2018 WL 823199 (Tex.) (Oral Argument)
This is an unofficial transcript derived from video/audio recordings
Supreme Court of Texas

Kenneth H. Tarr
v.
Timberwood Park Owners Association, Inc.

No. 16-1005
February 6, 2018

Oral Argument

Appearances:

Petitioner will be represented by Patrick Sutton (The Law Office of J. Patrick Sutton), from Austin.

Respondent will be represented by Frank O. Carroll III and Mia B. Lorick (Roberts Markel Weinberg Butler Hailey PC), from Houston.

Before:

Chief Justice Nathan L. Hecht; Justices Paul W. Green, Phil Johnson, Eva M. Guzman, Debra H. Lehrmann, James D. Blacklock, Jeffrey S. Boyd, Jeffrey V. Brown and James D. Blacklock.
Justice John P. Dvine did not participate

CONTENTS

CHIEF JUSTICE NATHAN L. HECHT: We'll hear argument in 16-1005, Tarr v. Timberwood Park Owners Association. Justice Devine cannot be present but expects to participate in the decision of the case.

MARSHAL: May it please the Court. Mr. Sutton will present argument for Petitioner. Petitioner reserved five minutes for rebuttal.

ORAL ARGUMENT OF PATRICK SUTTON ON BEHALF OF THE PETITIONER

ATTORNEY PATRICK SUTTON: Good morning and may it please the Court. Short-term rental case, big case, it's an important case. Before I set out the framework for decision, I want to give an example of why this is an important case. The court of appeals below imposed the standard by most houses in the state that someone has to have a physical presence and an intention to remain in that house for that house to qualify as residential. Presumably meaning that the house is a business and vetted in this process of occupation. HOA in this case has said, in its briefs below and in this Court that persons from out of state who were visiting Texas by definition don't intend to remain here. The upshot of this is that visitors from 49 and 50 states whether they are renters or whether they own property here are not entitled to stay in a house. They would have to actually establish residency in the state of Texas in order to rent a house. That

is a dramatic result and I don't think it's justified. Question before the court today is whether the court is going to launch on what is essentially a legislative progieyet to regulate short-term rentals, to regulate occu-- occupancy generally.

When deed restrictions are silent on a given issue such as the duration of someone's occupancy, answer of course should be, no. The residential use restriction and it's companion no business uses has been prevalent in this state for over 100 years, we've given you authority from 1922 that cites a 1909 instance of the restriction. A decision by this Court shutting down short-term rentals on the basis of that restriction will shut down short-term rentals as a practical matter in most of this state, and even short-term property use by owners if one goes by the literal wording of the court of appeals in this case. Even worse it will put thousands-- tens of thousands of owners in jeopardy of being sued for the short-term rentals that they have done within the limitations period which is the four-year residual limitations period. Owners who purchased properties years ago and over the last four years have rented them many times or exclusively for short-term rentals.

JUSTICE EVA M. GUZMAN: Are there any temporal sort of limitations on the re-- residential purposes language? Is, is that even part of the analysis in your opinion? You know, on what is residential purposes I guess?

ATTORNEY PATRICK SUTTON: In-- Justice Guzman, in this case, the deed restrictions simply don't define it and that's true with many restrictions particularly those more than ten or 20 years old, that it's never thought that it was necessary to impose a temporal restriction. The court of appeals-- in this case, another says, looked to dictionary definitions, and said, we can't get a clear notion of the temporal limitation based on a dictionary definition. The court of appeals in this case has looked at U.S. Supreme Court precedent in, in to that further. But the short answer is no, residential purposes says, nothing at all about duration. And if it did, it would necessarily apply both to owners and renters and their guests, it wouldn't merely apply leasing.

JUSTICE EVA M. GUZMAN: Do you look at intent?

