

Case No. 16-1005

THE SUPREME COURT OF TEXAS

KENNETH H. TARR,
Petitioner,

v.

TIMBERWOOD PARK OWNERS ASSOCIATION, INC.,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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

FRANK O. CARROLL III
TBA No. 24082785
MIA B. LORICK
TBA No. 24091415
Roberts Markel Weinberg Butler Hailey PC
2800 Post Oak Blvd., 57th Floor
Houston, Texas 77056
Tel: (713) 840-1666
fc Carroll@rmwbhlaw.com
mlorick@rmwbhlaw.com
ATTORNEYS FOR RESPONDENT
TIMBERWOOD PARK OWNERS
ASSOCIATION, INC.

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIES.....iv

RECORD REFERENCESvi

RESPONDENT’S RESPONSE TO PETITIONER’S ISSUES.....vii

STATEMENT OF FACTS 1

 I. TARR’S LEASING OF THE PROPERTY..... 1

 II. TEXAS COURTS’ SPLIT ON SHORT-TERM LEASING 3

 III. THE ASSOCIATION HAS NOT WAIVED ITS
 MULTI-FAMILY ARGUMENTS, AND TARR DID NOT
 CHALLENGE THIS PORTION OF THE ORDER IN THE
 TRIAL COURT..... 3

 A. The Summary Judgment Order..... 4

 B. The Evidence Before the Court..... 5

 C. Out-of-State Residents..... 6

 D. Petitioner’s Waiver..... 6

SUMMARY OF THE ARGUMENT 7

ARGUMENTS AND AUTHORITIES 9

 I. The Association does not want an amendment to the
 Declaration, but an interpretation of what is already
 written 9

II.	Tarr’s Use of the Property is Irreconcilable with the Deed Restrictions.....	10
A.	A Multi-Family Use is not a Single-Family Use	10
B.	A Business Use is not a Residential Use	11
1.	Munson v. Milton	13
2.	Bernard v. Humble	16
3.	Texas Tax Code Amendments	18
C.	A Transient Use is not a Residential Use	19
III.	Even if ambiguous, Texas Property Code Chapter 202 applies—a holding to the contrary renders Texas Property Code § 202.003(a) meaningless.....	22
	PRAYER	23
	CERTIFICATE OF COMPLIANCE.....	24
	CERTIFICATE OF SERVICE.....	25

TABLE OF AUTHORITIES

Cases

<i>Bank United & Utah State Ret. Inv. Fund v. Greenway Improvement Ass'n</i> , 6 S.W.3d 705 (Tex. App.—Houston [1st Dist.] 1999)	9
<i>Bank United v. Greenway Improvement Ass'n</i> , 6 S.W.3d 705 (Tex. App.—Houston [1st Dist.] 1999)	20
<i>Benard v. Humble</i> , 990 S.W.2d 929 (Tex. App.—Beaumont 1999)	16, 17
<i>Boudreaux Civic Ass'n v. Cox</i> , 882 S.W.2d 543 (Tex. App.—Houston [1st Dist.] 1994)	20
<i>Dunn v. Polly Ranch Homeowners Ass'n</i> , 943 S.W.2d 906 (Tex. App.—Houston [1st Dist.] 1996)	20
<i>Hodas v. Scenic Oaks Prop. Ass'n</i> , 21 S.W.3d 524 (Tex. App.—San Antonio 2000)	10
<i>Martinez v. Bynum</i> , 461 U.S. 321 (1983)	19, 21
<i>Munson v. Milton</i> , 948 S.W.2d 813 (Tex. App.—San Antonio 1997)	13, 15, 19, 21
<i>State v. Haugen</i> , 351 Or. 325 (2011)	18
<i>Tien Tao Ass'n v. Kingsbridge Park Cmty. Ass'n</i> , 953 S.W.2d 525 (Tex. App.—Houston [1st Dist.] 1997)	20
<i>Uptegraph v. Sandalwood Civic Club</i> , 312 S.W.3d 918 (Tex. App.—Houston [1st Dist.] 2010)	10, 20
<i>Wilmoth v. Wilcox</i> , 734 S.W.2d 656 (Tex. 1987)	10, 16

Statutes

Tex. Prop. Code Ann. § 202.003(a) (West) 3, 22
Tex. Tax Code Ann. § 156.001 (West) 19, 21, 22

RECORD REFERENCES

Citations in this Response to Petition for Review to the parties are as follows:

Petitioner Kenneth H. Tarr will be referred to as “Tarr” or “Petitioner.”

