Supreme Court of Texas

No. 24-0013

Beth Dutton and Rip Wheeler, Petitioners

v.

City of Scarlet &

Ruby Terrace Homeowners Association, Respondents

On Appeal from the Sixteenth Court of Appeals, Texahoma, and
the 532nd District Court, Scarlet County, Texas
Honorable Laura Pratt, Judge Presiding

ORDER[1]

THE COURT GRANTS THE PETITION FOR REVIEW AND SCHEDULES ORAL ARGUMENT ON THE FOLLOWING QUESTIONS PRESENTED:

1. Is the City of Scarlet's Ordinance an unconstitutionally retroactive law?

2. Does the City of Scarlet's Ordinance violate the Texas Constitution's Due Course of Law Clause?

3. Does the Ruby Terrace Homeowners Association Amendment destroy an existing property right?

4. Is the Ruby Terrace Homeowners Association Amendment illegal or against public policy?

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[1] Texas Young Lawyers Association 2024 State Moot Court Competition Problem. Written by Elizabeth Geary, Board Certified in Civil Appellate Law, Partner, Kelly, Hart & Hallman, LLP (elizabeth.geary@kellyhart.com).

In the Court of Appeals

for the Sixteenth District of Texas

City of Scarlet and

Ruby Terrace Homeowners Association, Appellants

v.

Beth Dutton and Rip Wheeler, Appellees

No. 16-23-00048

Filed: June 2, 2023

From the 532nd District Court of Scarlet County, No. 2023-523,019,
The Honorable Laura Pratt, Judge Presiding

MAJORITY OPINION

Perry, L., C.J., joined by Pierce, Rainwater, and Walker

This is a dispute concerning a municipal ordinance and an amendment to a homeowners association's deed restrictions, which both impose a minimum duration on leases of residential properties. The district court granted summary judgment in favor of Beth Dutton and Rip Wheeler (Homeowners). The City of Scarlet and the Ruby Terrace Homeowner's Association[2] appealed. We reverse and remand.

[2] The Homeowners filed one suit against both Defendants asserting that the same operative facts controlled. Neither the City nor the Association sought to sever the claims or causes of action.

I. BACKGROUND

The Homeowners lease residential properties as short-term rentals (STRs) through advertising and brokerage services, such as AirBYO and VR-BNB. In early 2019, the Homeowners purchased a residence in the Ruby Terrace Subdivision in Scarlet, Texas, and began offering it as an STR later that same year. Because of its proximity to Scarlet University, Ruby Terrace has become a popular area for STRs. The Property at issue in this dispute is subject to the Ruby Terrace Homeowners Association Declarations and Deed Restrictions, as well as the City of Scarlet ordinances.

A. The City Ordinance

On August 1, 2021, after citizen complaints regarding crime, nuisance, and destruction of property associated with STRs, the City of Scarlet passed an ordinance prohibiting "single-family dwelling transient rentals," which are defined as "the rental or offer for rental of any dwelling or any portion of a dwelling for a period of less than seven (7) days." Scarlet, Tex., Code of Ordinances, ch. 23, art. XII, § 10-0421. Leading up to the enactment of the Ordinance, the City held public hearings on the proposed restrictions following the mysterious death of a twenty-year old college student while staying in a Scarlet STR, known as the "Train Station." The parties' Agreed Statement of Facts provides that the City received increased crime and nuisance reports in neighborhoods with a higher percentage of STRs, particularly during weekends. In addition, the City experienced difficulty investigating nuisance

or crime complaints against individuals staying in STRs because they departed the City quickly after complaints.

B. The HOA Amendment

Similarly, up until October 18, 2021, the Ruby Terrace HOA Declarations, Bylaws, and Restrictions—recorded in Scarlet County real property records in 2014—provided the following provisions concerning rentals and amendments.

> 6.03 Rentals. Nothing in this Declaration shall prevent the rental of any Lot and the Improvement thereon by the Owner thereof for residential purposes only, so long as any lease shall be in writing and subject to the provisions of the Declarations, Bylaws, and Association Rules, as then existing and as may be amended. Within seven (7) days after the execution of any lease, the Owner shall provide notice to the Board, including the names of the tenants and length of time the lease is in effect. For leases with terms of less than thirty (30) days, the Owner shall provide the lessee's contact information to the Board for any necessary communications during the occupancy.
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> 10.04 Amendments. This Declaration may be amended by a majority of all Members at a Special or Annual meeting at any time following a 30-day written notice of the proposal of the amendment to the Members.

