

## MEMORANDUM

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**TO:** Jimmy Stathatos, Town Manager

**FROM:** Bryn Meredith

**DATE:** May 28, 2020

**RE:** Authority of Homeowner Associations to Prohibit Short-Term Rentals

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During the May 21, 2020, Town Council Workshop, I was asked to prepare a memo detailing the authority of homeowner associations to prohibit short-term rentals within their neighborhoods.

In 2018, the Texas Supreme Court took up the question of whether a restrictive covenant, which limited the use of properties for *residential purposes only*, would prohibit a homeowner from leasing their property out as a short-term rental<sup>1</sup>. The Timberwood Park Owners Association covenant read as follows:

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...

The Supreme Court ultimately held that the above restrictive covenant did not prohibit short-term rentals *because short-term rentals are a residential use*. This, despite the fact that the homeowner created an LLC to manage his short-term rental operations and that he also paid hotel occupancy taxes. In its ruling, the Court strongly favored individual property rights, noting that “the right of individuals to use their own property as they wish remains one of the most fundamental rights that individual property owners possess.” Specifically, the covenants at issue failed to address “leasing, use as a vacation home, short-term rentals, minimum-occupancy durations, or the like.” As a result, the Court held that “so long as the occupants to whom Tarr [the plaintiff/homeowner] rents his single-family residence use the home for a ‘residential purpose,’ no matter how short-lived, neither their on-property use nor Tarr’s off-property use violates the restrictive covenants in the Timberwood deeds.”

As a result of this ruling, homeowner associations in Texas should not rely on a restriction limiting use to residential purposes as a means to prohibit use of property as a short-term rental. Instead, each association wishing to prevent such use must ensure, by amendment or otherwise, that their applicable covenants, conditions and restrictions directly address “leasing, use as a

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<sup>1</sup> *Tarr v. Timberwood Park Owners Assoc., Inc*, 2018 WL 2372594 (Tex. 2018).

vacation home, short-term rentals, minimum-occupancy durations, or the like,” in accordance with the Supreme Court’s guidance. Of course, the process to amend existing covenants, conditions and restrictions will vary from association to association.

Each association that wishes to pursue a restriction on short-term rentals should consult with their legal counsel regarding the procedure and the substance of an appropriate amendment.

Examples of restrictions aimed at curtailing the practice of leasing homes for short term rental purposes, include the following:<sup>2</sup>

3. Rental/Leasing Conditions and Restrictions. The Rental/Leasing of Lots is subject to the following additional conditions:
  - a) Except in instances where a hardship exemption has been granted, at no time may more than six percent (6%) of the Lots be Rented/Leased at any time (maximum of 5 Lots).
  - b) As long as the Rental/Leasing limitation set forth in 3.a) above has not been met, and subject to any other limitations set forth in this Article, an entire Lot (but not less than entire Lot) may be Rented/Leased for private residential purposes only (i.e., rooms may not be individually Rented/Leased) without prior written approval of the Board of Directors. No Lot may be Rented/Leased for a term of less than twelve (12) consecutive months, and no lease may exceed a term of two years (twenty-four (24) consecutive months).
  - c) A Lot may not be Rented/Leased for hotel or transient purposes. No Lot may be Rented/Leased on an hourly, daily, weekend, weekly, monthly or quarterly basis.

Another example, is as follows:

It is permitted for Owners to lease (as defined below) a residential dwelling in the subdivision, so long as:

- (a) occupants are leasing the entire Lot (including all land and improvements comprising the Lot and residential dwelling) to use as a residence;
- (b) the term of the lease is greater than ninety (90) days;
- (c) the Owner and the occupants have the intent that the occupants remain on the Lot, and that it become the occupants' place of residency;

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<sup>2</sup> Please note that I do not offer an opinion on whether these examples have been reviewed by the courts or whether they would withstand judicial scrutiny. Each association should consult with legal counsel for guidance on this issue.

that is, that the occupants will make the Lot and residential dwelling their home; and

(d) the lease complies with any dedicatory instrument of the Association, including any leasing policy, rule, or regulation promulgated by the Board.

The term "leasing" as used herein means the occupancy of a Lot and residential dwelling by any person other than the Owner, for which the Owner receives any consideration or benefit, including, but not limited to, a fee, service, gratuity, or emolument. Uses such as short-term leases (less than ninety (90) days), temporary or transient housing, hotel, motel, vacation rental, and bed and breakfast shall be considered "business use" and are expressly prohibited.

I hope I have adequately addressed the issue of homeowner association authority to prohibit the lease of property for short-term rental purposes. Should you have any additional questions regarding this matter, please do not hesitate to contact me.