

THE HOTEL NEXT DOOR  
WHY SHORT-TERM RENTALS SHOULD BE  
CONSIDERED A COMMERCIAL USE OF  
PROPERTY IN TEXAS

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## I. INTRODUCTION

The right of individuals to use their land as they wish is one of the most fundamental of all property rights.<sup>1</sup> Thus, covenants that restrict the private use of land are often disfavored by Texas courts.<sup>2</sup> One could argue, however, that the lay people of Texas do not share this disfavor. Throughout the state, thousands of Texans flock to master-planned communities each year.<sup>3</sup> In addition to private pools and massive floor plans, most of these communities also come with restrictive covenants that limit the property to “residential-use only.”<sup>4</sup> Although these provisos typically vary in their degree of specificity, they often share a common purpose—to prevent non-residential, “commercial use” of the property by the owner.<sup>5</sup>

These land use restrictions have become increasingly at odds with the aspirations of entrepreneurial homeowners. Over the last ten years, the growth of sites like Airbnb, Homeaway and FlipKey have allowed homeowners to monetize their properties for short-term rental use.<sup>6</sup> Of the three sites previously mentioned, Airbnb is the most popular, boasting more than five million listings in 191 countries.<sup>7</sup>

The tension between residential and commercial use is an increasingly litigated subject in Texas. Given the rise of websites like Airbnb and HomeAway, courts have seen an influx of homeowners from master-planned communities fighting for the right to rent their properties as vacation homes.<sup>8</sup> In May of 2018,

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1. See *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 280 (Tex. 2018), *reh'g denied* (citing 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, 356 (2001)).

2. See *id.* (citing *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981)).

3. Sean Barry, *RCLCO: TX led master-planned communities in 2016*, CONSTRUCTIONDIVE (Jan. 4, 2017), <https://www.constructiondive.com/news/rcoco-tx-led-in-master-planned-communities-in-2016/433317/>.

4. Judon Fambrough & Cindy Dickson, *Governing Property Use: Living with Deed Restrictions*, TIERRA GRANDE, no. 410, 1983, at 1 (revised Sept. 2013).

5. *Id.*

6. *Careers at Airbnb*, AIRBNB, <https://careers.airbnb.com/positions/2067983/> (last visited Apr. 19, 2019) (“Airbnb uniquely leverages technology to economically empower millions of people around the world to unlock and monetize their spaces, passions and talents to become hospitality entrepreneurs.”).

7. See *id.*

8. See generally Emma Platoff, *Texas Supreme Court Sides with Short-Term Renters, Likely Bolstering State's Fight Against Austin's Ordinance*, TEX. TRIB. (May 25, 2018, 11:00 AM), <https://www.texastribune.org/2018/05/25/airbnb-homeaway-texas->

the Texas Supreme Court finally sided with these homeowners. In *Tarr v. Timberwood*, the court held that absent an explicit prohibition in the deed restriction, use of a property for short-term rentals is a residential use.<sup>9</sup> The court went on to hold that these types of short-term rentals do not violate restrictive covenants that prohibit general “commercial use” when the phrase is undefined.<sup>10</sup> A rehearing was denied in October of 2018.<sup>11</sup>

In addition to increased litigation, the rise of short-term rentals has also impacted the Texas Tax Code. In 2015, the Texas Legislature amended the tax code to define short-term rentals as hotels.<sup>12</sup> This change allowed both state and local municipalities to collect hotel occupancy taxes from short-term rental owners.<sup>13</sup> The comptroller’s office estimates that these collections have increased revenues by over \$10 million per year.<sup>14</sup> In 2017, the Texas State Comptroller’s Office partnered with Airbnb to collect occupancy taxes on behalf of homeowners directly and remit them to the state.<sup>15</sup> This partnership has increased tax revenues by over \$15 million since April 2017.<sup>16</sup> All revenues support tourism.<sup>17</sup>

This comment will address the conflict between the *Tarr* court’s holding, stating that the plaintiff’s use of a single-family home for short-term rentals is not “commercial,”<sup>18</sup> and the Texas Legislature’s decision to classify these same rental properties as

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supreme-court-ken-paxton-austin-ordinance/ (suggesting that there as been a rise in litigation within the state of Texas regarding restrictions on short-term rentals).

9. See *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 274, 291-92 (Tex. 2018), *reh’g denied*.

10. *Id.* at 291–92.

11. See *id.* at 274.

12. TEX. TAX CODE ANN. § 156.001(b) (“For purposes of the imposition of a hotel occupancy tax under this chapter, Chapter 351 or 352, or other law, ‘hotel’ includes a short-term rental.”).

13. *Hotel Occupancy Tax FAQs*, TEX. COMPTROLLER’S OFF., <https://comptroller.texas.gov/taxes/hotel/> (last visited Jan. 27, 2019).

14. See Sabriya Rice, *Airbnb Collected \$15.3 Million in Hotel Taxes from Texas Guests*, DALL. MORNING NEWS (June 13, 2018, 12:34 PM), <https://www.dallasnews.com/business/hotels/2018/06/13/airbnb-collected-153-million-hotel-taxes-texas-guests>.

15. See Paul Takahasi, *Airbnb Guests to be Charged Hotel Occupancy Tax in Houston*, HOUS. BUS. JOUR. (Apr. 12, 2017, 11:39 AM), <https://www.bizjournals.com/houston/news/2017/04/12/airbnb-guests-to-be-charged-hotel-occupancy-tax-in.html>.

16. Rice, *supra* note 14.

17. TEX. TAX CODE ANN. § 351.101(a) (“Revenue from the municipal hotel occupancy tax may be used only to promote tourism and the convention and hotel industry . . .”).

18. See *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 274, 291-92 (Tex. 2018), *reh’g denied*.

hotels.<sup>19</sup> Quite notably, the court references Tarr's payment of hotel occupancy taxes to both the state and Bexar County but does not address this implicit contradiction.<sup>20</sup> Instead, the court states that, absent clear language to the contrary, a property owner has not breached a residential-use covenant if a short-term rental is being used by the occupant for "living purposes."<sup>21</sup> Given, however, that Texas both defines and taxes short-term rental properties as hotels,<sup>22</sup> and hotels are generally considered a commercial use of property,<sup>23</sup> leasing a property for short-term rental should be considered a commercial use in Texas.

