherwise provide. *JBrice*

---

[1] This term has actually made its way in the Ninth District's jurisprudence, *albeit* in a concurring opinion by then Justice Stover:

> Our distinguished Chief Justice, Ronald L. Walker, an east Texas sage who is rapidly becoming a legend in his own time, has a rule called "t'aint fair". Here, I find myself adopting that rule.

GE v. California Ins. Guar. Ass'n, 997 S.W.2d 923, 931 n. 6 (Tex. App. – Beaumont 1999, pet. denied).

Holdings LLC v. Wilcrest Walk Townhomes Ass'n, 2020 Tex. App. LEXIS 6573, *10, 2020 WL 4759947 (Tex. App. – Houston [14th Dist.] Aug. 18, 2020, pet. filed). Though this amendment occurred after the owner acquired the townhome and began renting it out on Airbnb on a short-term basis, the question of applying the amendment to deprive the owner of one of the bundle of sticks was not squarely raised or addressed.

Even the Legislature shares this conceptual view. In creating the right to amend restrictive covenants, the Legislature built in certain safeguards, including especially the fact that those property owners who do not wish to amend are given the ability to opt out of any amendments which pass:

> Alternate boxes, clearly identified in a conspicuous manner next to the place for signing the Petition, that enable each record owner to mark the appropriate box to show the exercise of the owner's option to include or exclude the owner's property from being burdened by the restrictions being amended, created, added to or modified

TEX. PROP. CODE §201.007(a)(7).

None of these safe havens exist in the restrictive covenants at issue in this case, but such is the nature of a contract. As the Supreme Court explained, "'The law recognizes the right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal'" and "throughout the dispute, neither the association nor Tarr attempted to amend the deed restrictions to specify a minimum duration for leasing – an option available to both of them under the deed's amendment provisions" *Tarr v. Timberwood Park Owners Association*, 556 S.W.2d 274, 279 and 277 (respectively) (Tex. 2018) (citing *Curlee v. Walker*, 112 Tex. 40, 244 S.W. 497, 498 (Tex. 1922)). Because the parties in *Tarr* did not attempt to amend their restrictive covenants, the issue of whether that might have changed the outcome in *Tarr* was simply not before the Court. It remains to be seen whether the Supreme Court will find that (1) amendments of restrictive covenants which prohibit the usage being presently made of land

are still permissible per principles of contract law, or (2) such changes are unacceptable as contravening public policy. And until the Supreme Court or the Legislature speak on that issue – and one of them certainly should – the body of law which binds *this* Court supports the first of the two options listed above.

Even though there is some indication in Texas law – not to mention the law of Ohio and Michigan and in the Restatement – that the gravity of the amended restrictive covenant must play a role in whether it can be enforced, it is not the role of *this* Court to create such law. In this case and at this time, and based upon the pleadings, the matters set forth in the parties' Rule 11 Agreement, the memoranda of law, and the responses, there is no dispute that the property owners under the POA had the contractual right to amend the restrictive covenants, and they did so. The expectation of the Plaintiffs was that STRs were acceptable, and now they are not – which dashes their reasonable expectations. But the other property owners also had expectations – namely, their votes would be counted to permit them to control the nature of their community. At this point in Texas, the law says that the amendment is valid and enforceable and is, really, just a risk Plaintiffs undertook when they purchased property subject to restrictive covenants which could be amended. But the question of whether that should be the final say in a situation like this is open for the Supreme Court and the Legislature. This Court urges one of those bodies to resolve the issue. For now, it is:

ORDERED, ADJUDGED, AND DECREED as follows:

1. The POA is entitled to declaratory relief that the 2020 Amendment to the Amended Restrictions and Covenants at issue (which is an agreed exhibit and was attached as an exhibit to the POA's briefing and is incorporated herein by reference), which places conditions and requirements regarding leasing and advertising and a mandatory minimum

duration on leasing, is enforceable against Plaintiffs and is a valid amendment of the 2007 Amended Restrictions and Covenants, under which Plaintiffs purchased their property.

2. Therefore, Plaintiffs have been required to comply with, and shall comply with, the 2020 Amendment to the Amended Restrictions and Covenants.

3. Further, the Court has determined that the issues in this case are so important and so reasonably disputed between these parties that the American Rule should prevail and it is neither equitable nor just that the POA be awarded its attorney's fees against Plaintiffs or that Plaintiffs be awarded their attorney's fees against the POA.

4. The POA shall have and recover its costs of court against Plaintiffs, jointly and severally, as determined via a Bill of Costs prepared by the District Clerk's Office.

5. Interest shall accrue on the costs of court award at 5% per annum from date of judgment until paid.

This judgment is final and appealable and disposes of all parties and all claims. All relief not expressly granted herein is denied.

Signed 6/11/2021 11:43:59 AM

HON. KRISTIN BAYS

Tab C

2022 WL 869809
Only the Westlaw citation
is currently available.

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

Court of Appeals of Texas, Austin.

POOLE POINT SUBDIVISION
HOMEOWNERS' ASSOCIATION
and Poole Point Architectural
Control Committee, Appellants
v.
Sean DEGON and Erie DeGon, Appellees

NO. 03-20-00618-CV
|
Filed: March 24, 2022

FROM COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY, NO. C-1-CV-19-009597, THE HONORABLE TODD T. WONG, JUDGE PRESIDING

Attorneys and Law Firms

J. Patrick Sutton, The Law Office of J. Patrick Sutton, 1706 W. 10th Street, Austin, TX 78703, for Appellee.

Roy Kemp Kasling, Law Office of R. Kemp Kasling, P. C., 5511 Parkcrest Drive., Ste. 110, Austin, TX 78731-4917, J. Bruce Bennett, Cardwell, Hart & Bennett, LLP, 807 Brazos Street, Suite 1001, Austin, TX 78701, for Appellant.

Before Chief Justice Byrne, Justices Baker and Smith

MEMORANDUM OPINION

Thomas J. Baker, Justice

***1** Poole Point Subdivision Homeowners' Association and Poole Point Architectural Control Committee (collectively, "Poole Point") appeal from the trial court's judgment declaring that an amendment to the Poole Point Subdivision's deed restrictions imposing a minimum duration on leases of residences in the subdivision was unenforceable against Sean DeGon and Erie DeGon. For the reasons set forth below, we will reverse the trial court's judgment and remand the case to the trial court.

BACKGROUND

Our recitation of the pertinent facts in this case is taken from an agreed statement of facts signed by the parties. *See* Tex. R. Civ. P. 263 (providing for submission of agreed statement of facts). In December 2013, Sean and Erie DeGon, who reside in Houston, bought a residence on a lot in the Poole Point Subdivision ("the Property"). The Property is subject to the "Declaration of Covenants, Conditions and Restrictions" ("the Restrictions") dated April 1, 1987, and filed in the Real Property Records of Travis County, Texas. The Restrictions provide, in part:

> **NOW THEREFORE**, Declarant, the sole Owner in fee simple of POOLE POINT hereby declares that all lots in POOLE POINT shall be held, transferred, sold and conveyed subject to the following

> covenants, restrictions, reservations and charges, hereby specifying and agreeing that this Declaration and its provisions shall be and are covenants to run with the land and shall be binding on Declarant, its successors and assigns, all subsequent Owners of each lot, and the Owners by acceptance of their deeds do for themselves, their heirs, executors, administrators, successors and assigns, covenant and agree to abide by the terms and conditions of this Declaration.
>
> **....**
>
> **RESTRICTIONS**
>
> 1. All property (except for Lot 164) shall be used, devoted, improved and occupied exclusively to Single Family Residential Use. Only one single family dwelling unit may be erected on a lot.
>
> 2. No business and/or commercial activity to which the 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.
>
> ....
>
> **LAND USE AND STRUCTURES**
>
> 1. All lots in POOLE POINT shall be used and occupied for residential purposes only; except that Lot 164 is hereby reserved, set aside and dedicated as an easement for access to Lake Travis.
>
> **GENERAL PROVISIONS**
>
> 7. 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 of and provisions of this Declaration and any amendments thereto.

The DeGons stated that they reviewed and relied on the Restrictions before purchasing the Property.

***2** In 2017, the DeGons began leasing the Property for durations of fewer than 30 days. In 2019, pursuant to the Restrictions' amendment provision, owners of more than 67% of the lots in the Poole Point Subdivision executed and recorded an amendment to the Restrictions ("the Amendment"). The Amendment provides:

> The Deed Restrictions are hereby amended to include the following:
>
> No lot or property (including without limitation, any residence, room or rooms in a residence, any dwelling house, guest quarters, servants quarters, garage, or any other structure located on any lot) in the Subdivision, may be rented for a period of less than 180 consecutive days, and the lessee or lessees under any such rental 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.

The DeGons did not sign the Amendment but they do not contest the validity of the votes or the procedure by which the Amendment was executed and recorded. After the Amendment became effective, the DeGons continued to lease the Property for periods of 30 days and stated that they intend to continue this practice despite the Amendment. Poole Point then sent a cease-and-desist letter to the DeGons demanding that they comply with the Restrictions and the Amendment. The DeGons responded by suing Poole Point seeking a declaratory judgment that the Amendment could not be enforced against them. Poole Point filed a counterclaim asserting that the DeGons were in breach of the Restrictions and the Amendment by leasing the Property to third parties for prohibited durations and occupancies and requesting that the court enter a cease-and-desist order and grant declaratory relief.

The DeGons and Poole Point agreed to a bench trial pursuant to rule 263 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 263 (providing for submitting controversy to court on agreed statement of facts). After considering the filed stipulations and joint exhibits, the trial court rendered judgment in favor of the DeGons and awarded them attorneys' fees. The trial court's order recites that:

> the DeGons are entitled to declaratory relief that the 2019 Amendment to the [Restrictions] at issue, which places a mandatory minimum duration on leasing, is not enforceable against [the DeGons] owing to its deprivation of their settled property rights under the [Restrictions], under which they purchased [the] property. The 2019 Amendment represents a new and different restriction which defies the reasonable and settled expectations of the DeGons, who relied on the 1987 Declaration's grant of the right to lease the main dwelling without duration restriction and physical occupancy requirements.

