Leasing and Property Management Committee Meeting
2018 Texas REALTORS® Conference

Saturday, September 8, 2018
8:30 a.m. – 9:00 a.m.
Room 221 A
Henry B. Gonzalez Convention Center
San Antonio, Texas

LEASING AND PROPERTY MANAGEMENT
TEXAS ASSOCIATION OF REALTORS®

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I.	Call to Order	Warren Ivey, Chair
II.	Minutes	Warren Ivey, Chair
III.	Legislative & Regulatory Update a. Legislative Outlook b. Protecting Tenants at Foreclosure Act c. TREC Update	Danny Hardeman, Liaison Kelly Flanagan, Staff Attorney
IV.	Education Update	Marty Hutchison, Vice Chair
V.	Case Law Update a. Schneider v. Whatley b. Tarr v. Timberwood Park Owners Association, Inc.	Abby Lee, Staff Attorney
VI.	Unfinished Business	Warren Ivey, Chair
VII.	New Business	Warren Ivey, Chair
VIII.	Adjourn	Warren Ivey, Chair

Meeting minutes
Leasing and Property Management Committee
Regular meeting – February 10, 2018
Austin, TX
Minutes recorded by: Abby Lee

Chair Warren Ivey called the meeting to order at approximately 8:45 a.m. Roll was called and a quorum was established. Chair Ivey asked for any corrections to the meeting minutes from September 9, 2017. The minutes were approved as distributed.

Vice-Chair Marty Hutchison reported on the Property Management Education Subcommittee and provided a webinar report.

Liaison Danny Hardeman provided a TAR property management forms update.

Senior Associate Counsel Abby Lee provided information on TREC rules regarding the IABS & Consumer Protection Notice, unauthorized practice of law, and use of forms, as well as the possibility of a TREC property management specialty certification, and the 2018 TREC rule review. Deputy General Counsel Kinski Moss updated the committee on the adopted changes to the TREC advertising rule.

There was no unfinished business.

Under new business, Associate Director of Legislative Affairs Julia Parenteau discussed changes to the structure of the public policy subcommittees. There was no other new business.

The meeting was adjourned at 9:10 a.m.

Roll:

	Member	Present
1	Aaron Schooley	
2	Adona Lowery	x
3	Al Jurado	x
4	Angel Gonzalez	
5	Bart Sturzl	x
6	Bill Evans	
7	Cindy Hoover	
8	Cortney Gill	
9	Danny Hardeman	x
10	Derek Deguire	
11	Donna Pinon	x
12	Dorothy Wanko	
13	E. Lee Warren	x
14	Eddie Davis	
15	Elias Camhi	x
16	Gary Lingenfelter	x
17	Gregory Doering	x
18	J.C. Posey	x
19	Jason Gregory	x
20	Jim Smith	x
21	Jolie Smith	x
22	Joseph Furcron	
23	Lennox Alfred	x

	Member	Present
24	Linda Holzer	
25	Malisa Spivey	
26	Marty Hutchison	x
27	Michael Mengden	x
28	Nat Holzer	
29	Nathan Bell	x
30	Patsy Oakley	x
31	Paul French	x
32	Pete Neubig	
33	Randi Reams	x
34	Richard Elias	x
35	Rick Ebert	x
36	Robert Boot	x
37	Robert Johnson	
38	Robert McCourt	x
39	Ronnah Stabenow	x
40	Shannon Ferry-Moser	
41	Shirley Johnson	x
42	Tony Sims	x
43	Vanessa Dirks	x
44	Warren Ivey	x

Property Management Webinar Series Report

Webinar	Date	# of Registrants
Cyber Liability and Risk Reduction for Property Managers	August 15, 2018	222
Reasonable Accommodations and Accessibility	April 17, 2018	No data
Repairs, Risks and Responsibilities of Leasing in Texas	February 21, 2018	333
Illegal vs. Legal Evictions	December 13, 2017	157
Tenant Selection and Fair Housing	October 18, 2017	234
Eviction Road Map	August 16, 2017	354
2017 Leasing & Property Management Legislative Update	May 10, 2017	327
Security Deposits	February 22, 2017	318
Sharing Economy: The Good, The Bad, and the Ugly of Short-Term Rentals	December 14, 2016	227
Advertising: What You Need to Know	October 12, 2016	302
The Texas Association of REALTORS® Residential Lease	August 17, 2016	250
Leasing and Property Management Insurance Issues	May 18, 2016	236
The Tenant Application Process	February 17, 2016	252
2016 Changes to the TAR Leasing and Property Management Forms*	December 16, 2015	289
Credit Reports	October 21, 2015	140
Fair Housing Issues*	August 19, 2015	119
2015 Leasing and Property Management Legislative Update*	May 20, 2015	203
Trust Accounts*	February 18, 2015	214
Leasing and Property Management Q & A*	December 17, 2014	192

Lease Termination and Special Statutory Rights*	October 22, 2014	272
Protecting the Property Manager at Foreclosure: What You Need to Know*	August 20, 2014	120
The TAR Property Management Agreement*	May 21, 2014	254
Changes to the TAR Leasing and Property Management Forms*	February 19, 2014	498
Recent Changes to Texas Eviction Rules*	December 18, 2013	332
Security Devices*	October 23, 2013	No data
Fair Housing Issues*	August 21, 2013	193
2013 Property Management Legislative Update*	May 22, 2013	170
Repairs*	February 20, 2013	301
Evictions*	December 19, 2012	564
Security Deposits*	October 17, 2012	175
The Tenant Selection Process*	August 15, 2012	681
Agency & Intermediary*	May 16, 2012	365
Trust Accounts	March 15, 2012	345
Property Management Agreement	January 18, 2012	286
Security Devices & Smoke Alarms	December 21, 2011	358
Fair Housing	October 19, 2011	191
Evictions & Foreclosures	August 17, 2011	592
Lease Termination & Special Statutory Rights	May 18, 2011	305
Security Devices & Smoke Detectors	March 16, 2011	275
Property Management Forms	January 19, 2011	292
Security Deposits	December 15, 2010	212
Credit Reporting	October 20, 2010	183

Trust Accounts	May 19, 2010	unknown

* Participants received CE credit if viewed webinar at local association.

REPAIRS, RISKS, AND RESPONSIBILITIES OF LEASING IN TEXAS

Shanon Keith Stanfield
Stanfield Law Firm
512-457-1800
stanfieldlawfirm@gmail.com
stanfieldlawfirm.com

TOPICS

- Applications and Screening
- Move-in Condition Form
- Tell Them What You Want
- Inspections & Maintenance
- Walk-Throughs
- Closing the Lease
- Landlord's Duty to Repair
- Evictions
- *Questions*

THIS IS NOT EVERYTHING

DISCLAIMER:

The purpose of this presentation is to highlight only some of the many legal requirements and issues facing owners and management companies in Texas.

I have picked topics based on membership interest and my personal experience practicing landlord-tenant law for eight years.

Consult with an attorney for questions about a specific situation.

Applications and Screening

- Do Your Homework
  - Use a thorough application form
  - Verify rental references
  - Verify work and income
  - Get the PLATINUM background check
    - Credit
    - Criminal
  - Do your own research
    - Online records
    - Litigation history (evictions and other lawsuits)
    - County clerks (liens and foreclosures)

Applications and Screening

- Eligibility Requirements
  - Full Disclosure: Must provide list of eligibility requirements along with application
  - May not discriminate based on race, ethnicity, sex, etc.
  - Field and process all applications consistently
  - Nothing wrong with picking the highest rated applicant out of order but disclose the possibility
- Application Fees and Deposits
  - Both must be returned if no stated eligibility criteria
  - Application deposit must be returned if rejected
  - Application considered rejected if no answer in 7 days
  - JUST CHARGE A FEE TO COVER SCREENING

Applications and Screening

- Double-check before you offer
  - Make sure you like the tenants and the price
  - Make sure you are comfortable with the lease term
  - Shorten the term, go month-to-month, if the owner might sale within a year
  - Have a plan for management, rent, and repairs
    - Take advantage of technology
    - E-signing, auto-draft, email notices
  - Confirm major lease terms with the owner before approving tenant
  - Enter a management contract

Moving In Condition Form

- AS-IS
  - ”Opportunity to thoroughly inspect” - TENANT SIGN
- Provide with lease, follow up
  - The move-in condition form can be a big part of a property damage/security deposit dispute
  - Do your own assessment
  - Make it a main part of the move-in checklist
  - Follow up if you do not receive the completed form
- Take pictures before
  - You might already have these from the listing
  - Take additional photos for accurate representation

Tell Them What You Want

- Be upfront about your expectations
  - Landlords have different priorities
  - Tenants will assume you are like their past landlords
  - Establish priorities and don't be shy
  - Create outline of important items
  - Paying rent on time, charging late fees
  - No "long-term guests"
  - Regular inspections/maintenance
  - Level of cleanliness
  - How to submit repair requests
  - Pet policy

Inspections & Maintenance

- Privacy versus diligence
  - You have the right to access your property whenever but. . . .
  - Give advanced, WRITTEN notice of non-emergency visits
  - If possible coordinate with the tenants
  - Short communications are better than no communication
  - Texts and emails are acceptable written notice but be careful establishing a “texting relationship”
- Maintenance
  - You can contract for the tenants to be responsible for all damage and conditions that (1) do not affect the material health or safety of an ordinary tenant, and (2) are caused by the tenant or guests

Inspections & Maintenance

- Appliances and amenities
  - Broken appliances may not “affect health or safety” but might be considered “part of the bargain”
  - Explain tenant may be responsible for new appliances
  - Use the “Special Provisions” section and Addendums to emphasize important items and concerns that might deviate from standard lease language
- Pest control
  - Tenant obligation under the TAR lease
  - Use the comprehensive TAR addenda and make sure tenants sign or initial those addenda and understand their responsibilities

Walk-throughs

- **Provide detailed move-out instructions**
  - Include with lease documents at signing - TENANT SIGN
  - Specify mowing grass, trees, plants, yard condition
  - You can contract for professional cleaning
- **Benefits**
  - Encourages tenants to clean up and fix up
  - Can point out problems for tenant to address before moving
  - Looks better in court
- **Problems**
  - Walkthrough comments not legally binding, but tell that to tenants
  - Agents may not be upfront about damage in front of tenants
  - Last opportunity for confrontation in person

Closing the Lease

- **Security Deposit**
  - Tenant entitled to accounting and refund of security deposit minus lawful deductions within 30 days after surrender:
    - Any amount owed under the lease (rent, fees, utilities)
    - Amounts needed to cover the cost of repairs and cleanings to cover damage beyond normal wear and tear
    - Must be ITEMIZED, the more specific the better
  - “Normal wear and tear” is deterioration that results from the intended use of a dwelling, including breakage or malfunction due to age or deteriorated condition

Closing the Lease

- Does not include damage caused by tenant's negligence, carelessness, accident, or abuse
- Forwarding address required but good practice to email regardless
- Landlord who in "bad faith" fails to account for deductions, charges for normal wear and tear, or makes unreasonably high charges may be liable:
  - Three times the amount wrongfully withheld plus $100
  - Attorney's fees and costs
- PICTURES, FORMS, AND INVOICES
  - All good evidence to establish reasonableness of charges
  - You can do the work yourself and charge fair market

Closing the Lease

- **Recovering unpaid balance**
  - Send follow up demand letter after move-out statement
  - State possibility of negative rental reference and affect on credit
  - Find reputable third-party debt collector that collects unpaid accounts AND reports debts to consumer agencies
  - Report tenant to national database
  - Can attempt to collect yourself but will not qualify to submit account to credit agencies
- **Filing suit**
  - Make sure it's worth the time, money, and hassle
  - Application may give you idea of assets and accounts
  - Consider tenant personality and resources

Landlord's Duty to Repair

- **<u>Landlord must repair when all of the following met:</u>**
  - The tenant gives the landlord written notice of the condition
  - **The tenant is not delinquent in paying rent at the time of notice**; and
  - The condition "materially affects the physical health or safety of an ordinary tenant" OR arises from landlord's failure to maintain a hot water heater
  - Liability does not kick in until after the second written notice OR only one notice is required if sent certified mail, return receipt
  - Seven days is presumed to be a reasonable time, but might be longer depending on the nature of the condition and availability of materials and labor

Landlord's Duty to Repair

- "Materially affects the physical health or safety . . ."
  - No heater or air conditioner in particularly cold or hot weather
  - Water leaks that seep into walls, floor, cabinetry and could lead to mold growth
  - Mold complaints are usually overblown, but if you can see sprawling mold patterns and smell a musty odor it is advisable to pay for a mold assessment, even though it may not always be legally required
  - Uncommon physical hazards
  - Local ordinances good place to check for general health and safety requirements

Landlord's Duty to Repair

- Most likely does not "materially affect the physical health or safety . . ."
  - Mildew and non-toxic mold that is naturally present in the environment and generally does not materially affect the physical health of an ordinary person
  - Broken appliances: dish washer, microwave, refrigerator
  - Non-essential lights
  - Cosmetic issues: unsightly marks and stains on the walls and floors, general damage to cabinetry and shelving

Landlord's Duty to Repair

- Landlord fails to make required repairs tenant can:
  - Terminate the lease at will
  - Pro rata rent refund from date of move out
  - Deduct security deposit from rent or get refund
  - Tenants not usually entitled to repair and deduct
- Judicial relief
  - One month's rent plus $500
  - Actual damages such as moving costs
  - Attorney's fees and court costs
  - Repair and remedy lawsuit (fast tracked like evictions)

Landlord's Duty to Repair

- Casualty Loss Exception:
  - LL can wait until the insurance money comes in if condition results from an insured loss, such as fire, smoke, hail, or explosion.
  - If place is uninhabitable because of the condition, LL or T can terminate by written notice before repairs are completed.
  - If place is partially unusable but otherwise inhabitable and safe, LL and T can agree on reduced rent amount

Evictions

- LL must give T a three-day notice to vacate or one-day notice to vacate if allowed under lease
- Be as specific as possible in notice to vacate
- Notice to vacate must be hand delivered, sent by mail, or affixed to the inside of the door
- Can affix to outside of door if notice in sealed envelope with IMPORTANT DOCUMENT printed on outside AND also served by mail same day
- **Notice to Vacate MUST be given to T before eviction suit is filed; LL can easily lose case on NTV defect**
- “Notice of Termination” ends lease but serve additional “Notice to Vacate” for holding over

Evictions

- **Going to Court**
  - Documentation is key
  - Signed copy of lease
  - Signed copy of termination and vacate notices
  - Easy to read ledger/spreadsheet for charges and payments
  - For non-rent violations, written communications, photos, recordings, witnesses
    - Not as cut and dry as rent so have good evidence ready for judge to review

“Property Management – Avoid Getting Sued….and hacked”

Presented by
Barney Schwartz
CEO
Preferred Guardian Insurance

What you will learn?