Respondent Timberwood Park Owners Association, Inc. will be referred to as the “Association” or “Respondent.”

The property owned by Tarr at 26331 Romance Point, San Antonio, Texas, 78260 is referred to as the “Property.”

The Association’s deed restrictions, including its Articles of Incorporation, Bylaws, and Declaration are collectively referred to as “Deed Restrictions.”

Citations in this Response to Petition for Review to the record are as follows:

CR – Clerk’s Record (i.e. CR [page]; e.g. CR 1)

SUPP CR – Supplemental Clerk’s Record (i.e. SUPP CR [page]; e.g. SUPP CR 1)

RR – Reporter’s Record (i.e. RR [page]; e.g. RR 1)

Tarr’s Brief – Kenneth Tarr’s Tarr’s Brief (i.e. Tarr’s Brief [page]; e.g. Tarr’s Brief 1)

Petition for Review – Kenneth Tarr’s Petition for Review (i.e. Petition for Review [page]; e.g. Petition for Review 1)

Opinion – Opinion issued by the Fourth Court of Appeals (i.e. Opinion [page]; e.g. Opinion 1)

RESPONDENT'S RESPONSE TO PETITIONER'S ISSUES

Respondent agrees that the issue presented is whether the deed restrictions prohibit short-term rentals. Respondent disagrees with the contention that the restrictions are silent as to short-term rentals and leasing: the restrictions prohibit business uses, transient uses, and multi-family uses.

STATEMENT OF FACTS

The Association’s Deed Restrictions limit the use of “single-family residence[s]” to “residential purposes.”¹ Tarr undisputedly leases to multiple families for transient purposes (short-term rentals).

Respondent generally agrees with the factual assertions contained in Petitioner’s Brief, but disagrees with the arguments (stated as “fact”) and offers the following supplement to the facts:

I. TARR’S LEASING OF THE PROPERTY

In 2012, Tarr purchased a single-family home located in the Timberwood Park subdivision. Specifically, Tarr purchased the home located at 26331 Romance Point, San Antonio, Texas, 78260. Tarr’s Property is subject to the Timberwood Park Subdivision Articles of Incorporation, Bylaws, and Declaration of Restrictions.² The Deed Restrictions require that all homeowners use their property for residential purposes, unless the lot is designated for business use.³ However, in 2014, Tarr—who did not purchase a lot designated for business use—began advertising and leasing the Property for periods of

¹ CR 49.

² CR 524; CR 527; CR 559.

³ CR 49.

less than 15 days.⁴ Tarr booked over 40 leases—each lease ranging from 1 to 13 days—and will continue to advertise the Property for lease on the internet should the judgment not stand.⁵ Tarr leases the Property through a Texas LLC and pays hotel taxes.⁶

On July 29, 2014, the Association sent Tarr a notice of violation for using the Property as a commercial rental property rather than for residential purposes as required by the Deed Restrictions. The Association requested Tarr's compliance with the Deed Restrictions and Tarr failed to comply. The Association did not assess fines for Tarr's noncompliance. However, instead of attempting to work this out, Tarr filed a preemptive lawsuit against the Association. Tarr did not attempt to amend the Deed Restrictions—an option he too could seek. Instead, on September 22, 2014, Tarr filed suit against the Association under the Declaratory Judgment Act.⁷ Tarr also sued for breach of the restrictive covenants.⁸

⁴ CR 8.

⁵ CR 12.

⁶ *Id.*

⁷ CR 13–15.

⁸ *Id.*

II. TEXAS COURTS' SPLIT ON SHORT-TERM LEASING

Contrary to Tarr's assertions, the split opinions in Texas courts on short-term rentals are due to the varied application—or non-application—of Section 202.003(a) of the Texas Property Code. Unlike the San Antonio Court of Appeals, the Austin Court of Appeals and the Fort Worth Court of Appeals chose to judicially-bypass § 202.003(a)—rendering the statute meaningless.

III. THE ASSOCIATION HAS NOT WAIVED ITS MULTI-FAMILY ARGUMENTS, AND TARR DID NOT CHALLENGE THIS PORTION OF THE ORDER IN THE TRIAL COURT.