After the trial court denied Poole Point's motion for new trial, Poole Point perfected this appeal.

STANDARD OF REVIEW

Rule 263 of the Texas Rules of Civil Procedure provides:

> Parties may submit matters in controversy to the court upon an agreed statement of facts filed with the clerk, upon which judgment shall be rendered as in other cases; and such agreed statement signed and certified by the court to be correct and the judgment rendered thereon shall constitute the record of the cause.

Id. In an appeal involving an agreed statement of facts pursuant to Rule 263, the only issue on appeal is whether the trial court properly applied the law to the agreed facts. *See id.*; *Abbott v. Blue Cross & Blue Shield of Tex., Inc.*, 113 S.W.3d 753, 757 (Tex. App.—Austin 2003, pet. denied). We review this issue de novo. *Panther Creek Ventures, Ltd. v. Collin Cent. Appraisal Dist.*, 234 S.W.3d 809, 811 (Tex. App.—Dallas 2007, pet. denied). Our consideration is limited to those agreed facts. *Id.* The agreed facts are binding on the parties, the trial court, and the appellate court. *Patton v. Porterfield*, 411 S.W.3d 147, 153-54 (Tex. App.—Dallas 2013, pet. denied). In an appeal

of an "agreed" case, there are no presumed findings in favor of the judgment. *State Farm Lloyds v. Kessler*, 932 S.W.2d 732, 735 (Tex. App.—Fort Worth 1996, writ denied). We presume conclusively that the parties have brought before the court all facts necessary for the presentation and adjudication of the case. *Cummins & Walker Oil Co. v. Smith*, 814 S.W.2d 884, 886 (Tex. App.—San Antonio 1991, no writ). We do not review the legal or factual sufficiency of the evidence but simply review the trial court's order to determine if it correctly applied the law to the agreed stipulated facts. *Panther Creek Ventures*, 234 S.W.3d at 811.

DISCUSSION

***3** To amend deed restrictions, three conditions must be met. *See Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester West Fund, Inc.*, 177 S.W.3d 552, 562 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 313 (Tex. App.—Fort Worth 2001, no pet.). First, the instrument creating the original restrictions must establish both the right to amend and the method of amendment. *Wilchester West*, 177 S.W.3d at 562; *Dyegard Land P'ship*, 39 S.W.3d at 313. Second, the right to amend implies only those changes contemplating a correction, improvement, or reformation of the agreement rather than its complete destruction. *Wilchester West*, 177 S.W.3d at 562; *Dyegard Land P'ship*, 39 S.W.3d at 313. Third, the amendment must not be illegal or against public policy. *Wilchester West*, 177 S.W.3d at 562; *Dyegard Land P'ship*, 39 S.W.3d at 313.

In the present case, the parties agree that the Restrictions established both the right to amend and the method of amending them and the DeGons do not challenge the procedure by which the Restrictions were amended. Thus, the enforceability of the Amendment depends on (1) whether it corrects, reforms, or improves the Restrictions, rather than destroying them; and (2) whether the Amendment is illegal or against public policy.

We first consider whether imposing a minimum duration on leases of residences in the Poole Point Subdivision destroys the right to lease that was originally granted in the Restrictions. We conclude that it does not. The Restrictions do not grant homeowners an absolute or unlimited right to lease their residences. Instead, that right is "subject to all the provisions of" the Restrictions, which contain a provision permitting amendments. The Amendment, which was validly executed and recorded, does not completely prohibit the owners' ability to lease their residences. Rather, it imposes a minimum stay provision, establishing the minimum duration for a lease of a property owner's residence. *See 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.) (holding that minimum stay requirement did not completely prohibit the owners' ability to rent their property). The placing of certain conditions on the duration of a lease and the lessee's use of the leased property does not constitute "complete destruction" of the Deed Restrictions.[1] The Amendment reformed the right to lease

contained in the Restrictions by setting a minimum duration for any leases and requiring that the lessees use the leased property as their residence for the duration of the lease. Thus, unless the Amendment is illegal or against public policy, it constitutes an enforceable limitation on the right to lease the Property.

***4** Modifications to deed restrictions that impose greater restrictions are not prohibited by law when they are consistent with the overall plan of development. *See Dyegard Land P'ship*, 39 S.W.3d at 313 (upholding amendment to property restrictions that imposed prohibition against drilling private water wells when no such restriction previously existed); *Harrison v. Air Park Estate Zoning Comm.*, 533 S.W.2d 108, 111 (Tex. App.—Dallas 1976, no writ) (holding that modification to original restrictive covenant, although more restrictive, "was consistent with the overall plan of the development and was neither unreasonable nor prohibited by law"); *see also* 16 Tex. Jur. 3d, *Covenants, Conditions, and Restrictions* § 115 (2021) ("A restriction modified so as to make it even more restrictive is neither unreasonable nor prohibited by law where it is consistent with the overall plan of development and is adopted according to the subdivision plan."). The Restrictions for the Poole Point Subdivision indicate the intent that it be a residential community. For example, the Restrictions provide that "[a]ll property [ ] shall be used, devoted, improved and occupied exclusively for Single Family Residential Use." The Restrictions also prohibit business or commercial activity within the subdivision with the exception of "the leasing of a single family dwelling by the Owner thereof, subject to all the provisions" of the Restrictions. "[R]estrictions placed upon lots for the purpose of prescribing and preserving the residential character thereof are looked upon with favor by the courts." *Wald v. West MacGregor Protective Ass'n*, 332 S.W.2d 338, 343 (Tex. App.—Houston 1960, writ ref'd n.r.e.). The minimum duration requirement created by the Amendment reinforced the existing residential use and occupancy restriction and the prohibition against commercial activities. Furthermore, the Texas Supreme Court has indicated that amending deed restrictions is an appropriate method for specifying a minimum duration for leases in a residential subdivision. *See Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 277 (Tex. 2018). In *Tarr*, the supreme court was asked to determine whether short-term vacation rentals violated restrictive covenants that limited tracts to residential purposes and single-family residences. While declining to construe the covenants as they existed to prohibit short-term leases, the supreme court noted that "throughout the dispute, neither the association nor Tarr attempted to amend the deed restrictions to specify a minimum duration for leasing—an option available to both of them under the deed's amendment provisions." *Id.* Thus, in *Tarr* the supreme court acknowledged the propriety of amending residential-use deed restrictions to place durational limits on leases, which is precisely what Poole Point did. If such amendments were illegal or against public policy, the supreme court would not have described them as an available option.

We conclude that the Amendment is valid and enforceable because it meets the requirements that it (1) corrects, reforms, or improves the Restrictions, rather than destroying them; and

(2) is not illegal or against public policy. *See Wilchester West*, 177 S.W.3d at 562; *Dyegard Land P'ship*, 39 S.W.3d at 313. Consequently, the trial court erred in determining that the Amendment was unenforceable against the DeGons and rendering judgment in their favor. We therefore reverse the trial court's judgment granting the DeGons' request for declaratory relief.

On appeal, Poole Point challenges the trial court's award of attorneys' fees to the DeGons. *See* Tex. Civ. Prac. & Rem. Code § 37.009 (in proceeding under Uniform Declaratory Judgments Act (UDJA), court may award costs and reasonable and necessary attorneys' fees as are equitable and just). Poole Point argues that, because the DeGons are not entitled to the declaratory relief sought, this Court should reverse the award of attorneys' fees and render judgment denying them recovery of any attorneys' fees. In the alternative, Poole Point argues that the Court should remand the cause to the trial court for reconsideration of whether the DeGons are entitled to attorneys' fees under the UDJA.

"Under section 37.009, a trial court may exercise its discretion to award attorneys' fees to the prevailing party, the nonprevailing party, or neither." *Feldman v. KPMG LLP*, 438 S.W.3d 678, 685 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Thus, a trial court has the discretion to award attorneys' fees to a party even if it does not prevail. *Feldman*, 438 S.W.3d at 685-86 (concluding that trial court had power to award attorneys' fees under UDJA even though it had dismissed claim for declaratory relief for lack of jurisdiction). However, because on appeal the DeGons' status has changed from a prevailing party to a non-prevailing party, we will remand the issue of attorneys' fees to the trial court for reconsideration. *See Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637-38 (Tex. 1996) (remanding case to district court to consider and exercise its discretion to award attorneys' fees under UDJA when party may no longer have "substantially prevailed" in litigation); *Berquist v. Lamar Gateway Baceline Holdings, LLC*, No. 03-19-00096-CV, 2020 WL 4462328, at *6 (Tex. App.—Austin July 24, 2020, no pet.) (mem. op.) (when declaratory judgment is reversed on appeal, trial court's award of attorneys' fees may no longer be equitable and just).

Poole Point maintains that this Court should render judgment awarding it attorneys' fees, in the amount the parties stipulated was reasonable and necessary, pursuant to Texas Property Code section 5.006. *See* Tex. Prop. Code § 5.006. Section 5.006 provides that "[i]n an action based on breach of a restrictive covenant pertaining to real property, the court shall allow to a prevailing party who asserted the action reasonable attorney's fees in addition to the party's costs and claim." *Id.* However, at this stage Poole Pointe's claims based on the DeGons' breach of the Restrictions and its request for a cease-and-desist order have not been adjudicated. In its original answer, Poole Point asserted a counterclaim alleging that the DeGons breached the Restrictions and sought to enforce those restrictions through a cease-and-desist order. Poole Point also sought declaratory judgment that the Restrictions, as amended, were valid and enforceable against the DeGons. The trial court denied

these requests in its final judgment when it declared that the DeGons were entitled to the declaratory relief they sought and concluded: "This judgment is final and appealable and disposes of all parties and all claims. All relief not expressly granted herein is denied." *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) ("A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree."). We are remanding this case for the trial court to reconsider the award of attorneys' fees to the DeGons pursuant to the UDJA. On remand, and in light of this Court's opinion, Poole Point may secure a ruling on its counterclaim for breach of the Restrictions, request that the court enter a cease-and-desist order, and request specific declarations regarding the enforceability of the Restrictions. It may also seek to recover its "reasonable attorneys' fees" pursuant to Texas Property Code section 5.006.