Part II of this comment will address the background of short-term rental litigation in Texas, including how Texas state courts have resolved the ambiguity surrounding "residential-use" covenants in the past. It will also address the various tax code changes and how other states have approached the issue of short-term rentals. Part III will discuss the arguments for why a short-term rental should be considered a commercial use of property in Texas, including: (1) short-term rentals drive interstate commerce and tourism; (2) the occupants of short-term rentals use the property like customers, not homeowners; (3) short-term rentals can be easily distinguished from long-term rentals; and (4) short-term rentals compete directly with traditional hotels. Part IV will analyze how this decision will impact major Texas cities like Houston.

## II. BACKGROUND OF SHORT-TERM RENTAL LITIGATION IN TEXAS, CHANGES IN THE TEXAS APPROACH

The last twenty years have seen a radical shift in how Texas courts interpret the meaning of phrases like "single family residential use" and "residential use only." Prior to the year 2000, there were very few cases of Texas property owners arguing that their residential-use covenants allow short-term rentals.

The first major case to explore short-term rentals in the context of residential deed restrictions was *Benard v. Humble*.<sup>24</sup> In *Benard*, the appellants argued that they were not in violation of

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19. TEX. TAX CODE ANN. § 156.001(b) ("For purposes of the imposition of a hotel occupancy tax under this chapter, Chapter 351 or 352, or other law, 'hotel' includes a short-term rental.").

20. *Tarr*, 556 S.W.3d at 288.

21. *Id.* at 286.

22. TEX. TAX CODE ANN. § 156.001(b).

23. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

24. 990 S.W.2d 929 (Tex. App.—Beaumont 1999, pet. denied), *disapproved of by Tarr*, 556 S.W.3d at 291.

their restrictive covenant because the term “residential purposes” does not exclude weekly rentals.<sup>25</sup> The court disagreed,<sup>26</sup> concluding that the appellant’s perspective was “overbroad” and a short-term rental is “for retreat purposes, or transient housing, rather than for residential purposes.”<sup>27</sup> Although the appellate court admitted that the term “residential” was difficult to define, it seemed satisfied with the trial court’s effort to resolve the ambiguity using the residency requirements outlined in other Texas statutes.<sup>28</sup>

The significance of *Benard*, apart from the holding itself, is that the court openly acknowledged the tension between the Texas Property Code (which states that restrictive covenants should be construed liberally in a way that gives effect to the drafter’s intent),<sup>29</sup> and common law (which, in the case of real estate contracts, requires strict construction against the party try to enforce the provision).<sup>30</sup> As the court astutely points out, renting one’s home should not be considered a per se violation of a restrictive covenant.<sup>31</sup> However, the court also noted that giving effect to the phrase “residential purposes” necessarily means that there must be some types of rentals that can violate the provision.<sup>32</sup>

After *Benard*, there was a lull in short-term rental litigation. This changed dramatically in 2017, which saw a flurry of cases that would eventually serve as the precursor to the Texas Supreme Court’s decision in *Tarr*. In each case, the court rejected *Benard*, holding that in cases of ambiguous deed restrictions, short-term rentals did not violate residential-use provisions.<sup>33</sup> The court in

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25. *Id.* at 931.

26. *Id.*

27. *Id.*

28. *Id.* at 931–32 (noting that the trial court judge looked to both the residency requirements in the Texas Family Code and the voter registration residency requirements in the Texas Election Code).

29. TEX. PROP. CODE ANN. § 202.003(a) (“A restrictive covenant shall be liberally construed to give effect to its purposes and intent.”).

30. *Benard v. Humble*, 990 S.W.2d 929, 930 (Tex. App.—Beaumont 1999, pet. denied) (“For example, our Texas Supreme Court has stated: ‘Restrictive clauses in instruments concerning real estate must be construed strictly, favoring the grantee and against the grantor, and all doubt should be resolved in favor of the free and unrestrictive use of the premises.’”) (citation omitted).

31. *Id.* at 931.

32. *Id.*

33. *See Garrett v. Simpson*, 523 S.W.3d 862, 868 (Tex. App.—Fort Worth 2017, pet. denied) (“The Garretts’ short-term rentals of the Property thus do not violate the Restriction prohibiting commercial use.”); *Boatner v. Reitz*, No. 03-16-00817-CV, 2017 WL 3902614, at \*6 (Tex. App.—Austin Aug. 22, 2017, no pet.). *But see Ridgepoint Rentals, LLC v. McGrath*, No. 09-16-00393-CV, 2017 WL 6062290, at \*9 (Tex. App.—Beaumont Dec. 7,

*Garret v. Sympton* went even further, rejecting the use of other Texas statutes to guide its interpretation of the word “residential.”<sup>34</sup>

This sudden increase in litigation can likely be attributed to the meteoric rise of companies like Airbnb, which help homeowners—specifically single-family homeowners—connect with travelers who are looking to rent homes for a few days or weeks. In 2017, Airbnb was valued at roughly \$31 billion,<sup>35</sup> with the average Airbnb “host” (homeowner) earning an average of over \$900 a month in 2017 and the most successful hosts making over \$20,000.<sup>36</sup>

These sorts of attractive figures ultimately led to the dispute in *Tarr v. Timberwood*. In *Tarr*, the plaintiff Kenneth Tarr relocated to Houston and decided to lease his San Antonio property to short-term renters instead of committing to a standard year-long lease.<sup>37</sup> In 2014, he formed a separate company to manage the property and leased his home for approximately 102 days.<sup>38</sup> He also paid hotel taxes to both the state of Texas directly and Bexar county.<sup>39</sup>

Later that year, Tarr’s homeowners association informed him that his property was in violation of two deed restrictions.<sup>40</sup> The association argued that because the leases were temporary, Tarr breached both the “residential purpose covenant” and the “single-family-residence covenant.”<sup>41</sup> The residential purpose covenant specifically provided that all lots in Timberwood Park “shall be

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2017, pet. filed) (holding that, because the deed restrictions explicitly prohibit hotels, and that a short-term rental is a hotel under the Texas Tax Code, the homeowners were in violation).

34. *Garrett*, 523 S.W.3d at 867–68 (“Although Appellees invite us to utilize the [Supreme Court’s] two-part definition of ‘residence,’ [requiring both physical presence and an intention to remain] we decline to do so because the Restrictions here do not limit the Property’s use to merely a residence but rather to ‘residence purposes.’”) (emphasis in original).