ATTORNEY PATRICK SUTTON: Of course. A court in construing deed restrictions always looks at intent. In a case like this where deed restrictions are absolutely silent as to leasing it would not be possible to determine that there was any intent to li-- to limit leasing by duration. Other deed restrictions will have some kind of leasing wording. The sky-bye case for rent signs are allowed, in other cases there will be more elaborate leasing restrictions. But unless you have a restriction that on its face imposes some sort of duration restrictions, then the courts are going to have to write those if the court wants to launch on the project to regulate short-term rentals.

JUSTICE PAUL W. GREEN: Pay taxes that sort of way?

ATTORNEY PATRICK SUTTON: I-- I'll answer it this way. The Ken Tarr owns the property he and his wife formed an LLC to manage the property. So n LLC a company does manage the property. That LLC is located in Houston. But there's no business operating on the property …

JUSTICE PAUL W. GREEN: But well, that's like saying the, the hotel doesn't operate a business in the hotel if it's owned by someone, someone out of state. Here you had a hou-- a, a home that was used for a business purpose, that is-- at, at which-- if I'm remembering correctly, you will have four cases, some bit of confusion, there wan an election of, of hotel and motel taxes which were then remitted to the state and city, county whatever. So it seemed like it was operation of a business. Why wouldn't that be prohibited by the terms of, of the deed restrictions of, often that basis?

ATTORNEY PATRICK SUTTON: Many reasons. I'd, I'd say, I think the principal reason is one that's examined in a number of other state cases like the Wilkinson case out of Washington State, the Slaby case out of Alabama. Wherever an owner of a property maybe and whatever form is a business or a person leases out the property, the question that residential use and business use ask is what is happening on the land. People who rent a property for any duration short or long are going to be at the property doing something. The owner is going to make income. The owner is going to pay taxes, hire a property manager. The owner will be maintaining that property earning profit reporting it as a business possibly on a tax return. But if it were true that leasing constitutes a business, the leasing would broadly

be disallowed as a business all over the state because everyone has a residential use restriction. The people on the property in this case, the record shows, were or-- ordinary people staying at the property doing what ordinary people do, eating and sleeping, watching TV.

JUSTICE EVA M. GUZMAN: What if, what if the home was being used to house, for example, people with disabilities and homeowner was receiving payment so that people stay in the home in different bedrooms, whatever, and the homeowner receives payments and they're actually living there but he's collecting rent? Or you know, is that leasing, is that a business, is that not a residential purpose? So …

ATTORNEY PATRICK SUTTON: You were looking at case not at the owner and the form of ownership. There would be a question either but in that case I would be-- it, it would be a question of fact for a jury is having a group of persons who have a minder and helper and employee is on the site, for example, is that a business. And it probably is. A, a bed and breakfast or a hotel is plainly a business when operating from a house as would a facility with caretakers because there are multiple people on that site running and going concern with employees and furthermore the people that are there don't have sole and exclusive possession. In this case and in other short-term rental cases the tenants have sole and exclusive possession of the property under a lease.

JUSTICE EVA M. GUZMAN: And is it subject-- sole and exclusive subject to the landlord or the leasing company or the cleaning company? You know, it's not sole and exclusive because there are some limitations on that, I would assume. The landloard can come in.

ATTORNEY PATRICK SUTTON: The ord-- that's correct. The ordinary access rights that a landlord retains, to enter in case of an emergency or repairs, those are typically preserved in short-term leases. But otherwise it's just a regular lease, it's just for ten days instead of six months or six years. A decision by this Court that bar short-term rentals, as I've said, we'll bar short-term rentals all across the state, and supplant the judgment of the court for the judgment of people acting collectively in their subdivisions in cities. Reversing the court of appeals here do-- simply doesn't do any harm. It keeps this issue which is contentious and complex issue, it keeps it in the hands of the people who are best suited to decide it because there's-- are so many politically economic crosscurrents in it. It will be put back in the hands of subdivision owners have the right to amend this contract, it will put it in the hands of voters acting locally in cities, in counties, it will put it back in the hands of the legislature.

JUSTICE JEFFREY S. BOYD: We're not at liberty to do any of that unless we read the lease, the covenants the way you read it though. I mean, could be the parties here have already taken it out of the hands of the legislature.