CONCLUSION

***5** For the reasons stated in this opinion, we reverse the trial court's judgment granting the DeGons' request for declaratory relief. We remand the cause for the trial court to reconsider the award of attorneys' fees under section 37.009 of the UDJA. We also remand the cause to the trial court to consider Poole Point's counterclaims and request for attorneys' fees pursuant to section 5.006 of the Texas Property Code.

All Citations

Not Reported in S.W. Rptr., 2022 WL 869809

Footnotes

1 We note that the trial court did not conclude that the Amendment destroyed the DeGons' right to lease their residence in the Poole Point Subdivision. Instead, it based its decision on its finding that the Amendment "defies the reasonable and settled expectations of the DeGons, who relied on the 1987 Declaration's grant of the right to lease the main dwelling without duration restriction and physical occupancy requirements." The DeGons purchased their property knowing that the Restrictions could be amended and that the right to lease was "subject to all provisions" in the Restrictions, including any valid amendments. For this reason, the DeGons could not reasonably have expected that there could never be restrictions placed on the right to lease their residence.

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TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED MARCH 24, 2022

NO. 03-20-00618-CV

Poole Point Subdivision Homeowners' Association and Poole Point Architectural Control Committee, Appellants

v.

Sean DeGon and Erie DeGon, Appellees

APPEAL FROM COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY
BEFORE JUSTICES BYRNE, BAKER, AND SMITH
REVERSED AND REMANDED -- OPINION BY JUSTICE BAKER

This is an appeal from the judgment signed by the trial court on October 1, 2020. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the court's judgment. Therefore, the Court reverses the trial court's judgment and remands the case to the trial court to reconsider the award of attorneys' fees under section 37.009 of the UDJA. We also remand the cause to the trial court to consider appellants' counterclaims and request for attorneys' fees pursuant to section 5.006 of the Texas Property Code. Appellees shall pay all costs relating to this appeal, both in this Court and in the court below.

Tab D

2022 WL 869801
Only the Westlaw citation
is currently available.

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

Court of Appeals of Texas, Beaumont.

Charmain ADLONG and
Charles Kennedy, Appellants
v.
TWIN SHORES PROPERTY
OWNERS ASSOCIATION, Appellee

NO. 09-21-00166-CV
|
Submitted on January 27, 2022
|
Opinion Delivered March 24, 2022

On Appeal from the 284th District Court, Montgomery County, Texas, Trial Cause No. 20-05-05973-CV

Attorneys and Law Firms

J. Patrick Sutton, for Appellants.

Timothy Stostad, Andrew L. Johnson, for Appellee.

Before Golemon, C.J., Horton and Johnson, JJ.

MEMORANDUM OPINION

LEANNE JOHNSON, Justice

***1** This appeal pertains to a dispute over a property owners' association's amendments to property restrictions. Appellants Charmain Adlong and Charles Kennedy (collectively "Plaintiffs" or "Appellants") sued Appellee Twin Shores Property Owners Association ("Defendant," "Appellee," or "the POA") seeking declaratory relief. Appellants bought a home in Twin Shores subdivision in 2014. The parties agree that Appellants bought their property subject to the existing restrictions, and further that the governing documents allowed the POA, from time to time, to amend the restrictions. The Appellants challenge the amendments to the property restrictions adopted in 2020 by the POA, arguing the new restrictions ("the 2020 Amendment") took away their right to rent their property, which they contend they had "under prior restrictions." According to the Plaintiffs, the 2020 Amendment prohibited short-term rentals of less than six months, required regular and exclusive occupancy by tenants, prohibited leasing less than a whole house, prohibited leasing to more than one family, and prohibited rental advertising on specific internet sites.

The case was submitted in the trial court on the parties' briefs and on stipulated facts. The trial court granted declaratory relief to the POA and determined that the 2020 Amendment was a valid amendment that was enforceable against the Plaintiffs, but it declined to award attorney's fees to either party. Plaintiffs appealed. For the reasons stated herein, we affirm.

Stipulated Facts

The parties agreed for the case to be submitted under Rule 263 and stipulated to the relevant facts, which we quote below.[1]

1. The Twin Shores subdivision lies on Lake Conroe in Montgomery County, Texas.

2. The original restrictive covenants for Twin Shores were adopted and filed in the public record in 1972.[2] The provisions of the 2007 and 2020 Restrictions are stipulated.

3. Plaintiffs bought a lakefront vacation home in the Twin Shores subdivision in 2014. They relied on the rights accorded by the restrictive covenants when deciding to buy and remodel the home. They wished to rent out the home for short terms when they were not using the home for themselves and their family. They rely on the rental income to keep the property in light of the sums they spent improving it and mortgaging it.

4. Plaintiffs advertise their home for rent on the internet using websites such as VRBO.com.

5. On February 28, 2020, the Twin Shores Property Owners Association, having obtained the votes of a majority of the subdivision property owners in favor of Exhibit 2, recorded Exhibit 2 in the real property records of Montgomery County.

6. Plaintiffs voted "No" to Exhibit 2.

7. The HOA has indicated its intent to enforce the 2020 Restrictions, so a live controversy exists between the parties which a declaratory judgment would resolve.

8. Plaintiffs filed this suit on May 20, 2020 for a declaratory judgment that Exhibit 2 cannot be enforced against them. They sought attorney's fees under the Texas UDJA. Defendant answered with a general denial and claim for attorney's fees under the Texas UDJA.

***2** 9. Plaintiffs stipulate to the validity of the voting procedures for the 2020 Restrictions [ ] and the validity of the individual votes themselves regarding the 2020 Restrictions [ ]. Therefore, Plaintiffs do not challenge the procedural validity of the 2020 Restrictions [ ] and further agree that all procedures required for an amendment to the Restrictions were followed.

10. After deciding the legal issues presented, the trial court shall determine in its discretion what attorney's fees, if any, are equitable and just to any party under the Texas UDJA.

11. The reasonable and necessary attorney's fees for either party are stipulated to be $15,000 through the signing of the judgment on the agreed case. The reasonable and necessary attorney's fees for intermediate appeal shall be $12,500 for either side. The reasonable and necessary attorney's fees for proceedings in the Texas Supreme Court shall be $5,000 for the review stage; $5,000 for the briefing stage; and $2,500 for the oral argument stage.

12. Nothing herein shall affect or limit a party's right to seek supplemental or further relief pursuant to Tex. Civ. Prac. & Rem. Code § 37.011.

The 2007 and 2020 Amendments

The 2007 amendments to the existing restrictions that were in effect when the Appellants bought their property included the following language:

> Part I
>
> [I]n consideration of the premises and for the purpose of amending, continuing in effect and carrying out the purposes of insuring harmonious, pleasant and satisfactory living conditions in a residential subdivision, and to insure means for mutually safeguarding and enhancing the value of investments in said Subdivision by each property owner - therein, the undersigned lot owners and Twin Shores Property Owners Association hereby execute the Amended Declaration, which shall amend and supplant the Original Declaration in its entirety, and in so doing, the undersigned lot owners and Twin Shores Property Owners Association hereby adopt, establish, promulgate, and impress upon the Subdivision the restrictions and covenants set forth hereinafter, which said restrictions, covenants and provisions shall govern the development and use of said Subdivision, and shall be binding upon said owners, their heirs, successors and assigns, for the term stipulated herein.
>
> ...
>
> ... These covenants, restrictions and/or provisions may be amended or modified at any time, or terminated in its entirety, by the recording in the Official Public Records of Real Property of Montgomery County, Texas of an amendment or termination instrument, signed by Owners representing a majority of the total votes of the Members of the Association.
>
> Part IV
>
> 1. LAND USE: No Lot, building site or tract shall be used except for residential purposes, and may not be replated, subdivided or any portion of any Lot used for a road, public or private. .... No business of any type, kind or character, or apartment house, nor any occupation or business for commercial gain or profit shall be done or carried on in said residential area. All parts of said Subdivision are hereby designated as a residential area except a 1.534 acre parcel of land, and designated on the recorded plat as RESERVE ONE. This site is for the private and exclusive use of all Owners and shall have no commercial activities of any nature or character carried out here, and a portion of or all of Lot 102 and 103 may be used for the purpose of building tennis courts thereon, for the common use of Twin Shores property Owners. Unless otherwise expressly stated herein, no use shall be made of any reserve area as shown on the plat, of this Subdivision without the express written consent of Twin Shores Property Owners Association, or its successors in interest, and without the additional approval of the Architectural Control Committee.

***3** The 2020 Amendment included the following language:

> NOW, THEREFORE, in consideration of the premises and for the purpose of amending, continuing in effect and carrying out the purposes of insuring harmonious,

pleasant and satisfactory living conditions in a residential subdivision, and to insure means for mutually safeguarding and enhancing the value of investments in said Subdivision by each property owner - therein, the undersigned lot owners and Twin Shores Property Owners Association hereby execute the Amended Declaration, which shall amend and supplant the Original Declaration in its entirety, and in so doing, the undersigned lot owners and Twin Shores Property Owners Association hereby adopt, establish, promulgate, and impress upon the Subdivision the restrictions and covenants set forth hereinafter, which said restrictions, covenants and provisions shall govern the development and use of said Subdivision, and shall be binding upon said owners, their heirs, successors and assigns, for the term stipulated herein.