- Most common type of claims and ways to avoid being sued
- E&O Insurance vs General Liability Insuranc
- How to protect your email from getting hacked

E&O Who/What is Covered

- Who
  - Owner or Partner
  - An Employee
  - An Independent Contractor
- What Occupations
  - Real Estate Agent/Broker
  - Property Management?
    - Stated on the Dec Page or Definition of Covered Occupations

General Liability vs. E&O

- General Liability (Damage to Property or Injury)
  - Dog Bite
  - Slip and Fall
- E&O
  - Fiduciary Responsibility
  - Rendering of Advice
  - Failing to recommend

Dog Bite – Scenario 1

- If MLS Listing states, “Vicious Dog in Laundry Room, Do Not Open Door”, you open the door and the dog bites a potential buyer or renter. Is it an E&O Claim or a General Liability Claim?

Dog Bite – Scenario 2

- MLS states, “Do Not Open Laundry Room Door Due to Vicious Dog”, you tell your client and they say, “All dogs love me!”. They open the door and are bit – is it an E&O or General Liability claim?

General Liability

- Coverage is Entity Specific
- Premium is based off of Revenue
  - Fees to Manage Properties
  - Rents which are passed through are not included
- Landlord's Insurance Policy will usually be primary
- GL Company and E&O Companies may point fingers at each other
- Requires E&O to be in place
- Agent Owned Property Management is usually excluded

Fiduciary Duty

- Your Duty as an Agent
  - Inform your clients and provide information
  - Make suggestions and recommendations

- Your Duty is **NOT,** making decisions for your clients

What to do when a E&O claim or TREC Complaint surfaces or you receive a Subpoena Request?

- Report the claim promptly to your insurance broker or insurance company
- Do not try and settle on your own even if damages are under your deductible
- Do not hire an attorney as they may not be approved by the insurance company
- Report the Subpoena request to the insurance company

Most Common Types of Claims

- Property Maintenance
  - Timely handling of repairs
  - Failure to perform repairs
  - Misrepresentation of Zoning
  - Permission to Rent
- Management of Tenant Selection
  - Screening
  - Failure to locate Renters
  - Background checks
  - Handling and collection/return of deposits
  - Failure to maintain accurate rent receipts and records
  - Discrimination

Do what you do best!

- Legal Advice
- General Contractor
- Business Broker
- Residential Real Estate, its your call

"Force the client to make decisions"

Agent Owned Properties

- Agent owned is typically defined as 10% or greater ownership
- Most Insurance Companies will not provide coverage for Agent Owned Property Management
- Most litigation is between Property Manager and the Landlord and with agent owned they would be suing themselves

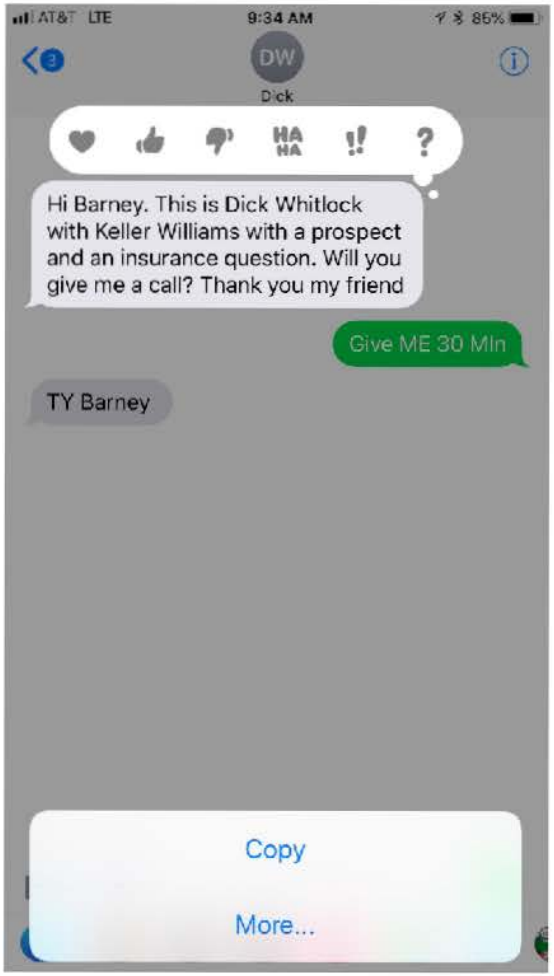
Contractor Management and Selection

- Insured
  - General Liability
  - Workers Compensation
  - Bonded
- Background Checked
- Maintain Great Records
  - Repairs
  - Warranty

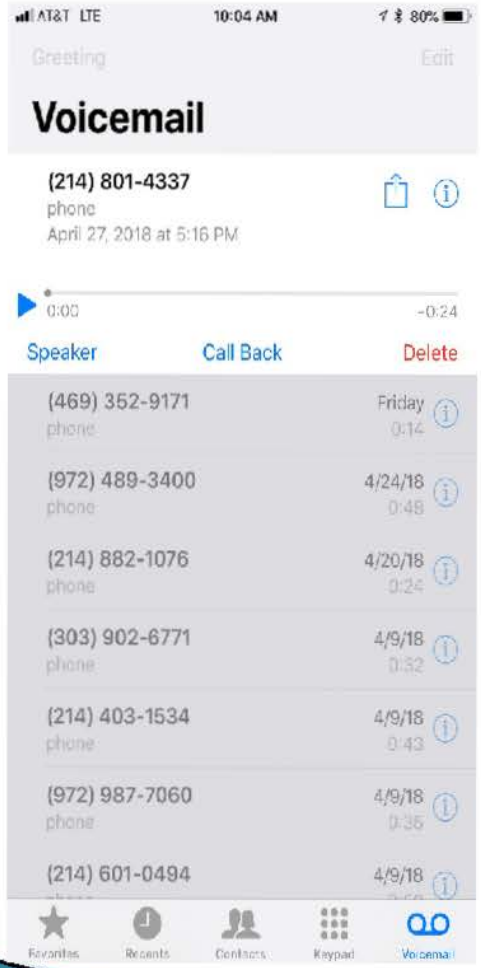
Confirm and Store Info

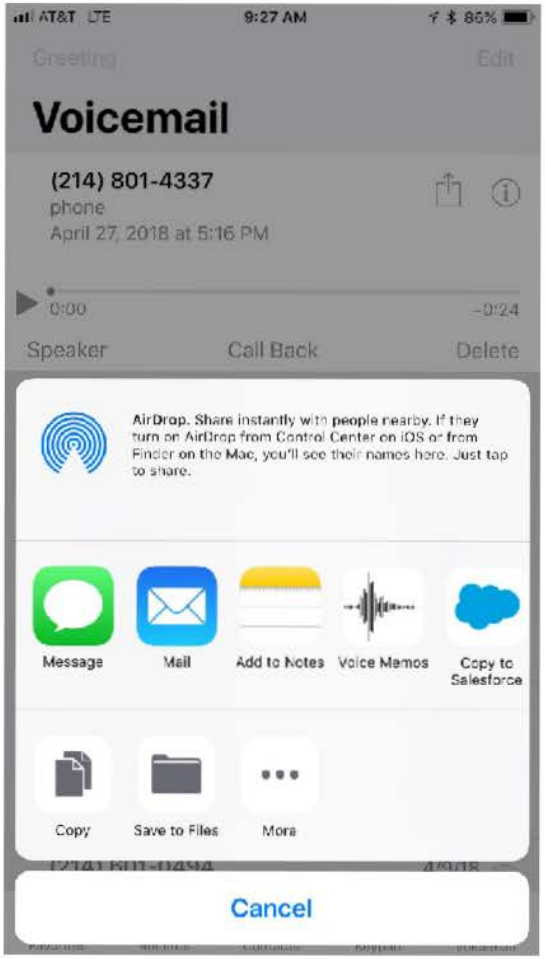
- Please confirm that you have received
- Create the information hub (online)
  - Text
  - Social Media
  - Email
  - Mail
  - Voicemail

Forwarding Text Message



Fowarding Voicemail to Email





Claim Scenario

"The Hack"

The Hack

- Password was discovered on a Gmail or Hotmail Account
- Password was changed
- Hacker read through email looking for cash buyers
- Sent the Cash Buyer wiring instructions to fictitious account
- $50,000 wired and in 20 minutes dispersed into 15 international bank accounts

Phishing

- Be aware of Phishing Schemes
  - Comes from someone you know.
  - Comes from someone who has sent you an email before.
  - Is something you were expecting.
  - Does not look odd, bus has hidden misspelling or characters.
  - **From Z!llow barney@preferredguardian.com**
    - Click Here for your Real Estate Referral.
- How to Address
  - Hit reply and ask, did you mean to send this email?
  - Hover mouse over the link
  - Look at sender carefully – Zillow vs. Z!llow

How can Cyber Crimes Impact a Property Manager

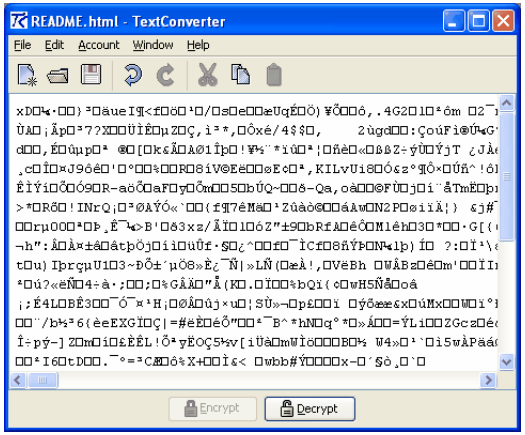
- Theft of Client Personal Information
- Encrypting Information on your computer – Ransom Virus
- Locking up your computer – Down Time
- Hacking into Email and providing wiring instructions to Cash Buyers or Renters
- Hack into a Landlord Computer and change wiring instructions – confirm

Theft of Client Information

- Over 1/3 of all Cyber claims happen to companies under 100 people
- Need to determine who was impacted
- Hiring of Computer Forensics
- Offer Credit Monitoring for 1-2 years

Ransom Virus

- Word, Excel, PDF's look like below



- Files are converted back after paying a Ransom
- Was a tracking device left on computer?

Password

- Fast App – Free App
- Stores Passwords with a single password
- Lose your computer and login to shut down stored passwords
- Double Authenticates Access to stored Password

Email Authentication

- Gmail
  - Add your phone number under Security Checkup
  - Signing into Google, 2 step verification
  - Add Text Message or Phone Call.
  - Yahoo Hotmail and Facebook have this as well

Use Phone for Hotspot

Preventative Methods

- Do not click on links that will allow password capture
- Password System – Last Pass?
- Password Complexity with Cell Phone Verification
- Do not use public Wifi

Maintain Records

- Create a Central Hub
  - Dropbox – 2GB Free
  - Google Drive – 5GB Free
  - Icloud – 5GB Free

Computer Backup

- Back Up Data
  - Mozy
    - 50gb $5.99
    - 125gb $9.99
  - Carbonite
    - $69yr Unlimited
    - $99 with Mirror Image

Tenant Selection Criteria

- Use a Selection Form
  - Names and Numbers of Previous Landlords
  - Monthly Income Requirements
  - Deposit within 24hrs
  - Credit and Criminal Reports Obtained
  - Pet Requirements (Excluded Breeds)

TAR's Model Tenant Selection Criteria Form

1. **Criminal History:** Landlord will perform a criminal history check on you to verify the information provided by you on the Lease Application. Landlord's decision to lease the Property to you may be influenced by the information contained in the report.