The HOA provided 30-days' notice by mail to the Members of the Ruby Terrace HOA that an amendment to Section 6.03 to the Declarations would be voted on during the October 18, 2021 HOA meeting, consisting of the following:

> 6.03 Rentals. Nothing in this Declaration shall prevent the rental of any Lot and the Improvement thereon by the Owner thereof for residential purposes only, so long as any lease shall be in writing, *for a minimum term of twelve (12) months,* and subject to the provisions of the Declaration, Bylaws, and Association Rules, as then existing and as may be amended. Within seven (7) days after the execution of any lease, the Owner shall provide notice to the Board, including the names of the tenants and length of time the lease is in effect.

The majority of the Members voted for the amendment by a margin of 55-32.[3]

C. Proceedings Below

After exhausting all administrative remedies necessary under the Texas Local Government Code, the Homeowners filed suit pursuant to the Uniform Declaratory Judgments Act (UDJA) seeking declarations that both the City Ordinance and the HOA Amendment are unenforceable as a matter of law.[4] The parties filed cross-motions for summary judgment on the declaratory judgment claims.

The Homeowners argued that the Ordinance is an impermissible retroactive law that alters fundamental rights previously held and that it violates their fundamental and settled property rights under the Due Course of Law Clause of the Texas Constitution. *See* Tex. Const. art. 1, § 16, 19; *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 138 (Tex. 2010). Further, the Homeowners argued that notice that the HOA Declarations contains an amendment clause is insufficient to apprise buyers that the HOA may amend the Declarations to "destroy" a property right that the homeowner relied upon when purchasing the property. Finally, the Homeowners argued that the HOA Amendment is against public policy and illegal.

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[3] We note that Texas Property Code Section 209.0041 requires a vote of 67 percent of the total votes allocated to property owners to enact a new deed restriction. *See* Tex. Prop. Code § 209.0041. Ruby Terrace had implemented a provision for Amendments within its Declarations, and in addition, Scarlet County is exempt from this provision due to its population. Regardless, the Homeowners did not challenge the HOA's voting procedures as a basis for their claims.

[4] The Homeowners claimed that in the alternative, they were entitled to just compensation under the Texas Takings Clause, Article I, Section 17. The district court did not reach this argument because it granted judgment declaring that the Ordinance was unenforceable as an unconstitutionally retroactive law that violates the Due Course of Law of the Texas Constitution. *See* Tex. Const. art. 1, § 16, 19.

The district court granted summary judgment in favor of the Homeowners and against both the City and the Homeowners Association—finding the Ordinance and the HOA Amendment unenforceable. The Appellants timely appealed.

D. The Parties' Agreed Statement of Facts Pursuant to Rule 263

1. In January of 2019, Beth Dutton and Rip Wheeler—full-time residents of Orange Rock, Wydaho—purchased a single-family residence in the Ruby Terrace Subdivision of Scarlet, Texas, with the intended purpose of utilizing the property as a short-term rental (STR). Dutton and Wheeler ("Homeowners," herein) reviewed the city ordinances and Ruby Terrace Declarations, finding no STR restrictions on the residence.

2. Dutton—a graduate of Scarlet University—is an avid college sports fan and frequents the University's football and basketball games. Dutton and Wheeler began purchasing residences to offer as STRs in other states following their marriage in 2018.

3. The Homeowners have developed a signature style that involves a complete redesign of the properties, aiming to replicate the feeling of a stay at their Wydaho ranch. The Homeowners named the STR residence, the Scarlet Stone. The Homeowners also invested in numerous relics to heighten the experience for their guests that are similar to their own ranch's decor, as well as memorabilia from Scarlet University and the City of Scarlet. The Homeowners have developed similar STR properties in four other states in the same manner without encountering restrictions. All of their properties are designed to create a unique stay with dramatic features that their short-term residents would not experience at home. Sixty-five percent of all STR stays booked through Air BYO or VR-BNB in this state are for a term of less than seven days. The Scarlet Stone's bookings have been consistent with this state-wide statistic.

4. In early 2021, after receiving numerous complaints and concerns, the City of Scarlet requested public comments on a proposed ordinance prohibiting "single-family dwelling transient rentals," which is defined as "the rental or offer for rental of any dwelling or any portion of a dwelling for a period of less than 30 days." The City provided the opportunity to comment online or at the public hearing.

5. On June 15, 2021, the City of Scarlet's Planning and Zoning Committee held a public hearing and received testimony from citizens that lived in close proximity to STRs describing nuisance reports, theft, and parking issues that the neighbors alleged were attributed to STR guests. Comments revealed that the theft allegations were specific to objects or personal property in citizen's yards, such as

flags, gnomes, and seasonal decor. Neighbors reported that these incidents typically occurred on weekends. Further, the City of Scarlet Police Chief spoke at the committee's request, accounting his department's difficulty in pursuing crime reports related to STR guests due to their short stay in Scarlet. Statistically, the police chief provided statistical reports revealing that crime reports were higher in neighborhoods where there are a higher percentage of STRs, such as near Scarlet University. In addition, public comments included references to the well-publicized mysterious death of a college student at an STR named the Train Station located within the city limits of Scarlet.