WHEREAS, the Members of the Association, desire to amend the above document as hereinafter set forth to address the above stated issue; and

WHEREAS, all Members of the Association have been provided written notice of this proposed amendment; and

WHEREAS, this amendment of the Declaration, as set forth below, has been approved by the Members casting at least 2/3rd of the votes in the Association in approval of this amendment:

NOW THEREFORE, pursuant to the above recitals, the Members of the Association hereby amend the provisions of the Declaration to adopt, establish and impose upon the Twin Shores Subdivision, sections one and two and the Association, the following amendments:

1. Part IV, Section 1 of the Declaration is amended to read as follows:

1. LAND USE: No Lot, building site or tract shall be used except for residential purposes.... No business of any type, kind or character, or apartment house, nor any occupation or business for commercial gain or profit shall be done or carried on in said residential area....

...

A. Leasing:

(1) Definitions. For purposes of this subsection, the terms “Lease” and “Leasing” shall refer to the regular, exclusive occupancy of a residence by any person other than the Owner, for which the Owner receives any consideration or benefit including, without limitation, a fee, service, or gratuity. “Rent,” “rentals,” or “renting” shall have the same meaning.

(2) Leases Approved. If the lease or leasing strictly complies with the following terms and conditions, the lease shall be deemed approved without further action by either the Owner or the Board:

(a) Written Lease. All leases for any Property must be in writing and shall provide that:

(i) such lease is specifically subject to the provisions of this Declaration and all other Governing Documents of the Association;

(ii) any failure of the Owner or tenant to comply with the terms of the Declaration and all other Governing Documents shall be deemed to be a default under such lease; and

(iii) the Owner acknowledges giving to the tenant copies of the Declaration and all other Governing Documents, as a part of the lease.

***4** (b) Notice to Association. Within 10 days of a lease being signed, the Owner of the leased residence shall notify the Association of the lease, send a signed copy of the lease to the Association or its management company, and provide any additional information the Association or Board may reasonably require.

(c) Whole House. Any residence that is leased shall be leased only in its entirety; separate rooms, floors, or other areas within a dwelling may not be separately leased.

(d) One Family. It is expressly forbidden to rent or lease and occupy an Owner's Lot or residence to more than one Single-Family.

(e) Lease Term. The lease shall provide for a minimum initial term of at least six (6) months. The residence may not be subleased and the lease may not be assigned during the initial six month term.

(f) Termination. In the event of termination of the lease after the tenant has taken occupancy and prior to the end of the minimum initial term, the Owner may not enter into a new lease with a term commencing prior to the date on which the previous lease would have expired without prior approval of the Board. The Board may grant approval for such a new lease if it determines that the Owner acted in good faith with no intent to circumvent the requirements of this subsection and could not have reasonably anticipated the early termination of the previous lease at the time the previous lease was signed.

(3) Leases Prohibited. Leasing of residences other than in strict conformity with Section 1.A.(2) hereof, including short-term or vacation rentals, is prohibited.

(4) Advertisements. No home or lot shall be advertised for lease for a period less than six (6) months. Further, no home or lot shall be advertised or listed on any short term or vacation rental website, media platform or database (e.g. Airbnb, VRBO, Flipkey, HomeAway, Hometogo, etc.)[.]

The 2020 Amendment also states, "the Owners having at least sixty-seven percent (67%) of the total votes allocated to the property owners in the Association have voted in favor of and approved this amendment."

Plaintiffs allege that they bought a residence in Twin Shores subdivision when the governing restrictions were the 2007 Restrictions and that under those restrictions, they had the right to use their property for short-term rental

property. They argue that this right was part of their rights as a property owner and part of their "bundle of rights," and they contend that the majority of the property owners in the HOA cannot take that right away from them by making amendments to the deed restrictions. Plaintiffs argue that the 2020 Amendment defeats the legitimate, reasonable expectations of those who bought under prior restrictions. According to Plaintiffs, short-term rentals became more widespread as the internet has developed and since the Texas Supreme Court determined in *Tarr*[3] that short-term leasing is an ordinary residential use under common deed restriction wording. Plaintiffs admit they were on notice of the existing 2007 Restrictions when they bought their property and argue they "relied on them crucially." Plaintiffs contend that the restrictions in place when they bought their property contained no restrictions on "leasing" or renting of property and no restrictions on the duration of occupancy of the main dwelling. Plaintiffs argue that because most restrictive covenants can be amended, "so no buyer can avoid it[,]" buyers are not "fairly on notice of future amended restrictions," such as a new restriction on the right to lease.

***5** According to Plaintiffs, while the law allows amendments that remove restrictive covenants, no Texas case has allowed a majority of property owners to take away property rights from owners who bought relying on earlier restrictions. Plaintiffs acknowledge that Texas court cases have validated amended restrictions, but Plaintiffs narrowly construe those cases to apply only if the restrictions "furthered the purposes of existing restrictions."[4]

Plaintiffs contend that the 2007 Restrictions allowed "wide-open leasing and occupancy[ ]" and such unrestricted rights should not be "taken away summarily after purchase." Plaintiffs characterize their position as "seek[ing] merely to preserve the original intent of the developer." According to the Plaintiffs, not all states interpret the amendment of deed restrictions in the same manner. Plaintiffs argue some states evaluate whether a new restriction is fair by examining whether it is "new and unexpected," while others employ a pure contract approach by which an amendment is enforceable if approved by the required number of votes by property owners. Plaintiffs contend that Texas courts should not adopt a pure contract approach to this issue because property buyers in Texas do not have a choice to avoid restrictive covenants or amendments thereto, and a typical buyer would not anticipate that an amendment to the restrictions can mean "my property rights can be taken away summarily by my neighbors." Plaintiffs also allege that the 2020 Amendment's ban on certain advertising is an unconstitutional denial of commercial speech.[5]

Plaintiffs do not contend that deed restrictions cannot ever be amended, but rather they challenge whether an existing owner can be subjected to the amended restrictions. Plaintiffs assert that the freer use of land results in higher property values and that new restrictions should not apply to existing owners but only "when any given property is conveyed anew[.]"

According to the Appellants, "an owner's right to decide who stays in a house when[ ]" is a fundamental property right, and if the

2020 Amendment is enforceable, "no property rights are safe anymore." They allege they relied on their "wide-open" property rights to rent out their home for short terms, and they relied on the rental income "in light of the sums they spent improving it and mortgaging it." Appellants complain that the trial court erred in concluding the 2020 Amendment is enforceable against them and that the trial court erred in relying on Chapter 201 of the Property Code because Chapter 201 allows property owners who do not agree to amendments to opt out and because "Chapter 201 was largely superseded by Chapter 209[.]"[6]

***6** Defendant disagrees and responds that the Plaintiffs bought their property with notice that the property was subject to certain restrictions and that the property was subject to an existing POA. Defendant emphasizes that the existing restrictions included a provision that expressly permitted the restrictions to be modified or amended by a vote of the members of the POA, that the Plaintiffs were given notice of the proposed amendments, and that the POA followed the governing procedure and a majority of the landowners voted to adopt the 2020 Amendment. The 2007 Restrictions also stated that they were binding on the owners in the subdivision and their "heirs, successors, and assigns," and the POA expressly had the power in the 2007 Restrictions to adopt, amend, terminate, or enforce the rules and regulations.

The POA contends that the power to amend restrictions is a traditional contract right that is bargained-for, and to reject the 2020 Amendment would "nullify the Amendment Clause in the parties' contract." According to the POA, while generally covenants restricting the free use of property are not favored under Texas law, that rule of construction only applies when a restriction (or contract provision) is ambiguous.[7] Otherwise, the POA argues that Texas jurisprudence has a "strong public policy favoring freedom of contract[,]" and courts " 'are not lightly to interfere with this freedom of contract.' "[8] The Defendant disagrees with the Plaintiffs' interpretation of Texas law and emphasizes that Texas caselaw consistently interprets deed restrictions and the power of an association to amend such restrictions under principles governing contract law. The POA asserts that the contractual and bargained-for right to amend property restrictions is a way that homeowners may address "novel developments" such as the internet and vacation rentals that could not have been anticipated when they bought their property or when the subdivision was created. The POA contends that restrictive covenants and amendments thereto should be given their commonly accepted meaning, whether the amendment results in a marginal or significant change. The POA further maintains that enforcing the 2020 Amendment will not destroy property rights but would protect the homeowners' contractual rights.

The POA specifically emphasizes that in *Tarr*, the Texas Supreme Court recognized property owners have the right " 'to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal.' "[9] And, the POA argues that in *Couch v. Southern Methodist University*, the Texas Supreme Court did not reject the right to amend restrictions but only limited the right to amend to include "changes contemplating a correction,

improvement or reformation of the agreement rather than a complete destruction of it."[10]

We note a significant factual distinction between the facts here and the facts in *Couch.* Unlike our facts, the existing restrictions in *Couch* did not include language that granted the association the right to terminate the restrictions entirely. The POA explains that the 2020 Amendment limiting short-term rentals did not cause a "complete destruction" of the restrictive covenants but rather the amendments were "a change wrought in accordance with the covenants' own Amendment Clause." The POA contends that Texas cases such as *Winter, Sunday Canyon*, and *Harrison* upheld the right of a property owners' association to amend restrictive covenants and enforce them against property owners who had purchased before the amendments.[11] The POA also argues that the 2020 Amendment about advertising was not subject to a constitutional free-speech challenge because the restrictions are private restrictions that were voted on and passed by a majority of the homeowners.[12]

The Trial Court's Final Judgment

***7** After summarizing the parties' arguments in its judgment and briefly noting some existing Texas statutes, the trial court concluded that the POA was entitled to declaratory relief that the 2020 Amendment was enforceable against the Plaintiffs and the Plaintiffs were required to comply with the 2020 Amendment. The trial court did not award attorney's fees to either party. The trial court awarded costs to the POA.