Tarr contends that the Association addresses arguments and facts not addressed in the trial court—this is incorrect. The hearing on the cross-motions for summary judgment was a multi-hour hearing, and many arguments were raised—both from the briefs and the questions from the bench. No record was made of the hearing, but the order and evidence speaks for themselves. Petitioner's subjective believe of what transpired at the hearing is not given deference over the documents in the appellate record.

A. The Summary Judgment Order

In the order, the trial court stated:

2) In addition, or in the alternative, the Court finds that Plaintiff is renting his property for short terms to parties that are not individuals or single-families. These "multi-family" short-term rentals are a violation of the Declaration of Covenants, Conditions and Restrictions for Timberwood Park Owners Association, Inc.¹ For this reason, Defendant's summary judgment is GRANTED.

The trial court specifically relied on the motions, evidence before the court, and arguments of counsel in arriving at the reasons stated in the order:

After considering the Motions, Pleadings, Responses, Replies (if any), the evidence properly before the Court, and arguments of counsel, the Court is of the opinion that the Defendant's Traditional Motion for Summary Judgment is good and should be, and hereby is, in all things GRANTED while Plaintiff's Partial Motion for Summary Judgment should be, and hereby is, in all things DENIED for the following reasons.

Tarr wants this Court to take his recollection as true. However, Tarr's recollection is controverted by the summary judgment order. The plain language of the order should not give way to the vague

recollection of Tarr who presents no reporter's record to substantiate his arguments.

B. The Evidence Before the Court

The trial court relied on evidence, provided in summary form by Tarr, which showed Tarr leased to multiple-families, including leases to 9 adults and zero children, 8 adults and zero children (2 leases), 8 adults and 3 children, 8 adults and 2 children, and 7 adults and one child—to name just a few of the short-term rentals.⁹ Also, Tarr's leases place no restriction on whether the guests are members of a single-family, and in fact, the leases allow for guests in excess of 10 at a time (for a nominal \$10 per guest fee).¹⁰ This evidence was uncontroverted, and sufficient to uphold the trial court's finding that Tarr leased his property to multiple families at a time. Because the trial court relied on the arguments of counsel, and the evidence before the court, in arriving at the finding that multi-family rentals violate the deed restrictions, the arguments and issues should be considered.

⁹ CR 590–593.

¹⁰ CR 77.

C. Out-of-State Residents

Tarr alleges that renting his home to persons out of state is irrelevant and also waived. As is clear from the briefing, that point goes to whether the people renting the home are residents of Texas. This directly goes to the finding that the leases at issue are transient uses, rather than residential uses.

People who are residents of Alaska, California, Massachusetts, New York, etc. are not residents of Texas under any conception of the word, and the fact that Tarr rents his home for the weekend to people who maintain permanent residence outside the state is a fact that was properly considered by the trial court in finding a violation of the deed restrictions.

D. Petitioner's Waiver

Tarr knew that the multi-family issue was raised in the summary judgment order specifically, and yet did not file a motion for new trial, a motion to modify the judgment, a motion nunc pro tunc, or any other device available to him to correct the alleged "faulty" judgment. Accordingly, Tarr's waiver issue is waived.

SUMMARY OF THE ARGUMENT

It is not an exaggeration to say short-term rentals can ruin communities. A cursory “Google” search for short-term rentals yields vast and immediate results evidencing the intense dispute brewing across the country.



While the parties do not dispute the seriousness of the issues presented, Texas already has a legal framework to address short-term rentals in residential subdivisions—a framework that has been in place for nearly 20 years.

The court found that short-term rentals constitute a “business use.” The parties have agreed throughout this case that the operation of a bed and breakfast is a business use that violates the residential restriction. But (according to Tarr), an Airbnb (Air Bed & Breakfast)

suddenly converts the use of the property into a “residential use.” The necessary question, and the question that must be answered to establish a legal principle, is “why should the two be treated differently?”

Tarr posits throughout his brief that the necessary inquiry is whether the short-term lessees are using the home for activities such as eating, sleeping, and watching tv. But people at a bed and breakfast (or a hotel, motel, or trailer park for that matter) also eat, sleep and watch tv. It cannot be that a bed and breakfast is distinguished because it provides free breakfast, while an Airbnb does not. The question of whether the use is “business”—and thus prohibited—or “residential”—and thus allowed—cannot come down to whether the lessee receives free waffles. When scrutinized, Tarr’s position is unworkable and untenable.

Instead, the Court should apply the 20-year-old legal standard recognizing a distinction between transient and residential uses, and between residential and business uses. These determinations should be made through the lens of the Texas Property Code that requires “liberal construction” to give effect to the intent of the deed restrictions.