2. **Previous Rental History:** Landlord will verify your previous rental history using the information provided by you on the Lease Application. Your failure to provide the requested information, provision of inaccurate information, or information learned upon contacting previous landlords may influence Landlord's decision to lease the Property to you.

3. **Current Income:** Landlord may ask you to verify your income as stated on your Lease Application. Depending upon the rental amount being asked for the Property, the sufficiency of your income along with the ability to verify the stated income, may influence Landlord's decision to lease the Property to you.

4. **Credit History:** Landlord will obtain a Credit Reporting Agency (CRA) report, commonly referred to as a credit report, in order to verify your credit history. Landlord's decision to lease the Property to you may be based upon information obtained from this report. If your application is denied based upon information obtained from your credit report, you will be notified.

5. **Failure to Provide Accurate Information in Application:** Your failure to provide accurate information in your application or your provision of information that is unverifiable will be considered by Landlord when making the decision to lease the Property to you.

6. **Other:** _____

Bad Dogs

Service Animals

- **Emotional support** animals, comfort animals, and **therapy dogs** are not **service** animals under Title II and Title III of the ADA. ... Psychiatric **Service Dog** is a **dog** that has been trained to perform tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and lessen their effects
- Emotional support animals require a letter from a Doctor or therapist – Can obtain online
- Cannot ask if the Animal is an Emotional Support Animal
- Cannot require additional security deposit
- Require a consistent Pet Deposit?

Insurance for Rental Properties

- Home should be insured on a Dwelling Fire Policy or a Landlord Policy and not a Homeowner Policy.
- Make sure the property owner carries liability limits of at least $300,000
- The Landlord should also make sure the policy covers loss of rents
- Property Manager should be added as an “Additional Interest” so you are notified if the policy has been cancelled

Vacant Home

- Homes are considered vacant after 30 or 60 days
- Coverage is either reduced or voided by most insurance companies
- Increase exposure to Theft and Vandalism
- No way to mitigate a water claim

Tips to Avoid Lawsuits

- Maintain Good Communication
- Be liked
- Avoid Giving False Expectations
- Have the Client Make the Hard Decisions
- Document your Advice
- Do not file commission disputes
- Avoid the difficult and unethical client
- Client Interests First

Questions?

PREFERRED GUARDIAN
INSURANCE

Barney Schwartz
CEO

Barney@Preferredguardian.com
972-331-5100 – Office
972-741-2569- Cell

Protecting Tenants at Foreclosure Act reinstated

June 22, 2018 | TAR Staff

A law that expired in December 2014 was restored this month. The Protecting Tenants at Foreclosure Act (PTFA) is intended to shield tenants from eviction because of foreclosure on the property they occupy.

The PTFA applies in the case of any foreclosure on a federally related mortgage loan or on any dwelling or residential real property. Generally, tenants of foreclosed properties may have the right to remain in the property for at least 90 days after foreclosure and may have the right to stay longer.

Here are a few tips property managers should consider with the resurrection of the PTFA.

- Get familiar with Paragraph 4(I): Foreclosure of the *Residential Leasing and Property Management Agreement* (TAR 2201).
- Provide tenants with the *General Information for Tenant of Property Facing Foreclosure* (TAR 2220) form, which is updated to reflect the reinstatement of the PTFA.
- If you are managing a property under foreclosure, be sure to document everything you can.
- Avoid giving tenants or the owner legal advice and refer them to an attorney.

More information for renters in foreclosure is available from the National Low Income Housing Coalition.

TEXAS REAL ESTATE COMMISSION

AGENDA ITEM 15
ADOPTED RULE ACTION FROM THE AUGUST 13 2018, MEETING OF THE COMMISSION
CHAPTER 535 GENERAL PROVISIONS
Subchapter N. Suspension and Revocation of Licensure
§535.155, Advertisements

§535.155. Advertisements.

(a)Each advertisement must include the following in a readily noticeable location in the advertisement:

(1)the name of the license holder or team placing the advertisement; and

(2)the broker's name in at least half the size of the largest contact information for any sales agent, associated broker, or team name contained in the advertisement.

(b)For the purposes of this section:

(1)"Advertisement" is any form of communication by or on behalf of a license holder designed to attract the public to use real estate brokerage services and includes, but is not limited to, all publications, brochures, radio or television broadcasts, all electronic media including email, text messages, social media, the Internet, business stationery, business cards, displays, signs and billboards. Advertisement does not include:

(A) a communication from a license holder to the license holder's current client; and

(B) a directional sign that may also contain only the broker's name or logo.

a communication from a license holder to the license holder's current client.

(2)Associated broker has the meaning assigned by §535.154.

(3)"Broker's name" means:

(A)the broker's name as shown on a license issued by the Commission;

(B)if an individual, an alternate name registered with the Commission; or

(C)any assumed business name that meets the requirements of §535.154.

(4)"Contact Information" means any information that can be used to contact a license holder featured in the advertisement, including a name, phone number, email address, website address, social media handle, scan code or other similar information.

(5)"Party" means a prospective buyer, seller, landlord, or tenant, or an authorized legal representative of a buyer, seller, landlord, or tenant, including a trustee, guardian, executor, administrator, receiver, or attorney-in-fact. The term does not include a license holder who represents a party.

(6)"Team name" has the meaning assigned by §535.154.

(c)For an advertisement on social media or by text, the information required by this section may be located on a separate page or on the account user profile page of the license holder, if the separate page or account user profile is:

(1)readily accessible by a direct link from the social media or text; and

(2)readily noticeable on the separate page or in the account user profile.

(d)For purposes of this section and §1101.652(b)(23) of the Act, an advertisement that misleads or is likely to deceive the public, tends to create a misleading impression, or implies that a sales agent is responsible for the operation of the broker's real estate brokerage business includes, but is not limited to, any advertisement:

(1)that is inaccurate in any material fact or representation;

(2)that does not comply with this section;

(3)that identifies a sales agent as a broker;

(4)that uses a title, such as owner, president, CEO, COO, or other similar title, email or website address that implies a sales agent is responsible for the operations of a brokerage;

(5)that contains a team name with terms that imply that the team is offering brokerage services independent from its sponsoring broker, including, but not limited to, [~~"realty",~~] "brokerage", "company", and "associates";

(6)that contains the name of a sales agent that is not the name as shown on the sales agent's license issued by the Commission or an alternate name registered with the Commission;

(7)that contains the name of a sales agent whose name is, in whole or in part, used in a broker's name and that implies that the sales agent is responsible for the operation of the brokerage;

(8)that causes a member of the public to believe that a person not licensed to conduct real estate brokerage is engaged in real estate brokerage;

(9)that contains the name or likeness of an unlicensed person that does not clearly disclose that the person does not hold a license;

(10)that creates confusion regarding the permitted use of a property;

(11)about the value of a property, unless it is based on an appraisal that is disclosed and readily available upon request by a party or it is given in compliance with §535.17;

(12)that implies the person making the advertisement was involved in a transaction regarding a property when the person had no such role;

(13)about a property that is subject to an exclusive listing agreement without the permission of the listing broker and without disclosing the name of the listing broker unless the listing broker has expressly agreed in writing to waive disclosure;

(14)offering a listed property that is not discontinued within 10 days after the listing agreement is no longer in effect;

(15)about a property 10 days or more after the closing of a transaction unless the current status of the property is included in the advertisement;

(16)that offers to rebate a portion of a license holder's compensation to a party if the advertisement does not disclose that payment of the rebate is subject to the consent of the party the license holder represents in the transaction;

(17)that offers to rebate a portion of a license holder's commission contingent upon a party's use of a specified service provider, or subject to approval by a third party such as a lender, unless the advertisement also contains a disclosure that payment of the rebate is subject to restrictions;

(18)that offers or promotes the use of a real estate service provider other than the license holder and the license holder expects to receive compensation if a party uses those services, if the advertisement does not contain a disclosure that the license holder may receive compensation from the service provider;

(19)that ranks the license holder or another service provider unless the ranking is based on objective criteria disclosed in the advertisement; or

(20)that states or implies that the license holder teaches or offers Commission approved courses in conjunction with an approved school or other approved organization unless the license holder is approved by the Commission to teach or offer the courses.

Agenda Item 17:

Discussion and possible action to propose amendments to 22 TAC §535.2, Broker Responsibility

Summary:

The proposed amendments to §535.2 were recommended by the Commission appointed Broker Responsibility Working Group. The amendments requires a broker to designate anyone who leads, supervises or directs a team in the brokerage to be a delegated supervisor. This will require that person to take a six hour broker responsibility course as part of their required continuing education for each renewal. The timeframe when a license holder must be delegated as a supervisor was shortened from six months to three consecutive months. A reference to a recently adopted advertising rule was added. The term "work files" was deleted and replaced with more specific items. A phrase was added to clarify the broker must ensure that a sponsored sales agent has geographic competence in the market area being served. A minimum criteria for training sales agents engaging in a brokerage activity for the first time was added. And, in recognition of digital communications, the time frames for responding to clients, agents, other brokers, and the Commission were reduced to two and three days respectively.

Staff Recommendation:

Propose amendments as presented.

Recommended Motion:

MOVED, that staff is authorized, on behalf of this Commission, to submit the proposed amendments to 22 TAC §535.2, Broker Responsibility, as presented, along with any technical or non-substantive changes required for proposal, to the *Texas Register*, for publication and public comment.

TREC
TEXAS REAL ESTATE COMMISSION

AGENDA ITEM 17
PROPOSED RULE ACTION FROM THE AUGUST 13, 2018, MEETING OF THE COMMISSION
CHAPTER 535 GENERAL PROVISIONS
Subchapter B. General Provisions Relating to the Requirements of Licensure
§535.2. Broker Responsibility

§535.2. Broker Responsibility.

(a) – (d) (No change.)

(e) A broker may delegate to another license holder the responsibility to assist in administering compliance with the Act and Rules, but the broker may not relinquish overall responsibility for the supervision of license holders sponsored by the broker. Any license holder who leads, supervises, directs, or manages a team must be delegated as a supervisor. Any such delegation must be in writing. A broker shall provide the name of each delegated supervisor to the Commission on a form or through the online process approved by the Commission within 30 days of any such delegation that has lasted or is anticipated to last more than three consecutive [~~six~~] months. The broker shall notify the Commission in the same manner within 30 days after the delegation of a supervisor has ended. It is the responsibility of the broker associate or newly licensed broker to notify the Commission in writing when they are no longer associated with the broker or no longer act as a delegated supervisor.

(f) (No change.)

(g) A broker is responsible to ensure that a sponsored sales agent's advertising complies with §§535.154 and 535.155 [~~§535.154~~] of this title.

(h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the broker must, at a minimum, maintain the following records in a format that is readily available to the Commission for at least four years from the date of closing, termination of the contract, or end of a real estate transaction:

(1) disclosures;

(2) commission agreements such as listing agreements, buyer representation agreements, or other written agreements relied upon to claim compensation;

(3) communications with parties to the transaction [~~work files~~];

(4) offers, contracts and related addenda;

(5) receipts and disbursements of compensation for services subject to the Act;

(6) property management contracts;

(7) appraisals, broker price opinions, and comparative market analyses; and

(8) sponsorship agreements between the broker and sponsored sales agents.

(i) A broker who sponsors sales agents or is a designated broker for a business entity shall maintain, on a current basis, written policies and procedures to ensure that:

(1) Each sponsored sales agent is advised of the scope of the sales agent's authorized activities subject to the Act and is competent to conduct such activities, including competence in the geographic market area where the sales agent represents clients.

(2) Each sponsored sales agent maintains their license in active status at all times while they are engaging in activities subject to the Act.

(3) Any and all compensation paid to a sponsored sales agent for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.

(4) Each sponsored sales agent is provided on a timely basis, before the effective date of the change,

notice of any change to the Act, Rules, or Commission promulgated contract forms.

(5) In addition to completing statutory minimum continuing education requirements, each sponsored sales agent receives such additional educational instruction the broker may deem necessary to obtain and maintain, on a current basis, competency in the scope of the sponsored sales agent's practice subject to the Act. At a minimum, when a sales agent performs a real estate brokerage activity for the first time, the broker must require that the sales agent receive coaching and assistance from an experience license holder competent for that activity.

(6) Each sponsored sales agent complies with the Commission's advertising rules.

(7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are maintained by the broker with appropriate controls in compliance with §535.146.

(8) Records are properly maintained pursuant to subsection (h) of this section.

(j) A broker or supervisor delegated under subsection (e) of this section must respond to sponsored sales agents, clients, and license holders representing other parties in real estate transactions within two [~~three~~] calendar days.