Issues

Appellants state their issues as follows: (1) whether a majority of owners in a subdivision may adopt new restrictive covenants that deprive existing owners of property rights; (2) whether restrictive covenants may require someone who rents a home to physically occupy it for a minimum length of time; and (3) whether restrictive covenants may prohibit a property owner from advertising a home on the internet.[13] We consider Appellants' first two issues together, and we address their third issue separately.

Standard of Review

The trial court's Final Judgment begins with a discussion of the issues and arguments presented by the parties. The discussion—which precedes that section of the Final Judgment that includes decretal language—does not on its face include findings of fact or conclusions of law. Therefore, we regard the discussion portion of the Final Judgment as a letter ruling that is not binding on this court.[14] We do not determine whether the trial court's discussion supports its judgment.[15]

In a case submitted to the trial court on an agreed stipulation of facts under Rule 263, the parties are seeking a judgment on a special verdict and "judgment in accordance with the applicable law."[16] On appeal, we examine the correctness of the trial court's application of the

law to the admitted facts, which is a question of law that we review under a de novo standard.[17]

Tarr v. Timberwood Park Owners Association

***8** In 2018, the Texas Supreme Court decided *Tarr v. Timberwood Park Owners Association.*[18] In *Tarr*, the Court concluded that a property owner's short-term rental of his property did not violate the applicable deed restriction that limited tracts to "residential purposes and single-family residences[,]" because the unambiguous restrictive covenants imposed no such limitation on short-term rentals.[19] The Court emphasized that such restrictions or covenants are subject to "general rules of contract construction[,]"[20] and noted that "[o]ur courts enforce these private agreements subject to certain well-established limitations."[21] In making its ruling, the Court expressly noted that "neither the association nor Tarr attempted to amend the deed restrictions to specify a minimum duration for leasing—an option available to both of them under the deed's amendment provisions."[22] Unlike the parties in *Tarr*, in the case that is now before us, the POA exercised its option and right to amend its restrictions as provided for under the governing provisions. The Plaintiffs and Defendant stipulated that the POA properly followed the governing procedures when the POA amended the restrictions in 2020. In this case, with respect to the leasing provision in the 2020 Amendment, the Plaintiffs are not arguing the terms in the 2020 Amendment are ambiguous, they are not arguing the POA violated the amendment procedures, nor are they asking the Court to interpret the terms in the leasing section of the 2020 Amendment. Rather, Plaintiffs' argument hinges on the underlying premise that a POA should not be allowed to exercise the amendment procedures available when the amendment would restrict an existing property owner's rights to use her property.[23]

Restrictive Covenants

Generally, an instrument containing restrictive covenants in a subdivision defines the rights and obligations of property ownership in the subdivision, and the mutual and reciprocal obligations undertaken by all purchasers in a subdivision creates a property interest, possessed by all purchasers.[24] Mutuality of obligation is " 'central to the purpose of restrictive covenants.' "[25] A property owner "submits to a burden upon his own land because of the fact that a like burden imposed on his neighbor's lot will be beneficial to both lots."[26]

***9** Under Texas law, three conditions must be met to amend deed restrictions.[27] First, the instrument creating the original restrictions must establish both the right to amend and the method of amendment.[28] Second, the right to amend implies only those changes contemplating a correction, improvement, or reformation of the agreement rather than its complete destruction.[29] Third, the amendment must not be illegal or against public policy.[30] Here, Appellants do not dispute that the 2007 Restrictions established a right to amend and method of amendment, nor do they challenge

the validity of voting procedures or individual votes.

The Texas Supreme Court has stated that " '[t]he law recognizes the right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal.' "[31] "Courts strive to honor the parties' agreement and not remake their contract by reading additional provisions" into the agreement.[32] We construe a contract in favor of mutuality of obligation.[33] "Although covenants restricting the free use of property are not favored, when restrictions are confined to a lawful purpose and are within reasonable bounds and the language employed is clear, such covenants will be enforced."[34] Courts should refrain from nullifying a transaction because it is contrary to public policy, " 'unless the transaction contravenes some positive statute or some well-established rule of law.' "[35]

Appellants acknowledge that they had notice in 2014 when they bought their property that the deed restrictions allowed amendments. The 2007 Restrictions, by their express terms, provided that the terms could be "amended, or modified at any time, or terminated in [their] entirety" by recording an amendment or termination signed by a majority of the property owners.[36] When buyers purchase property subject to a declaration capable of amendment if certain procedures are followed, they are "on notice that the unique form of ownership they acquired when they purchased their [property] was subject to change through the amendment process, and that they would be bound by properly adopted amendments."[37] So, property owners that purchase property that is part of a valid existing POA "know in advance that the rules might change and that they are often subjecting themselves to the will of the majority" in the POA.[38]

***10** Appellants argue that this Court should reject the "pure-contract approach" because it fails to acknowledge that buyers do not have a meaningful choice to avoid amendments to restrictive covenants, and because home buyers lack the power to "negotiate away restrictive covenants." Appellants also argue that an enforceable amendment is only one that furthers the purposes of existing restrictions, and they infer that the POA's 2020 Amendment does not further the purpose of the scheme or plan of the subdivision, or the existing restrictions. Appellee disagrees and argues the 2020 Amendment is entirely consistent with the 2007 Restrictions and within the express authority and procedure for amendment.

Appellants and Appellee both cite *Tarr v. Timberwood*, *Winter v. Bean*, *Sunday Canyon Property Owners Association v. Annett*, and *Harrison v. Air Park Estates Zoning Commission.*

We previously discussed *Tarr v. Timberwood.*[39] In *Winter v. Bean*, the Winters bought property that was subject to an amendment clause.[40] Later, the deed restrictions were amended to prevent property owners from subdividing existing lots.[41] The Winters claimed they had no notice that their alleged "vested property right" to subdivide their lot could be revoked.[42] Because the original deed restrictions expressly

provided that a majority of property owners could change or modify the restrictions and did not require notice to be given to all property owners, the Houston First Court of Appeals concluded that upon purchasing their property, the Winters were on constructive notice that the original deed restrictions could be modified or changed.[43] So the First Court concluded the Winters were bound by the amendments, which prohibited the Winters from splitting or further subdividing their lot.[44] The Winters argued the amendments violated their freedom to contract and freely use their land, and should be declared void in violation of public policy.[45] While the First Court agreed with the general public policy principles about the freedom to contract, it still concluded the Winters had failed to "explain how these general principles were violated[.]"[46]

In *Sunday Canyon*, the originally recorded plat for the subdivision included restrictions, and the restrictions included a provision allowing a modification by written consent of 51% of the owners.[47] The Annetts purchased two lots in the subdivision. The owners of more than 51% of the lots voted to modify the plat and restrictions that empowered the POA, to levy charges and assessments for roads, the water system, common areas, to provide for architectural control over improvements, and "to promote the health, welfare and safety of the residents."[48] The Annetts did not vote for the amendments, and they sued, arguing that the original restrictions were vague and ambiguous and incapable of enforcement and that the modification created new POA powers not intended by the original restrictions.[49] In its judgment, the trial court concluded that the modification was enforceable because it complied with the method prescribed in the original restrictions, but that the assessments and charges were an impermissible lien against the Annetts' property.[50] On appeal, the Amarillo Court of Appeals concluded that the original restrictions set forth an enforceable mechanism for amendment which was neither illegal nor against public policy.[51] The court explained the right to contract with respect to property owned "embraces the ability to impose on the property restrictive covenants and to abrogate or modify them."[52] The court concluded that the modified restrictions did not destroy the dedication but were changes made in accordance with it and to further the purpose of the original restrictions.[53]

***11** Applied to this case, we read *Tarr, Winter*, and *Sunday Canyon* to support the conclusion that amended or modified restrictive covenants may be enforced, against owners who acquired their property before the amendment, even if they did not vote for the amendment, when the original restrictions provided a method for amendment, that method was followed, and the owners were on constructive notice the restrictions could be amended by amendment.

In *Harrison*, Harrison bought property in a subdivision developed to provide "homesites for people who like airplanes."[54] When Harrison bought his lot, the deed restrictions provided that "[a] hangar may be built before the home is built[.]"[55] Later, 76.4% of the property owners voted to modify the restrictions to provide that "no hangar may be built before a home[.]"[56] After the modified restriction was approved, Harrison submitted

a plan for the construction of a hangar on his lot without first building a house, and his plan was disapproved.[57] The subdivision's zoning committee sued to enjoin Harrison's construction, and the trial court granted the subdivision's request for a temporary injunction to enjoin Harrison from building the hangar.[58] Harrison appealed, arguing in part that a grantor may not sell property under certain restrictions while retaining the right to impose further restrictions. Harrison also argued the subdivision's modifications were void because they were more restrictive than the original restrictions on his lot.[59] The Dallas Court of Appeals affirmed, finding the modified restrictions reasonable because they were consistent with the developer's original plan.[60] The court stated that "[l]andowners have the right to impose any restrictions they choose so long as the restrictions are not against public policy or illegal."[61] We conclude that *Harrison* supports the principle that amended restrictive covenants may be enforced against an owner who bought property before the amendment, when the amendment is consistent with the general plan or scheme of development for the subdivision.

The 2007 Restrictions in place when Appellants bought their property stated that they were adopted for "the purposes of insuring harmonious, pleasant and satisfactory living conditions in a residential subdivision, and to insure means for mutually safeguarding and enhancing the value of investments" in the subdivision.[62] The record evidence provides no basis for this Court to conclude that the 2020 Amendment does not further the purposes stated in the previous restrictions.

