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¿Mi Casa Es Su Casa?
Restrictive Covenants and Short-Term Rentals

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December 10, 2018

Publication 2216

In 1975, Gary Dahl made a fortune. In case the name doesn't ring a bell, Dahl invented the Pet Rock. He obtained the stones from a beach in Mexico for about a penny each, added some creative writing and packaging, and sold them for four bucks a pop. The craze took the nation by storm, and Dahl became a millionaire.

Like the Pet Rock, the short-term rental phenomenon has swept the nation over the past few years, driven by the rise of services such as Airbnb and VRBO. Proponents of the idea say it's easier than ever for property owners to generate extra income from their properties—perhaps like picking it up off the beach. But opponents voice concerns over noise, property values, and unruly occupants. After all, as the Pet Rock training manual observed, "Nobody, but nobody likes a surly, misbehaving rock."

Unlike the Pet Rock, short-term rentals may be here to stay. Their popularity creates a fertile ground for disputes, particularly when restrictive covenants are involved. The 2018 Texas Supreme Court opinion *Tarr v. Timberwood Park Owners Association Inc.* is being hailed as a victory for private property rights, but it is not the broad and sweeping victory some might believe. Not only is the holding limited to the narrow factual circumstances of the case, there are additional opportunities for regulation that have not yet reached the court.

The Takeaway

A 2018 Texas Supreme Court decision regarding restrictive covenants and short-term rental properties was hailed as a victory for private property rights, but look closely. The court simply held that deed restrictions in that particular case did not prohibit short-term rentals. The court expressed no opinion on whether other deed restrictions prohibiting short-term rentals would be enforceable, nor did it express an opinion on the power of state and local governments to prohibit or regulate short-term rentals.

The Tarr Case

Kenneth Tarr owned a single-family home in San Antonio's Timberwood Park subdivision. After his employer transferred him to Houston, Tarr began renting the home on a short-term basis using online sites such as VRBO. Tarr formed a limited liability company to manage the property. Although Tarr did pay hotel taxes applicable to short-term rentals, he rented out the entire home—not just rooms—and provided no hotel-type services, such as housekeeping or meals. Over approximately five months, Tarr rented the home 31 times for one to seven days at a time. In total, the home was rented for 102 days during that time.

Lots in Timberwood Park are subject to the following restrictive covenant:

> *All tracts shall be used solely for residential purposes, except tracts designated on the above-mentioned plat for business purposes, provided, however, no business shall be conducted on any of these tracts which is noxious or harmful by reason of odor, dust, smoke, gas fumes, noise, or vibration . . .*

In a separate paragraph, the restrictions provide:

> *No building, other than a single-family residence containing not less than 1,750 square feet . . . shall be erected or constructed on any residential tract in Timberwood Park Unit III.*

The Timberwood Park Owners Association (Timberwood) took issue with the short-term rentals. Timberwood took the position that short-term rentals violated the "residential purposes" requirement, and, therefore, made the property a commercial rental property, rather than a single-family residence. The short-term renters, Timberwood said, were not residents and, therefore, were using the home for "transient purposes" rather than residential purposes.

Tarr contended the building *was* a single-family residence and that it *was* being used for residential purposes. The structure itself was not a duplex or apartment building; it was a single-family house. The people staying there were using the home for living purposes, and those are "residential purposes." The restrictions contained no requirement that a homeowner personally occupy his home, nor was there a minimum length of stay required. Tarr also argued that, by law, if the restriction was ambiguous, doubts must be resolved in favor of the free use of the property (see sidebar). In law, *ambiguous* means that a term may reasonably be interpreted in more than one way; i.e., it is susceptible to two or more reasonable interpretations. *Unambiguous* means that the term can be given a definite legal meaning.

Restrictive Covenants

Restrictive covenants, also called deed restrictions, are a way of regulating how land may be used and what structures may be placed on it. The most common of these restrictions are "real covenants," which "run with the land." In other words, once the restrictions are placed on the property, they generally stay there and apply to subsequent owners of the property. They may be placed on a single parcel of property, but most commonly they are placed on land when it is divided and developed into a subdivision. By imposing similar restrictions on all lots of the same type in the subdivision, certain uses and behaviors can be prevented and property values can be maintained. Covenants may be enforced by individual landowners or by a property owners' association.

Disputes involving deed restrictions often revolve around determining exactly what they mean. The law has developed certain rules the courts apply when construing these restrictions. Courts interpret restrictive covenants applying the same basic rules used in interpreting contracts, and the main idea is to determine what the parties intended at the time the contract or restriction was made.

Courts generally prefer interpretations that allow for the free use of land. However, they will enforce restrictive covenants if they are "clearly worded and confined to a lawful purpose" (*Wilmoth v. Wilcox* [1987]). If the restriction's language is ambiguous, the court interprets the restriction narrowly, resolving any doubts in favor of the free and unrestricted use of the property. If the language is unambiguous, the court interprets the restriction more broadly, following Section 202.003(a) of the Texas Property Code, which requires that a restriction "shall be liberally construed to give effect to its purposes and intent."

The trial court and the San Antonio Court of Appeals relied on previous case law to side with Timberwood. Residential use differed from "transient purposes," they said, in that residential use required both physical presence and an intention to remain for a sufficient duration. They found that the restriction was unambiguous, and thus could be interpreted broadly. Tarr petitioned the Texas Supreme Court for review.

The Supreme Court unanimously held in favor of Tarr. Interestingly, the Supreme Court also held that the restriction was unambiguous, yet it came to the exact opposite conclusion about its meaning. The unambiguous meaning of the restrictions, it said, was clear: The *structures* must be single-family residences. Their *use* must be for living purposes. It refused to conflate the structural and use restrictions into one mega-restriction. Put another way, the court held that "residential purposes only" plus "single-family residences only" does *not* equal "single-family residential purposes only."

Residential purposes, according to the court, are living purposes, regardless of the duration of the stay. Likewise, *single-family residences* is a term defining the type of structure permitted on the property. It does not require that the homes be occupied only by single families and only for certain periods of time. The court refused to read into the restrictions what the restrictions did not specifically say.

What the Court Did Not Say

Property owners and property rights advocates were quick to laud the decision as a strong victory for private property rights. While that certainly may be true, it would be wise to observe what the court did not say.

The court did not strike down or prohibit restrictive covenants that circumscribe short-term rentals. If the drafters of the covenants had been more specific, the short-term rentals could have been prohibited. They could have prohibited uses other than "single-family residential purposes" and defined terms to clarify the intent of the restrictions. They could have specified the minimum or maximum length of short-term rentals.

The court expressed no opinion on whether renting individual rooms could be prohibited or whether property owners may provide full hotel services. It expressed no opinion on whether short-term rentals, if properly defined, could be prohibited altogether. These appear to be open questions to be decided on the facts and the wording of covenants in future cases.

Likewise, the court expressed no opinion on whether state and local governments have the power to prohibit or regulate short-term rentals. These questions were left for another day.

Nothing in this article should be construed as legal advice. For specific advice, consult an attorney.

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