35. Laurence Thomas, *Airbnb Just Closed a \$1 Billion Round and Became Profitable in 2016*, CNBC, <https://www.cnbc.com/2017/03/09/airbnb-closes-1-billion-round-31-billion-valuation-profitable.html> (last updated Mar. 9, 2017, 2:42 PM).

36. Stacey Leasca, *Here’s How Much the Average Airbnb Host Earns in a Month*, TRAVEL + LEISURE (June 16, 2017), <https://www.travelandleisure.com/travel-tips/how-much-airbnb-hosts-make>.

37. See *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 274, 276 (Tex. 2018), *reh’g denied*.

38. *Id.*

39. *Id.* at 277.

40. *Id.*

41. *Id.*

used solely for residential purposes,” except the tracts that were designated “for business purposes.”<sup>42</sup>

Tarr ignored the association’s multiple warning letters and instead sued for a declaratory judgment.<sup>43</sup> He sought a declaration that “the deed restrictions [did] not impose a minimum duration on occupancy or leasing” and that Timberwood Park could not “police home-rental advertisements or impose penalties in the form of fines.”<sup>44</sup>

The trial court granted summary judgment against Tarr and permanently enjoined him from “engaging in short-term rentals” and from “operating a business on his residential lot.”<sup>45</sup> The court reasoned that the “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.”<sup>46</sup> The Fourth Court of Appeals affirmed, noting that the deed restrictions at issue were “unambiguous” and that “the rule disfavoring restrictions on the free use of property did not apply.”<sup>47</sup> Given Tarr’s payment of hotel taxes and that Tarr had created a separate company to manage the short-term rentals, the court determined that Tarr’s use of the property failed the residential purpose test.<sup>48</sup>

The Texas Supreme Court sided with Tarr despite these lower court rulings.<sup>49</sup> After noting the potential conflict between strict and liberal construction, the court states that:

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. 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

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42. *Id.*

43. *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 274, 277 (Tex. 2018), *reh’g denied*.

44. *Id.*

45. *Id.* at 278.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 274, 292 (Tex. 2018), *reh’g denied*.

into existence when the covenant is silent as to that limitation.<sup>50</sup>

The court further states that Tarr's deed restrictions are silent as to short-term rentals.<sup>51</sup> *Benard* states that the court should not "impose an intent or physical-presence requirement when the covenant's language includes no such specification and remains otherwise silent as to durational requirements."<sup>52</sup> According to the court, "no matter how short-lived, neither [the tenants'] on-property use nor Tarr's off-property use violates the restrictive covenants in the Timberwood deeds."<sup>53</sup>

#### A. Texas Tax Code Changes for Short-Term Rentals

As the *Tarr* court mentioned, short-term rental properties are classified as hotels in Texas. For many years, the definition of the word "hotel" was very narrow, and primarily focused on traditional hotels, motels, and inns.<sup>54</sup> In 2015, however, the Texas Legislature amended the Texas Tax Code to include the following language:

For purposes of the imposition of a hotel occupancy tax under this chapter, Chapter 351 or 352, or other law, "hotel" includes a short-term rental. In this subsection, "short-term rental" means the rental of all or part of a residential property to a person who is not a permanent resident under Section 156.101.<sup>55</sup>

The code goes on to define a permanent resident as anyone "who has the right to use or possess a room in a hotel for at least 30 consecutive days, so long as there is no interruption of payment for the period."<sup>56</sup> Thus, a short-term rental is any property that rents rooms for consideration for less than thirty consecutive days.<sup>57</sup>

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50. *Id.* at 284–85.

51. *Id.* at 290 ("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.")

52. *Id.* at 291.

53. *Id.*

54. See TEX. TAX CODE ANN. § 156.001 ("In this chapter, 'hotel' means a building in which members of the public obtain sleeping accommodations for consideration. The term includes a hotel, motel, tourist home, tourist house, tourist court, lodging house, inn, or rooming house, or bed and breakfast.")

55. § 156.001(b).

56. § 156.101.

57. See 34 TEX. ADMIN. CODE § 3.161(b)(6) (expanding on when the permanent resident exemption applies).



In addition to expanding the definition of a hotel, the Texas Tax Code also creates a mandatory, six percent state hotel occupancy tax that is separate from local hotel taxes that can be levied by cities and some counties in Texas.<sup>58</sup> According to the statute, short-term rental property owners are required to submit this state hotel tax payment directly to the Comptroller's office each month.<sup>59</sup> Airbnb, however, changed this.

In 2017, Airbnb partnered with the Texas Comptroller's Office to collect hotel taxes on behalf of its host properties and remit them directly to the state.<sup>60</sup> This allowed the company to become a major driving force behind tax reform in Texas. In addition to opening a new revenue stream for Texas homeowners, Airbnb has also streamlined the occupancy tax collection process, easing the burden on property owners who had difficulty paying the required taxes directly.<sup>61</sup> Texas joined more than thirty other states who chose to partner with Airbnb that same year.<sup>62</sup> According to reports, nearly ten percent of the revenue collected from the state hotel tax goes to support the economic development and tourism office.<sup>63</sup> All local hotel taxes collected must go to supporting tourism projects.<sup>64</sup>

This agreement with Airbnb has proven to be extremely successful for the Texas state treasury. After only one year, tax revenue collected nearly doubled the \$8 million per year revenue expectations.<sup>65</sup> As of June 2018, the agreement had generated more than \$15 million in hotel occupancy taxes.<sup>66</sup> The Texas Comptroller, Glen Hagar, praised the agreement, stating that “[t]he sharing economy plays an important role in our state's overall fiscal health.”<sup>67</sup> He also stated that he hoped other rental

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58. TEX. TAX CODE ANN. § 156.052; *Hotel Occupancy Tax FAQs*, TEX. COMPTROLLER'S OFF., <https://comptroller.texas.gov/taxes/hotel/> (last visited Jan. 27, 2019).

59. TEX. TAX CODE ANN. § 156.151.

60. Karen Robinson-Jacobs, *Airbnb to Start Collecting Hotel Taxes in Texas Beginning May 1*, DALL. MORNING NEWS (Apr. 13, 2017, 12:18 PM), <https://www.dallasnews.com/business/local-companies/2017/04/13/airbnb-to-start-collecting-hotel-taxes-in-texas-beginning-may-1/>.