In sum, the Association’s Deed Restrictions limit the use of “single-family residence[s]” to “residential purposes.” Tarr leases to multiple families for transient purposes (short-term rentals), and in doing so operates a business. This use is irreconcilable with the plain language of the Deed Restrictions. For these reasons, the petition for review should be denied.

ARGUMENTS AND AUTHORITIES

I. The Association does not want an amendment to the Declaration, but an interpretation of what is already written.

Contrary to Tarr’s arguments, the Association is not looking for an amendment to the Deed Restrictions, but an interpretation of the Deed Restrictions as written. The Deed Restrictions provide that properties governed by the Association shall not be used for any purpose other than single-family residences and for residential purposes.

As when interpreting any contract, the court’s primary duty in construing a restrictive covenant is to ascertain the drafter’s intent.¹¹ Moreover, the Texas Property Code requires that a restrictive covenant

¹¹ *Bank United v. Greenway Improvement Ass’n*, 6 S.W.3d 705, 708 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

be liberally construed to give effect to its purpose and intent.¹² In looking to purpose and intent, the court must examine the covenant as a whole, in light of the circumstances present when the covenant was made.¹³ The court must give words and phrases in restrictive covenants their commonly accepted meaning.¹⁴ Therefore, the court is not being asked to amend the declaration, but to interpret what is already there.

II. Tarr’s Use of the Property is Irreconcilable with the Deed Restrictions.

A. A Multi-Family Use is not a Single-Family Use.

The Deed Restrictions limit the use of “single-family residence[s]” to “residential purposes.”¹⁵ Tarr sued for a declaratory judgment insisting that “[t]he leasing of single-family residences for use as dwellings is inherently, by its nature and by centuries-old common law, a residential use.”¹⁶ The trial court found that renting to multiple families at once is not consistent with the “single-family, residential purpose” restriction.

¹² *Hodas v. Scenic Oaks Property Ass’n*, 21 S.W.3d 524 (Tex. App.—San Antonio 2000, pet. denied) (citing Tex. Prop. Code §202.003(a)); *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987).

¹³ *Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 925 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

¹⁴ *Id.*

¹⁵ CR 49.

¹⁶ *See* CR 14.

The trial court relied on evidence, provided in summary form by Tarr, which showed Tarr leased to multiple-families, including leases to 9 adults and zero children, 8 adults and zero children (2 leases), 8 adults and 3 children, 8 adults and 2 children, and 7 adults and one child—to name just a few.¹⁷ Also, Tarr’s leases place no restriction on whether the guests are members of a single-family, and in fact, the leases allow for guests in excess of 10 at a time (for a nominal \$10 per guest fee).¹⁸ This evidence was uncontroverted, and sufficient to uphold the trial court’s finding that Tarr leased his property to multiple-families at a time.

Because a multi-family rental is not a single-family use, the petition for review should be denied.

B. A Business Use is not a Residential Use.

In addition to, or in the alternative, the trial court found Tarr is using his single-family residence for business purposes, in contravention of the “residential purposes” restriction. Tarr uses a business entity to manage the property and contract with guests,¹⁹ pays

¹⁷ CR 590–593.

¹⁸ CR 77.

¹⁹ CR 102.

the state and local hotel tax,²⁰ and rents the property to people from across the country—sometimes for only one night.²¹ Under these facts, the trial court had sufficient evidence to conclude that this is a business use, and consequently, a violation of the Deed Restrictions.

The Deed Restrictions specifically state “[a]ll tracts shall be used solely for residential purposes” and that “no building, other than a single-family residence . . . shall be constructed or erected on any residential tract in Timberwood Park Unit III.”²² Therefore, all tracts designated as residential lots governed by the Association shall not be used for any purpose other than for single-family residential purposes. The only commercial businesses allowed within the Timberwood Park community are the lots specifically designated for business use—which Tarr’s Property is not. There is no dispute that Tarr’s Property is designated as a residential lot within the Timberwood Park community and therefore cannot be used for business purposes.

Tarr attempts to show that advertising and short-term leasing of the Property constitute a residential use. But Texas law is clear.

²⁰ CR 455.

²¹ CR 590–593; CR 31.

²² CR 524.

Short-term leases, such as the type of leases Tarr has entered into, are considered a business use.