Appellants also argue the 2020 Amendment should only apply to new property owners and cannot be enforced in a manner that would take away the rights of owners who bought before the amendment. Under this theory, amended restrictions would only be enforceable against purchasers who purchase property after the amendments are adopted and would not be enforceable against all current owners, even when the property owners voted for the amendment. No language in the 2007 Restrictions or the 2020 Amendment suggests that limitation. We find no Texas case directly on point that would require that result. To the contrary, as noted above, the case law when applied to these stipulated facts, simply does not support Appellants' arguments. When Appellants bought their lots, the lots were subject to restrictions that could be amended pursuant to the very process that occurred here. Both sides agreed to that process, and we will not rewrite their agreement.[63] So, we reject Appellants' argument.

***12** Appellants further argue that freer use of property—that is, property unencumbered by restrictive covenants—frees up land for more uses and "equates to higher property value." Appellants provide no citation to the record or to legal authority for this argument.[64] As a general proposition, while that may be true in the abstract for some buyers in some markets, the Texas Supreme Court has stated that "restrictive covenants can enhance the value of real property."[65] "The buyer submits to a burden upon his own land because of the fact that a like burden imposed on his neighbor's lot will be beneficial to both lots."[66] Whether the

2020 Amendment would increase or decrease property values is not before us, the Appellant has failed to cite to anything in the record on that issue, and we note that this issue would normally be a question of fact. We may review only questions of law in this appeal.[67]

On the record, we conclude the trial court did not err in concluding that the 2020 Amendment is valid and enforceable against Appellants. The amended restrictions neither forbid all rentals of property, nor did Appellants present any stipulated facts in the trial court that rentals of at least six months, the duration required by the amended restrictions, is unreasonable. When the Appellants bought their property, they were on notice that the POA could amend the restrictive covenants by a majority vote of the property owners. Appellants do not argue that they did not get notice of the proposed amendments, and in fact they agree that they exercised their voting rights and voted against the changes. Here, the POA exercised its option to amend the deed restrictions, specifying a minimum duration for leasing, "an option available to [ ] them under the deed's amendment provisions."[68]

Appellants are bound by the 2020 Amendment. The record reflects that the POA complied with the necessary elements for amending the restrictions, and the 2020 Amendment was favorably supported by a majority of the owners.[69] We need not address Appellants' arguments about Chapter 201.[70] We overrule Appellants' first and second issues.

Restrictions on Advertising

We separately consider the limitations on advertising in the 2020 Amendment. Appellants argue that the limitations on advertising violate public policy and are "facially overbroad and repugnant to free speech." Appellants argued in the trial court that the limitations on advertising were a "flat-out denial of commercial speech [that] rises to the level of a constitutional infirmity." As to Appellants' First Amendment arguments, we conclude the record does not support the Appellants' argument claiming the 2020 Amendment constitutes "state action" implicating their First Amendment rights.[71]

Restrictive covenants may be enforced so long as they are lawful, the language employed is clear, and they are within reasonable bounds.[72] The advertising restriction at issue states: "No home or lot shall be advertised for lease for a period less than six (6) months. Further, no home or lot shall be advertised or listed on any short term or vacation rental website, media platform or database (e.g., Airbnb, VRBO, Flipkey, HomeAway, Hometogo, etc.)[.]" The first sentence is consistent with the six-month duration required in the lease provision, and the second sentence of the limitation prohibits any advertisement on "any short-term or vacation rental website, media platform or database" followed by examples of websites where the property may not be advertised. Here, the record contains no evidence to show the terms of service or the listings on the websites where the Appellants may have advertised their property, nor does the record contain any evidence on whether these are the only websites

available for advertising property that requires a lease for at least six months. As already noted, we are limited in this appeal to reviewing questions of law.[73]

***13** On this record, we conclude the 2020 Amendment prohibiting advertising on "short term or vacation rental website[s]" is not arbitrary or unreasonable.[74] Accordingly, we conclude the trial court did not err by finding the advertising restriction was enforceable against the Plaintiffs. We overrule Appellants' third issue.

Attorney's Fees

The trial court determined that it would not be equitable or just to award attorney's fees because the issues were important and reasonably disputed. We review an award or denial of attorney's fees under the Declaratory Judgments Act for an abuse of discretion.[75] Under the Declaratory Judgments Act, a trial court has discretion in deciding whether to award attorney's fees.[76] A court may decide that fees should not be awarded if such an award would not be equitable and just in light of all the circumstances.[77] On this record, we hold the trial court did not abuse its discretion by refusing to award attorney's fees.[78]

We overrule Appellants' issues, and we affirm the trial court's Final Judgment.

AFFIRMED.

All Citations

Not Reported in S.W. Rptr., 2022 WL 869801

Footnotes

1 *See* Tex. R. Civ. P. 263 (providing that parties may submit matters in controversy upon a filed agreed statement of facts).

2 The original restrictions from 1972 are not part of our record. The only restrictions in the record are dated in 2007 and 2020.

3 *See Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 276, 290-92 (Tex. 2018).

4 *See Winter v. Bean*, No. 01-00-00417-CV, 2002 WL 188832 at *——, 2002 Tex. App. LEXIS 1012 at *1 (Tex. App.—Houston [1st Dist.] Feb. 7, 2002, no pet.) (enforcing an amendment that prohibited an owner from re-subdividing a lot originally platted by the developer); *Sunday Canyon Prop. Owners Ass'n v. Annett*, 978 S.W.2d 654, 658 (Tex. App.—Amarillo 1998, no pet.) (allowing a majority of owners to enforce new assessments for maintaining infrastructure against a minority of owners because the purpose of the amendments was to further the purpose of the original restrictions); *Harrison v. Air Park Estates Zoning Comm.*, 533 S.W.2d 108, 111 (Tex. App.—Dallas 1976, no writ) (in a subdivision intended as "homesites for people who like airplanes[,]" an amended restriction requiring construction of a home before construction of a hangar was valid as a reasonable extension of the original restrictions).

5 Citing *Anderson Courier Serv. v. State*, 104 S.W.3d 121 (Tex. App.—Austin 2003, pet. denied) (concluding that section 38.18 of the Penal Code, which made it a misdemeanor to use information obtained from the Department of Public Safety for the direct solicitation of business or employment or for pecuniary gain, was an unconstitutional regulation of commercial free speech).

6 *See* Tex. Prop. Code Ann. § 201.009(b)(3), (4) (allowing for property owners to opt out of restrictions that are added, modified, created, or extended under Chapter 201 if the owners did not sign the petition to amend restrictions and did

not receive actual notice of filing the petition, or if the owners did not sign the petition and file within one year a statement electing to have their property excluded from the amendment).

7 *See Tarr*, 556 S.W.3d at 280 (citing *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981)).

8 *See Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016); *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007) (quoting *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 767 (Tex. 2005)).

9 556 S.W.3d at 279 (quoting *Curlee v. Walker*, 112 Tex. 40, 244 S.W. 497, 498 (Tex. 1922)).

10 10 S.W.2d 973, 974 (Tex. 1928).

11 *See Winter,* 2002 WL 188832, 2002 Tex. App. LEXIS 1012; *Sunday Canyon*, 978 S.W.2d 654; *Harrison*, 533 S.W.2d 108.

12 *See Park v. Escalera Ranch Owners' Ass'n, Inc.*, 457 S.W.3d 571, 590 n.9 (Tex. App.—Austin 2015, no pet.) (stating that the property owners' association was a private nonprofit corporation, and the association did not engage in state action subject to a constitutional challenge); *see also Palma v. Genesis Cmty. Mgmt., Inc.*, No. 4:18-CV-0124, 2018 WL 2291404 at *3, 2018 U.S. Dist. LEXIS 84983 at *8 (S.D. Tex. May 2, 2018) ("Courts within the Fifth Circuit have held that homeowner's associations are not state actors," unless the State of Texas is pervasively entwined in management and operations); *Du Bois v. Bradley*, Civil Action No. 4:13-CV-00252, 2013 U.S. Dist. LEXIS 101946 at *10 (S.D. Tex. June 10, 2013) ("[T]he First Amendment does not regulate the conduct of private parties.").

13 Here, we are not presented with the issue of whether short-term rentals—whether for one day or six months—constitute a residential or commercial use, as that issue was not argued to the trial court nor on appeal.

14 *Cf. Cherokee Water Co. v. Gregg Cty. Appraisal Dist.*, 801 S.W.2d 872, 877-78 (Tex. 1990) (concluding that a letter ruling was not competent evidence of the trial court's basis for its judgment); *AIMS ATM, LLC v. Sanip Enters.*, No. 01-13-00155-CV, 2014 WL 810839, 2014 Tex. App. LEXIS 2261 (Tex. App.—Houston [1st Dist.] Feb. 27, 2014, no pet.) (mem. op.) ("Explanatory letters from the trial court preceding a judgment do not impact the standard or scope of our appellate review."); *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 482 n.24 (Tex. App.—Austin 2012, pet. denied) (same).

15 *See Bell Helicopter Textron, Inc. v. Burnett*, 552 S.W.3d 901, 911 n.7 (Tex. App.—Fort Worth 2018, pet. denied) (explaining that a letter ruling does not constitute formal findings and is not competent evidence of the trial court's basis for its judgment).

16 *Harris Cty. Appraisal Dist. v. Transamerica Container Leasing Inc.*, 920 S.W.2d 678, 680 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

17 *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *DeGuerin v. Wash. Cty. Appraisal Dist.*, No. 01-11-00548-CV, 2012 WL 1379633 at *——, 2012 Tex. App. LEXIS 3031 at *8 (Tex. App.—Houston [1st Dist.] Apr. 19, 2012, no pet.) (citing *Transamerica*, 920 S.W.2d at 680; *Harris Cty. Appraisal Dist. v. Tex. Gas Transmission Corp.*, 105 S.W.3d 88, 91 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)); *Port Arthur Indep. Sch. Dist. v. Port Arthur Teachers Ass'n*, 990 S.W.2d 955, 957 (Tex. App.—Beaumont 1999, pet. denied).

18 556 S.W.3d 274.

19 *Id.* at 276.

20 *Id.* at 280.