61. *Id.*

62. Rice, *supra* note 14.

63. Gerard MacCrossan & Joyce Jauer, *The Hotel Occupancy Tax: A Short History of a Complex Levy*, TEX. COMPTROLLER'S OFFICE FISCAL NOTES (June 2016), <https://comptroller.texas.gov/economy/fiscal-notes/2016/june-july/hotel-tax.php>.

64. *Id.*

65. Rice, *supra* note 14.

66. *Id.*

67. Darla Guillen, *Airbnb Guests in Houston to Start Paying Tax May 1*, HOUS. CHRON. (Apr. 17, 2017, 8:47 AM), <https://www.chron.com/life/travel/article/Airbnb-guests-in-Houston-to-start-paying-tax-May-1-11069049.php>.

companies would consider partnering with the state.<sup>68</sup> In 2016, the state of Texas generated \$6.4 billion in tax revenue from tourism and travel.<sup>69</sup> The availability of accommodation plays a large role in the generation of this revenue.<sup>70</sup>

The exception to this success is the city of San Antonio, which has struggled to collect the required hotel occupancy taxes from short-term rental properties.<sup>71</sup> According to city officials, “out of the more than 2,000 short-term rentals . . . only about 14 percent of property owners” pay the required hotel tax.<sup>72</sup> This gap has cost the city more than \$2.4 million of revenue in 2018 alone.<sup>73</sup> No official enforcement mechanism is used for non-payment of these taxes; however, the city is looking to establish an online payment system to combat this problem.<sup>74</sup>

### *B. Other Short-Term Rental Approaches*

Texas is not the only state that has been inundated with short-term rental litigation. In the last ten years, courts in Colorado, Alabama, New Mexico, and North Carolina have all held that short-term rentals do not violate the residential restrictive covenants at issue.<sup>75</sup> None of these states, however, have classified short-term rentals as hotels. Instead, most large cities in these states have opted to regulate the rentals through local ordinance.<sup>76</sup>

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68. Andrea Leinfelder, *Airbnb Provided \$15.3M in Tax Revenues to Texas*, HOUS. CHRON. (June 13, 2018, 10:57 AM), <https://www.chron.com/business/bizfeed/article/Airbnb-provided-15-3M-in-tax-revenues-to-Texas-12990641.php>.

69. CARINE MARTINEX-GOUHIER & KATHLEEN HUNKER, *THE HOTEL OCCUPANCY TAX IN TEXAS*, TEX. PUB. POLICY FOUND. 4 (MAY 2018), <https://files.texaspolicy.com/uploads/2018/08/16104507/2018-04-RR-Hotel-Occupancy-Tax-in-Texas-CEP-MartinezHunker.pdf>.

70. *See id.* at 4–5.

71. *See* Iris Dimmick, *Fewer Than 15% of SA Short-Term Rental Owners Pay Hotel Taxes*, RIVARD REPORT (Apr. 24, 2018), <https://therivardreport.com/fewer-than-15-of-sa-short-term-rental-owners-pay-hotel-taxes/>.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Houston v. Wilson Mesa Ranch Homeowners Ass’n*, 360 P.3d 255, 260 (Colo. App. 2015) (“[S]hort-term vacation rentals . . . are not barred by the commercial use prohibition in the covenants.”); *Slaby v. Mountain River Estates Residential Ass’n*, 100 So. 3d 569, 582 (Ala. Civ. App. 2012) (holding that renting a cabin on a short-term basis to various groups for residential purposes was not inconsistent with the restrictive covenant at issue); *Estates at Desert Ridge Trails Homeowners’ Ass’n v. Vazquez*, 300 P.3d 736, 743 (N.M. Ct. App. 2013) (holding that the residential restrictive covenants did not prohibit short-term rentals); *Russell v. Donaldson*, 731 S.E.2d 535, 539 (N.C. Ct. App. 2012) (holding that the language “for business or commercial purposes” does not include short-term rentals).

76. *See, e.g.* DENVER, CO., REV. MUNICIPAL CODE ch. 33, art. III (requiring licensure of short-term rentals and creating requirements licensees must comply with); BIRMINGHAM,

The Wisconsin Supreme Court has also recently given a lengthy analysis of the term “commercial use” as it relates to short-term rentals. In *Forshee v. Neuschwander*, concurring Justice Abrahamson found that the term “commercial activity” is unambiguous and subject to only one interpretation.<sup>77</sup> Justice Abrahamson stated that “[t]he conclusion that the short-term rentals qualify as ‘commercial activity’ is unavoidable. As the court of appeals observed, ‘it is undisputed that the Neuschwanders make money, and intend to make money, and by inference a profit, by renting their property to others on a short-term basis.’”<sup>78</sup>

### III. SHORT-TERM RENTALS SHOULD BE CONSIDERED A COMMERCIAL USE OF PROPERTY IN TEXAS

There are several arguments for why short-term rentals should be considered unambiguous commercial use in Texas: (1) short-term rentals drive interstate commerce and tourism; (2) the occupants of short-term rentals use the property like customers, not homeowners; (3) short-term rentals can be easily distinguished from long-term rentals; and (4) short-term rentals compete directly with traditional hotels. This section will examine each of these arguments in turn.

#### A. *Short-Term Rentals Drive Interstate Commerce and Tourism*

The Texas Legislature has chosen to classify short-term rentals as hotels.<sup>79</sup> Though the *Tarr* court does not address this change directly, few would argue against the classification of a hotel as commercial property. The two most compelling arguments for this are: (1) the treatment of hotels by Congress under the Commerce Clause and (2) the direct effect that short-term rentals have on tourism.

The first argument is rooted in the Commerce Clause and its relationship to common carriers. Hotel accommodations are essential to the orderly facilitation of interstate travel. Courts have consistently acknowledged that hotels are common carriers,

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ALA., CODE title 3A, ch. 6 (implementing a tax for hosts and minimum standards for operation); SANTA FE, N.M. CODE ch. 14, art. 6, § 1(A)(5) (requiring permit for short-term rentals); ASHEVILLE, N.C. CODE, ch. 7, art. XVI, § 7-16-1 (requiring a permit for short-term rentals).

77. 914 N.W.2d 643, 651 (Wis. 2018) (Abrahamson, J., concurring).