(k) A sponsoring broker or supervisor delegated under subsection (e) of this section shall deliver mail and other correspondence from the Commission to their sponsored sales agents within three [~~10~~] calendar days after receipt.

(l) – (m) (No change.)

This Texas Supreme Court Ruling is a Significant Win for Texas Property Rights

June 06, 2018 | Jaime Lee

Private-property rights in Texas gained a huge victory last month when the Texas Supreme Court unanimously sided with a San Antonio-area homeowner who was renting out his property on a short-term basis.

The homeowners association for the neighborhood claimed that this was a violation of the deed restrictions limiting property use to "residential purposes." However, the justices ruled that short-term rentals *are* residential uses.

The Texas Association of REALTORS® sees this as a significant win for property owners across the state, as TAR has consistently stated that homeowners should be able to use their homes how they see fit, including as short-term rentals, without government intrusion.

While TAR did not file a "friend of the court" brief in this case, TAR closely monitored this case throughout the court process. Look for a more extensive review of the case and its impact on private-property rights in a future issue of *Texas REALTOR*® magazine.

IN THE SUPREME COURT OF TEXAS

No. 16-1005

KENNETH H. TARR, PETITIONER

v.

TIMBERWOOD PARK OWNERS ASSOCIATION, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued February 6, 2018

JUSTICE BROWN delivered the opinion of the Court.

This case requires us to decide whether short-term vacation rentals violate certain restrictive covenants that limit tracts to residential purposes and single-family residences. The trial court concluded that a homeowner violated the restrictions by operating a business on a residential tract and engaging in multi-family, short-term rentals. The court of appeals affirmed, agreeing with the trial court that the rental agreements contradict the residential-purpose limitation because the renters' stays are merely temporary. We hold that the unambiguous restrictive covenants impose no such limitation and decline to inject restrictions into covenants under the guise of judicial interpretation. Accordingly, summary judgment for the homeowner's association was improper. We reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

I

In 2012, Kenneth Tarr purchased a single-family home in San Antonio's Timberwood Park subdivision. Two years later, after his employer transferred him to Houston, Tarr began advertising the home for rent on websites such as VRBO (short for Vacation Rentals by Owner). *See Santa Monica Beach Prop. Owners Ass'n v. Acord*, 219 So. 3d 111, 113 n.2 (Fla. Dist. Ct. App. 2017) (describing VRBO as "a website on which owners can advertise their houses and other properties for rent"). He also formed a limited-liability company called "Linda's Hill Country Home LLC" to manage the rental of the home. Between June and October of 2014, Tarr entered into thirty-one short-term rental agreements, ranging from one to seven days each. In the aggregate, the home was rented for 102 days.

Tarr's short-term rental contracts permit various-sized rental parties but limit the guest count to no more than ten people. And the home was indeed leased to parties of all sizes. For example, the home was booked by parties consisting of three adults and three children, four adults and five children, six adults and four children, seven adults and one child, and nine adults and no children. Nearly one quarter of the rentals were to two adults accompanied by as many as six children. The agreement does not mandate that the guests be members of a single family, and the record contains no evidence of the familial relationships of the individuals to whom the home was leased. These rental groups came from towns throughout Texas, as well as other states, such as Washington and Indiana.

The short-term rental agreement that Tarr employed leased the entire home, rather than individual rooms, to these various groups. So unlike what one might expect at a hotel, rental groups were alone in Tarr's house, unaccompanied by employees and without services a hotel stay might

provide, such as cooked meals or housekeeping. In addition, no business office, leasing office, signage, or other business activity exists at the home. But Tarr does remit hotel taxes applicable to home rentals of less than thirty days. Specifically, he pays the Texas Hotel Tax, which applies to such rentals statewide, *see* TEX. TAX CODE ch. 156, and the San Antonio/Bexar County Hotel/Motel Occupancy Tax.

The dispute that led to this case arose late in 2014. As reflected in a plat recorded in the Bexar County plat records in 1979, Timberwood Park Unit III, which includes Tarr's property, is subject to certain "easements, covenants, conditions, and restrictions." In July and September of 2014, the Timberwood Park Owners Association notified Tarr that the rental of his home violated two deed restrictions: (1) the residential-purpose covenant, and (2) the single-family-residence covenant. The residential-purpose covenant provides, in part:

> All tracts shall be used solely for residential purposes, except tracts designated . . . 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 . . . .

No one disputes that Tarr's tract is not designated for business purposes. A separate paragraph sets forth the single-family-residence restriction, which provides:

> No building, other than a single family residence containing not less than 1,750 square feet, exclusive of open porches, breezeways, carports and garages, and having not less than 75% of its exterior ground floor walls constructed of masonry, i.e., brick, rock, concrete, or concrete products shall be erected or constructed on any residential tract in Timberwood Park Unit III and no garage may be erected except simultaneously with or subsequent to erection of residence. . . . All buildings must be completed not later than six (6) months after laying foundations and no structures or house trailers of any kind may be moved on to the property.

Because the leases of Tarr's home were temporary, the association determined short-term rentals did not adhere to the "single family residence" restriction and, instead, rendered the tract

"a commercial rental property." So the association sent Tarr a violation notification requesting his compliance. The notification further indicated that the violation would remain in effect until the online advertisements were taken down and the home was no longer used for commercial purposes. Should he not comply within fourteen days, the notification letter warned, the association would assess a fine of $25 per day.

Tarr did not heed the association's warnings. And throughout the dispute, neither the association nor Tarr attempted to amend the deed restrictions to specify a minimum duration for leasing—an option available to both of them under the deed's amendment provisions. Instead, the fines against Tarr mounted steadily.[1] Tarr appealed the imposition of the fines to the association's board. The board heard and denied the appeal in September 2014, stating it would continue imposing the fines so long as the violations persisted. Five days after the board sent a letter denying his appeal, Tarr sued for a declaratory judgment and claimed breach of the restrictive covenants.

Tarr sought a declaration that the deed restrictions do not impose a minimum duration on occupancy or leasing. Nor, Tarr contended, do they permit the association to police home-rental advertisements or impose penalties in the form of fines. The association filed a general denial; both parties sought attorney's fees.

The trial court soon faced competing traditional summary-judgment motions. It granted the association's and denied Tarr's, concluding that Tarr operated a business on his residential lot and engaged in "multi-family," short-term rentals in violation of the unambiguous deed restrictions. In doing so, the trial court noted that it must ascertain the drafters' intent by "balancing the statutory

[1] In its brief, the association now denies ever imposing these fines. However, the record, including the letters the association's board sent to Tarr, indicate otherwise.

requirement to liberally construe language within restrictive covenants with the common law mandate to strictly construe restrictive clauses in real estate instruments resolving all doubt in favor of the free use of real estate." It reasoned that one's use of a home is not residential unless the occupant is physically present and has an existing intent to physically remain there for a sufficient duration. The trial court also permanently enjoined Tarr from "operating a business on his residential lot" and from engaging in short-term rentals to "multi-family parties." In a separate order, the trial court awarded attorney's fees to the association. Tarr appealed.

The Fourth Court of Appeals affirmed the trial court, holding that the deed restrictions prevented Tarr from leasing the home for short periods of time to individuals who did not possess an intent to remain in the house. 510 S.W.3d 725, 730 (Tex. App.—San Antonio 2016). First, the court noted that the intent underlying the covenant at issue must be afforded a liberal construction as it is unambiguous, and thus the rule disfavoring restrictions on the free use of property did not apply. *Id.* at 729–30. The court of appeals relied on its opinion in *Munson v. Milton*, in which it noted that though "residence" welcomes a variety of connotations, the term usually mandates both a "physical presence and an intention to remain." *Id.* at 730 (quoting *Munson v. Milton*, 948 S.W.2d 813, 816 (Tex. App.—San Antonio 1997, pet. denied)). Accordingly, it distinguished between "transient" and "residential" purposes on property subject to such restrictive covenants. *Id.* at 730–31. And under the facts of this case, especially in light of the short-term rental agreements and Tarr's creation of an LLC to manage the property, as well as his payment of hotel taxes, the court of appeals held the leasing agreements to be in direct contradiction with its residential-purpose test—that the renter intend to remain at the home with a contemporaneous physical presence. *Id.* Tarr sought our review.

II

A trial court's ruling on a motion for summary judgment is reviewed de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004). To prevail on a traditional motion for summary judgment, the movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). Here, Tarr and the association filed cross-motions for summary judgment. When competing summary-judgment motions are filed, "each party bears the burden of establishing that it is entitled to judgment as a matter of law." *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). In that instance, if "the trial court grants one motion and denies the other, the reviewing court should determine all questions presented" and "render the judgment that the trial court should have rendered." *Id.*; *see also Comm'rs Court of Titus Cty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997) (requiring appellate courts to "review the summary judgment evidence presented by both sides" when making this inquiry); *Guynes v. Galveston Cty.*, 861 S.W.2d 861, 862 (Tex. 1993) (reviewing cross-motions for summary judgment where the facts were undisputed by "determining all legal questions presented").

III

The parties do not dispute that the deed provisions at issue contain restrictive covenants. Like a trial court's summary-judgment ruling, courts review "a trial court's interpretation of a restrictive covenant de novo." *See Buckner v. Lakes of Somerset Homeowners Ass'n*, 133 S.W.3d 294, 297 (Tex. App.—Fort Worth 2004, pet. denied). Before this Court, Tarr argues that if a deed restriction does not expressly address or restrict a certain property use, that usage must be permitted. Accordingly, short-term rentals must be permitted because the Timberwood Park

Unit III's deeds remain silent as to short-term rentals. Tarr further contends that a deed restriction forbidding business purposes and permitting only residential purposes does not alter the permissibility of renting property in Timberwood for short durations of time. Meanwhile, the association interprets the restrictive covenants as prohibiting owners from using their tracts for any purpose other than single-family, residential use, which does not encompass Tarr's short-term rentals as that is a business, transient, multi-family use. It employs a "liberal" reading of the covenants and reasons that short-term rentals are not residential because the individuals occupying the home do not satisfy the definition of "residence" that it advances: physical presence for a substantial period of time coupled with an intent to remain. Both parties, however, maintain that the restrictive covenants they rely on are unambiguous.

A

The parties arrive at their divergent interpretations of the restrictive covenants by employing different mechanisms to give effect to the drafters' intent. In Tarr's view, restrictive covenants must be strictly construed as they historically were at common law. The association contends, on the other hand, that the legislature superseded the common-law rule when it adopted Texas Property Code section 202.003(a), calling for restrictive covenants to be liberally construed.

"A 'restrictive covenant' is a negative covenant that limits permissible uses of land." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.3(3) (AM. L. INST. 2000). Such covenants limit the use an owner or occupier of land can make of their property. *See id.* cmt. e; *see also* TEX. PROP. CODE § 202.001(4) (defining "[r]estrictive covenant"). "The freedom to restrict the use of land gives individuals the ability to control land in a manner in which they deem to be socially preferable. The use of restrictive covenants to control the use of land has its roots as far back as

sixteenth century England." David A. Johnson, *One Step Forward, Two Steps Back: Construction of Restrictive Covenants After the Implementation of Section 202.003 of the Texas Property Code*, 32 TEX. TECH L. REV. 355, 358 (2001) (footnote omitted).

"The law recognizes the right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal." *Curlee v. Walker*, 244 S.W. 497, 498 (Tex. 1922). And while our jurisprudence does not favor restraints on the free use of land, we have previously acknowledged that restrictive covenants can enhance the value of real property. *See Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981). Accordingly, when land is sold, the agreed-to covenants "enter[] into and become[] a part of the consideration." *Curlee*, 244 S.W. at 498 (quoting *Hooper v. Lottman*, 171 S.W. 270, 272 (Tex. Civ. App.—El Paso 1914, no writ)). "The buyer submits to a burden upon his own land because of the fact that a like burden imposed on his neighbor's lot will be beneficial to both lots." *Id.* (quoting *Hooper*, 171 S.W. at 272). Consequently, the covenant "between the original owner and each purchaser is . . . mutual." *Id.* (quoting *Hooper*, 171 S.W. at 272).

So the courts have always treated unambiguous covenants "as valid contracts between individuals." Johnson, *supra*, at 356; *see also Ski Masters of Tex., LLC v. Heinemeyer*, 269 S.W.3d 662, 668 (Tex. App.—San Antonio 2008, no pet.) ("A restrictive covenant is a contractual agreement between the seller and the purchaser of real property."). Therefore, "restrictive covenants are subject to the general rules of contract construction." *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). Whether a restrictive covenant is ambiguous is a question of law for the court to decide by looking at "the covenants as a whole in light of the circumstances present when the parties entered the agreement." *Id.*; *see also Coker v. Coker*, 650 S.W.2d 391, 394 (Tex.

1983). "Like a contract, covenants are 'unambiguous as a matter of law if [they] can be given a definite or certain legal meaning." *Pilarcik*, 966 S.W.2d at 478 (alteration in original) (first quoting *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997); and then citing *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)). However, "if the covenants are susceptible to more than one reasonable interpretation, they are ambiguous." *Id.* "Mere disagreement over the interpretation of a restrictive covenant does not render it ambiguous." *Buckner*, 133 S.W.3d at 297.

