

**No. 16-1005**

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**THE SUPREME COURT OF TEXAS**

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KENNETH H. TARR,  
*Petitioner,*

v.

TIMBERWOOD PARK OWNERS ASSOCIATION, INC.,  
*Respondent.*

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**RESPONSE TO PETITION FOR REVIEW**

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

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**ORAL ARGUMENT REQUESTED**

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## 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)

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

## STATEMENT OF FACTS

Contrary to Tarr’s statement of the facts, the Deed Restrictions are not silent as to the issue presented. The Association’s Deed Restrictions limit the use of “single-family residence[s]” to “residential purposes.”<sup>1</sup> Tarr leases to multiple families for transient purposes (short-term rentals).

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.<sup>2</sup> The Deed Restrictions require that all homeowners use their property for residential purposes, unless the lot is designated for business use.<sup>3</sup> However, in 2014, Tarr—who did not purchase a lot designated for business use—began advertising and leasing the Property for periods of less than 15 days.<sup>4</sup> Tarr booked over 40 leases—each lease ranging from 1 to 13 days—and will continue to advertise the Property for lease on

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<sup>1</sup> CR 49.

<sup>2</sup> CR 524; CR 527; CR 559.

<sup>3</sup> CR 49.

<sup>4</sup> CR 8.

the internet should the judgment not stand.<sup>5</sup> Tarr leases the Property through a Texas LLC and pays hotel taxes.<sup>6</sup>

On July 29, 2014, the Association sent Tarr a notice of violation due to Tarr 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 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.<sup>7</sup> Tarr also sued for breach of the restrictive covenants.<sup>8</sup>

### **SUMMARY OF THE ARGUMENT**

As stated above, the Association's Deed Restrictions limit the use of "single-family residence[s]" to "residential purposes."<sup>9</sup> Tarr leases to multiple families for transient purposes (short-term rentals). This use is irreconcilable with the plain language of the Deed Restrictions.

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<sup>5</sup> CR 12.

<sup>6</sup> *Id.*

<sup>7</sup> CR 13–15.

<sup>8</sup> *Id.*

<sup>9</sup> CR 49.

Tarr attempts to unnecessarily convolute this appeal. Tarr sued for a declaratory judgment 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.”<sup>10</sup> Based on relevant case law and the Association’s governing documents, the court of appeals found that the Association’s Deed Restrictions are not ambiguous and “do prevent such activity” and “prevent homeowner Kenneth H. Tarr from leasing his home for short periods of time to individuals who have no intent to remain in the home.”<sup>11</sup> The court of appeals further states that “the term ‘used solely for residential purposes’ has a definite legal meaning and is unambiguous” and “the term ‘residence’ ‘generally requires both physical presence and an intention to remain’”<sup>12</sup>

This appeal is not centered around duration as presented by Tarr, but on the interpretation and meaning of “solely for residential purposes” and whether the occupants of Tarr’s property had an “intent to remain.”<sup>13</sup> Both the trial court and the court of appeals found the occupants did not have an intent to remain and therefore Tarr’s short-

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<sup>10</sup> See CR 14.

<sup>11</sup> See Opinion 1.

<sup>12</sup> See Opinion 6 (citing *Munson*, 948 S.W.2d at 816).

<sup>13</sup> See Opinion 1.

term leasing of his property is a violation of the Association’s Deed Restrictions. For these reasons, the Petition for Review should be denied.

## ARGUMENTS AND AUTHORITIES

### **I. The Relevant Inquiry Is Intent—Not Duration.**

Tarr claims that because there is no duration language in the Deed Restrictions that the Association cannot restrict short-term leasing.<sup>14</sup> Throughout his Petition for Review, Tarr alleges that “physical permanent occupancy” is required for residential purposes. This is simply incorrect. The court of appeals found that “the term ‘residence’ ‘requires both physical presence and an intention to remain.’”<sup>15</sup>

As outlined in the trial court and in the court of appeals, none of Tarr’s lessees had an “intent to remain.” 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.<sup>16</sup> Also, Tarr’s leases

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<sup>14</sup> CR 382.

<sup>15</sup> See Opinion 6 (citing *Munson v. Milton*, 948 S.W.2d 813, 816 (Tex. App.—San Antonio 1997, pet. denied).).

<sup>16</sup> CR 590–593.

place no restrictions 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).<sup>17</sup> This evidence was uncontroverted, and sufficient to uphold the trial court’s finding that Tarr leased his property to multiple families at a time.

The court of appeals outlined many factors that show the Property was used for “transient purposes”—including check-in time, check-out time, and minimum stay requirements.<sup>18</sup> The court of appeals found that “[t]he leasing agreement is not consistent with a renter who has the intent to remain at the home; the agreement thus shows that the home is being used for transient purposes rather than residential purposes.”<sup>19</sup> “One leasing his home to be used for transient purposes is not complying with the restrictive covenant that it be used solely for residential purposes.”<sup>20</sup> This holding is well-founded in Texas law and is correct. Accordingly, the Petition for Review should be denied.

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<sup>17</sup> CR 77.

<sup>18</sup> See Opinion 7.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* See also, *Bernard v. Humble*, 990 S.W.2d 929, 931–32 (Tex. App.—Beaumont 1999, pet. denied) (holding that homeowner’s short term rental of home violated deed restriction that home could be used only for “single-family residence purposes”).

## II. The Controlling Law On Short-Term Leasing Has Been Established For Twenty Years.

Twenty years ago, in *Munson v. Milton*, the San Antonio court of appeals addressed the issue of short-term leasing.<sup>21</sup> In *Munson*, a homeowner began renting out his home to third parties through “Rio Frio Bed Breakfast and Lodging,” a professional rental agency.<sup>22</sup> The third parties were vacationers who occupied the home for periods of two to five days at a time.<sup>23</sup> 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 homeowners 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 made a distinction between residential and business use, so the court looked to the definition of residence and stated:

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<sup>21</sup> *Munson v. Milton*, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, pet. denied).