78. *Id.* (Abrahamson, J., concurring) (quoting *Forshee v. Neuschwander*, 900 N.W.2d 100, 104–05 (Wis. Ct. App. 2017)).

79. TEX. TAX CODE ANN. § 156.001(b).

and thus have different obligations as compared to other businesses.<sup>80</sup> In *Hearts of Atlanta Motel*, for example, the Court held that hotels are a substantial source of intrastate and interstate commerce and that they, therefore, are within the reach of Congress's ability to regulate under the Commerce Clause.<sup>81</sup>

Short-term rentals are also a desirable lodging option for travelers and have become a major driver of interstate tourism throughout the United States. In April of 2018, Airbnb opened its office of global tourism.<sup>82</sup> The goal of this office is to increase tourism worldwide:

Since the company was founded 10 years ago, travelers have discovered new destinations and neighborhoods off the typical tourist path, bringing the economic benefits of tourism to small businesses and local residents around the world. Building off of this work through partnerships, programs and events, Airbnb will expand its efforts to economically empower communities, drive travel to lesser-known places, and support environmentally-friendly travel habits with the Office of Healthy Tourism.<sup>83</sup>

Austin, the capital of Texas, is one of the best examples of this. Austin currently leads Texas in the number of short-term rentals, welcoming more than 30% of the 1.5 million Airbnb guest arrivals.<sup>84</sup> This surge of rentals is “driving business into neighborhoods ‘that haven’t traditionally benefitted from tourism.’”<sup>85</sup> It has also allowed visitors to attend major Austin events like South by Southwest, Austin City Limits Music

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80. Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1668–69 (2015) (“At common law, a common carrier, is an entity that is required to adopt an ‘all-comers’ policy that does not discriminate (‘unjustly,’ in the usual formulation) among those who seek to use its service. Railroads and hotels are classic common carriers.”).

81. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (“It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, [i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.”) (quoting *United States v. Women’s Sportswear Mfg. Ass’n*, 336 U.S. 460, 464 (1949)) (alteration in original).

82. *Airbnb Launches Global Office of Healthy Tourism*, AIRBNB NEWSROOM (Apr. 17, 2018), <https://press.airbnb.com/airbnb-launches-global-office-of-healthy-tourism> (quoting Airbnb’s public policy director for the Southwest).

83. *Id.*

84. Daniel Salazar, *Airbnb’s Most Popular Places to Stay in Austin Include Ultra-Modern Guesthouse, Tiny Home*, AUSTIN BUS. J. (Jan. 30, 2018, 7:37 AM), <https://www.bizjournals.com/austin/news/2018/01/30/airbnbs-most-popular-places-to-stay-in-austin.html>.

85. *Id.*

Festival, and the Formula 1 U.S. Grand Prix.<sup>86</sup> Austin is also home to HomeAway Inc., Airbnb's largest competitor, further demonstrating the importance of short-term rentals to the local Austin economy.<sup>87</sup>

Rural areas of Texas have also experienced a surge of tourism. More than two thirds of room stock and over 75 percent of all traditional hotel room revenue in Texas are concentrated in four major metro areas: Houston, Dallas-Fort Worth, Austin and San Antonio.<sup>88</sup> This has left "large swaths of rural Texas" without accommodations for travelers.<sup>89</sup>

For example, Bosque County is home to just two small hotels according to Hotels.com, yet the local Airbnb host community has helped the county take full economic advantage of its growing popularity with visitors, with 224 percent year-over-year guest growth over the past year. Similarly, Llano County, also home to just two hotels according to Hotels.com[,] is one of the most popular Texas destinations for Airbnb guests. Local homeowners helped catalyze the local economy by hosting 9,500 guests in the past year to the county, earning \$1.31 million in supplemental income in the process.<sup>90</sup>

After completing repairs on a cabin following Hurricane Harvey, one family in Lumberton, Texas discovered the property's wide appeal and decided to "use Airbnb to turn their hospitality into a full-time business."<sup>91</sup> According to the family, many guests are international travelers from Australia, China, and Brazil who are interested in seeing rural Texas.<sup>92</sup>

*B. The Occupants of Short-Term Rental Properties Use the Premises as Customers, Not as Homeowners*

A second argument made by the *Tarr* court is that "residential use" provisions should be interpreted as references to the types of

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86. *Id.*

87. *Id.*

88. *AirBnB in Texas Rural County Growing*, BLANCO COUNTY NEWS (Oct. 3, 2018), <https://www.hillcountrypassport.com/blanco/article/2603/airbnb-in-texas-rural-county-growing>.

89. *Id.*

90. *Id.*

91. See Hayley Bruyn, *Photos: SE Texans Find Extra Income Through Airbnb*, BEAUMONT ENTER. (Sept. 24, 2018, 9:00 AM), <https://www.beaumontenterprise.com/news/article/Airbnb-takes-root-in-rural-and-small-town-Texas-13249103.php#photo-16209467>.

92. *Id.*

activities that occur on the property itself.<sup>93</sup> The court held that “residential” means the property should be used “for living purposes.”<sup>94</sup> According to the court, because the rental occupants are using the property for eating and sleeping, Tarr’s “residential use” provision has not been violated.<sup>95</sup> Moreover, the court states that because there was no “indicia” of a business on the property, there was no commercial use.<sup>96</sup>

There are two subtle, yet fundamental flaws underlying the court’s argument in this aspect. The first relates to the language of the covenant provision itself. Living and business purposes, though juxtaposed in the language of Tarr’s covenants,<sup>97</sup> are not mutually exclusive. It is quite possible for a residential property to be used simultaneously for both living *and* business purposes. This is particularly true when the purpose of the business is to license the use of a property’s living space for profit. The very existence of things like hotels and apartments is evidence of this.

It is this misunderstanding that leads to the second flaw. Throughout its opinion, the *Tarr* court maintains that there is no business being conducted on the property itself.<sup>98</sup> On the surface, this seems like a reasonable argument; the occupants of the Tarr house appear to be doing what homeowners in the neighborhood do in their own homes.<sup>99</sup> What the court fails to consider, however, is the nature of business at issue in this case.

The primary purpose of any hotel or short-term rental is to offer general sleeping accommodations in exchange for

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93. See *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 274, 288 (Tex. 2018), *reh’g denied* (“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.”).

94. *Id.* at 290 (“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.”) (citation omitted).