A paramount concern when construing covenants is giving effect to the objective intent of the drafters of the restrictive covenant as it is reflected in the language chosen. *See Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987); *see also Owens v. Ousey*, 241 S.W.3d 124, 129 (Tex. App.—Austin 2007, pet. denied). Accordingly, "[c]ourts must examine the covenants as a whole in light of the circumstances present when the parties entered the agreement," *Pilarcik*, 966 S.W.2d at 478, giving the "words used in the restrictive covenant . . . the meaning which they commonly held as of the date the covenant was written, and not as of some subsequent date." *Wilmoth*, 734 S.W.2d at 658. Moreover, the words in a covenant "may not be enlarged, extended, stretched or changed by construction." *Id.* at 657; *accord Buckner*, 133 S.W.3d at 297. And courts should avoid any "construction that nullifies a restrictive covenant provision." *Pilarcik*, 966 S.W.2d at 479.

Our courts enforce these private agreements subject to certain well-established limitations. For instance, it must "appear[] that a general building scheme or plan for the development of a tract of land has been adopted, designed to make it more attractive for residential purposes by reason of certain restrictions to be imposed on each of the separate lots sold." *Curlee*, 244 S.W. at 498 (quoting *Hooper*, 171 S.W. at 272). Moreover, we have continuously called for a covenant's

enforcement if it is "confined to a lawful purpose and [is] within reasonable bounds and the language employed is clear." *Davis*, 620 S.W.2d at 565. But we have also noted that "covenants restricting the free use of property are not favored," *id.*, because "[t]he right of individuals to use their own property as they wish remains one of the most fundamental rights that individual property owners possess." Johnson, *supra*, at 356. As such, we have limited this mandate to enforce restrictive covenants to instances where purchasers of real property buy "with actual or constructive knowledge of the scheme, and the covenant was part of the subject-matter of his purchase." *Curlee*, 244 S.W. at 498 (quoting *Hooper*, 171 S.W. at 272). If, however, one "purchases for value and without notice," he "takes the land free from the restriction." *Davis*, 620 S.W.2d at 566. Whether the purchaser had notice "is determined at the date of the inception of the general plan or scheme," which is the time at which the restrictions were filed in the county's property records. *Id.* at 567.

For those reasons, courts nationwide have long afforded restrictive covenants a narrow interpretation.[2] For example, the Kansas Supreme Court has explained:

> The rules governing the construction of covenants imposing restrictions on the use of realty are the same as those applicable to any contract or covenant, including the rule that, where there is no ambiguity in the language used, there is no room for construction, and the plain meaning of the language governs. When construction is necessary, the language used will be given its obvious meaning.

[2] *See, e.g.*, *Stephenson v. Perlitz*, 532 S.W.2d 954, 956 (Tex. 1976) (recognizing that other courts have found specific covenants ambiguous, and thus applying a "long-standing rule of construction" that adopts the interpretation that "least restricts the free use of the land" (quoting *Houk v. Ross*, 296 N.E.2d 266, 275 (Ohio 1973))); *see also Wood v. Blancke*, 8 N.W.2d 67, 69 (Mich. 1943) ("Restrictive covenants in deeds are construed strictly against grantors and those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property."); *1733 Estates Ass'n v. Randolph*, 485 N.W.2d 339, 340 (Neb. Ct. App. 1992) ("[C]ovenants restricting the use of property are not favored in law. If restrictive covenants are ambiguous, they will be construed in a manner permitting the maximum unrestricted use of the property." (citation omitted)); *Hunt v. Held*, 107 N.E. 765, 766 (Ohio 1914) ("[I]t is a well-settled rule that in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed[,] all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee.").

> Another well-settled rule is that covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction. Doubt will be resolved in favor of the unrestricted use of property.

Sporn v. Overholt, 262 P.2d 828, 830 (Kan. 1953) (citation omitted). Thus, the court explained that the construction of a covenant will not preclude any property use that is "not plainly prohibited" by the restriction's clear language. *Id.* (quoting *Bear v. Bernstein*, 36 So. 2d 483, 484 (Ala. 1948)).

Like those jurisdictions, "the courts in Texas have approached . . . restrictive covenants with some skepticism." Johnson, *supra*, at 356. In 1925, this Court adopted an opinion of the Commission of Appeals, which relayed this interpretative standard:

> Covenants or restrictive clauses in instruments concerning real estate must be construed strictly, favoring the grantee and against the grantor, and all doubts should be resolved in favor of the free and unrestricted use of the premises.
>
> A reservation contained in an instrument of conveyance or lease which favors the grantor or lessor and tends to limit the free use of the premises by the grantee or lessee will not be enlarged by construction, but will be given effect according to the plain meaning and intent of the language used.

Settegast v. Foley Bros. Dry Goods Co., 270 S.W. 1014, 1016 (Tex. 1925).[3] Texas jurisprudence steadily adhered to this strict approach for decades. Indeed, fifty-six years after *Settegast v. Foley*

[3] Six years after our 1925 decision, the Amarillo court of civil appeals explained the skepticism with which courts view the application of restrictive covenants:

> In this country[,] real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed. Hence, 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 as to its use; and, hence, in the construction of deeds containing restrictions and prohibitions as to the use of the property by a grantee, all doubts should, as a general rule, be resolved in favor of a free use of property and against restrictions.

Ragland v. Overton, 44 S.W.2d 768, 771 (Tex. App.—Amarillo 1931, no writ) (quoting 4 Thompson on Real Property § 3361). We adopted this statement a decade later and explained: "Being in derogation of the fee conveyed by the deed, if there be any ambiguity in the terms of the restrictions, or substantial doubt of its meaning, the ambiguity and doubt should be resolved in favor of the free use of the land." *Baker v. Henderson*, 153 S.W.2d 465, 467 (Tex. 1941).

Bros. Dry Goods Co., this Court regarded these standards as "fundamental rules," which we linked with the requirement that a purchaser have notice of the limitations on his title:

> Although covenants restricting the free use of property are not favored, when restrictions are confined to a lawful purpose and are within reasonable bounds and the language employed is clear, such covenants will be enforced. However, a purchaser is bound by only those restrictive covenants attaching to the property of which he has actual or constructive notice. One who purchases for value and without notice takes the land free from the restriction.

Davis, 620 S.W.2d at 565–66 (citation omitted). We reasoned that absent such notice, "it cannot be said that they entered into the scheme or assumed the mutual obligation." *See id.* at 567.

Despite these principles being well established, courts have often reached seemingly divergent holdings. These discrepancies initially arose from the factually specific nature of construing covenants and determining if the complained-of conduct was a violation of a specific covenant's prescriptions.[4] But the catalyst for the dissimilarities among cases may have changed in 1987 with the enactment of Texas Property Code section 202.003(a), which has caused many to doubt the common-law principles' vitality. *Cf.* Johnson, *supra*, at 363 ("Th[e] strict construction of restrictive covenants by the Texas courts continued directly up to the Texas Legislature's passage of Texas Property Code section 202.003(a) in 1987.").

In 1987, the legislature enacted House Bill 356 to "allow property owners to withdraw their signatures from a petition to modify" or terminate restrictive covenants "without lengthy and expensive litigation." House Comm. on Judicial Affairs, Bill Analysis, Tex. H.B. 356, 70th Leg.,

[4] *See Hooper*, 171 S.W. at 271 ("[A]s may be anticipated, from the very nature of the topic[of restrictive covenants,] the cases abound in fine and subtle distinctions. Many of the decisions upon this branch of the law appear to be in hopeless conflict, but are usually reconcilable when the facts peculiar to each are understood. In fact, the courts seem to have had no special difficulty in ascertaining and declaring the controlling general principles of the law, but, in their application to concrete facts, it may well be said that the decisions are in hopeless conflict and confusion, and individual cases are without value as precedents, except as general principles are recognized and declared.").

R.S. (1987). Among its provisions was a rule of construction, now codified at Texas Property Code section 202.003: "A restrictive covenant shall be liberally construed to give effect to its purposes and intent." Act of June 1, 1987, 70th Leg., R.S., ch. 712, § 1, 1987 Gen. Laws 2585, 2585 (codified at TEX. PROP. CODE § 202.003(a)). Its application was given retroactive effect so that it applies to all covenants regardless of when they were created. TEX. PROP. CODE § 202.002(a).

With Texas Property Code section 202.003(a)'s promulgation, courts suddenly had extreme "difficulty in ascertaining and declaring the controlling general principles of the law," *cf. Hooper*, 171 S.W. at 271, because they began to question whether this legislative enactment was an attempt to contravene our long-adhered-to common-law standards. *See* Johnson, *supra*, at 368, 372. And, unfortunately, "the legislature provided no explanation as to the motivations or necessity for . . . change" to help guide our courts. *Id.* at 370. As a result, Texas' courts of appeals have grappled "with the varying standards established by the passage of section 202.003 and the historical common-law rules of construction" but "have been unable to determine any uniform standard for interpreting ambiguous restrictive covenants." *See id.* at 371–72.

Thirty-one years after the statute's enactment, our courts remain immersed in this debate.[5] And as in those courts, the parties here dispute what standard controls our analysis. Unsurprisingly,

[5] One court described the hesitation in electing which standard to utilize as follows:

> Some courts of appeals have recognized that the common-law requirement of construing restrictions strictly and section 202.003(a)'s requirement of construing residential covenants liberally to effectuate their purposes and intent might appear contradictory. As a result, some courts of appeals have held or implied that section 202.003(a)'s liberal-construction rule concerning residential covenants supersedes the common-law rule of strict construction. In contrast, other courts of appeals, including ours, have concluded that there is no discernable conflict between the common law and section 202.003(a). Even among the courts that believe that the common law and section 202.003(a) can be reconciled, there exists a split in how to apply section 202.003(a). Some of these courts, including ours, have simply continued to apply the common-law rule without a precise explanation of how to reconcile it with section 202.003(a). Other courts of appeals have held that the common-law rule applies only when there is an ambiguity concerning the drafter's intent, but to

Tarr contends that section 202.003(a) did not alter the judicial restraint courts have historically exercised when interpreting covenants, so he advances that the common-law strict-construction requirement still governs.[6] Conversely, the association argues that the statute trumps the common-law approach and that section 202.003(a) should be applied to covenants that succumb to the pitfalls of ambiguity. So, although the association contends that the deed restrictions are unambiguous, it argues in the alternative that even if they are ambiguous, section 202.003(a) should still govern this Court's review.[7]

> determine if such an ambiguity exists, these courts first apply section 202.003(a)'s liberal-construction mandate.
>
> Finally, . . . some courts of appeals since 1987 have simply continued applying the common-law strict-construction rule without referring to section 202.003(a) at all. Others, including ours, have applied section 202.003(a)'s liberal-construction standard without referring to the common-law construction principles at all.

Uptegraph v. Sandalwood Civic Club, 312 S.W.3d 918, 926–27 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (footnotes omitted). And as exemplified by that passage, the divide is even engrained within single appellate courts, resulting in contradictory standards being applied in various opinions issued by the same court of appeals. *See id.*

[6] Tarr argues that the common-law rule protects property rights against deed restrictions that are either unclear or silent as to the permissibility of certain activities. In addition, he raises concerns pertaining to ambiguity, constitutionality, and homeowners' autonomy. First, Tarr notes that none of the appellate decisions "explain what 'liberal' means." Thus, he argues the statute's use of that term is ambiguous. And he posits that the statute may be unconstitutionally vague as it may violate due process if and when it subjects property owners to unfair enforcement actions. This is so because what constitutes a "liberal" reading of a covenant is too subjective and can potentially deprive an owner of their freedom to make certain uses of their property. In an attempt to illustrate this point, Tarr notes that when purchasing a parcel subject to a residential-use limitation, the buyer would not be able to discern restrictions on their ability to rent the property and the applicable minimum duration of that lease. But he concedes the constitutionality issue may not be ripe for review, so we do not analyze that contention. *See San Antonio Gen. Drivers, Helpers Local No. 657 v. Thornton*, 299 S.W.2d 911, 915 (Tex. 1957) ("A court will not pass on the constitutionality of a statute if the particular case before it may be decided without doing so."). Finally, Tarr argues that any questions about how restrictions are to be applied should be left to the members of homeowners' associations who can amend their property restrictions. To liberally construe deed restrictions in a way that expands the restrictions' reach and that impairs the free use of property would usurp the property owners' power to self-govern. Such a usurpation, Tarr argues, diminishes both the owners' property rights and their freedom to contract.