1. *Munson v. Milton*

In *Munson v. Milton*, the San Antonio Court of Appeals addressed the issue of short-term leasing.²³ In *Munson*, a homeowner began renting out his home to third parties through “Rio Frio Bed Breakfast and Lodging,” a professional rental agency.²⁴ The third parties were vacationers who occupied the home for periods of two to five days at a time.²⁵ The homeowners association sought a temporary injunction due to the homeowner violating the deed restrictions, which stated that motels, tourist courts, and trailer parks were considered to be a business use. Therefore, the homeowner’s association asserted that the homeowner’s use of his property for short-term leasing constituted a business use. The court agreed.

In determining that the homeowner was using his home for a business purpose rather than residential purpose, the court looked to the intent of the framers of the deed restrictions. The deed restrictions

²³ *Munson v. Milton*, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, pet. denied).

²⁴ *Id.* at 815.

²⁵ *Id.*

made a distinction between residential and business use, so the court looked to the definition of residence and stated:

Although the term residence is given a variety of meanings, ***residence generally requires both physical presence and an intention to remain.*** If a person comes to a place temporarily, without any intention of making that place his or her home, that place is not considered the person's residence.²⁶

The court further stated:

The Texas Property Code draws a distinction between a permanent residence and transient housing, which includes rooms at hotels, motels, inns, and the like. For purposes of the hotel occupancy tax, the Texas Tax Code defines hotel to include 'a hotel, motel, tourist home, tourist house, tourist court, lodging house, inn, rooming house, or bed and breakfast.' Although the venue statutes permit a defendant to have a residence in two counties, the ***residence must be occupied over a substantial period of time and must be permanent rather than temporary*** in order to qualify as a second residence.²⁷

Relying on the above, the court found short-term leasing to be a business use. The Court held that when restrictions are confined to a

²⁶ *Munson*, 948 S.W.2d at 816–17 (citing *Smith v. Board of Regents of the University of Houston System*, 874 S.W.2d 706, 712 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Slusher v. Streater*, 896 S.W.2d 239, 243 (Tex. App.—Houston [1st Dist.] 1995, no writ) (emphasis added).

²⁷ *Munson*, 948 S.W.2d at 817 (citing *Warehouse Partners v. Gardner*, 910 S.W.2d 19, 23 (Tex. App.—Dallas 1995, writ denied); Tex. Prop. Code § 92.152(a); Tex. Tax Code Ann. § 156.001; *Howell v. Mauzy*, 899 S.W.2d 690, 697 (Tex. App.—Austin 1994, writ denied) (emphasis added).

lawful purpose and are reasonable, such covenants will be enforced.²⁸ The court further held that property owners are permitted to create binding restrictions on the use of their property, and restrictions limiting the use of property to residential purposes and prohibiting business use are not unenforceable restraints on alienation.²⁹

Similar to *Munson*, Tarr is leasing his Property through a professional rental agency—Linda’s Hill Country Home LLC—which was formed for the purpose of conducting business, and Tarr pays the Texas hotel tax.³⁰ Moreover, Tarr is leasing his Property for periods of 1 to 13 days.³¹ Tarr has leased the Property to third parties from Washington, Illinois, Arkansas, Louisiana, Iowa, Indiana, Arizona, California, New Mexico, Maine, Colorado, as well as all over Texas.³²

Additionally, just like *Munson*, the Deed Restrictions governing Tarr’s Property make a distinction between residential purpose and business use—by requiring that “all tracts shall be used solely for residential purposes, except tracts designated on the above mentioned

²⁸ *Munson*, 948 S.W.2d at 814.

²⁹ *Id.*

³⁰ CR 569; SUPP CR 4.

³¹ SUPP CR 6; CR 590–593.

³² CR 590.

plat for business purposes.”³³ Texas law states that in construing deed restrictions, the primary concern is to determine the intent of the framers.³⁴

Here, the framers intended to limit business use on tracts designated for residential purposes, and under *Munson*, a restriction on business use is enforceable. Because a business use is not a residential use, the petition for review should be denied.

2. *Bernard v. Humble*

In *Benard*, the court considered whether short-term leasing was a violation of single-family use restrictions.³⁵ And, relying on language similar to that presented in the Deed Restrictions here, the court held short-term leasing is a commercial use.³⁶

In *Benard*, plaintiffs leased their home out on a weekly and weekend basis.³⁷ A lawsuit followed for the violation of the deed restrictions governing the plaintiffs’ property, which stated, “[n]o lot shall be used except for single-family residence purposes.”³⁸ The trial

³³ CR 524.