95. See *id.* at 292.

96. See *id.* at 292 n.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.”) (citation omitted).

97. *Id.* at 291–92.

98. *Id.*

99. *Tarr v. Timberwood Park Owners Ass’n*, 556 S.W.3d 274, 288 (Tex. 2018), *reh’g denied* (“Tarr juxtaposes activities such as eating, sleeping, praying, and watching TV with activities such as blacksmithing, shop-tending, event-hosting, and automobile repair.”).

consideration.<sup>100</sup> In other words, the temporary accommodation is the product being offered for sale. Therefore, although short-term renters may appear to be using the property like a homeowner, their use can be distinguished in that they are actually customers. Moreover, because the product to be consumed and the property where the product is located are one and the same, the customer can only consume the product on the property.

It is this reality that further belies the court's assertion that there are no indicia of a business on the property. The *Tarr* court attempts to distinguish a short-term rental property from things like automobile repair and blacksmithing when, in fact,<sup>101</sup> Tarr's business might have even more of an indicium than the aforementioned because, unlike in those cases, he has actual customers on his property. Moreover, it was likely the presence of those customers that alerted the neighborhood to Tarr's business in the first place.

### *C. Short-Term Rentals can be Distinguished from Long-Term Rentals*

Another argument made in the *Tarr* case is that renting a property for profit cannot be considered a business use because if it were, then long-term rentals would also be forbidden.<sup>102</sup> This is a straw man argument.

Short-term rentals can be easily distinguished from long-term rentals in two key aspects: (1) short-term rental agreements are often considered licenses (as opposed to leases), which do not give rise to a landlord-tenant relationship under the Texas Property Code;<sup>103</sup> and (2) when a property is rented long-term as a

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100. Ruby B. Weeks, Annotation, *Meaning of the Term "Hotel" as Used in Zoning Ordinances*, 28 A.L.R.3d 1240 (1969) ("The term 'hotel' has been regarded as synonymous with the term 'inn' and defined as a house held out to the public as a place where transient persons who come in a fit condition will be received and entertained as guests for compensation . . ."); see also 34 TEX. ADMIN. CODE § 3.161(a)(3) ("Any building or buildings in which members of the public obtain sleeping accommodations for a consideration. The term includes, in addition to the buildings listed in Tax Code, § 156.001, manufactured homes, skid mounted bunk houses, residency inns, condominiums, cabins, and cottages.").

101. *Tarr*, 556 S.W.3d at 288.

102. *Id.* at 288 ("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.").

103. Howard Sigal, *Lease vs. License—Practical Legal Nuances for Finding the Right Fit*, SHOPPING CTR. L & STRATEGY (Summer 2016), <https://docplayer.net/103400937-Lease-vs-license-practical-and-legal-nuances-towards-finding-the-right-fit-howard-sigal-ggp-chicago-il.html> ("[A] lease is something more than a license. The lease contains an expectation, documented in the contract, of a definitive term of time, and usually carries

residence, profits are merely incidental to the use of the property and thus do not typically rise to the level of a business use under Texas common law.<sup>104</sup>

Although the terms are sometimes used interchangeably, a lease and a license are not synonymous.<sup>105</sup> Moreover, the language of a document alone is not enough to prove whether an agreement is a license or a lease.<sup>106</sup> Under Texas law, a license can be primarily distinguished from a lease in that it does not vest any interest in the property to the licensee.<sup>107</sup> A license is also often revocable at will, whereas a lease is not.<sup>108</sup>

The booking terms found on most short-term rental websites support this view. Airbnb's Terms of Use agreement, for example, expressly states that guests only have a limited, revocable license to use the Host property:

8.2.1 You understand that a confirmed booking of an Accommodation ("Accommodation Booking") is a limited license granted to you by the Host to enter, occupy and use the Accommodation for the duration of your stay, during which time the Host (only where and to the extent permitted by applicable law) retains the right to re-enter the Accommodation, in accordance with your agreement with the Host.<sup>109</sup>

Airbnb competitors like FlipKey (a subsidiary of TripAdvisor) use similar language in their booking agreements.<sup>110</sup> This license-to-use is relevant to the second distinguishing feature between short-term and long-term rentals. Despite the *Tarr* court's assertion, it is well-established that not all business activity

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inherent legal protections. A license typically is not definitive. A license, by its very nature may be unexpectedly revoked or 'pulled.'")

104. See *Lerner v. Bloomfield Twp.*, 308 N.W.2d 701, 703 (Mich. Ct. App. 1981) (noting that incidental use of a home is one which furthers the primary use of the property as a residence).

105. See *H.E.Y. Tr. v. Popcorn Express Co.*, 35 S.W.3d 55, 58 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

106. *Id.* at 61 n.3 (stating that "a contract of real property in a shopping area of an airport . . . does not demonstrate that it is a lease of real estate[,] . . . [but] merely identifies that the type of license at issue is a 'real property' license").

107. *Digby v. Hatley*, 574 S.W.2d 186, 190 (Tex. App.—San Antonio 1978, no writ) ("A license in real property is a privilege or authority given to a person, or retained by a person, to do some act or acts on the land of another but such license conveys no interest in or title to the property concerned.").

108. See *id.*

109. *Terms of Service*, AIRBNB [https://www.airbnb.com/terms#sec201910\\_8](https://www.airbnb.com/terms#sec201910_8) (last updated Nov. 1, 2019).

110. See *TripAdvisor Rentals—Traveler Terms of Use*, TRIPADVISOR RENTALS, [https://rentals.tripadvisor.com/en\\_US/termsandconditions/traveler](https://rentals.tripadvisor.com/en_US/termsandconditions/traveler) (last updated Oct. 16, 2017).



occurring on a residential property rises to the level of commercial use.<sup>111</sup> Unless a deed restriction contains explicit language to the contrary, Texas courts have conceded that homeowners can conduct certain business activities on their properties so long as the activities conducted are incidental to the property's primary use as a residence.<sup>112</sup>

In Tarr's case, the plaintiff's use of the property for short-term rentals was not incidental to its use as a residence because the property was not being used as a residence at all since neither Tarr nor his guests lived there.<sup>113</sup> Instead, Tarr advertised the property to potential customers as an alternative to a hotel.<sup>114</sup>

Tarr's situation can be sharply contrasted from one in which a tenant with a bona fide lease uses a long-term rental property as his or her primary residence. In that case, the homeowner has actually transferred an interest in the property to the tenant.<sup>115</sup> Because of this, the tenant becomes more like a homeowner and no longer pays hotel taxes.<sup>116</sup> Additionally, the tenant cannot have their right to exclusive use of the property revoked at will.<sup>117</sup> Thus, although the real homeowner might be making a profit from the rent, those profits are now incidental to the property's primary use as the tenant's home.