[7] Notably, this contravenes many courts' approaches. *Compare Highlands Mgmt. Co. v. First Interstate Bank of Tex., N.A.*, 956 S.W.2d 749, 752 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) ("'[T]he covenant should not be hedged about with strict construction, but given a liberal construction to carry out its evident purpose.' This rule of construction . . . applies to all restrictive covenants." (alteration in original) (quoting *Candlelight Hills Civic Ass'n v. Goodwin*, 763 S.W.2d 474, 477 (Tex. App.—Houston [14th Dist.] 1988, writ denied))), *with Jennings v. Bindseil*, 258 S.W.3d 190, 195 (Tex. App.—Austin 2008, no pet.) ("When the language of a restrictive covenant is unambiguous, the Texas Property Code requires that the restrictive covenant be liberally construed . . . . However, if the language is

We have not yet deliberated section 202.003(a)'s effect, if any, on the construction principles we have long employed to interpret restrictive covenants.[8] Nor do we reach that decision today. We don't have to reconcile any potential conflict between section 202.003(a) and the common-law principles—or whether those common-law standards can ever again be appropriately employed—because our conclusion today would be the same regardless of which interpretative standard prevails. As explained below, the covenants at issue unambiguously fail to address the property use complained of in this case. No construction, no matter how liberal, can construe a property restriction into existence when the covenant is silent as to that limitation.[9] A day may

found to be ambiguous, [it] is construed strictly against the party seeking to enforce the restriction, and all doubts must be resolved in favor of the free and unrestricted use of the property." (citation omitted)). But the association notes that section 202.003(a) does not confine its applicability to unambiguous covenants. And nor should it in the association's point of view. Since an unambiguous covenant can be strictly construed according to its plain language, a liberal construction is not required. Instead, it alleges that the legislative mandate to liberally construe restrictive covenants governs the interpretation of *ambiguous* deed restrictions that cannot be strictly construed.

[8] "The Texas Supreme Court has noted, but not yet resolved, the potential conflict between the common law and section 202.003(a)." *Uptegraph*, 312 S.W.3d at 927. House Bill 364 was signed into law on June 18, 1987. *See* Act of June 1, 1987, 70th Leg., R.S., ch. 712, § 1, 1987 Gen. Laws 2585, 2585 (codified at TEX. PROP. CODE § 202.003(a)). A few weeks later, this Court had to interpret restrictive covenants in *Wilmoth v. Wilcox*. *See* 734 S.W.2d 656. In doing so, however, we did not reference the legislature's recent call for a liberal construction. *See generally id.* Instead, we simply turned to the common-law mandates. *See id.* at 657–58 ("[W]e note that covenants restricting the free use of land are not favored by the courts, but when they are confined to a lawful purpose and are clearly worded, they will be enforced. All doubts must be resolved in favor of the free and unrestricted use of the premises, and the restrictive clause must be construed strictly against the party seeking to enforce it." (citations omitted)). On September 16, 1987, two months after the Property Code amendments, we denied rehearing. *Id.* at 656.

Eleven years later, we acknowledged section 202.003(a)'s promulgation. In *Pilarcik v. Emmons*, the parties debated what standards controlled the covenants' interpretation with one side advancing the common-law rules and the other calling for a liberal construction pursuant to section 202.003(a). *See* 966 S.W.2d at 478. After noting this dispute, we recounted general principles without mentioning the common-law rules. *See id.* We never determined whether the statutory liberal construction or the common-law strict construction controlled the interpretation of restrictive covenants. *See generally id.* at 478–79. Instead, we held the covenants at issue were unambiguous and decided the case by merely analyzing the drafters' intent. *See id.*

[9] *See Waterford Harbor Master Ass'n v. Landolt*, No. 14-13-00817-CV, 2015 WL 293262, at *6 (Tex. App.—Houston [14th Dist.] Jan. 22, 2015, pet. denied) (mem. op.) (declining to rewrite a covenant "or add to its language under the guise of interpretation," and instead electing to "enforce it as written"); *Hollis v. Gallagher*, No. 03-11-00278-CV, 2012 WL 3793288, at *7 (Tex. App.—Austin Aug. 28, 2012, no pet.) (mem. op.) ("Courts[] . . . may not 'liberally' construe a restrictive covenant to say something that it plainly does not say." (citations omitted)); *Hicks v. Falcon Wood Prop. Owners Ass'n*, No. 03-09-00238-CV, 2010 WL 3271723, at *7 (Tex. App.—Austin Aug. 19, 2010, no pet.) (mem. op.) ("[T]o say that an unambiguous restrictive covenant is to be 'liberally construed' does not

come when we must choose between strictly or liberally construing restrictive covenants. But it is not this day. So we proceed to the merits.

B

Pertaining to the trial court's "multi-family" use holding, the association argues that the covenants prohibit the use of tracts in the subdivision for any purpose other than single-family residences and for residential purposes. And it maintains the trial court properly concluded that Tarr's use violated the "single-family, residential purpose" restriction because he has leased to parties who are not members of a single family. In response, Tarr argues that the single-family restriction simply limits the type of structure allowed rather than restricting use.[10]

In arguing that the deeds impose a single-family, residential-use restriction, the association has combined two separate covenants. Paragraph one of the Timberwood Park Unit III subdivision's deeds provides:

> 1. 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 . . . .

That covenant does not set forth any provisions pertaining to single-family uses or residences. Instead, that limitation is imposed by paragraph three:

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mean that it necessarily restricts the land use in dispute—the covenant, properly construed, may unambiguously state otherwise."); *Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d 524, 528 (Tex. App.—San Antonio 2000, pet. denied) ("If a phrase or covenant is so worded that we can give it a certain legal meaning, it is not ambiguous, and we will construe it as a matter of law, giving effect to the objective intent of the drafter as expressed or as is apparent in the provision."); *Permian Basin Ctrs. for Mental Health & Mental Retardation v. Alsobrook*, 723 S.W.2d 774, 776 (Tex. App.—El Paso 1986, writ ref'd n.r.e.) ("A restrictive covenant that is clear and unambiguous[] . . . can be enforced as written, but it cannot be enlarged by interpretation."); *see also Bear*, 36 So. 2d at 484 ("[C]ourts should not extend, by construction, the restraint beyond its proper scope by writing into it what is not clearly inhibited.").

[10] Tarr further notes the lack of evidence that the tenants were members of multiple families. Instead, the evidence concerned only the number of occupants and did not identify how, or even whether, they were related to each other.

> 3. No building, other than a single family residence containing not less than 1,750 square feet, exclusive of open porches, breezeways, carports and garages, and having not less than 75% of its exterior ground floor walls constructed of masonry, i.e., brick, rock, concrete, or concrete products shall be erected or constructed on any residential tract . . . and no garage may be erected except simultaneously with or subsequent to erection of residence. No less than a 300 lb. per square asphalt or fiberglass shingle shall be used in any construction in Timberwood Park Unit III.

Although the association is correct that the deeds mention both single-family residences and mandate a residential purpose, to combine those provisions into one mega-restriction is a bit of a stretch. Both the context in which those provisions arise and the case law construing similar covenants demonstrate that those restrictions must be read as separate and distinct.

In discerning the drafters' intent, courts must "consider whether the covenant's restrictions apply to the use of the building or to the nature of the physical structure" to be erected on the property. Thomas F. Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421, 426 (1984). Accordingly, courts have often distinguished between *use* restrictions and *structural* restrictions and have declined to conflate the two. *See, e.g.*, *1733 Estates*, 485 N.W.2d at 340–41.

Indeed, in *Stephenson v. Perlitz*, this Court held, "A restriction that property is for residence purposes is quite different from a restriction which additionally provides that only one residence may be erected on the property." 532 S.W.2d at 956. So, we continued, where tracts are limited to residential uses, the covenants require merely that the property be used for "living purposes"; they did not also impart a prohibition against duplex or apartment housing. *Id.* at 955 (citation omitted). *Stephenson*'s holding is particularly relevant in this case as it came just three years before the Timberwood deeds were recorded. *See Pilarcik*, 966 S.W.2d at 478 (requiring courts to "examine the covenants as a whole in light of the circumstances present when the parties entered the

agreement"); *Wilmoth*, 734 S.W.2d at 658 (giving "words used in the restrictive covenant . . . the meaning which they commonly held as of the date the covenant was written, and not as of some subsequent date").

Permian Basin Centers for Mental Health & Mental Retardation v. Alsobrook is also instructive. 723 S.W.2d at 774. In that case, the court of appeals interpreted separate covenants, one of which provided the tracts "shall be known and described as residential lots, except[] . . . [those] designated as commercial lots." *Id.* at 775. The second paragraph provided: "No structures shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling, not to exceed two stories in height[] . . . ." *Id.* The court held that "single-family dwelling" referred "only to the type of structure that may be built on the property," which was the interpretation that was "more reasonable and more in keeping with what was intended by the original grantor." *Id.* at 776. It analyzed the two different paragraphs as follows:

> The paragraph in which the term "single-family dwelling" appears deals with the character of structures that may be "erected, altered, placed or permitted to remain on any residential building plot." There is no mention in this or any other paragraph of the covenant that seeks to impose a single-family occupancy requirement. The only "use" provisions in the covenant distinguish between commercial and residential use and prohibit the use of outbuildings as residences.

Id. The court concluded the restrictive covenant "limits the use of the property to residential purposes, and the term 'single-family dwelling' limits the residential use to single-family structures—that is, homes designed for single families as opposed to duplexes or apartment buildings." *Id.* at 777.

Likewise, the limitations in Tarr's deeds are set forth in separate paragraphs that speak to distinct restrictions. Like the covenants in *Permian Basin*, paragraph three of the Timberwood

deed describes structural or architectural limitations by specifying that the building "erected or constructed" upon a tract must be a "single family residence," specifying the minimum square footage of such a building, and the materials of which it shall be constructed. The only instance in which the deed imposes the single-family restriction is in this structural limitation. Conversely, paragraph one speaks to how owners in the subdivision may permissibly use their property. It limits their use to "residential purposes" as contradistinguished from "business purposes." It remains silent as to whether so-called "multi-family" use is permitted. Other use provisions in the deed—which speak to dumping garbage and breeding animals on tracts, for example—also fail to restrict owners' use to single-family purposes.

We cannot ignore the context in which these limitations are imposed and conflate the two paragraphs. *See Boatner v. Reitz*, No. 03-16-00817-CV, 2017 WL 3902614, at *5 (Tex. App.—Austin Aug. 22, 2017, no pet.) (mem. op.) ("The references in the deed restrictions to the terms 'single family' and 'dwelling,' however, are in the context of the building requirements for the main structure on the property as compared with the provision addressing the 'use' of the property."); *see also 1733 Estates*, 485 N.W.2d at 340 (defining "residential purposes" as a limit on "the way the property is used" while "[s]ingle-family dwelling" limits "the type of building which may be constructed and not to the use of such building"). The single-family residence restriction merely limits the structure that can properly be erected upon Tarr's tract and not the activities that can permissibly take place in that structure.[11] The parties do not dispute that Tarr's

[11] Notably, by considering the covenant's context and the meaning afforded to such a covenant in 1979, we would reach this interpretation regardless of whether we strictly or liberally construed it. *See Wilmoth*, 734 S.W.2d at 657–58 ("[T]he restrictive clause must be construed strictly against the party seeking to enforce it. The words used in the restriction, and the restriction as a whole, may not be enlarged, extended, stretched or changed by construction. . . . The words used . . . must be given the meaning which they commonly held as of the date the covenant was written[] . . . ." (citations omitted)); *Liberal Interpretation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining a

tract contains a single-family residence, so he has not violated the single-family-residence restriction. Because the single-family-residence limitation is not relevant to the short-term rentals at issue, we turn to the question of whether paragraph one—the paragraph restricting use—bars such activity.

C

The "use" restriction in paragraph one of Tarr's deed provides: "All tracts shall be used solely for residential purposes, except tracts designated on the above mentioned plat for business purposes[] . . . ." The court of appeals held that the covenant unambiguously restricted Tarr's short-term-rental use because use of the word "residence" connotes a "physical presence and an intention to remain." 510 S.W.3d at 730 (quoting *Munson*, 948 S.W.2d at 816). Distinguishing between "residential purposes" and "transient purposes," the court concluded that a homeowner who leases "his home to be used for transient purposes" violates the covenant that limits the use of his tract to "*solely* . . . residential purposes."[12] *Id.*

Tarr argues that "residential purposes" must be read in comparison to "business purposes," focusing on the activities in which the people in possession of the property partake. So Tarr juxtaposes activities such as eating, sleeping, praying, and watching TV with activities such as blacksmithing, shop-tending, event-hosting, and automobile repair. In addition, Tarr refutes that duration of use can be considered in conjunction with the character of the use; "residential

liberal interpretation is one that broadly interprets "a text *in light of the situation presented* . . . with the object of effectuating the spirit and broad purpose of the text" (emphasis added)); *see also Stephenson*, 532 S.W.2d at 956 (deciding in 1976 that "[a] restriction that property is for residence purposes is quite different from a restriction which additionally provides that only one residence may be erected on the property").