6. Following public comment, the City of Scarlet passed a municipal ordinance on August 1, 2021 prohibiting "single-family dwelling transient rentals," which is defined as "the rental or offer for rental of any dwelling or any portion of a dwelling for a period of less than 7 days." Scarlet, Tex., Code of Ordinances, ch. 23, art. XII, § 10-0421. The Planning and Zoning Committee, as well as the City Council, noted that many of the reports indicated that the shorter stays were the source of the reported concerns, and therefore, the City shortened the minimum duration from 30 days to 7 days.

7. Caroline Warner, a neighbor of the Dutton/Wheeler property and Ruby Terrace Homeowner Association President, offered her comments at the public hearing before the Planning and Zoning Committee. Warner accounted that she began noticing disruptive conduct, including loud parties in the backyard, from various people renting the Scarlet Stone, particularly during weekends when Scarlet University had home football games. Warner's own Clementine University flag was stolen out of her yard during the weekend that Clementine's football team played Scarlet in late August of 2021. The flag was later found on the porch of the Scarlet Stone and returned to Warner.

6. The Ruby Terrace HOA Bylaws and Restrictions—recorded in Scarlet County real property records in 2016—provided the following provisions concerning rentals and amendments.

> 6.03 Rentals. Nothing in this Declaration shall prevent the rental of any Lot and the Improvement thereon by the Owner thereof for residential purposes only, so long as any lease shall be in writing and subject to the provisions of the Declarations, Bylaws, and Association Rules, as then existing and as may be amended. Within seven (7) days after the execution of any lease, the Owner shall provide notice to the Board, including the names of the tenants and length of time the lease is in effect. For leases with terms of less than thirty (30) days, the Owner shall provide the lessee's contact information to the Board for any necessary communications during the occupancy.

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> 10.04 Amendments. This Declaration may be amended by a majority of Members in attendance at a Special or Annual meeting at any time following a 30-day written notice of the proposal of the amendment to the Members. As provided herein, the Quorum required to amend the Declarations and Restrictions is fifty-one percent of the owners.

In addition, the Declarations provide that the subdivision be "solely a residential community and any commercial use must be in compliance with the restrictions."

7. Warner provided 30-days' notice by mail to the Members of the Ruby Terrace HOA that an amendment to Section 6.03 to the Declarations and Restrictions would be voted on during the October 18, 2021 HOA meeting, consisting of the following:

> 6.03 Rentals. Nothing in this Declaration shall prevent the rental of any Lot and the Improvement thereon by the Owner thereof for residential purposes only, so long as any lease shall be in writing, for a minimum term of twelve (12) months, and subject to the provisions of the Declaration, Bylaws, and Association Rules, as then existing and as may be amended. Within seven (7) days after the execution of any lease, the Owner shall provide notice to the Board, including the names of the tenants and length of time the lease is in effect.

Although Dutton, Wheeler, and a few other Members that also leased their property as STRs attended to vote against the amendment, the majority of the owners voted for the amendment by a margin of 55-22.

8. The Amendment went into effect immediately and was recorded in the real property records of Scarlet County, Texas.

II. DISCUSSION

Standard of Review

When, as here, the parties agree to a statement of facts pursuant to Rule 263, the "agreed facts are binding on the parties, the trial court, and the appellate court." *See Patton v. Porterfield*, 411 S.W.3d 147, 153 (Tex. App.—Dallas 2013, pet. denied). This Court reviews the trial court's application of the law to the agreed facts de novo.

See Abbott v. Blue Cross & Blue Shield of Tex., Inc., 113 S.W.3d 753, 757 (Tex. App.—Austin 2003, pet. denied).

A. The City Ordinance

First, we consider the City's enactment of the Ordinance prohibiting STRs for a period of less than seven days. Scarlet, Tex., Code of Ordinances, ch. 23, art. XII, § 10-0421. Over the past several years, travelers have increasingly chosen STRs—leased for as little as one night to weeks at a time—as opposed to more traditional lodging, such as hotels. *See* Donald J. Kochan, *The Sharing Stick in the Property Rights Bundle*, 86 U. Cin. L. Rev. 893, 894-95 (2018). Along with the increase of STRs, municipalities and local governments have sought the means to regulate the STR market due to concerns, and often complaints, voiced by neighboring property owners.

The City of Scarlet is a "home-rule city," chartered pursuant to Article XI, Section 5 of the Texas Constitution—not as a result of any legislation. *See* Tex. Const. art. XI, § 5; *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 23 (Tex. 2016). A home-rule city is entitled to self-government so long as it does not enact an ordinance that is "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." *See* Tex. Const. art. XI, § 5(a). Therefore, a home-rule city is only limited to the extent that any of its ordinances are preempted or inconsistent with existing Texas law. *See BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016).