#### *D. Short-Term Rentals Now Compete Directly with Traditional Hotels*

In *Tarr*, the court makes much of the fact that Tarr's rental property did not feature services "traditionally" found in hotels

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111. 77 TEX. JUR. 3d *Zoning* § 107, Westlaw (database updated May 2020) (footnotes omitted) ("Home businesses are frequently expressly authorized as accessory or incidental uses in districts zoned for residential purposes. Thus, under local ordinances, a nursery or babysitting business, a music school, and a real estate and insurance business have been permitted in single-family residential zones as customary home businesses.").

112. See *Davis v. City of Houston*, 869 S.W.2d 493, 495 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (citation omitted) (noting that commercial activities are not incidental when there is no one living on the property or using it as a residence).

113. *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 276 (Tex. 2018), *reh'g denied*.

114. *Id.*

115. See *Digby v. Hatley*, 574 S.W.2d 186, 190 (Tex. Ct. App. 1978).

116. *Hotel Occupancy Tax Exemptions*, TEX. FILM COMMISSION, [https://gov.texas.gov/film/page/laws\\_hotel\\_tax](https://gov.texas.gov/film/page/laws_hotel_tax) (last visited Jan. 27, 2019) (noting that any person who stays in a hotel room for longer than 30 consecutive days is no longer subject to the hotel occupancy tax).

117. See *Digby v. Hatley*, 574 S.W.2d at 190.

like daily housekeeping or cooked meals.<sup>118</sup> This focus on services and amenities, however, belies the reality that short-term rentals are direct competitors to traditional hotels.<sup>119</sup> It also neglects the changing times, in which travelers are able to get “better accommodation at more reasonable prices” in cities with Airbnb rentals.<sup>120</sup>

Forbes Magazine recently highlighted this phenomenon.<sup>121</sup> According to a new joint study sponsored by the Massachusetts Institute of Technology and Harvard Business School, the entry of Airbnb into the marketplace results in fewer traditional hotel rooms booked and loss of hotel revenue in that area.<sup>122</sup> Moreover, Airbnb listings are available in over 191 countries, with over four million listings total.<sup>123</sup> This is more than the top five major hotel brands *combined*.<sup>124</sup>

Airbnb is also increasing efforts to make guest experiences more like those at top resorts.<sup>125</sup> In 2018, Airbnb expanded its aptly named Experiences offerings, allowing Airbnb users to book restaurant reservations, concert tickets, and local excursions like hunting or surfing during their stay.<sup>126</sup>

Although these similarities may have eluded the *Tarr* court, they have not been lost on the hotel industry itself. Since the inception of Airbnb, hotels have been disadvantaged by Airbnb’s sharing economy model.<sup>127</sup> A large portion of these losses,

118. *Tarr*, 556 S.W.3d at 276 (“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.”).

119. Dina Gerdeman, *The Airbnb Effect: Cheaper Rooms for Travelers, Less Revenue for Hotels*, FORBES (Feb. 27, 2018, 12:25 PM), <https://www.forbes.com/sites/hbworkingknowledge/2018/02/27/the-airbnb-effect-cheaper-rooms-for-travelers-less-revenue-for-hotels/#1a64f705d672> (“[R]esearch [based on data gathered in 2014] shows that in the 10 cities with the largest Airbnb market share in the US, the entry of Airbnb resulted in 1.3 percent fewer hotel nights booked and a 1.5 percent loss in hotel revenue.”).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Airbnb Doubles Down on Experiences, Expanding to 1000 Destinations and Adding New Passion Categories in 2018*, AIRBNB (Feb. 23 2018), <https://news.airbnb.com/airbnb-doubles-down-on-experiences-expanding-to-1000-destinations-and-adding-new-categories-in-2018/>.

126. Dara Kerr, *Airbnb Will Expand ‘Experiences’ to 1000 Cities This Year*, CNET (Feb. 23, 2018, 1:13 PM), <https://www.cnet.com/news/airbnb-rolls-out-experiences-to-1000-new-cities/>.

127. Stephanie J. Knightly, *Regulating Innovation: The Positive Economic Impact of Taxing Airbnb Like the Hotel Industry*, 51 SUFFOLK U. L. REV. 457, 461 (2018) (“Compared to Airbnb, hotels are disadvantaged: Airbnb rates are usually much cheaper than average

according to some in the hotel industry, stem from the fact that short-term rentals are unregulated and act as “illegal hotels.”<sup>128</sup> The American Hotel and Lodging Association argues that hosts with multiple units are the drivers of Airbnb’s success:

[A] significant – and rapidly growing – portion of Airbnb’s revenue in major U.S. cities is driven by commercial operators who rent out more than one residential property short-term visitors, essentially operating just like a hotel. Closing this “illegal hotel loophole” is the only way for state and local governments to protect communities and ensure a fair and competitive travel marketplace.<sup>129</sup>

This sentiment is more than just a myth. In April of 2018, the New York Office of Special Enforcement levied a \$1 million fine against a couple for operating an illegal hotel under the guise of Airbnb.<sup>130</sup> In New York, “[i]t is illegal . . . to rent empty apartments in buildings with more than three units for fewer than 30 days . . . .”<sup>131</sup>

Similarly, the city of San Francisco levied a \$2.25 million fine against landlords who evicted tenants “in order to rent out the apartments on Airbnb.”<sup>132</sup> Quite notably, San Francisco is one of the few cities in the United States that requires Airbnb to supply monthly information that allows the city to confirm whether a short-term rental has been properly registered under its ordinances.<sup>133</sup> The city also “requires Airbnb to verify that its hosts

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hotel rates because Airbnb allows hosts to list their apartments or spare rooms and establish their own customized accommodation rates. As a result, it is estimated that hotels are losing approximately \$445 million in revenue annually.”)

128. *Illegal Hotels*, AM. HOTEL & LODGING ASS’N, <https://www.ahla.com/issues/illegal-hotels> (last visited Mar. 28, 2019).