21 *Id.*

22 *Id.* at 277. At oral argument, Appellant argued that this statement in *Tarr* was *dicta* and implied it has no precedential value. We disagree because we conclude the statement is at a minimum *judicial dictum* that is instructive and should be followed by us. In *Seger v. Yorkshire Insurance Co.*, 503 S.W.3d 388, 399 (Tex. 2016), the Texas Supreme Court noted that dictum is defined as: " 'An opinion expressed by a court, but which, not being necessarily involved in the case, lacks

the force of an adjudication; an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point.' " (quoting *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124, 1126 (Tex. 1913)). The Court explained that there are two types of dicta: *judicial dictum* and *obiter dictum. Id.* (citing *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 773 (Tex. 1964)). *Obiter dictum* is not binding as precedent, but *judicial dictum* is instructive and a statement that is made "deliberately after careful consideration and for future guidance in the conduct of litigation." *Id.* (citing *Lund v. Giauque*, 416 S.W.3d 122, 129 (Tex. App.—Fort Worth 2013, no pet.); *Palestine Contractors, Inc.*, 386 S.W.2d at 773). Therefore, *judicial dictum* "is at least persuasive and should be followed unless found to be erroneous." *Id.* (citing *Palestine Contractors, Inc.*, 386 S.W.2d at 773) (citing *R.R. Comm'n v. Aluminum Co. of Am.*, 380 S.W.2d 599, 601 (Tex. 1963)); *see also In re S. Ins. Co.*, No. 09-11-00022-CV, 2011 WL 846205 at *2, 2011 Tex. App. LEXIS 1734 at *4 (Tex. App.—Beaumont Mar. 10, 2011, orig. proceeding) (mem. op.) ("Even if some statements ... may not have been pivotal to the [Texas] Supreme Court's opinion, a lower court is not free to ignore statements of law 'said deliberately' by the Supreme Court.").

23 Here, as in *Tarr*, the amendment process was an option available to the parties and it is the POA's exercise of the amendment process that the Plaintiffs argue is "repugnant" to their individual right to use of their own property. This repugnance, if any, existed when Plaintiffs decided to buy property that was part of an existing subdivision with a POA, subject to regulations on use, and which could be amended. Under Plaintiffs' theory, each landowner would only be subject to those restrictions that were in place when they bought their property and future amendments would not be enforceable against them if the amended restrictions reduced a respective landowner's existing property rights, even when the amendment was duly adopted by governing procedures.

24 *See C.A.U.S.E. v. Village Green Homeowners Ass'n, Inc.*, 531 S.W.3d 268, 274 (Tex. App.—San Antonio 2017, no pet.); *see also Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 636 (Tex. 1987) ("The concept of community association and mandatory membership is an inherent property interest.").

25 *Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 593 S.W.3d 324, 333 (Tex. 2020) (quoting *Davis*, 620 S.W.3d at 568).

26 *Curlee*, 244 S.W. at 498.

27 *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552, 562 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 313 (Tex. App.—Fort Worth 2001, no pet.); *Hanchett v. E. Sunnyside Civic League*, 696 S.W.2d 613, 615 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)).

28 *Id.*

29 *Id.*

30 *Id.*

31 *Tarr*, 556 S.W.3d at 279 (citing *Curlee*, 244 S.W. at 498).

32 *Gastar Expl. Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

33 *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 857-58 (Tex. 2009).

34 *Tarr*, 556 S.W.3d at 282 (quoting *Davis*, 620 S.W.2d at 565).

35 *Teal Trading & Dev., LP*, 593 S.W.3d at 338 (quoting *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001); *Sherrill v. Union Lumber Co.*, 207 S.W. 149, 153 (Tex. App.—Beaumont 1918, no writ)).

36 Chapter 204 of the Texas Property Code provides a method for a POA to amend bylaws and regulate the use of a subdivision, although where a document expressly provides terms allowing a POA to modify existing provisions, that document prevails over Chapter 204. *See* Tex. Prop. Code Ann. §§ 204.003(a), 204.010(a)(1), (6), 209.0041(h).

37 *See* *Woodside Vill. Condo. Ass'n, Inc. v. Jahren*, 806 So. 2d 452, 460-61 (Fla. 2002).

38 *See* Donald J. Kochan, *The Sharing Stick in the Property Rights Bundle: The Case of Short Term Rentals & HOAs*, 86 U. Cin. L. Rev. 893, 910 (2018).

39 *See supra* at pp. 17-18.

40 2002 WL 188832, at *——, 2002 Tex. App. LEXIS 1012, at *1.

41 *Id.* at *——, 2002 Tex. App. LEXIS 1012, at **1-2.

42 *Id.* at *——, 2002 Tex. App. LEXIS 1012, at *2.

43 *Id.* at *——, 2002 Tex. App. LEXIS 1012, at **4-5.

44 *Id.* at *——, 2002 Tex. App. LEXIS 1012, at **4-5.

45 *Id.* at *——, 2002 Tex. App. LEXIS 1012, at *7.

46 *Id.* at *——, 2002 Tex. App. LEXIS 1012, at **8-9.

47 978 S.W.2d at 656.

48 *Id.*

49 *Id.* at 657.

50 *Id.*

51 *Id.*

52 *Id.* at 658.

53 *Id.*

54 533 S.W.2d at 110.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.* at 110-11.

60 *Id.* at 111.

61 *Id.*

62 Airbnb has been in business since 2008. *See* *Parker Madison Partners v. Airbnb, Inc.*, 283 F.Supp.3d 174, 181 (S.D.N.Y. 2017); *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F.Supp.3d 1066, 1069 (N.D. Cal. 2016). For that reason, it would not have been possible for the 2007 Restrictions to anticipate the development of Airbnb advertising. We note that the current Airbnb Terms of Service caution that "Some landlords and leases, or homeowner and condominium association rules, restrict or prohibit subletting, short-term rentals and/or longer-term stays." *See* Airbnb.com, *Terms of Service* (Feb. 10, 2022), https://www.airbnb.com/help/article/2908/terms-of-service.

63 *See* *Tarr*, 556 S.W.3d at 280 (Courts should construe restrictive covenants to give them meaning " 'as of the date the covenant was written, and not as of some subsequent date.' ") (quoting *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987)); *Mann Frankfort Stein & Lipp Advisors, Inc.*, 289 S.W.3d at 857-58 (We construe a contract in favor of mutuality of obligation.); *Gastar Expl. Ltd.*, 412 S.W.3d at 583 (We construe a contract as written, not "reading [in] additional provisions[,]" and giving effect to all provisions and rendering none meaningless or useless.).

64 *See* Tex. R. App. P. 38.1(i) (requiring appellate briefs to provide citations to authorities and to the record).

65 *See* *Tarr*, 556 S.W.3d at 279.

66 *Id.* at 280 (quoting *Curlee*, 244 S.W. at 498).

67 *See* *Transamerica*, 920 S.W.2d at 680.

68 *See* *Tarr*, 556 S.W.3d at 277.

69 *See generally* *Winter,* 2002 WL 188832, 2002 Tex. App. LEXIS 1012; *Sunday Canyon*, 978 S.W.2d 654; *Harrison*, 533 S.W.2d 108.

70 *See* Tex. R. App. P. 47.1; *Bos v. Smith*, 556 S.W.3d 293, 299 (Tex. 2018) ("An erroneous conclusion of law does not require reversal if the trial court rendered the proper judgment.") (citing *BMC Software Belg., N.V.*, 83 S.W.3d at 794).

71 *See* *Palma,* 2018 WL 2291404, at *3, 2018 U.S. Dist. LEXIS 84983, at *8; *Du Bois*, 2013 U.S. Dist. LEXIS 101946, at *10; *Park*, 457 S.W.3d at 590 n.9.

72 *See* *Davis*, 620 S.W.2d at 565; *Dyegard*, 39 S.W.3d at 315 ("[A]n amendment must meet a standard of reasonableness and cannot be exercised in an arbitrary or capricious manner.").

73 *See* *Transamerica*, 920 S.W.2d at 680.

74 *See* *id.*

75 *Forest Hills Improvement Ass'n, Inc. v. Flaim*, No. 09-18-00199-CV, 2019 WL 4493325 at *——, 2019 Tex. App. LEXIS 8478 at *4 (Tex. App.—Beaumont Sept. 19, 2019, no pet.) (mem. op.).

76 *See* *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) (citing Tex. Civ. Prac. & Rem. Code Ann. § 37.009).

77 *See* *Flaim,* 2019 WL 4493325, at *——, 2019 Tex. App. LEXIS 8478, at *5.

78 *See* *Sunday Canyon*, 978 S.W.2d at 658-59 (the trial court did not err by not awarding either party attorney's fees in a dispute over the enforceability of modified restrictive covenants).

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IN THE NINTH COURT OF APPEALS

09-21-00166-CV

CHARMAIN ADLONG AND CHARLES KENNEDY

V.

TWIN SHORES PROPERTY OWNERS ASSOCIATION

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 20-05-05973-CV

JUDGMENT

Having considered this cause on appeal, THE NINTH COURT OF APPEALS concludes that the judgment of the trial court should be affirmed. In accordance with the Court's opinion, IT IS THEREFORE ORDERED the judgment of the trial court is affirmed. All costs of the appeal are assessed against the appellant.

Opinion of the Court delivered by Justice Leanne Johnson

March 24, 2022

AFFIRMED

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Copies of this judgment and the Court's opinion are certified for observance.