1. Retroactivity - Article I, Section 16 of the Texas Constitution

The City contends that the district court erred in granting summary judgment because the Ordinance is not unconstitutionally retroactive. "A retroactive law is one that extends to matters that occurred in the past." *See Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 707 (Tex. 2014). Further, a retroactive law is "one that affects acts or rights which accrued before it became effective." *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). But, "[m]ost statutes operate to change existing conditions, and it is not every retroactive law that is unconstitutional." *See Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971). Retroactive ordinances must survive under the *Robinson* three-factor test: (1) "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings;" (2) "the nature of the prior right impaired by the statute;" and (3) "the extent of the impairment." *See Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 139 (Tex. 2010) (noting that the presumption against retroactivity is based on the objectives of protecting reasonable, settled expectations, and guarding against legislative abuses). We are not convinced that the STR Ordinance is a retroactive law because there were no laws in existence authorizing STRs previously. Nonetheless, we will proceed with the *Robinson* factors, assuming without deciding that the law is retroactive.

Zoning advances a significant public interest to address the "fair and reasonable termination of nonconforming property uses." *See City of Univ. Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972) ("A nonconforming use of land or buildings

is a use that existed legally when the zoning restriction became effective and has continued to exist."). Further, a city's efforts to "safeguard the public safety and welfare" are likewise strong public interests that justify the enactment of a retroactive ordinance. *See Barshop v. Medina Co. Underground Water Conservation Dist.*, 925 S.W.2d 618, 634 (Tex. 1996). The nature of the prior right and extent of the limitation can favor a finding that a law is not unconstitutionally retroactive when the exercise of the police power under city government is reasonable and narrow. *See Zaatari v. City of Austin*, 615 S.W.3d 172, 206-07 (Tex. App.—Austin 2019, pet. denied) (Kelly, J., dissenting) ("Just because the property owners are not making as much profit as they could with unfettered rights to short-term rentals does not mean their property right has been unconstitutionally impaired.").

As opposed to other cities that have attempted a complete STR ban of at least thirty days or more, this Ordinance strikes a more reasonable balance with a limitation of seven days. The Homeowners are not outright prohibited from owning and leasing STRs, but simply must ensure that all rentals are for a term of no less than seven days. The agreed facts reveal that the City received complaints and concerns regarding public safety, disturbances, and citizen welfare related to the shorter rentals over weekends when transient visitors arrive for concerts, college football games, or other events. Therefore, regardless of whether the ordinance is retroactive, it is not unconstitutionally so. We sustain the City's first point.

2. The Homeowners' Due Course of Law claim.

Next, the City argues that the Ordinance does not offend the Due Course of Law[5] clause of the Texas Constitution. In support, the City contends that as opposed to other cities that have attempted an ordinance that effectively bans all STRs, this Ordinance permits STRs with reasonable zoning restrictions. The Homeowners argued at the lower court that the Ordinance offends both the Takings and Due Course of Law clauses of the Texas Constitution by depriving them of substantive-due-process rights because "leasing is a fundamental use of property that is sacrosanct in Texas." The Homeowners further claim that they hold a "fundamental leasing right derived from their fundamental property ownership right." In addition, the Homeowners assert that the deprivation that they will suffer is an expected loss of income from STR leasing as part of their "bundle of sticks" arising from their fundamental property rights.

Article I, Section 19 of the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." *See* Tex. Const. art. I, § 19.[6] The City does not dispute that the Homeowners hold a fundamental

[5] We note that the Homeowners also brought an alternative claim for just compensation under the Takings Clause of the Texas Constitution, Article I, Section 17. The district court did not reach this question because it found the Ordinance unenforceable. Therefore, while we have similar doubts as to its applicability, we do not address whether the Takings Clause of the Texas Constitution would apply.

[6] For an extensive discussion of the history and development of the Texas Due Course of Law Clause and the standard that applies to its analysis, *see Patel v. Tex. Dept. of Licensing & Regul.*, 469 S.W.3d 69, 82 (Tex. 2015).

property ownership right, but disagree that this right carries with it an unfettered right to lease without restrictions. We agree with the City.