129. *Hosts with Multiple Units – A Key Driver of Airbnb Growth*, AM. HOTEL & LODGING ASS’N, <https://www.ahla.com/hosts-multiple-units-key-driver-airbnb-growth> (last visited Mar. 28, 2019) (citing HOSTS WITH MULTIPLE UNITS – A KEY DRIVER OF AIRBNB GROWTH: A COMPREHENSIVE NATIONAL REVIEW INCLUDING A SPOTLIGHT ON 13 U.S. MARKETS, CBRE (March 2017), [https://www.ahla.com/sites/default/files/CBRE\\_AirbnbStudy\\_2017.pdf](https://www.ahla.com/sites/default/files/CBRE_AirbnbStudy_2017.pdf)).

130. Ameena Walker, *Manhattan Couple Hit with \$1M Fine for Illegal Airbnb Listings*, CURBED N.Y. (Apr. 3, 2018, 1:30 P.M.), <https://ny.curbed.com/2018/4/3/17193246/airbnb-illegal-hotels-nyc-crackdown>.

131. *City Wins \$1M Judgment Against Couple Who Illegally Airbnb’d*, REAL DEAL (Apr. 3, 2018, 11:45 A.M.), <https://therealdeal.com/2018/04/03/city-wins-1m-judgment-against-illegal-hotel-operators/>.

132. Megan Rose Dickey, *SF Fines Two Landlords \$2.25 Million for Illegal Airbnb Rentals*, TECHCRUNCH (Nov. 5, 2018, 3:44 P.M.), <https://techcrunch.com/2018/11/05/sf-fines-two-landlords-2-25-million-for-illegal-airbnb-rentals/>.

133. *Id.*

have registered with the city before showing ads for their homes online.”<sup>134</sup>

#### IV. *TARR* IMPACTS ON MAJOR TEXAS CITIES

The *Tarr* decision will likely have major impacts on large Texas cities, particularly its largest city—Houston. Houston is the only major city in America without formal zoning laws.<sup>135</sup> Despite multiple zoning proposals, Houstonians have repeatedly voted against any type of zoning inside of the city limits.<sup>136</sup> Instead, the city primarily regulates land use through the enforcement of deed restrictions.<sup>137</sup> This enforcement authority includes the ability to determine whether a particular property’s use of land complies with private restrictive covenants.<sup>138</sup> Unless residents choose to amend their deed restrictions, Houstonians will now be unable to bring challenges to short-term rentals under many restrictive covenants throughout the city.

Austin will also face challenges under the *Tarr* court’s ruling. Currently, the City of Austin heavily regulates short-term rental properties. These regulations require short-term rental owners to not only pay a local hotel tax, but also to register their property with the city and receive a certificate of occupancy.<sup>139</sup> Several residents have already brought a challenge to the ordinance, arguing that it is an impermissible burden on their Constitutional

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134. Kate Conger, *Airbnb Sues San Francisco Over New Rental Legislation*, TECHCRUNCH (June 27, 2016, 7:51 P.M.), <https://techcrunch.com/2016/06/27/airbnb-sues-san-francisco/>.

135. Brady Getlan, *Houston Strong: A World Series Ring, But Is There a Problem with a Lack of Zoning Laws?*, 7 U. BALT. J. LAND & DEV. 63, 63, 67 (2018) (“Houston, however, is one of the few cities that does not have formal zoning laws. Houston prides itself on having no formal zoning laws and calls itself the ‘city with no limits.’”).

136. *Houston Voters Again Reject Zoning*, WASH. POST (Nov. 6, 1993), [https://www.washingtonpost.com/archive/realestate/1993/11/06/houston-voters-again-reject-zoning/47ad1558-465a-48f2-b330-a4a6fcb01387/?noredirect=on&utm\\_term=.25933d929019](https://www.washingtonpost.com/archive/realestate/1993/11/06/houston-voters-again-reject-zoning/47ad1558-465a-48f2-b330-a4a6fcb01387/?noredirect=on&utm_term=.25933d929019).

137. *Deed Restrictions—Frequently Asked Questions*, CITY OF HOUS. LEGAL DEP’T, <https://www.houstontx.gov/legal/dr-faq.html> (last visited Jan. 27, 2019) (“The City of Houston is not zoned. Therefore, the State Legislature and City Council have authorized the City to help with enforcement of recorded deed restrictions for the protection of neighborhoods, for the benefit of all residents, citizens, and taxpayers of the City, and to promote the health, safety, morals, and general welfare of the City.”).

138. See TEX. LOC. GOV’T CODE ANN. § 212.153(a) (stating that a municipality can sue to enforce deed restrictions that have been recorded).

139. *Short Term Rental Licensing—Frequently Asked Questions*, CITY OF AUSTIN, <http://austintexas.gov/content/1325/FAQ/17283> (last visited Jan. 27, 2019).

rights.<sup>140</sup> Alternatively, given the *Tarr* court's assertion that short-term rental properties are not a commercial use,<sup>141</sup> challengers could argue that Austin is treating them like a hotel when they are not.

## V. CONCLUSION

The Texas Supreme Court's decision in *Tarr v. Timberwood* will undoubtedly mark a substantial shift in how short-term rental cases are adjudicated throughout the state. It will also likely lead to increased litigation, given the fundamental tensions that remain. The primary tension is whether the state of Texas should be allowed to treat short-term rental property owners as though they are running a hotel in all other aspects except as they relate to restrictive covenants. While there are still some differences between traditional hotels and short-term rental properties, the gap will only continue to narrow as companies like Airbnb continue to expand their offerings into additional cities.

Given that the Texas Supreme Court is likely done considering the issue of short-term rental properties, the Texas Legislature should strongly consider amending the tax code to carve out a separate definition for short-term rental properties. Calling short-term rental properties "hotels" and requiring owners to pay hotel taxes increases confusion among property owners and guests.

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140. *TPPF Stands for Rights of Short Term Rental Owners and Guests*, TEXAS PUB. POL'Y FOUND. (Mar. 30, 2018), <https://www.texaspolicy.com/press/tppf-stands-for-rights-of-short-term-rental-owners-and-guests>.

141. See *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 292 (Tex. 2018), *reh'g denied* ("Moreover, Tarr's use does not qualify as a commercial use.").