ATTORNEY PATRICK SUTTON: I'm sorry, I don't understand the question.

JUSTICE JEFFREY S. BOYD: Well, you're making good policy arguments about how the legislature ought to make this decision. But we're stuck right now with the language of the deed for the restrictive covenants. And if that deed and restrictive covenant the parties to this agreement have already said, you can or you cannot use the property in this way, then that solves the problem, and we can't-- we, we can't even send it to the legislature to resolve.

ATTORNEY PATRICK SUTTON: That's right. But there is great comfort in knowing that there are always mechanisms here for these owners in this subdivision and every other one to act collectively on a complicated issue. Instead of having a court sitting in judgment of deed restrictions that are completely silent on the issue writing in detailed regulation. You'll have to fill in something that guides homeowners who at closing have a set of deed restrictions in front of them that says, residential use but doesn't say anything about leasing or what the minimum term it should be. So I suggest that it would be a legislative project for the courts to launch down-- to launch this regulatory scheme and there will be other problem cases is coming because once you go down the road of saying leasing is limited to 30 days then you have problems of multiple owner and corporate owner situations whether individual owners are entitled to use their own property for short-terms. So you cre-- you're going to create a new jurisprudence on this issue.

JUSTICE EVA M. GUZMAN: Does the silence create an ambiguity?

ATTORNEY PATRICK SUTTON: No, it doesn't, I disag-- I respectfully disagree with the court of ap-- both the court of appeals that have held in favor of homeowners. The Wilkinson court in Washington State says, this forcefully. Silence in deed restrictions is not ambiguous. Silence means there's no restriction. Now I recognize that the court of appeals looked for a legal framework to say that deed restrictions that are silent shouldn't have things read into them. And it's, it's a valid result but it's not convincing to me. I think it's clear and unambiguous that the deed restrictions don't say anything about leasing. So I don't think you need to go down the road of saying every time that there's something that is completely left out of deed restrictions that we're going to say that there's uncertain-- or uncertainty or ambiguity, the people buying the property are certain that there's nothing in there about leasing. I framed the issue of what the case is about, I like to say what this case is not about because it comes up so often in this case and other cases. This case is not about noise, nuisances, national or geographic origin, how many cars are parked in the street, what constitutes a single family, how many people occupy a home.

People who complain about short-term rentals have many legal avenues to complain, bring suit for breach of restrictive covenant concerning behavior that happens on property. I know of no demonstrated evidence that the duration of rental has anything to do with the behavior of tenants, whether owners have selected good tenants, whether owner-- owners have screened tenants. Duration is not the issue. Often when people have complaints their complaints are about the behavior of tenants. Finally, I've, I've talked about these restrictions being silent and what that effect is. I want to remind the court that this is not a case about a license to use a property where you're given a narrow branch of rights. It's about someone buying the property that in the American tradition has all the bundle of rights that you would expect unless there is a restriction that takes that away. And so you assume a priori when you buy that you have the right to lease. It's only when a deed restriction tells a buyer who's evaluating a property, leasing is restricted, that the buyer understands. We see this often, but another important historical right in the issue of leasing is livestock and almost all residential deed restrictions these days restrict keeping any kind of livestock for farm animals. Because you would think if you bought the property and it didn't say that, that you have the right to have chickens on your land.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Sutton. We'll hear from the Respondent.

MARSHAL: May it please the Court. Mr. Carroll and Ms. Lorick will present argument for Respondent. Mr. Carroll will open the first ten minutes.

ORAL ARGUMENT OF FRANK O. CARROLL III ON BEHALF OF THE RESPONDENT

ATTORNEY FRANK O. CARROLL III: Mr. Chief Justice, and may it please the Court. My name is Frank Carroll, and along with my co-counsel Mia Lorick, we represent Timberwood Park Owners Association. There are three issues presented for review. First, does a single family residential restriction prohibit short-term and multi-family rentals? Second, are short-term rentals a business use? And third, are short-term rentals consistent with the intent of a single family declaration? I'll be addressing the residential use restriction and Ms. Lorick will be addressing the business use and intent issues. To our first point, a single family residential restriction prohibits short-term and multi-family rentals. As the Fourth Court of Appeals below noted, and I quote, cases and statutory provisions draw distinctions between temporary or transient housing and a residence. And the framers that restrict covenant intended to draw a similar distinction. I will address the cases, the statutes, and the intent of the framers in turn.