Before a substantive due course of law right attaches, the party must hold a liberty or property interest worthy of constitutional protection. *See Tex. Dept. of State Health Servs. V. Crown Distributing LLC*, 647 S.W.3d 648, 655 (Tex. 2022). The Homeowners contend that the Ordinance is unconstitutional because (1) the purpose of the Ordinance "could not arguably be rationally related to a legitimate governmental interest," and (2) the Ordinance's "actual, real-world effect as applied to the [Homeowners] could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015). The Homeowners primarily rely on a future "loss of income"[7] as the property right at issue, when rather, the loss of investment is the touchstone of property rights. *See Village of Tiki Island v. Ronquille*, 463 S.W.3d 562, 578 (Tex. App.—Houston [1st Dist.] 2015, no pet.). "Property owners do not have a constitutionally protected vested right to use real property in any certain way, without restriction." *See id.* The Homeowners' primarily asserted harm—loss of income—does not, in and of itself, mean that the Ordinance infringes on a vested property right. *See Benners*, 485 S.W.2d at 778. *Benners*—which has not been overruled[8]—provides that zoning declarations "under reasonable

[7] The Homeowners pointed to a purported loss of investment in the relics, furnishings, and improvements. The agreed facts, however, do not reveal any indication that the improvement value of the property would be lost, nor that the relics or furnishings—that are not attached to the property—are relevant to the property's value.

[8] *See Bd. of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 431 (Tex. 2002).

conditions" are permissible under the scope of municipal police power. *See id.* (holding that a property owner does not have vested rights in any particular use of one's property). We find that the Homeowners do not have a vested right in the specific use of their property as an STR. *See Klumb v. Houston Mun. Emp. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015).

Further, even if the right to lease on a short-term basis were a vested property right in the manner that the Homeowners contend, the Agreed Statement of Facts reveal that the City has demonstrated a legitimate governmental interest related to citizen safety and wellbeing. The statistics show that the particularized concern focuses on the shorter-term rentals of a few days, when most of the concerning incidents occurred. This particular ordinance—restricting STRs to a minimum term of seven days—is rationally related to the concerns raised regarding the shorter rentals over the weekends. As opposed to the longer thirty-day minimum terms that other cities have attempted, this Ordinance bears a more rational relationship to the legitimate governmental interest. *See Klumb v. Houston Mun. Emp. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015) Therefore, the Homeowners have not shown a deprivation of a vested property right because they are still permitted to exercise the right to lease under reasonable restrictions. *See Draper v. City of Arlington*, 629 S.W.3d 777, 786-77 (Tex. App.—Fort Worth 2021, pet. denied).

We hold that the City Ordinance is enforceable and does not offend the Texas constitutional requirements under the Due Course of Law Clause. Therefore, we sustain the City's second point.

B. The HOA Amendment

We turn next to the HOA Amendment of the Ruby Terrace Declarations. The Amendment restricted all leasing terms to a minimum of twelve months—amending the prior restriction which provided no minimum term so long as the Homeowners provided notice of the lease within seven days. The HOA argues that the lower court erred by enjoining the enforcement of the 2021 Amendment because (1) deed restrictions, or declarations, are contractual in nature and the homeowners agreed to the amendment clause; (2) the Amendment does not effectively destroy the right to lease the residences as provided in the 2016 Declarations; and (3) the Amendment is not illegal or against public policy. The Homeowners contend that even if the Declarations contained an amendment clause, they reasonably relied on the express language in the leasing clause at the time of their purchase—allowing STRs with leasing terms of less than thirty days. Therefore, the Homeowners contend that the Amendment effectively destroys bargained-for property rights.

Texas law provides for deed restriction amendments, so long as three conditions are met. *See Roddy v. Holly Lake Ranch Ass'n*, 589 S.W.3d 336, 342 (Tex. App.—Tyler 2019, no pet.). First, "the instrument creating the original restrictions must establish both the right to amend and the method of amendment," or in the alternative, the amendments must comply with Texas Property Code Section 209.0041. *See Poole Point Subdivision Homeowners' Ass'n v. DeGon*, No. 03-20-00618-CV, 2022 WL 869809, at *3 (Tex. App.—Austin Mar. 24, 2022, pet. denied); Tex. Prop. Code § 209.0041 (providing the procedure for amendments to deed restrictions).

Second, the amendment must only include "those changes contemplating a correction, improvement, or reformation of the agreement rather than its complete destruction." *See id.* (citing *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552, 562 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Third, "the amendment must not be illegal or against public policy." *Id.* Consequently, at the time of purchase, the homeowners are aware that the deed restrictions, or declarations, may be amended. *See Angelwylde HOA, Inc.*, 2023 WL 2542339, at *3 ("When buyers purchase property governed by a declaration capable of amendment, they are on notice that 'the unique form of ownership they acquired when they purchased their [property] was subject to change through the amendment process, and that they would be bound by properly adopted amendments.'").

The parties agree that the Ruby Terrace Declarations provided a procedure to amend. Although the Homeowners argue that the HOA's procedure, which allows a simple majority to amend the Declarations, further bolsters their argument that the amendment is against public policy, they did not directly challenge the HOA's right to amend or its procedure when amending. Instead, the Homeowners focus on the remaining two requirements, that the 12-month lease minimum term restriction "destroys" their property rights as provided in the 2016 Declarations, and that it imposes an amendment that is illegal or against public policy.