³⁴ *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987).

³⁵ *Id.*

³⁶ *Bernard v. Humble*, 990 S.W.2d 929, 930 (Tex. App.—Beaumont 1999).

³⁷ *Id.*

³⁸ *Id.*

court found that leasing to different groups of people for weekend and weekly vacation rentals violated the deed restrictions and further held that a lease for a period of less than 90 days was also a violation of the deed restrictions.

The Tarr appellate court agreed with the trial court and reasoned as follows:

In the present case, [a]ppellants were “renting” subdivision property on a weekly and/or weekend basis. Tarr's use of their property as a rental property could be more aptly described as temporary, or for retreat purposes, or transient housing, rather than residential purposes. . . . Renting per se is certainly non-violative of the restrictions in question. However, we agree with the trial court that this type of rental use runs afoul of the single-family residential purposes provision.³⁹

Similarly to *Bernard*, the Deed Restrictions governing Tarr’s Property state “[a]ll tracts shall be used solely for residential purposes.”⁴⁰ The Deed Restrictions further state “No building, other than a single-family residence . . . shall be constructed or erected on any residential tract in Timberwood Park Unit III.”⁴¹ Therefore, the Deed Restrictions are very similar to the deed restrictions at issue in *Benard* because they both restrict all tracts that are not designated as

³⁹ *Id.*

⁴⁰ CR 524.

⁴¹ CR 524.

commercial tracts to single-family residential use. Because Tarr's Property is on a residential tract, he is subject to the single-family residential use restriction. In addition to the similarities in the deed restrictions, the violations in *Benard* and in this case are the same—short-term leasing for periods of less than 90 days.

The courts in *Benard* and *Munson* both held short-term leasing to be a business use. Tarr's short-term leasing is no different. Tarr leases the Property for periods of less than 15 days; he leases the Property as a vacation rental; and, he has entered into over 40 leases, thereby drastically increasing the number of people entering the community on any given weekend.⁴² As such, under Texas law, Tarr is in violation of the Deed Restrictions.

3. *Texas Tax Code Amendments*

The Texas Tax Code was recently amended to include short-term rentals under the definition of a “hotel” for purposes of the occupancy tax. Specifically:

(b) For purposes of the imposition of a hotel occupancy tax under this chapter, Chapter 351 or 352, or other law, “hotel” includes a short-term rental. In this subsection, “short-term rental” means the rental of all or part of a residential

⁴² CR 590–593.

property to a person who is not a permanent resident under Section 156.101.⁴³

This amendment to the Tax Code is further evidence of the businesslike character of short-term rentals.

Because a business use is not a residential use, the petition for review should be denied.

C. A Transient Use is not a Residential Use.

In addition to, or in the alternative, the trial court found that rentals to out-of-state residents, for terms of sometimes only one night, is not consistent with the “residential purposes” restriction, as both Texas and federal common law define “residence” as physical presence with a contemporaneous intent to remain.⁴⁴ Out-of-state residents staying for just a few days do not meet this standard, and are “transients”—not “residents.” Under common law precedent of this Court, a “transient” use of a property (like the use of Tarr’s Property here) is inconsistent with a “residential” use restriction (like the one found in the Association’s Deed Restrictions).⁴⁵

⁴³ Tex. Tax Code § 156.001(b).

⁴⁴ CR 861–866.

⁴⁵ CR 861–866; *Martinez v. Bynum*, 461 U.S. 321, 330 (1983); *Munson v. Milton*, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, pet. denied).

In Texas, deed restrictions and accompanying enforcement mechanisms are treated as a contract between the individual owners of the property and the association.⁴⁶ As when interpreting any contract, the court's primary duty in construing a restrictive covenant is to ascertain the drafter's intent.⁴⁷ Moreover, the Texas Property Code requires that a restrictive covenant be liberally construed to give effect to its purpose and intent.⁴⁸ In looking to purpose and intent, the court must examine the covenant as a whole, in light of the circumstances present when the covenant was made.⁴⁹ The court must give words and phrases in restrictive covenants their commonly accepted meaning.⁵⁰

Because Texas law requires a court to look at the commonly accepted meaning of the words and phrases in restrictive covenants, the phrase "residential purpose" should be given its commonly accepted

⁴⁶ *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547 (Tex. App.—Houston [1st Dist.] 1994, no writ); see also *Dunn v. Polly Ranch Homeowners Ass'n*, 943 S.W.2d 906, 908 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Tien Tao Ass'n, Inc. v. Kingbridge Park Community Ass'n, Inc.*, 953 S.W.2d 525, 532 (Tex. App.—Houston [1st Dist.] 1997, no writ.).