First, Texas cases draw distinction between transient or temporary housing and residences. Now I agree that the court has noted that the term, residence is an elastic one and that oftentimes difficult to quantify. But this Court held over 50 years ago and set out a test in Mills versus Bartlett. Neither bodily presence alone or intention alone will suffice to create residence. But when the two coincide, that moment the residence is fixed and determined. There's no specific length of time for the bodily presence to continue, here there was combined volition, intention, and action. And what

we propose is that this Court follow its 50-year precedent and use that test to determine whether these residential business activities comply with the residential reuse restriction, volition, intention, and action.

JUSTICE PAUL W. GREEN: Those six-month lease might be okay, but a 3 day rental is not?

ATTORNEY FRANK O. CARROLL III: Right. Right. And Mr. Tarr has, has raised the-- a, a number of apocalyptic things that will happen across the state if this Court, you know, fails to allow short-term rentals. But if you apply this volition, volition, intention, and action test, you can look to what the people are doing on the proper to see is it consistent with using the property as a residence or is it using as a business or temporary and transient housing.

JUSTICE JEFFREY S. BOYD: Is that equivalent of the legal residency test?

ATTORNEY FRANK O. CARROLL III: Tarr and I heard Mr. Sutton just say that you have to establish residency in order to own property. No, it's not the equivalent although residential means used as a residence according to Merriam Webster's. And using as a residence and certainly is going to include an intent element. And so intent-- you know, the duration is going to be evidence of intent, how long you're there, whether you're registering to vote. Those are evidence.

JUSTICE JEFFREY S. BOYD: Right, evidence of intent of what?

ATTORNEY FRANK O. CARROLL III: The intent to remain and the intent to use the property as a residence.

JUSTICE JEFFREY S. BOYD: So my intent is to remain all weekend why isn't that enough?

ATTORNEY FRANK O. CARROLL III: Sure, the intent to remain for a weekend is not sufficient under the test because that would be a temporary use or transient use. I think everyone agrees that two days isn't temporary or transient use. What they said, was and the, the Tarr in the court below said, if a person comes to a place temporarily without any intention in making that place his or her home that place is not considered a person's residence. So to your example, your hypothetical, I would imagine if you're coming to Tarr's air bed and breakfast for two days, you're coming to that place temporary. I'd imagine you're coming back to Austin or wherever you live. And so it would not be a residence. You had no intention, you had no volition, you had no action to make that in residence.

JUSTICE PAUL W. GREEN: But if I'm a traveling salesman and -- I just don't have a house. I'm traveling all the time so I go from bed and breakfast or use these short term rentals all the time. So when I'm there, I mean, that's my residence for that three days. Right?

ATTORNEY FRANK O. CARROLL III: Yeah, you-- I think-- I-- in my research I found a traveling salesman exemption. And I-- I'm not speaking to that, I hope you're not either, because I'm not prepared to speak to that, but I, I think even as a traveling salesman you would look to in that instance the volition, intention, and action of the traveling salesman. If that person truly is a transient, and that's what these traveling salesman case is, they call him a transient, I think what they talked about is whether you can vote well, that person is still not going to be using it as a residence, that person truly is a transient by the strictest definition of the word. And the cases make a distinction between transient and residential. Now the Supreme Court of the United States, they came later after-- actually in the Texas Supreme Court in Martinez versus Bynum and set forth or at least announce a test, a two-part test in Martinez versus Bynum. The two-part definition includes both fiscal presence and an intent to remain. I frankly think the Texas Supreme Court's test is a better one looking not only to those two factors but also volition, intention, action, we would ask the court follow its own precedent.

Next, Texas statutes draw a distinction between transient and residential uses. The Texas Property Code at Property Code Section 92.152, it's actually entitled residential tenancies and it expressly excludes a room in a hotel, motel, or inn or to similar transient housing. So under the Property Code, this would not be a residential tenancy, it would be similar transient housing. The Texas Tax Code provides that the definition of hotel include short-term rentals. And the, and the next section entitled permanent residence provides that tax is not imposed, the hotel tax, if you have the

right to possess or occupy for 30 continuous days. The Texas Elections Code makes a distinction between transient and residential and provides a person does not acquire residence in a place to which she has come for temporary purpose only and without the intention of making that place his home. Now we're not certainly advocating a bright line test, but again the duration is evidence of intent, it's rep-- it's evidence of volition and action.

JUSTICE JEFFREY S. BOYD: But, but how, how does it-- the test work at all without a bright line? I mean, if we assume opinion and say we construe these deed restrictions to only allow rentals when the renter intends to remain for some meaningful period of time, there's no bright line, that we're not giving any guidance at all, that okay, well, I, I intend to remain for six weeks, and isn't that meaningful enough, and I would suspect your clients would say no, six weeks isn't enough, six months maybe they can tolerate a renter in their neighborhood for six months at a time but not si-- so if we-- but if we, if we don't draw a line, we're, we're not providing any guidance on what this actually means. If you do draw a line, how, how, how do we find that line based on the language of the deed?

ATTORNEY FRANK O. CARROLL III: Texas Court, the Texas Supreme Court, the Texas courts and the-- well, its federal court have all dealt with this issue. Whether to draw a bright line or whether to have a multi-factor test, bright line certainly make it easier for us as trial lawyers as we navigate through the trial courts and the appellate courts. And there is statutory guidance for what would be a bright line. I think at the very minimum the Election Code is pretty harsh and-- but the Tax Code says, 30 days, the right to continuously occupy for 30 days. And I think what the court could do is say that that is the minimum amount of evidence that you need to establish the volition and action to remain. And so you could establish a 30-day line and it would comport with what the legislature has defined to be permanent residence. But I don't think you have to set out a bright line test, you could look to the circumstances. And in this case, certainly it's not present. The evidence before this Court is that nine people are coming to Tarr's bed and breakfast, they're out of state, sometimes out of the country, certainly not residence of Bexar County, they're staying in a three-bedroom, two-bathroom home in a quiet single family residential community for as little as one night.

There's no evidence that they're seeking to vote or put their kids in school or take any steps to avail themselves of the benefits of residing in Bexar County. Accordingly, what's happening here is Tarr is providing temporary shelter or temporary housing to paying customers. And under any construction whether bright line or multi-factor test that is not consistent with residential use. And finally to my third point the intent of the framers is evidence by distinction between transient and residential use. Now as you all know, the courts look to the commonly accepted meanings of phrases restrictive covenants to give effect to their intent and the plain language is the best evidence of intent. Here we have residential purposes. Residential means uses a residence. Residence means the act or fact of dwelling in a place for some time. And purpose is a particular requirement or consideration typically one that is temporary or restrictive in scope or extent. The deed restrictions also place a distinction between residential and business purposes in paragraph 2 of that very short restrictions. And so residential purposes plainly means using the dwelling as a residence and restricted to using the dwelling as a residence.

JUSTICE DEBRA H. LEHRMANN: What about just requiring the parties to be specific in the deed exactly as to what they mean?

ATTORNEY FRANK O. CARROLL III: That-- so that goes to the amendment process and whether you just want to go and amend. The language is unambiguous. It's a residential community and it says, residential purposes and no business. What the framers were absolutely barring was the 1979 version of air bed and breakfast which at that time we just called, bed and breakfast. And so it's unambiguous what they were trying to restrict. Mr. Tarr is trying to disrupt the status quo, not the association. And so the onus of amending to change the fundamental character of the single family residential community should be on Tarr, not the association. For these reasons we respectfully ask that you affirm the court of appeals.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Carroll. Ms. Lorick, we'll hear from you. You have nine minutes.

ATTORNEY MIA B. LORICK: Mr. Chief Justice, and may it please the Court. My name is Mia Lorick and I will address two issues. First, the short-term rental at issue in this case as a business and second, the Texas Property Code

requires that a court liberally construe a restrictive covenant to give effect to its purposes and intent. To my first point, the relevant restrictive covenant in this case states that, all tracks shall be used solely for residential purposes, except tracks designated on the above-mentioned plat for business purposes. The San Antonio and Beaumont Courts of Appeals have held that when restrictions make a difference between residential use and business use it shows a clear intent on behalf of the framers to prohibit business uses on residential tracks. Specifically, the San Antonio Court of Appeals in Munson Milton considered this same restriction and considered short-term rentals that were occurring for periods of two to five days. The San Antonio courts of this type of use runs afoul of the residential use restriction because this use is more akin to a business.

Similarly, the Beaumont Court of Appeals in Benard v. Humble also found that rentals that occurred on a weekend and weekly basis were a business use under the residential use restriction. The Beaumont Court of Appeals affirm in this logic in its recent decision Ridgepoint versus McGrath which was decided in December of 2017.

JUSTICE JEFFREY S. BOYD: Then why isn't it a six-month lease a business purpose?

ATTORNEY MIA B. LORICK: A six-month lease would probably not amount to a business because you don't have a revolving door of transients and a series of transactions being conducted in a residential community.

JUSTICE JEFFREY S. BOYD: Well, you do, it's just the door resol-- revolves a bit more slowly.

ATTORNEY MIA B. LORICK: It does revolve more slowly on a six-month lease. But if a tenant is in a property for six months, it's more likely that that tenant is receiving mail at the property. That if they have children or children are in school at the prop-- at-- in the community in the subdivision a one le-- a one day lease, two-day lease or even a five-day lease is not enough to establish that that person is a resident, they're more of a transient creating that revolving door.

JUSTICE JEFFREY S. BOYD: Yeah, but, but I'm focusing on business aspect, not the residence aspect. Your argument is that even if they're sort of residing there but only short-term this is a business because he's making money off of his property.

ATTORNEY MIA B. LORICK: And …

JUSTICE JEFFREY S. BOYD: And that seems to me if I lease my house out for six months, I, I recently follow at a house, and I, I let the, the former tenant stay in it for one extra month after I bought it. So I did a one month lease. Well, that-- it was out of business?

ATTORNEY MIA B. LORICK: That would depend on the facts. The facts of this case tell us that it's a business. For example, Mr. Tarr uses a leasing agency through an LLC to establish these leases. The leases provide for a check-in time and check-out time and even a cancellation fee. Mr. Tarr pays the hotel tax. So there's all of these things that are undisputed facts in the record, specifically page 71 of the record, that tell us that his use is a business. In your hypothetical, there may need to be some more fact finding to find out if the operation as a whole amounts to a business.

JUSTICE EVA M. GUZMAN: To look at whether there is a business, do you, you, do you import the residence inquiry? Is that part of determining whether this is an on going concern or a business? Is that a subset of, of that inquiry?

ATTORNEY MIA B. LORICK: Yes, it is part of the inquiry because you have to look at residential versus business especially with these particular restrictions. He lives on a residential tract that cannot be used for business purposes. And so you do have to sort of weigh the two to look at the primary use of the home and here the primary use of the home is a business use. The other thing that you have to look at are the restrictive covenants as a whole. Looking at the intent of the framers. And here the San Antonio court of appeals look to the restriction that disallow us advertising or for sale signs without prior written approval from the developer. The court of appeals considered that and even considered that even on a business tract the owner is required to get approval for the type of business that they want

to conduct on that tract. All of those things together led the court of appeals to correctly hold that Mr. Tarr's use is a violation of the business use restriction. And that leads me to my second point because admittedly there are courts in Fort Worth and Austin that have held differently. But this is because they failed to apply the Texas Property Code's mandate.

Specifically, Section 202.003(a) of the Texas Property Code, states that, are restrictive covenant shall be liberally construed to give effect to its purposes and intent. And the applicability of this section is governed by Section 202.002(a) which states that, this provision applies to all restrictive covenants regardless of the date on which they were created. When courts ignore the statutory mandate, it leads not only to inconsistent results and the current circuit slit before the court, but it also gives an unworkable framework for the district courts below to follow.

JUSTICE JEFFREY S. BOYD: Yeah, but how do we decide which intent we're trying to liberally-- we're trying to favor through our liberal construction?

ATTORNEY MIA B. LORICK: If I understand your question, Justice Boyd, you mean the intent between the developer or the intent between the owner?

JUSTICE JEFFREY S. BOYD: Well, so the statute says, we should liberally construe the language to effectuate an intent of the deed restriction. How do we know the intent of the deed restriction?

ATTORNEY MIA B. LORICK: The intent of the deed restriction can be found through other provisions in the restrictive covenant. And I submit to this Court that if the intent is not clear after looking to the restrictive covenant as a whole then parole evidence should be admitted to determine the intent of the framers in that particular restrictive covenant. But what some intermediate courts of appeals have done is that they've merely found ambiguity and then made the conclusion that they do not have to follow the mandate under the Texas Property Code. And this is incorrect because the Texas Property Code makes no distinction between ambiguous or unambiguous restrictive covenants. It says that, all restrictive covenants must be liberally construed. Specifically the Fort Worth court in Garrett versus Simpson that …

JUSTICE DEBRA H. LEHRMANN: Well, but excuse me, but you're not really answering Justice Boyd's question because it still gets back to what is liberally construed mean because we don't know where the intent is going.

ATTORNEY MIA B. LORICK: Yes, your Honor. Liberal is defined as not strict or narrow. And so looking at the San Antonio court's analysis, when they liberally construe, they look at the term, business use and they say, well, what is a business, they look at the facts of this particular case and they say that this amounts to a business given all of the factors that I inform the court of earlier. And so we liberally construe the covenant no business purposes by looking at the no advertising restriction, by looking at the business use requirement to get approval, and then we liberally construe to say the intent was to bar businesses on residential lots and that because we have a business here that use is barred as Mr. Tarr lives on a residential lot. Now even if ambiguity is found, again, 202 still applies. And the Austin Court of Appeals in Boatner said that, businesses must be expressly listed in order for them to be barred. However, this goes back to your question, Justice Lehrmann because if you expressly list everything you would never have to liberally construe the covenant, it would read that word liberal out of existence in the statute. And so that holding is wrong for those reasons, the court should have looked to other restrictions in that document to determine the intent first rather than finding an ambiguity and throwing out the Texas Property Code.

Because when courts throw out the statutory mandate, they are now falling back to the common law which says, strict construction against the drafter. But I submit to this Court that the statutory mandate in the common law are indirect conflict, meaning that the statutory mandate should trump the common law in this situation. Here we have restrictive covenants that were implemented in 1979. It's hard for restrictive covenants to anticipate every single business that's going to come about in the next 30, 40, or 50 years. But what we do know is that there was an intent to bar businesses on lots. Now Mr. Sutton argue that reversing this Court of Appeals decision would cause no harm. However, it would, because we have to look at the intent of the framers. No advertising, no businesses, even on business spots without approval, and that shows an intent to bar this type of use. Based on the above, we're asking that this Court apply

202.003 to all restrictive covenants. Otherwise it leaves intermediate courts to insert their own intent into the restrictive covenants leading to a circuit split and inconsistent results. Because the intent of the Timberwood Park restrictive covenants is to bar business use and Mr. Tarr is leasing out his property for a short periods of time to transients using form leases with check in and check out times.

We ask that this Court find that Mr. Tarr's leases are a violation of the residential and business use restrictions. Accordingly, we ask that you affirm the judgment below. Thank you.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Ms. Lorick. Mr. Sutton, you have five minutes.

REBUTTAL ARGUMENT OF PATRICK SUTTON ON BEHALF OF PETITIONER

ATTORNEY PATRICK SUTTON: I want to first point the court to a decision of the court from 1941 which is the first time that the court dis-- discusses at any length this rule favoring the free use of property in the absence of the clear restriction. It's called, Baker against Henderson, it is 137 Texas 266. It is contrary to the well-recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions. Hence in the construction of deeds containing restrictions all doubts, not ambiguity, doubts should be resolved in favor of a free use of property. What we're talking about here is perhaps the most fundamental part of the liberty, liberty that we have as Americans to own property, people who came to this country to get a bundle of rights, property that they could do what they want to, to-- people-- well, well, they could do what they wanted with the property and then along come restrictions that tie it up in various ways.

JUSTICE EVA M. GUZMAN: But the same people got together and decided that they wanted to have some rules, you know, governing, how the property is used, do I want cows in the front yard, or you know, do I want loud parties, do I want teenagers, so it's the same people that want these property rights that also want these restrictions of homeowner's associations is what they're called.

ATTORNEY PATRICK SUTTON: That's exactly right and what they do is they impose restrictions instead of giving a list of things that you're allowed to do. And so there is this broad universe of things that everyone is allowed to do unless there's a restriction. And so you come to buy a property, you shouldn't have to have a lawyer explain to you what the deed restriction say, that's not …

JUSTICE DEBRA H. LEHRMANN: So what about the rule that erred to be liberally construed as she was arguing?

ATTORNEY PATRICK SUTTON: The statutory rule in my opinion is ambiguous. The courts have struggled with it for years, have asked this Court to intervene, no one knows what it means. I would offer that, I would offer also the following. Judges are always already doing what the statute says. They're trying to come to terms with what a set of deed restriction say and what an individual restrictions among the restrictions say its contract interpretation. Why? The legislature put it in statutory form, it's not clear from the, from the legislative history. I think in-- this is an, an, an argument that I got a cold look to the court of appeals but I cling to this argument nonetheless. When a set of deed restrictions does not obviously disfavor leasing or in any way restrict occupancy by duration, then to me a liberal interpretation is the deed restrictions favor the rights of property owners to use the property as they fit irrespective of duration. I think that's liberal.

CHIEF JUSTICE NATHAN L. HECHT: Did you put a sign in the front yard for lease, call this number?

ATTORNEY PATRICK SUTTON: Absolutely. That if signage is not forbidden, then it's allowed.

CHIEF JUSTICE NATHAN L. HECHT: Did you take one of the backrooms and let that a leasing and maintenance office?

ATTORNEY PATRICK SUTTON: No, once you start setting up actual business operations at a property, you start to cross the line. There are many wonderful examples on the line that ultimately you might have to have an issue-- you might have to have a jury tell you about. And I want to say one problem I have with this intent test, it's not only do Honors owners not know what they're buying but then we have to have a trial every time they lease out their property for anything less than five years, one year, what is the court going to tell us about this, but I'll give you some examples, live examples, people rent out the property for a, a corporate retreat for a weekend kind of on the line, kind of looks commercial 'cause you would think they would want to rent an ev-- an event venue for that. Different example, people rent out a property for a bachelorette party where 20 people descend on the house, wouldn't they normally have a, a, a place to rent as a venue-- event venue? Well, maybe if only five stayed there overnight and they just have the party during the day it's just the tenant having a party and five people sleep over.

More aggressive is when the owner starts providing goods and services and I would point you to the Hawaii case whose name escapes me at the moment, it's in our brief. The Hawaii case is very careful about remanding that case because there seemed to be evidence that the owner had people on site providing additional goods and services to the tenants. So the tenants didn't have sole and exclusive possession of the premises. I see that I'm out of time. I want to point out that none of the statutes that had been cited relate to this case and in the Norwood case we don't apply-- we, we can apply terms-- differently depending on the scenario. We ask you to reverse and remand.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Sutton. The case is submitted. The arguments scheduled for this morning are completed. The Marshal will adjourn.

MARSHAL: All rise.