1. Existing Property Rights under the Prior Deed Restrictions

We first consider whether the amendment "destroys" an existing property right under the agreement as the Homeowners allege. While Texas courts have not

considered the enforceability of HOA restrictions of STRs as extensively as they have considered municipal ordinances restricting STRs, the courts that have reviewed similar HOA restrictions have found them permissible. *See e.g.*, *Angelwylde HOA, Inc. v. Fournier*, No. 03-21-00269-CV, 2023 WL 2542339, at *5 (Tex. App.—Austin 2023, pet. denied).[9] Similar to *Angelwylde*, the 2016 Declarations do not provide an absolute or unlimited right to lease residences. *See Poole Point Subdivision Homeowners' Assoc.*, No. 03-20-00618-CV, 2022 WL 869809, at *3. While the Amendment does impose a new minimum lease term that did not previously exist, the Homeowners still hold the right to lease their property. The Homeowners argue that the 2016 Declarations include an express provision reflecting the allowance of STRs of less than thirty days, and therefore, this case is distinguishable from *Angelwylde* and similar cases. While true that the prior Declarations did reflect a reference to leases of less than thirty days, the Declarations also included the express right to amend. Pursuant to that right to amend, the HOA Amendment imposes a "correction" or "reformation" on leasing—not an outright ban or destruction of the prior agreement. New minimum term restrictions do not effectively "destroy" the Homeowners' property rights related to leasing under the Declarations. *See id.* ("The placing of certain conditions on the duration of a lease and the lessee's use of the leased property does not constitute 'complete destruction' of the Deed Restrictions.").

[9] During the pendency of this appeal, the Supreme Court of Texas denied the petition for review after full briefing on the merits in *Angelwylde HOA, Inc. v. Fournier*, No. 03-21-00269-CV, 2023 WL 2542339 (Tex. App.—Austin 2023, pet. denied) and *Cottonwood Trail Investments, LLC v. Pirates Prop. Owners Assoc.*, No. 01-22-00400-CV, 2023 WL 5535664 (Tex. App.—Houston [1st Dist.] Aug. 29, 2023, pet. denied). For purposes of this problem, the date of the denial of the petitions for review shall be considered consistent with the date of this court of appeals opinion.

Therefore, we hold that the second requirement is met because the Amendment "corrects, reforms, or improves the Restrictions, rather than destroying them." We sustain the HOA's first point.

2. Public policy and the legality of the HOA Amendment

Next, we consider whether the Amendment setting the twelve-month lease term minimum is against public policy or is illegal. The Homeowners contend that short-term leasing is part of the Homeowners' bundle of sticks purchased in reliance on the Declarations, and therefore, constitutes a fundamental property right. Similar to their arguments concerning the Ordinance, the Homeowners contend the judicial enforcement of the Amendment constitutes an impermissible deprivation of due process by state action. In support, the Homeowners rely on *Shelley v. Kraemer*—the 1948 United States Supreme Court case involving the judicial enforcement of restrictive covenants based on race. 334 U.S. 1 (1948) (holding that judicial enforcement of the racially-based covenants constituted state action and a deprivation of equal rights).

"Modifications to deed restrictions that impose greater restrictions are not prohibited by law when they are consistent with the overall plan of development." *See id.* at *4. Even if an amendment is more restrictive than the original restrictive covenant, it is not prohibited by law nor unreasonable when it is consistent with the overall plan for the subdivision. *See Harrison v. Air Park Estate Zoning Comm.*, 533 S.W.2d 108, 111 (Tex. App.—Dallas 1976, no writ). The 2016 Ruby Terrace Declarations provided that the subdivision "be solely a residential community and

any commercial use must be in compliance with the restrictions." The Amendment furthers this purpose. In addition, the Supreme Court of Texas has previously referenced the ability of an association to amend the restrictions to implement durational limits on leases. *See Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 277 (Tex. 2018).

The only favorable authority that the Homeowners provide concerning STR restrictions are out-of-state[10] cases, and while many of those cases have found that HOA amendments that dramatically restrict STRs are unenforceable, we are not bound by that authority. And, we do not find the case of *Shelley v. Kraemer* applicable. As opposed to the due process and equal rights based on race at stake in *Shelley*, the Homeowners still hold their fundamental property rights, including the right to lease their property. While the right to lease is subject to restrictions, it is not outright prohibited or "destroyed." Such restrictions are permissible so long as amendments comply with the HOA's right to amend and therefore, are not illegal or against public policy. We sustain the HOA's second point contending that the Amendment is enforceable.