<sup>22</sup> *Id.* at 815.

<sup>23</sup> *Id.*

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.<sup>24</sup>

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.<sup>25</sup>

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 lawful purpose and are reasonable, such covenants will be enforced.<sup>26</sup>

The court further held that property owners are permitted to create

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<sup>24</sup> *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).

<sup>25</sup> *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).

<sup>26</sup> *Munson*, 948 S.W.2d at 814.

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.<sup>27</sup>

Similar to *Munson*, Tarr is leasing the 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.<sup>28</sup> Moreover, Tarr is leasing the Property for periods of 1 to 13 days.<sup>29</sup> Tarr has leased the Property to third parties from Washington, Illinois, Arkansas, Louisiana, Iowa, Indiana, Arizona, California, New Mexico, Maine, Colorado, and all over Texas.<sup>30</sup>

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 plat for business purposes.”<sup>31</sup>

So like *Munson*, the court here found that transient, short-term rentals are irreconcilable with Association’s Deed Restrictions that limit

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<sup>27</sup> *Id.*

<sup>28</sup> CR 569; SUPP CR 4.

<sup>29</sup> SUPP CR 6; CR 590–593.

<sup>30</sup> CR 590.

<sup>31</sup> CR 524.

the use of “single-family residence[s]” to “residential purposes.”<sup>32</sup> This was a correct application of controlling law. Accordingly, the Petition for Review should be denied.

### **III. *Zgabay* is a red herring.**

The court of appeals noted that “[w]e respectfully disagree with the Austin Court of Appeals and do not find its reasoning persuasive” in regards to the ruling in *Zgabay*.<sup>33</sup>

*Zgabay* dealt with a request for declaratory relief “that renting the house to an individual or single family for residential use is considered a ‘single family residential purpose’ that is allowed under the restrictive covenants.”<sup>34</sup> That alone makes *Zgabay* wholly inapplicable to the issues presented here.

Should this Court find *Zgabay* does have some import under the facts presented in this appeal, the Deed Restrictions of the Association are substantially and importantly different from the restrictions in *Zgabay*.

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<sup>32</sup> CR 49.

<sup>33</sup> See Opinion 8.

<sup>34</sup> *Zgabay v. NBRC Prop. Owners Ass’n*, No. 03-14-00660-CV, 2015 Tex. App. LEXIS 9100, at \*2 (App.—Austin 2015).

In *Zgabay*, the Third Court of Appeals considered whether the deed restrictions governing the River Chase subdivision restricted short-term leasing.<sup>35</sup> The court looked to the specific language of the restrictions and found that it limited certain lots to “single-family residential purpose.”<sup>36</sup> Although the restrictions did not limit leasing on each lot by duration, the restrictions did limit other uses by duration.<sup>37</sup> Specifically, the restrictions limited the duration a person could live in a temporary structure—such as a mobile home or a garage—to no longer than six months.<sup>38</sup> Because the restrictions contained a provision, in a different section, that limited a specific use by duration, the court held that the drafters considered and knew how to impose a duration limitation on particular types of uses.<sup>39</sup> And, because the drafters in *Zgabay* did not limit leasing by duration the court held that “the absence of a specific minimum duration for leasing at best render[ed] the restrictions ambiguous.”<sup>40</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 5

<sup>37</sup> *Id.* at 5–6.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *Id.*

The *Zgabay* court used the fact that the drafters limited duration in other provisions to show that the restrictions raised doubt—rendering section 202.003 of the Texas Property Code, which requires the court to look at the drafter’s purpose and intent, inapplicable.<sup>41</sup> Instead, the *Zgabay* court found the restrictions at issue to be ambiguous, and therefore, it applied a different standard—the common law standard—that requires all doubt be resolved in favor of unrestricted use of property.<sup>42</sup> But, unlike *Zgabay*, the common law standard does not apply here.

In the Deed Restrictions governing the Timberwood Park subdivision, residential lots are limited to single-family residential purposes and similar to *Zgabay* there is no durational language on that restriction. ***But, unlike Zgabay there is no provision in any section of the Timberwood restrictions that limits use by duration.*** And, unlike *Zgabay*, the Timberwood restrictions do not create conflict and render varying provisions ambiguous; therefore, section 202.003 of the Texas Property Code governs and requires that the court look to the

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<sup>41</sup> Tex. Prop. Code §202.003(a).

<sup>42</sup> *Zgabay*, 2015 Tex. App. LEXIS 9100, at \*6–8.

purpose and intent of the drafters.<sup>43</sup> In this case, the drafters sought to limit business activities to certain lots and restrict residential lots to residential purposes, which the Court of Appeals has already ruled excludes short-term rentals. The ambiguity argument relied on heavily by the *Zgabay* court cannot be applied here. Accordingly, *Zgabay* is distinguishable, and the Petition for Review should be denied.

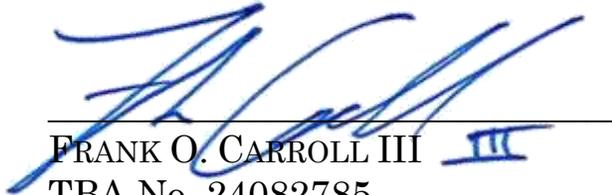
### **PRAYER**

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.

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<sup>43</sup> Tex. Prop. Code §202.003(a).

Respectfully submitted,  
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**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 Response to Petition for Review is 2,801 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 3rd day of April, 2017.

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