No. 16-1005

IN THE SUPREME COURT OF TEXAS

KENNETH H. TARR,

Petitioner,

v.

TIMBERWOOD PARK OWNERS ASSOCIATION, INC.,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. Solely duration of use is at issue

The HOA's response implies that there were grounds other than duration of occupancy for the decision below. There were not. The only issue was whether the deed restriction "residential purposes only," which is silent as to duration of use, imposes a duration requirement on occupancy or leasing. As to that, three courts of appeals have given irreconcilably different answers:

- *Zgabay* said no.
- *Benard* said yes, 90 days.
- The *Tarr* panel below said yes, but without specifying a clear minimum duration requirement for owner- or lease-occupancy.

Pet'n at 11-15. The HOA nevertheless accuses Tarr of violations that the HOA never asserted and that have nothing to do with the duration of occupancy: renting to unrelated people and renting to too many people. Response at 4-5.

Concerning the relationship among occupants, some deed restrictions (unlike those here) do modify the term "residential purposes" with the additional limitation "single family." Pet'n Tab C (CR412); *see, e.g., Zgabay v. NBRC Property Owners Association,* No. 03-14-00660-CV, 2015 WL 5097116, at *1-3 (Tex. App.—Austin Aug. 28, 2015, pet. denied). Yet even *Zgabay*, contrary to what the HOA suggests, did not involve a live dispute over whether multiple

families occupied the Zgabays' property:

> As for whether the covenants state a minimum permissible duration for the leasing of homes, the covenants do not provide any minimum term for which a property may be leased but do address the use of a temporary structure such as a mobile home, a barn, or a garage as a residence . . . . Therefore, it is clear that the drafters of the covenants considered and knew how to impose a duration on particular uses or types of structures.
>
> Looking at the restrictive covenants as a whole, we conclude: (1) that the leasing or renting of residences in the subdivision is permissible, (2) that the covenants themselves do not place any limit on the duration of the leasing of a residence, and (3) that the drafters were familiar with the concept of time limits with regard to uses that may be made of structures in the subdivision and did not impose any duration limits with regard to the leasing of homes.

2015 WL 5097116, at *3. The Zgabays did not pick a fight on the "single family" restriction because they merely sought to rent for short terms, irrespective of the occupants' relationships. Tarr likewise has not asserted the right for multiple families to occupy his property.

In a similar vein, the HOA's Response suggests that the *number* of occupants is somehow a violation of "residential purposes," Response at 4-5. That too is unrelated to the issue of *duration* of occupancy. The number of lease occupants is statutorily actionable under Tex. Prop. Code § 92.010 (max. 3 adults per bedroom for leased property, private right of action),

but the HOA never brought such an action.

II. Fact-intensive inquiry into subjective intent thwarts the purpose of having deed restrictions in the first place

The San Antonio panel and the HOA advocate an "intent to remain" test which would ask on a case-by-case basis whether a given lease "qualifies" as residential instead of commercial. 2016 WL 6775591 at *3; Response at 4. This test has many problems. How would it be administered lease-by-lease? Which of several occupants or co-tenants would have to take and pass the test? What standards would guide the inquiry? How to assuage a renter's anxiety that a wrong answer renders a lease a forbidden business enterprise in violation of the deed restrictions? How to address early terminations, month-to-month rentals, and post-sale lease-backs? The San Antonio court's test invites litigation and the generation of an entire new jurisprudence to address cases – and there are many – where deed restrictions are silent as to duration of occupancy or leasing. Yet the reason deed restrictions exist in the first place is to give property owners clear answers to basic property rights questions.

The Austin and Beaumont cases provide simple and clear answers, but starkly conflicting ones. The Austin court of appeals holds that silence on an issue invokes the common-law rule favoring the free use of property, which respects the reasonable expectations of owners whose deed restrictions impose no lease

duration limit. 2015 WL 5097116, at *2-3 and n.3 (faulting trial court for requiring mandatory, physical occupation of the property as required in San Antonio). Buyers and owners can assume that they have rights unless clearly stated otherwise. The *Benard* decision, while it would ban STR's all over the state, did at least avoid the trap of vagueness: it declared 90 days as the minimum lease term where deed restrictions are silent. *Benard v. Humble*, 990 S.W.2d 929, 932 (Tex. App.–Beaumont 1999, pet. denied) (Pet'n Tab F). Either of these approaches is an improvement on the decision below, which leaves everyone guessing and muddies the state of the law.

This Court should tell landowners how to interpret silence in deed restrictions so that the risks of purchasing real property are widely understood and can be accurately priced.

III. Where deed restrictions are utterly silent, all the more reason for the courts not to write them

The HOA argues that because the deed restrictions here have no wording at all devoted to duration of occupancy, all the more reason for the courts to step in and impose a duration where the drafter did not. Response at 10. In *Zgabay*, the drafter had contemplated duration elsewhere in the deed restrictions while conspicuously failing to impose a duration limit on leasing. 2015 WL 5097116, at *2-3. The present case presents a starker proposition: the drafter imposed no duration limits at all. It is a

common feature of deed restrictions. Yet the *Zgabay* rule favoring property rights in the absence of a plain restriction is all the more important where deed restrictions are completely silent on an issue. Otherwise, silence will bar everything that is not expressly allowed, and no owner can predict what unwritten prohibition will be imported into deed restrictions from unrelated legal contexts.