CONCLUSION

We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

[10] *See e.g.*, *Wilkinson v. Chiwawa Cmty. Ass'n*, 327 P.3d 614, 621-22 (Wa. 2014); *Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18, 25 (Ariz. 2022)

DISSENTING OPINION

Teeter, J., dissenting

The majority opinion ignores fundamental and well-settled Texas property rights jurisprudence. Both the City's Ordinance and the HOA's Amendment infringe on the Homeowners' well-settled use and enjoyment of their property. As a result, I would affirm the district court's summary judgment in favor of the Homeowners, and respectfully dissent from the majority opinion.

I. The City Ordinance

Contrary to the majority's assessment, the Ordinance banning STRs for less than seven days significantly affects the Homeowners' substantial interests in their well-recognized property right of leasing. The public interest that the City identifies is unsubstantiated and minimal, at best. Because the ordinance "gives pre-enactment conduct a different legal effect from that which it would have had without the passage of the [ordinance,]" the STR minimum-term ordinance operates to eliminate a portion of the Homeowners' well-established and settled property rights. *See Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 60 (Tex. 2014) (quoting Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960)). In addition, the HOA Amendment effectively destroys a previously unrestricted property right, and is likewise against public policy and illegal.

A. The City Ordinance is unconstitutionally retroactive because it eliminates well-established and settled property rights.

In turning to the *Robinson* factors to determine whether the ordinance is unconstitutionally retroactive, none of the factors favor the constitutionality of the

Ordinance. First, the City did not point to any agreed facts reflecting that the concerns regarding crime and nuisance reports were directly tied to STRs. The agreed statement of facts merely acknowledged that a correlation of increased crime and nuisance reports occurred in neighborhoods with a higher percentage of STRs. But this alone does not provide any support to the City's argument that the STRs were the cause of the reports. The Homeowners countered with the well-substantiated point that all of the neighborhoods that the City identified were in close proximity to Scarlet University and that many citizen reports are also linked to college housing, rather than STRs. Without more, the City has not shown support for the claim that the purported public interest is compelling or would be served by the Ordinance. Therefore, the first *Robinson* factor does not support the constitutionality of the retroactive ordinance.

The remaining *Robinson* factors fare no better for the City. The nature of the prior right is essential because the "ability to lease property is a fundamental privilege of property ownership." *See Zataari*, 615 S.W.3d at 190; *see also Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (observing that an "essential attribute" of property rights includes "the right to use, lease and dispose of [property] for lawful purposes"). While true that the right to lease property may be subject to certain limitations, it is undisputedly an established right. *See Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 708 (Tex. 2014). The right to lease one's property on a short-term basis is likewise established, and the City has admitted as much by noting that prior to the ordinance, STRs were an "allowable use." In addition, the Homeowners in this

case entered the STR market after expending significant funds into the property for this purpose. Therefore, the property right at stake in this matter is well-settled.

The City contends, and the majority agrees, that the impairment caused by this particular Ordinance is more reasonable and less extensive than similar ordinances that Texas courts have found unenforceable. *See, e.g.*, *Zataari*, 615 S.W.3d at 181 (finding an ordinance unconstitutional when it restricted STRs to not less than thirty days and prohibited more than six unrelated adults from using the property). While that may be true, the Ordinance would eliminate approximately 65 percent of all rentals of the STRs due to the minimum lease-term requirement. An ordinance that eliminates approximately two-thirds of all sources of income that the Homeowners expected when investing in the property constitutes an extensive impairment. Because of the well-settled property right at issue, I would conclude that the retroactive ordinance is unconstitutional because it reduces that right substantially—likely making it economically unfeasible to continue its intended use. Therefore, I would affirm the district court's judgment in favor of the Homeowners.

B. The Ordinance violates the Texas Constitution's Due Course of Law Clause because the Homeowners hold a vested property right and the Ordinance is not rationally related to a legitimate governmental interest.

For the same reasons, I would conclude that the Ordinance also violates the Texas Constitution's Due Course of Law Clause because the Homeowners hold a vested right in leasing their property and the City has not shown that the ordinance is rationally related to a legitimate governmental interest. As the majority recognizes, the Texas Constitution provides that "[n]o citizen of this State shall be deprived of

life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." *See* Tex. Const. art. I, § 19. Free use of one's property is one of the most long-standing and engrained interests of the public. *See Tarr*, 556 SW.3d at 281-82 (noting that Texas law has historically favored free and unrestricted use of land). "Private property ownership is a fundamental right." *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012). "The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others; and the *right to lease* it to others, and therefore derive profit, is an incident of such ownership." *Calcasieu Lumber Co. v. Harris*, 13 S.W. 453, 454 (Tex. 1890) (emphasis added). The parties agreed that the Homeowners enjoyed the unrestricted use of their property allowing short-term rentals prior to the Ordinance. Therefore, I dissent from the majority's opinion and I would conclude that the right to lease—including the lease of property on a short-term basis—is a fundamental vested property right.