[12] In doing so, the court of appeals rejected the interpretation the Austin court of appeals afforded a similar covenant. 510 S.W.3d at 731 (citing *Zgabay v. NBRC Prop. Owners Ass'n*, No. 03-14-00660-CV, 2015 WL 5097116, at *3 (Tex. App.—Austin Aug. 28, 2015, pet. denied) (mem. op.)). The Austin court concluded that the covenant was ambiguous and strictly construed it, as the common law requires. *Zgabay*, 2015 WL 5097116, at *3.

purposes" does not in and of itself differentiate between owner occupancy and tenant occupancy or imply duration limits on either. As for the "business purpose" prohibition in the covenant, Tarr contends that merely renting one's property or realizing a profit therefrom does not convert a homeowner's use into a business use. And if it did, he argues, then long-term leasing arrangements would likewise be forbidden. Because these covenants often remain silent as to the minimum amount of time one must use a home for it to qualify as a residential use, Tarr questions the soundness of cases that impose ninety-day limitations, require physical, permanent occupancy, or examine an intent to remain. Instead, Tarr urges this Court to conclude that because the covenants are silent as to leasing arrangements or minimum-duration-of-use requirements, such activities are permissible—as what is not expressly proscribed is allowed. This construction, Tarr insists, best effectuates the original grantor's purpose and intent.

The association, on the other hand, focuses on the transient and temporary nature of Tarr's renters' use of the property. Because the tenants have no intent to remain beyond the short term for which they have leased the property, their use is merely transient as opposed to residential. To support this definition of "residential," the association relies upon various Texas and federal regulatory definitions of "residence." So the association not only contrasts "residential purpose[s]" with "business purposes," but also with "transient purposes." And as proof that Tarr's use is a business use, the association notes that he pays hotel taxes and that he formed an LLC to manage the property.

As noted above, when interpreting a restrictive covenant, courts must first determine whether the covenant is ambiguous by looking to the "covenant[] as a whole in light of the circumstances present when the parties entered the agreement." *Pilarcik*, 966 S.W.2d at 478. A

covenant is ambiguous if it is "susceptible to more than one reasonable interpretation," but it is unambiguous if it can be afforded "a definite or certain legal meaning." *Id.* (citations omitted). Whether a covenant is ambiguous is a question of law for the court to decide. *Id.*

First, we will examine the covenant to determine the relevant activity at issue. As we noted above, "'residential purpose' refers to the way the property is used." *1733 Estates*, 485 N.W.2d at 340. But one must inquire whether the covenant's language focuses upon the owner's use of the property or upon the activity that actually takes place on the land. If the suitable probe is how the owner is using the property, Tarr could be said to have violated the provision by establishing an LLC and generating income from his property. We note, however, the covenant here provides that the tract "shall be used solely for residential purposes, except tracts designated . . . for business purposes, provided, however, no business shall be conducted on any of these tracts which is noxious or harmful." By referring to the activities "conducted *on*" the tracts, the covenant expressly makes the relevant inquiry the conduct taking place on the physical property itself (as opposed to how the owner is using the property). Viewing the use taking place on the property as the relevant measure accords with the views adopted by other states' courts that have decided this issue. *See, e.g.*, *Dunn v. Aamodt*, No. 3:10-CV-03119, 2012 WL 137463, at *3 (W.D. Ark. Jan. 18, 2012); *Slaby v. Mountain River Estates Residential Ass'n*, 100 So. 3d 569, 579, 581 (Ala. Civ, App. 2012); *Houston v. Wilson Mesa Ranch Homeowners Ass'n*, 2015 COA 113, ¶¶ 23–24; *Santa Monica Beach Prop. Owners Ass'n v. Acord*, 219 So. 3d 111, 115 (Fla. Dist. Ct. App. 2017).

Turning to the meaning of "residential purpose," we initially note that the Timberwood covenants do not provide a definition of either "residential purpose" or "business purpose." This lack of direction from the deeds themselves is especially problematic because "residence" is a term

"of multiple meanings." 20 AM. JUR. 2D *Covenants* § 179 (2018). Often, however, the appropriate meaning can be discerned from "the context in which it is used." *Id.* Still, even when context is taken into account, ambiguity sometimes rears its head. As a Colorado court explained:

> Although "residential" unambiguously refers to use for living purposes, courts have recognized ambiguity in the term in cases involving short-term rentals or other situations where those residing in the property are living there only temporarily, not permanently. . . .
>
> Other courts have found no ambiguity, reasoning that, as long as the property is used for living purposes, it does not cease being "residential" simply because such use is transitory rather than permanent.

Houston, 2015 COA 113, at ¶¶ 17–18 (citations omitted). Whether a covenant is ambiguous must be determined based upon the plain language set forth in the covenant as seen in light of the circumstances present when it was drafted. *Cf. Pilarcik*, 966 S.W.2d at 478. And courts sometimes too quickly conclude that a term is ambiguous:

> Some words have two or more quite different meanings. . . . More commonly, however, the interpretive issue involves not which of two totally different meanings is intended but what level of generality is to be accorded to a single meaning. In writings on the interpretation of texts, the loose norm is to refer to all uncertainties of meaning as *ambiguities*. But there is a useful and real distinction between textual uncertainties that are the consequence of verbal ambiguity (conveying two very different senses, as when *table* could refer either to a piece of furniture or to a numerical chart) and those that are the consequence of verbal vagueness (as when *equal protection of the laws* can be given a scope so narrow as to include only protection from injury, or so broad as to include equal access to government benefits). A word or phrase is ambiguous when the question is which of two or more meanings applies; it is vague when its unquestionable meaning has uncertain application to various factual situations.

ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 31–32 (2012). In other words, if a court can assign a meaning to "residential purposes," the term is not rendered ambiguous solely because the application of "its unquestionable meaning" to a certain factual situation is "uncertain" or "vague." *See id.*

We note again that the Timberwood deeds do not provide definitions of "residential" or "business" purpose; so we must give those words "the meaning which they commonly held as of the date the covenant was written." *Wilmoth*, 734 S.W.2d at 658; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 89 (2012) ("The choice is this: Give text the meaning it bore when it was adopted, or else let every judge decide for himself what it should mean today."). In 1969, in *MacDonald v. Painter*, we construed a clause that forbade using tracts for "mercantile business" and permitted only "residence purposes." 441 S.W.2d 179, 180 (Tex. 1969). We held: "The terms 'residence purposes,' and 'residences' require the use of property for living purposes as distinguished from uses for business or commercial purposes." *Id.* at 182.[13] Similarly, *American Jurisprudence* provides this explanation for the phrase:

> Generally speaking, "residential use" is one that involves activities generally associated with a personal dwelling. Similarly, a "residential building" is a building which is used for residential purposes or in which people reside, dwell, or make their homes, as distinguished from one which is used for commercial or business purposes. The phrase "residential purposes" does not mean only the occupying of a premises for the purpose of making it one's "usual" place of abode; a building is a residence if it is "a" place of abode.

20 AM. JUR. 2D *Covenants* § 179 (2018) (footnotes omitted). The use of the phrase "residential purposes" in the Timberwood deeds comports with these interpretations. The restrictive covenant in this case effectively defines "residential purposes" by juxtaposing it to "business purposes"—the use it expressly forbids.

[13] Likewise, the Galveston court of appeals construed a provision with a residential-use restriction this way: "The word 'residential' as used in a covenant restricting the use of property, is used in contradistinction to 'business' or 'commerce.' A building used as place of abode, and in which no business is carried on, is devoted to a 'residential use' so long as such use continues." *Briggs v. Hendricks*, 197 S.W.2d 511, 513 (Tex. Civ. App.—Galveston 1946, no writ), *quoted in Vaccaro v. Rougeou*, 397 S.W.2d 501, 503 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

The covenants in the Timberwood deeds fail to address leasing, use as a vacation home, short-term rentals, minimum-occupancy durations, or the like. They do not require owner occupancy or occupancy by a tenant who uses the home as his domicile. Instead, the covenants merely require that the activities on the property comport with a "residential purpose" and not a "business purpose." We decline to add restrictions to the Timberwood covenants by adopting an overly narrow reading of "residential." "Without some indication to the contrary, general words (like all words, general or not), are to be accorded their full and fair scope. They are not to be arbitrarily limited." *Id.* at 101.

For this reason, we disapprove of the cases that impose an intent or physical-presence requirement when the covenant's language includes no such specification and remains otherwise silent as to durational requirements. *See generally Benard v. Humble*, 990 S.W.2d 929 (Tex. App.—Beaumont 1999, pet. denied) (affirming the trial court's interpretation of "single-family residence purposes" as prohibiting "renting for a period of less than ninety days" even though the covenants did "not explicitly contain language covering temporary renting of property"). Even if we were to afford the covenant a liberal construction, we cannot erect limitations on the homeowners' use of property of which they had no notice. *See Davis*, 620 S.W.2d at 566 (relieving property owners of restrictions if they purchased "for value and without notice" of the limitation on their property use); *cf. Mason Family Tr. v. DeVaney*, 207 P.3d 1176, 1178 (N.M. Ct. App. 2009) ("In the context of a residential subdivision, we interpret a dwelling purpose to be use as a house or abode, and once a proper use has been established, we do not attach any requirement of permanency or length of stay."). We do not imbue general phrases with a meaning not even raised by implication. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION

OF LEGAL TEXTS 93 (2012) ("Nothing is to be added to what the text states or reasonably implies . . . . That is, a matter not covered is to be treated as not covered."). Nevertheless, we confine this interpretation to the unambiguous language of these particular restrictive covenants. We recognize that another court may reach a different conclusion if the covenant it reviews defines "residential" or "business" uses by specifically enumerating prohibited conduct. *See, e.g.*, *Munson*, 948 S.W.2d at 815 (analyzing a covenant that defined "business use" to include "[m]otel, tourist courts, and trailer parks").

Affording these phrases their general meanings and interpreting the restrictions as a whole, we hold that so long as the occupants to whom Tarr 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.[14] Moreover, Tarr's use

[14] Facing similar questions, other states' courts have reached similar conclusions. For example, in 2003, the Idaho Supreme Court decided *Pinehaven Planning Board v. Brooks*, which implicated covenants providing that residential tracts may only contain one single-family dwelling and forbidding any "commercial or industrial ventures or business." 70 P.3d 664, 665 (Ida. 2003). The court held that the covenants unambiguously permitted "the rental of residential property for profit" because leasing "the property for residential purposes, whether short or long-term does not fit within" the covenants' prohibitions. *Id.* at 667–68. The short-term renters partook in activities reflecting a residential purpose because they used "it for the purposes of eating, sleeping, and other residential purposes," which was not a use that violated the commercial and business activity proscriptions. *Id.* at 668.

Relying on *Pinehaven* in part, an Alabama court of appeals analyzed analogous covenants and ultimately reached a similar conclusion. In *Slaby v. Mountain River Estates Residential Association*, the property's use was limited to "single family residential purposes only," and "commercial, agricultural or industrial use[s]" were expressly prohibited. 100 So. 2d at 571. In an attempt to give effect to the phrase "single family residence purposes only," the court first noted that "the restrictive covenant does not require that the cabin be exclusively 'owner-occupied' or the like, so they 'are not constrained in the character of their residential use of the property by the deed covenants.'" *Id.* at 577 (citations omitted). Thus, the court adopted the majority view and held that "property is used for 'residential purposes' when those occupying it do so for ordinary living purposes. . . . [S]o long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities, . . . they are using the cabin for residential purposes." *Id.* at 579. Holding otherwise, the court recognized, would mean that unless property owners use their property "as their primary residences," they would be violating similar covenants, even where the owners themselves use the residence as a vacation home. *Id.* Consequently, the court decided that "the term 'residential purposes' does not mean only 'occupying of a premises for the purpose of making it one's usual place of abode.'" *Id.*

Moreover, although Tarr did generate revenue off his property in Timberwood, we also agree with our sister courts nationwide and hold that Tarr did not violate the covenants solely by receiving income from using his property

does not qualify as a commercial use.[15] Accordingly, as the association failed to adduce any evidence that Tarr's tenants have used the property in any manner inconsistent with a residential purpose, summary judgment for the association was improper.

* * *

We hold that Tarr has not violated the Timberwood restrictive covenants by entering into short-term vacation rental agreements. Accordingly, the trial court should not have entered summary judgment for the association, and the court of appeals erred in affirming the trial court's judgment. We reverse and remand the case to the trial court for proceedings consistent with this opinion.

_____
Jeffrey V. Brown
Justice

OPINION DELIVERED: May 25, 2018

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to facilitate his short-term-rental endeavor. However, because the relevant inquiry, under this specific covenant, is the activity taking place on the lot itself, this decision might differ if Tarr furthered his profit-generating-venture on the Timberwood tract itself. As the Alabama court explained:

> [N]o mercantile or similar activity occurs at the cabin. The actual renting of the cabin, and any financial transactions associated therewith, occurs off-site. The [owners] do not solicit renters on-site, but do so through the Internet, where potential tenants can view the premises without actually going there. While occupying the cabin, the tenants must cook and clean for themselves and they do not receive any services from the [owners.] Although the [owners] remit a lodging tax, . . . that fact does not detract from the conclusion that no commercial activity takes place on the premises.

Slaby, 100 So. 3d at 580 (citation omitted).