This is where the rubber meets the road in the conflicting cases – *Benard*, *Zgabay*, and *Tarr*. The HOA uses bold-faced italics to emphasize that ***"[U]nlike Zgabay, there is no provision in any section of the Timberwood restrictions that limits use by duration."*** Response at 11. To the HOA, this surprisingly frank admission registers as a reason for the courts to impose duration limits by fiat, with resort to external sources from unrelated legal contexts. For the HOA, *"what is not expressly allowed is forbidden."* To Tarr, deed restrictions' utter silence on an issue registers as the lack of any restriction on that issue and thus nothing for a court to interpret "liberally" under Tex. Prop. Code § 202.003(a). *Cf. Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash. 2d 241, 252, 327 P.3d 614, 620 (Wash. 2014) (*en banc*) (in STR case with similar facts, silence as to duration means there is nothing to interpret). For Tarr, *"what is not expressly forbidden is allowed."*

The STR cases offer this Court a lens for resolving this important conflict among the courts of appeals. *See generally*

Gregory S. Cagle, *Texas Homeowners Association Law* § 9.2 (2d. Ed. 2013) ("[T]he Texas Supreme Court has still not resolved the continuing conflict over the proper method of interpreting Restrictive Covenants.").

IV. The HOA fails to reckon with the panel opinion's conflict with *Benard*

The HOA relegates one of the three critical cases, *Benard*, to a footnote. Response at 5, n. 20. The HOA thus runs from acknowledging the conflict between *Benard* and the panel opinion, to say nothing of the profound conflict between those opinions and *Zgabay*. *Benard* threw a dart at the statute-book and struck a 90-day divorce-related requirement. 990 S.W.2d at 931-32. The panel below scored hits on a rental property door lock statute and civil venue rules. 2016 WL 6775591, at *3 (incorporating reasoning from *Munson v. Milton*, 948 S.W.2d 813 (Tex. App. – San Antonio 1997, writ denied)). The *Benard* result, though arbitrary given the number of statutes and sources that define "residence" differently in wildly different contexts, at least has the virtue of clarity: "residential" is a precise minimum number of days (90) to which a lease must adhere.

The panel's result, however, in mandating either "permanent" occupancy or an inquiry into subjective renter "intent to remain," is both draconian and ambiguous. Whereas *Benard* would impose a 90-day minimum all over the state – arbitrary but clear – the

panel opinion would do far worse: it would inject confusion and uncertainty into the market for real property. Neither owners nor tenants in much of the state have any certainty that using a property sporadically, as individual needs and wants dictate, does not run afoul of the oldest, most ubiquitous of deed restrictions – "residential purposes only." People cannot use their property whenever they wish. That situation is untenable in a state known for treating property rights as sacrosanct.

V. Other pending cases point up the necessity of review

Besides the trio of conflicting cases in Austin, Beaumont, and San Antonio, the issue raised in the petition is pending in three other appellate districts and has arisen again in Austin:

- *Ridgepoint Rentals, LLC v. James W. McGrath et al.*, No. 09-17-000006-CV (Tex. App. – Beaumont) (briefed, at issue);
- *William T. Garrett et al. v. Georgia Kay Simpson et al.*, No. 02-16-00437-CV (Tex. App. – Fort Worth) (briefed, set for arg. April 18, 2017);
- *John and Debbie Schack v. Prop. Owners of Sunset Bay et al.*, No. 13-16-00440-CV (Tex. App. – Corpus Christi) (briefing stage);
- *Bruce Boatner et al. v. Craig Reitz*, No. 03-16-00817-CV (Tex. App. – Austin) (briefed, at issue) (deed restrictions silent as to both leasing and duration).

More such cases are in the pipeline; more can be expected.

CONCLUSION

Three courts of appeals answer the same question differently. Three others are set to weigh in. No property owner outside of the Austin appellate district can engage in a property use as to which their deed restrictions are silent without the risk of being sued. Even in the Austin appellate district, clear precedent favoring property rights where deed restrictions are silent has not insulated property owners from suit for unwritten rules. The situation statewide is confused and incendiary over a fundamental property right, in this case the hot-button issue of short-term rentals. The issue is important, implicates conflicting interpretations of a statute, and needs to be resolved.

PRAYER FOR RELIEF

For the foregoing reasons, Kenneth Tarr asks this Court to grant this petition for review, reverse the court of appeals, and remand as to attorney's fees.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on April 10 2017, per T.R.A.P. 6.3(b), a true, correct copy of this brief was served by efiling on:

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in Century Schoolbook 14-point for text and 12-point for footnotes. Spacing is expanded by .5 point for clarity. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i)(2)(E) because it contains **1765** words, less than the limit of 2400 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

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