As discussed above, the City wholly failed to show how the cited statistics regarding the crime or nuisance reports in neighborhoods with a higher percentage of STRs justified the ban of the majority of short-term rental leases. The City merely provided a list of justifications that the agreed facts did not adequately support. *See Zaatari*, 615 S.W.3d at 189 (noting in a related analysis that "nothing in the record supports a conclusion that a ban on [STR] rentals would resolve or prevent the stated concerns"). Therefore, I would hold that the Ordinance violates the Due Course of Law Clause of the Texas Constitution.

II. The HOA Amendment

The majority has leapt into the same problematic conclusions that our sister courts have adopted regarding the enforceability of HOA Amendments that are unforeseeable, illegal, and against public policy, without regard to other states' analysis where this issue is further developed. *See e.g.*, *Wilkinson v. Chiwawa Communities Ass'n*, 327 P.3d 614, 621-22 (Wa. 2014) (holding that amendment restricting short-term rentals was unenforceable because it was an entirely new restriction unrelated to any existing restriction); *Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18, 25 (Ariz. 2022) (holding that new amendments restricting use of residential properties was not foreseeable and therefore, not enforceable). While the Supreme Court of Texas has not yet ruled on the question of whether an HOA amendment that imposes a new minimum term restriction on STRs is enforceable, it has provided guidance concerning related attempts to restrict STRs—identifying such attempts as resulting in a "mega-restriction." *See Tarr*, 556 S.W.3d at 280.

A. The HOA Amendment is an effective destruction of existing property use rights.

In *Tarr*, the Court held that the existing deed restrictions that restricted use of property for "single-family, residential-use" did not result in a prohibition on STRs. *See id.* at 286 ("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."). As the Court noted, actual or constructive notice of the restriction at the time of purchase is the crux of restrictive covenant analysis and STRs are not barred by a "residential purposes" provision. *See*

id. ("But we have also noted that 'covenants restricting the free use of property are not favored.'") (quoting *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981). In reaching its opinion reversing the court of appeals' decision, the Court relied on other state's interpretation of restrictive covenants. *See id.* at 289 (citing cases from Arkansas, Alabama, Colorado, and Florida). I believe that the Court would likely look to other states again when setting precedent on the enforceability of an amendment creating such a "mega-restriction."

While I agree that the HOA may amend the Declaration in the procedure that it did, it may not do so in a manner that imposes an entirely new restriction that the Homeowners could not foresee at the time of their purchase. The inclusion of an amendment provision within the Declarations does not put buyers on notice of the potential for an entirely new restriction that significantly alters the buyers' rights related to their use of the property. *See Myers v. Tahitian Village Prop. Owners Assoc'n, Inc.*, No. 03-21-00105-CV, 2022 WL 91660, at *3 (Tex. App.—Austin Jan. 6, 2022, pet. denied). STRs are operated and marketed in a completely different manner than long-term residential leasing because in the case of STRs, the customer is not seeking a home, but rather a short-term stay away from home. Therefore, the contention that the Homeowners are still permitted to participate in the leasing market through long-term leasing is disingenuous. As the agreed facts reveal, STRs are designed entirely for a different customer—providing unique, fully furnished surroundings on a temporary basis. For the same reasons that the ordinance interferes in a settled property right, the Amendment operates as a destruction of an

existing property use right, rather than a "correction, improvement, or reformation." *See id.* Therefore, even if the Amendment meets the other two elements, it does not meet the requirement that it may not operate to destroy property rights existing at the time of purchase.

B. The HOA Amendment is unenforceable because it is illegal and against public policy.

Nonetheless, for the same reasons that the Ordinance illegally infringes on fundamental property rights, the Amendment does so as well. Free use of one's property is one of the most long-standing and engrained interests of the public. *See Tarr*, 556 SW.3d at 281-82 (noting that Texas law has historically favored free and unrestricted use of land). Subjecting property owners to unexpected restrictions that were not in existence in any manner at the time of purchase defies public policy.

In addition, I see no reason that the principles of *Shelley v. Kraemer* are not applicable here when fundamental rights are at stake. *See Shelley*, 334 U.S. at 14; *contra Cauthorn v. Pirates Prop. Owners' Assoc'n*, ---S.W.3d---, 2023 WL 5535665, at *5 (Tex. App.—Houston 2023, pet. denied). The judicial enforcement of an amendment which effectively strips property owners of fundamental property use rights bargained for at the time of purchase constitutes an impermissible state action. *See Shelley*, 334 U.S. at 15 ("The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights. . ."). I would hold that the Amendment is illegal and against public policy.

Therefore, I would affirm the judgment of the district court.

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