⁴⁷ *Bank United v. Greenway Improvement Ass'n*, 6 S.W.3d 705, 708 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

⁴⁸ *Hodas v. Scenic Oaks Property Ass'n*, 21 S.W.3d 524 (Tex. App.—San Antonio 2000, pet. denied (citing Tex. Prop. Code §202.003(a))); *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987).

⁴⁹ *Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 925 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

⁵⁰ *Id.*

meaning. This Court should look to the United States Supreme Court as well as the San Antonio Court of Appeals' interpretation of the term "residence" to determine whether a short-term lease is a "residential" use.⁵¹

The United States Supreme Court first defined residence as requiring both physical presence and an intention to remain.⁵² In defining this term, the Court noted that "this classic two-part definition of residence has been recognized as a minimum standard in a wide range of contexts, time and time again."⁵³ The San Antonio Court of Appeals followed the precedent set by the United States Supreme Court and in *Munson* held that "residence generally requires both physical presence and an intent to remain."⁵⁴ Tarr points out the variance in language in the restrictions in *Munson* and the Deed Restrictions in this case, but the *Munson* court's analysis is based on the definition of residence—which is the same issue presented here.

Additionally, the Texas legislature has again provided some guidance in the recent amendments to the Texas Tax Code. Section

⁵¹ *Munson v. Milton*, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, pet. denied).

⁵² *Martinez v. Bynum*, 461 U.S. 321, 330 (1983).

⁵³ *Id.* at 331.

⁵⁴ *Munson*, 948 S.W.2d at 814.

156.101, entitled “Permanent Residents,” provides that the tax is not imposed “on a person who has the right to use or possess a room in a hotel for at least 30 consecutive days, so long as there is no interruption of payment for the period.”⁵⁵ This definition of “residence” could be used to determine whether the residency requirement is satisfied, while avoiding issues regarding someone’s vacation home and the like.

Because a transient use is not a residential use, the petition for review should be denied.

III. Even if ambiguous, Texas Property Code Chapter 202 applies—a holding to the contrary renders Texas Property Code § 202.003(a) meaningless.

As shown above, the deed restrictions are not ambiguous. But even if they are, Texas Property Code § 202.003(a) still applies. § 202.003(a) provides “[a] restrictive covenant shall be liberally construed to give effect to its purposes and intent.”⁵⁶ If § 202.003(a) only applies to unambiguous deed restrictions, the legislature’s mandate requiring “liberal construction”, would never apply. Unambiguous restrictions can be strictly construed according to the language. Therefore, the legislative mandate to “liberally construe” applies to

⁵⁵ Tex. Tax Code §156.001.

⁵⁶ Tex. Prop. Code § 202.003(a).

ambiguous deed restrictions that cannot be strictly construed. The Austin and Fort Worth Court of Appeals render the legislature's mandate of § 202.003(a) meaningless because rather than liberally construe the language, they improperly followed the common law—and this the courts cannot do.

PRAYER

For the reasons stated in this response, Respondent asks the Supreme Court to deny the petition for review, and for any further relief it may be entitled.

Respectfully submitted,
Roberts Markel Weinberg Butler Hailey PC



FRANK O. CARROLL III

TBA No. 24082785

MIA B. LORICK

TBA No. 24091415

2800 Post Oak Blvd, 57th Floor

Houston, TX 77056

Tel: (713) 840-1666

fcarrroll@rmwbhlaw.com

mlorick@rmwbhlaw.com

**ATTORNEYS FOR RESPONDENT
TIMBERWOOD PARK OWNERS
ASSOCIATION, INC.**

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4 i(3) of the Texas Rules of Appellate Procedure, I certify that the word count in this Brief is 4,970 words.



FRANK O. CARROLL III

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon the parties listed below by facsimile, messenger, regular U.S. Mail, certified mail, return receipt requested and/or electronic service in accordance with the Texas Rules of Appellate Procedure on this the 7th day of August, 2017.

Mr. J. Patrick Sutton
The Law Office of J. Patrick Sutton
1706 W. 10th Street
Austin, Texas 78703



FRANK O. CARROLL III