Carly Latiolais
Clerk of the Court

Tab E

Nos. 22-0316, 22-0318
Table of Implicated Restrictive Covenants

	Adlong	***DeGon***
"Residential Use" wording	No Lot, building site or tract shall be used except for residential purposes.	All property . . . shall be used, devoted, improved and occupied exclusively to Single Family Residential Use.
"Business Use" wording	No business of any type, kind or character, or apartment house, nor any occupation or business for commercial gain or profit shall be done or carried on in said residential area	No business and/or commercial activity to which the 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.
"Temporary Residency" wording	No temporary structures such as a trailer, tent, shack, shed. storage room or garage shall be used at any time on any building site in this Subdivision as either temporary or permanent residence.	No structure of a temporary character, mobile home, trailer, basement, tent, shack, garage, barn or other outbuilding shall be used on any lot at any time as a residence, either temporary or permanent.
Advertising wording	No signs consisting of advertising display or devices of any type or kind shall be in public view on any building site in this addition.	No signs of any kind shall be displayed for public view on any lot . . . except one sign . . . advertising the property for sale or rent.
Amendment wording	These covenants, restrictions and/or provisions may be amended or modified at any time, or terminated in its entirety, by the recording . . . of an amendment or termination instrument, signed by Owners representing a majority of the total votes of the Members of the Association.	This Declaration may be amended or repealed at any time by a recorded written instrument to that effect, executed and acknowledged by Declarant and the Owners of not less than 67% of the lots within Poole Point.

Tab F

Case	Status	Orig. Restrictions	New Restrictions
Adlong v. Twin Shores Prop. Owners' Assoc., No. 09-21-00166-CV, 2022 WL 869801 (Tex. App. – Beaumont March 24, 2022, pet. filed)	Petition for review filed, consolidation sought	Residential purposes only; No business purposes; No temporary residence in structures other than main dwelling.	Prohibit leasing for less than six months; Require "regular, exclusive" occupancy by tenants; Prohibit leasing of less than the whole house; Prohibit leasing to more than one family; Prohibit advertising on the internet.
Poole Point Subdiv. Homeowners' Assoc. v. DeGon, 03-20-00618-CV, 2022 WL 869809 (Tex. App. – Austin March 24, 20, no pet. h.)	Petition for review filed, consolidation sought	Single-family residential purposes only; No business purposes "to which the general public is invited"; "Nothing . . . shall prevent the rental of any lot for residential purposes only."	Prohibit leasing for less than 180 days; Require actual, physical occupancy by tenants for their full lease term.

Case	Status	Orig. Restrictions	New Restrictions
Chu v. Windermere Lakes Homeowners' Assoc., Inc., No. 14-21-00001-CV (Tex. App. – Houston [14th Dist.] 2021)	Under submission	Single-family residential purposes only; No temporary residence in structures other than main dwelling.	Prohibit leasing for less than 180 days; Require tenants to "remain on the lot" and establish residency there.
Angelwylde HOA, Inc. v. Fournier, No. 03-21-00269-CV (Tex. App. – Austin 2021)	Under submission	"Nothing in this Declaration shall prevent the rental of any Lot and the improvements thereon by the Owner thereof for residential purposes only."	Prohibit leasing for less than 12 months; Prohibit any advertising for a lease term of less than 12 months.

Case	Status	Orig. Restrictions	New Restrictions
Milius v. Seven Oaks Neighborhood Ass'n, Inc., No. C-1-CV-21-001075 (Travis CCL 2)	Pending, abatement sought by homeowner pending review in *DeGon*	Single-family residential purposes only; No business purposes; "An Owner may lease the Owner's Lot and all Improvements situated thereon for single-family residential purposes only."	Prohibit leasing for less than 12 months; Prohibit more than two leases per year; Prohibit advertising short-term leases; Impose $5,000 fines per day; Appoint the HOA as the owner-landlord's attorney-in-fact under the lease and requires the owner-landlord to indemnify the HOA for its attorney's fees when the HOA acts as attorney-in-fact.
Cauthorn v. Pirates Prop. Owners' Assoc., No. 20-CV-1940 (Galveston 56th Jud. Dist.)	Tried by agreed case on April 21, 2022, consolidated with *Cottonwood Trail*	Residential purposes only; No temporary residence in structures other than main dwelling.	Prohibit leasing for less than 90 days.
Cottonwood Trail Investments, LLC, No. 21-CV-0240 (Galveston 56th Jud. Dist.)	Tried by agreed case on April 21, 2022, consolidated with *Cauthorn*	Residential purposes only; "A lot owner may from time to time rent his home for profit"; No temporary residence in structures other than main dwelling.	Prohibit leasing for less than 90 days.
Russell v. Fall Creek Homeowners Assoc., Inc., No. 202164460 (Harris 190th Jud. Dist.)	Pending, motion to abate sought by homeowner pending review in *Adlong*	Single-family residential use only; No business use with some exceptions; "The leasing of a Single Family Residence shall not be considered a trade or business."	Prohibit leasing for less than 90 days. Tenant must "intend to make the Lot and/or Single Family Residence their home."

Case	Status	Orig. Restrictions	New Restrictions
Clayton v. Travis Landing Prop. Owners, Inc., No. C-1-CV-21-001144 (Travis CCL 2)	Abated pending review in *DeGon* and *Angelwylde*	Residential purposes only; "Tenants of any rental property" must abide by restrictive covenants; "For rent" signs allowed; No temporary residence in structures other than main dwelling.	Prohibit leasing for less than 30 days.
Golub v. Brown, No. 202068257 (Harris 80th Jud. Dist.)	Abated pending outcome in *Chu*	"Residential lots"; No temporary residence in structures other than main dwelling.	Prohibit leasing for less than 6 months except for post-sale lease-backs by sellers.
LV Premier Homes, LLC v. Waugh Homeowners' Assoc., Inc., No. 2021-32867 (Harris 333rd Jud. Dist.)	Abated pending outcome in *Chu*	Residential purposes only; No business purposes; "The leasing of a Dwelling Unit shall not be considered a trade or business."	Prohibit leasing for less than 180 days.
Shires v. Guadalupe River Estates Prop. Owners' Assoc., Inc., No. C2020-1067B (Comal 207th Jud. Dist.)	Abated pending outcome in *DeGon* and *Angelwylde*	Residential purposes only; No business purposes; "Guesthouses . . . to the rear . . . may not be used for rental purposes." "For rent" signs allowed.	"Business" defined to prohibit "vacation rentals."

Case	Status	Orig. Restrictions	New Restrictions
McClain v. Deer Island Estates Prop. Owners' Ass'n, Inc., No. 00026-CCL-21 (Henderson CCL)	Pending	Residential purposes only; Renting expressly allowed; No business purposes; No temporary residence in structures other than main dwelling.	Prohibit leasing for less than 6 months; Fines newly allowed; Creates new assessment scheme on owners of multiple houses.
Cline v. Kings Point Prop. Owners' Ass'n, Inc., No. C2022-0462D	Pending	Single-family residential purposes only.	Prohibit leasing for less than 6 months; Require tenants to remain on the lot for the entire term of the lease.

Tab G

Case	Status	Orig. Restrictions	New Restrictions
Snowden v. Three Forks Bluff Road Maint. Ass'n, No. 21DCV326765 (Bell 169th Jud. Dist.)	Nonsuited.	Mixed agricultural and residential use with allowance for one large animal per acre; Owners may resubdivide to min. 1-acre.	No animals except household pets; No resubdividing.
Nguyen v. Breckinridge Farms Homeowners' Ass'n, Inc., No. 05-21-00994-CV (Tex. App. – Dallas 2021)	Dismissed by agreement.	Residential purposes only; "Tenants" allowed; "For rent" signs allowed.	Prohibit leasing for less than 12 months; Anyone with a felony conviction prohibited from renting; Leasing prohibited during first 12 months of ownership.
Treadway v. Enclave on Cedar Creek Homeowners' Ass'n, No. 00064-CCL2-20 (Henderson CCL)	Nonsuited.	Single-family residential purposes; No business purposes.	Prohibit leasing for less than 12 months; Allow HOA directors to bar 90% of the owners from leasing; and New fines and foreclosure authorized.
Martin v. Swan Point Landing Commun. Ass'n, Inc., No. 2021-CV-4324-DC (Calhoun 24th Jud. Dist.)	Pending.	Mix of commercial and residential lots; Uniform assessments.	Give board complete discretion to decide assessment per lot, including 80% of total road repair costs on one owner of one commercial lot; Prohibits owners of commercial lots from leasing out any residential lots they own if the tenants are also customers of the commercial lot; Prohibits leasing without permission from HOA board.

Case	Status	Orig. Restrictions	New Restrictions
Mendoza v. Donore Square Homeowners' Ass'n, Inc., No. 2020CI20931 (Bexar 285th Jud. Dist.)	Pending.	Residential purposes only.	Prohibit leasing for less than 6 months.
Park City Quit'n Time, LLC v. Settler's Point Prop. Owner's Ass'n, Inc., No. 21-0724 (Hays 207th Jud. Dist).	Pending.	Residential purposes only. Any dwelling on a Tract or any Tract may be rented to one to four Persons, provided that no Tract or dwelling may be occupied under any lease or other rental arrangement by more than four natural adult persons.	Prohibit leasing for less than 30 days; Require home to be "primary residence for a single family."
Lamb v. Flying L Ranch Prop. Owners' Ass'n, Inc., No. CVOR-22-0000041 (Bandera 198th Jud. Dist.)	Pending.	Minimum floor area of the principal residence . . . shall not be less than 1600 square feet.	Minimum floor area of the principal residence . . . shall not be less than 2000 square feet.
Geiger v. San Geronimo Airpark Owners' Ass'n, No. 2021CI14619 (Bexar 166th Jud. Dist.)	Pending.	Commercial use for airplane hangar allowed on lots at issue.	Require residential use on lots at issue.

Tab H

Case	State	Amending Clause	Holding
Kalway v. Calabria Ranch HOA, LLC, 506 P.3d 18, 24 (Ariz. 2022)	AZ	"Amendment by majority vote."	"[A]n HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations. . . . [F]uture amendments cannot be "entirely new and different in character, untethered to an original covenant."
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.
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."
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."
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.
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.

Case	State	Amending Clause	Holding
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.
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.
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.
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.
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.
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.
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.

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