[15] Other state courts have measured the commercial or business purposes, when defined in contradistinction to residential purposes, by examining whether the use involved employees or other indicia of business on the tract itself. *See, e.g.*, *Santa Monica*, 219 So. 3d at 115 (distinguishing another case that involved an inn that "had a number of indicia of a business, such [as] a manager to 'control the guests,' signs located on the property advertising it as a 'Bed and Breakfast Inn," and five bedrooms each with a separate entrance to the outside of the structure"). Here, there is no evidence that Tarr makes any commercial use upon the tracts themselves, and he concedes that were he to establish a leasing office or similar indicia of business, his property use would then violate the Timberwood covenants.

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ROSALIE GRAF SCHNEIDER,[1]	§	
		No. 08-14-00300-CV
Appellant,	§	
		Appeal from the
v.	§	
		County Court at Law Number Five
CHARLES WHATLEY AND VIRGINIA WHATLEY,	§	
		of El Paso County, Texas
	§	
Appellees.		(TC# 2014-CCV00803)
	§	
	§	

O P I N I O N

Charles Andrew Whatley and Virginia Graf Whatley sought relief against Rosalie Graf Schneider pursuant to Texas Property Code Section 92.109, which permits recovery from a landlord who in bad faith retains a security deposit. Schneider counterclaimed for breach of contract. TEX.PROP.CODE ANN. § 92.109(a) (West 2014). After a bench trial, and as authorized by Section 92.109, the trial court entered judgment against Schneider, holding her liable for the sum of $100 plus three times $1,990, the balance of the wrongfully withheld security deposit

[1] Although the trial court judgment identifies Schneider's first name as "Rosalie," Schneider's signature and the signature block on the lease identify her as "Roselie."

balance, and awarded the Whatleys reasonable attorneys' fees of $3,000. TEX.PROP.CODE ANN. § 92.109(a) (West 2014).

In a single issue, Schneider contends the evidence is legally insufficient to support a finding that she acted in bad faith as required under Section 92.109(a). TEX.PROP.CODE ANN. § 92.109(a) (West 2014). For the following reasons, we affirm.

FACTUAL SUMMARY

The Lease, Security Deposit, and Landlord's Notice of Retention

In June 2012, the Whatleys leased Schneider's El Paso house while she lived out of state. They paid a security deposit of $2,650, and on April 19, 2013, gave written notice of their intention to move on June 30, 2013. Schneider had a new tenant move in on July 1, 2013.

After the Whatleys moved, Schneider sent written notice dated July 10, 2013, which included a list of repairs for which she had obtained estimates. The list included removal of stapled cables on the floor, door, molding and walls of the house; preparation and painting of walls and alcoves through the house; "touch up" of walls throughout the house; removal of towel bars in the bathrooms and window blinds in the office; patching and painting; removal of shelves from garage walls; repair of a garage wall; removal of a satellite dish; repair of roof damage; and the repair of "elastomeric paint from speaker area." Schneider included estimates totaling $3,142.56, and after deducting the security deposit of $2,650, she informed the Whatleys they owed her $492.56.

The Whatleys' attorney notified Schneider that with her knowledge, they had made improvements to the home at their own expense as permitted by the terms of the lease. The letter also noted that as late as April 2013, Schneider had expressed her gratitude and appreciation for

the Whatleys "taking such good care" of the home. The Whatleys suggested that the reasonable cost of reimbursement for repairs would be approximately $300 to $400. Pursuant to Sections 92.102 and 92.103 of the Property Code, the Whatleys demanded that Schneider refund their security deposit less itemized repair charges on or before thirty days of the date on which the Whatleys had surrendered the property and gave Schneider a forwarding address supported by receipts for the repair work performed. *See* TEX.PROP.CODE ANN. §§ 92.102, 92.103 (West 2014).

Trial De Novo

In December 2013, the case proceeded to trial in the justice court, and concluded with a judgment entered against Schneider. Schneider appealed, and the case proceeded to a *de novo* bench trial in county court in August 2014. TEX.R.CIV.P. 506.3. The trial court heard evidence from seven witnesses. Charles acknowledged that the terms of the lease permitted deductions of reasonable charges from the security deposit for restoration of walls, flooring, landscaping or any alterations not approved in writing by the landlord, and agreed that Schneider had not approved changes in writing but noted that she had thanked them in writing. The Whatleys claimed they had made changes to the house with Schneider's permission, which was expressed to them either verbally or by email. They had subsequently recapped with Schneider the modifications that had been made.

Schneider admitted that the Whatleys would inform her of the work performed but noted that they would present it "like it was a good thing[.]" Schneider felt that she could not change completed additions. After the Whatleys vacated the home, Schneider preferred that the house be returned to its original state. She secured estimates which formed the basis of her retention and demand letter to the Whatleys. With the exception of the bathroom towel bars that the Whatleys

had installed and the cleaning of the garage "carpet," Schneider alleged that all repair work in the house had been performed but the security deposit was insufficient to cover the actual cost of repairs in the sum of $3,065, which she believed to be reasonable.

Charles acknowledged that under the terms of the lease, he and Virginia were prohibited from removing any fixtures they installed at the house because the lease provided that all fixtures would become the property of the landlord. He described the relationship with Schneider as friendly until the Whatleys' attempts to obtain financing to purchase the home had been rejected.

Having considered this and other evidence and testimony, including photographs, estimates, and the terms of the lease, the trial court ruled that Schneider could properly retain $660 spent to repair certain alterations, but she was not entitled to compensation or retention of the security deposit for repairs made due to normal wear and tear, and would be required to return the remainder to the Whatleys. The trial court also expressly found Schneider to be "in violation of the Property Code . . . in not returning the remainder [of the security deposit], which would have been $1,990." After it assessed damages of "$100 plus three times the amount that should have been returned in the amount of $1,990" the trial court awarded attorneys' fees to the Whatleys and declared that Schneider take nothing. In its written findings of fact and conclusions of law, the trial court failed to make an express finding that Schneider acted in bad faith.

SUFFICIENCY OF THE EVIDENCE

In her sole issue, Schneider challenges the legal sufficiency of the evidence to support the trial court's implied finding that she acted in bad faith. *See* TEX.PROP.CODE ANN. § 92.109(a) (West 2014).

Standard of Review

We will sustain a challenge to the legal sufficiency of the evidence only if: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014). We must consider evidence favorable to the finding if a reasonable fact finder could and disregard evidence contrary to the finding unless a reasonable fact finder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). The trial court, as fact finder, is the sole judge of the credibility of the witnesses in a bench trial. *Sw. Bell Media, Inc. v. Lyles,* 825 S.W.2d 488, 493 (Tex.App.--Houston [1st Dist.] 1992, writ denied). The judge may take into consideration all the facts and surrounding circumstances in connection with the testimony of each witness and accept or reject all or any part of the testimony. *Lemus v. Aguilar*, 491 S.W.3d 51, 59 (Tex.App.--San Antonio 2016, no pet.).

Applicable Law

The Texas Property Code provides that a landlord "shall refund a security deposit to the tenant on or before the 30th day after the date the tenant surrenders the premises," provided the tenant has given the landlord a written statement of their forwarding address for purposes of refunding the security deposit. TEX.PROP.CODE ANN. §§ 92.103, 92.107 (West 2014). With limited exceptions, if the landlord retains any part of the security deposit, she must give the tenant a written description and an itemized list of all deductions along with the balance of the deposit. TEX.PROP.CODE ANN. § 92.104 (West 2014).

When a tenant brings a cause of action to recover a wrongfully held security deposit, the

landlord has the burden of proving that the retention of any portion of the security deposit was reasonable. TEX.PROP.CODE ANN. § 92.109(c) (West 2014). When there are no permanent damages to the premises, the landlord is entitled to the reasonable cost of repairs as the proper measure of damages if she waits until after the term of the lease has expired to seek damages. *See Pulley v. Milberger*, 198 S.W.3d 418, 429 (Tex.App.--Dallas 2006, pet. denied). However, the landlord is not permitted to retain any portion of a security deposit to cover normal wear and tear. TEX.PROP.CODE ANN. § 92.104(b) (West 2014). Wear and tear is defined as deterioration that results from the intended use of a dwelling including breakage or malfunction due to age or deteriorated condition, but does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises. *See* TEX.PROP.CODE ANN. § 92.001(4) (West 2014).

The Property Code further provides that a landlord who in bad faith retains a security deposit in violation of this subchapter is liable for an amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorney's fees. TEX.PROP.CODE ANN. § 92.109(a) (West 2014). A landlord is presumed to have acted in bad faith if she fails either to return a security deposit or to provide a written description and itemization of deductions on or before the 30th day after the date a tenant surrenders possession. TEX.PROP.CODE ANN. § 92.109(d) (West 2014).

Analysis

Most cases brought under Section 92.109 involve circumstances in which a presumption of bad faith exists. The statutory presumption of bad faith does not apply here because the evidence established that Schneider provided a written description and itemization of deductions

to the Whatleys on or before the 30th day after the date they surrendered possession of the house. TEX.PROP.CODE ANN. § 92.109(d) (West 2014).

Because no presumption of bad faith exists, it is an element of the cause of action that the Whatleys were required to establish at trial. A residential landlord acts in bad faith if she either "acts in dishonest disregard of the tenant's rights or intends to deprive the tenant of a lawfully due refund." *Johnson v. Waters at Elm Creek, L.L.C.*, 416 S.W.3d 42, 47 (Tex.App.--San Antonio 2013, pet. denied). A landlord's mere intentional retention of the security deposit beyond the thirty day statutory period does not establish the landlord's dishonest intent to deprive the tenant of the deposit. *Shamoun v. Shough*, 377 S.W.3d 63, 72 (Tex.App.--Dallas 2012, pet. denied), *quoting A.B. Inv. Corp. v. Dorman*, 604 S.W.2d 506, 508 (Tex.Civ.App.--Dallas 1980, no writ).

In its findings of fact, the trial court found that Schneider could properly deduct from the security deposit $495 for repair to the roof, $75 to remove television cables, $25 for repairs to the kitchen, and $65 for repairs to the office, thus implicitly finding these expenses to be reasonable. The trial court also found that Schneider had "wrongfully withheld" the balance of the security deposit in the amount of $1,990. Among its conclusions of law, the trial court declared that the Whatleys had performed all conditions of the lease and had performed all requirements necessary to be entitled to a refund of their security deposit, including efforts to clean, repair, and restore the property to the same or better condition.

Findings of fact filed by the trial court shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. TEX.R.CIV. P. 299. When a court makes findings of fact but inadvertently omits an essential element of a ground of recovery or defense, the presumption of validity will supply by implication any omitted, unrequested element that is

supported by evidence. *See* TEX.R.CIV.P. 299. When a party fails to timely request additional findings of fact, she is deemed to have waived the right to complain on appeal of the court's failure to enter additional findings. *Briargrove Park Property Owners, Inc. v. Riner,* 867 S.W.2d 58, 62 (Tex.App.--Texarkana 1993, writ denied); *Cities Services Co. v. Ellison,* 698 S.W.2d 387, 390 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). Further, where the original findings omit a finding of a specific ground of recovery which is crucial to the appeal, failure to request an additional finding will constitute a waiver of the issue. *Poulter v. Poulter,* 565 S.W.2d 107, 111 (Tex.Civ.App.--Tyler 1978, no writ). Here, the record reflects a deemed finding of bad faith. Schneider failed to ask for additional fact findings to avoid this waiver.

Because the current tenants were using the towel bars, Schneider had authorized the contractor to allow the current tenants' belongings to remain on the towel racks. Schneider wanted the bathroom towel bars removed, in essence, because she had no need for them and did not use them. Although Schneider had authorized the Whatleys to paint the house a neutral color at their expense, she preferred the original colors of the home, which included black, and she sought to recover the cost to repaint the house. Although the house had a garage, Schneider thought it was merely possible that the Whatleys would park their cars in it, and wanted to recover cleaning costs of the garage carpet that was stained. She also wanted to recover the expense of removing the professionally-installed garage shelves because she personally did not want them in the garage, despite the fact that there was unrefuted testimony that her items were stored on them and photographs showed the current tenants were using them. Schneider's negative testimony regarding the installation of window blinds was countered by her congratulatory email. She sent another email to the Whatleys thanking them for making repairs to the exterior speakers at their

own expense.

As fact finder, the trial court was permitted to consider all the facts and surrounding circumstances in connection with the testimony of each witness, and to accept or reject all or any part of the testimony. *Lemus*, 491 S.W.3d at 59. This evidence, in part or in whole, supports a determination that Schneider acted in dishonest disregard of the Whatleys' rights or intended to deprive the Whatleys of a lawfully due refund, and therefore supports the deemed finding of bad faith. *See* TEX.R.CIV.P. 299; *Waters at Elm Creek, L.L.C.*, 416 S.W.3d at 47. The sole issue on appeal is overruled.

The judgment of the trial court is affirmed.

ANN CRAWFORD McCLURE, Chief Justice

November 29, 2017

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating