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Enforcement of Private Land Use Regulations: Point-Counter Point

The Community Association’s Viewpoint

I. Introduction

A. Scope of Article. This article is limited to the regulation of real property through private restrictions, focusing on enforcement by community associations.

B. Definitions. A community association might also be referred to as a homeowners association (“HOA”), a property owners association (“POA”),¹ a common interest development (“CID”),² a common-interest community (“CIC”) or a planned unit developments (“PUD”).

A common-interest community is defined in Restatement Third, Property (Servitudes) as follows:

§ 1.8 Common-Interest Community Defined

A “common-interest community” is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal

(1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or

(2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property,

or that enforces other servitudes burdening the property in the development or neighborhood.³

A property owners association is defined in Section 202.001(2), Texas Property Code, as follows:

“Property owners’ association” means an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development.⁴

C. Background. Deed restrictions are servitudes and servitudes have been a part of the law since Roman times. Again quoting Restatement Third, Property (Servitudes):

Rights of way appear in the Twelve Tables of Rome, and later Roman law recognized a variety of servitudes including rights to dig and burn lime, pasture cattle, draw and transport water, encroach on a neighbor’s airspace, and rights to light, view, and support. A running covenant entitling a land owner to

the services of a religious house to sing in the manor chapel appears in an English Year Book case of 1368. The privity and touch-or-concern doctrines of real covenants law derive from Spencer's Case decided in 1583. The 1834 decision in *Keppel v. Bailey* (2 MV&K 517, 39 Eng. Rep. 1042) led to the split of covenants enforceable at law and those in equity. Medieval English law recognized servitudes of various sorts but categorized them as 'incorporeal hereditaments.' The easements and profits categories emerged in the 19th century.⁵

These old methods of controlling land use have received significantly increased legal attention as people have moved into planned unit developments by the millions. According to the Community Associations Institute

[a]n estimated 42 Million Americans now live within community associations. There are 205,000 community associations in the United States - in 1965 there were only 500. Approximately 50% of all new homes built in major metropolitan areas fall within community associations.⁶

Deed restrictions are an "efficient and effective method of creating and maintaining planned community developments."⁷ Restrictions are designed to protect property values and preserve the quality of life within the neighborhood. Restrictions are

based on the assumption that many of us live in close quarters, that we will give up some of our discretion

to obtain limitations on the loud noise and bad taste of our neighbors, and that we are willing to pay for private governance because we cannot afford to obtain these amenities – show-shoveling, swimming pool, roadside planting – individually.⁸

II. Enforcement Policy

The Association should enact, by a resolution of its board of directors, an enforcement policy which includes a statement of policy and a set of standard procedures.

A normal enforcement procedure would include one or two initial letters pointing out the violation and reminding homeowners of the deed restrictions. The board or deed restriction committee may choose to speak to the homeowners and try to cure the violation by agreement without legal involvement. However, sometimes homeowners can be very hostile to any suggestion that anyone else can tell them what to do with their property.

Association volunteers should use discretion in attempting to work out a solution directly with the homeowner. No final agreement should be made without the full consent of the board of directors. Additionally, the Association's attorney should be consulted if the Association intends to compromise with the homeowner and accept anything less than full compliance with the restrictions.

A. Initial Attorney Demand

If the violation remains unresolved, the

file would be referred to the Association's attorney. The attorney should send out one or two letters clearly presenting the Association's position and advising the homeowner that the Association will be forced to file suit against them if the violation is not immediately cured. An example of a standard deed restriction demand letter is attached to this paper. See Appendix 1, Initial Demand Letter.

B. Dealing with Homeowners

Normally the attorney is given the difficult task of not only persuading or forcing a recalcitrant homeowner into curing the violation of the restrictions, but also collecting the Association's legal fees. As noted below, the Association has a right to its reasonable attorney's fees incurred in enforcing the deed restrictions.

In fact, Chapter 204.010(a)(11), Texas Property Code, gives Associations in Harris County (or any other county with a population of 2.8 million or more)⁹, the right - after notice and an opportunity "to be heard" to

collect reimbursement of actual attorney's fees and other reasonable costs incurred by the property owners' association relating to violations of the subdivision's restrictions or the property owners' association's bylaws and rules....¹⁰

A reasonable interpretation of this section would suggest that a notice included in the attorney's demand letter is sufficient. The letter should state that the homeowner is being charged for the Association's legal fees in the enforcement of the restrictions and that the board will hear the homeowner if he or she chooses to address the board on the subject.

To further the Association's efforts in collecting these attorney's fees, the next subparagraph, Section 204.010(a)(12), states the Association may

charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments....¹¹

It is not clear whether the association has the right to foreclose on a homestead to collect attorney's fees for deed restriction enforcement.

C. Filing Suit. In most cases, if the homeowner refuses to comply with the deed restrictions, the Association should file suit.

III. Enforcement of Restrictions in Court

A. Choice of Courts

1. Justice of the Peace Courts. The Justice of the Peace has the jurisdiction to hear certain deed restriction enforcement cases¹², and to assess attorney's fees and civil penalties of up to \$200.00 per day for each violation of the restrictive covenants.¹³

There are several drawbacks with the JP courts. First, the JP does not have the jurisdiction to issue injunctions requiring the cure of the violation of a restrictive covenant.¹⁴ This means that a homeowner may be subjected to fines, but may still keep the violation intact. Second, the JP court process is more unpredictable than a court where a record is made and procedural rules are more assiduously followed.

2. County Court. For whatever reason, the

county courts are not the preferred court for deed restriction enforcement.

3. District Court. The district court is the usual court chosen for the enforcement of restrictive covenants.

B. Choice of Remedy

1. Temporary Restraining Order. The issuance of a TRO usually requires extreme circumstances. An example might be where a homeowner is constructing a structure in violation of the restrictions and will finish it before the Association can have a hearing on the temporary injunction. A demand should be sent by messenger to the homeowner and contractor stating that the Association is going to court immediately.

Temporary restraining orders are more difficult to obtain and most judges expect to see a true emergency to issue a TRO. Additionally, it is usually more expensive and time-consuming for both the Association and its counsel. The lawyer for the Association must drop everything else, prepare the pleadings and the witnesses and go to the courthouse without having a scheduled hearing date or time.

Although the courts will try to accommodate an unscheduled emergency hearing, this could mean sitting at the courthouse all day just waiting to be heard.

2. Temporary Injunction. In the 1980s, the standard practice in Harris County was to automatically seek a temporary injunction in every deed restriction enforcement case.

There are several advantages to having a preliminary hearing. First, having a temporary injunction hearing forces the

homeowner to immediately deal with the lawsuit and appear at the hearing or risk a temporary injunction being granted.

Second, if the injunction is granted the homeowner will usually begin to negotiate to end the lawsuit.

Finally, the Association gets two bites of the apple. If the injunction is granted, there probably will be a settlement. If it is not granted, the homeowner's defenses were revealed at the temporary injunction hearing and the Association had a good rehearsal of the trial.

Currently, many lawyers file suit with an application for a permanent injunction without seeking a temporary injunction. The chief drawback to a temporary injunction hearing is the legal fees required to present the Association's case.

A temporary injunction hearing is typically held before the answer date in the case, so the Association's counsel does not know whether the homeowner will appear pro se, with counsel or not at all. As a result, each hearing requires substantial preparation which may not seem justified if a pro se defendant appears and agrees to an agreed judgment in the hall prior to the temporary injunction hearing.

Collecting the Association's legal fees is always a stumbling block in settlement discussions and the higher the fees are, the more difficult it is to settle the case.

Consequently, it is many times more useful to skip the temporary injunction hearing and proceed with the case through discovery.

Of course, there are many exceptions to this approach. The most obvious is where the violation creates an extreme eyesore, a safety or health hazard or for whatever reason has the entire subdivision in an uproar.

C. Prima Facie Case

1. Existence and Notice of Restrictions. Covenants which are not against public policy or illegal are enforceable.¹⁵ To establish a prima facie case in a action to enforce a restrictive covenant, the plaintiff must prove (a) the existence of a restrictive covenant,¹⁶ (b) notice of the restrictive covenant¹⁷ and (c) the applicability and violation of the restrictive covenant.

2. Substantial Breach. An injunction is the appropriate remedy where a deed restriction violation is demonstrated.¹⁸ Ordinarily, the party seeking a temporary injunction must prove the existence of a wrongful act, the existence of imminent harm, the existence of irreparable injury and the absence of an adequate remedy at law.¹⁹ However, when enforcing deed restrictions, associations are not required to prove that actual damage will be sustained or that irreparable injury will be suffered. It is sufficient to show a distinct or substantial breach of the restrictive covenants.²⁰

In addition, to warrant the issuance of a temporary injunction, a plaintiff must show a probable right of recovery.²¹ This showing should be made in the context of the essential purpose of the temporary injunction, which is to preserve the status quo.

3. Status Quo. At a hearing upon the request for a temporary injunction, the preliminary question before the trial court is whether the applicant is entitled to preservation of the

status quo of the subject matter of the suit pending a trial on the merits.²²

The status quo may be defined as the last, actual, peaceable, noncontested status that preceded the controversy.²³ However, the status quo which is preserved cannot be a violation of the law.²⁴ Similarly, the status quo for deed restriction controversies is the last status existing prior to the violation.²⁵

D. Defenses

1. Laches. A party asserting the affirmative defense of laches has the burden of proving (1) an unreasonable delay in asserting a legal or equitable right, and (2) a good faith change of position by another to his detriment because of the delay.²⁶

In *Culver v. Pickens*, 142 Texas 87, 176 S.W. 2d 167, the Texas Supreme Court quoted with approval from Pomeroy on Equity, Vol. 5, Sec. 1442, as follows:

Laches, in legal significance, is not mere delay but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within the limits allowed by law; but when knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right.²⁷

Many defendants seem to believe that delay alone is the essence of a laches defense.

However, the passing of time in and of itself does not raise the presumption of laches. The delay must be unreasonable and must work an injury to another person.²⁸

2. Waiver. Another common defense to a deed restriction suit is waiver or abandonment. To show waiver, the defendant must prove that the plaintiff voluntarily and intentionally relinquished its right to enforce the deed restriction.²⁹ A court may refuse to enforce a deed restriction if other substantial violations have been allowed within the restricted area.³⁰

The case law directs trial courts to consider waiver only if the “average man” would reasonably conclude that the restriction was abandoned and no longer being enforced.³¹

The existing violations of the restrictions must be "so great as to lead the mind of the 'average man' to reasonably conclude that the restriction in question has been abandoned and its enforcement waived." ³²

The court should consider “the number, nature, and severity of the then existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant.” ³³

However, the extent of existing violations can have a disproportionate impact on the court’s analysis. In *Sharpstown Civic Association, Inc. v. Pickett*,³⁴ the Texas Supreme Court dealt with a residential-only deed restriction. The property owner placed a small building on the property to use as a real-estate office. Where there was continuous use for nine years and no prior complaints from the neighbors, the court found waiver. However, the court refused to allow the more substantial violation of a car

wash. There is no waiver of the enforcement of restrictive covenants by a prior violation of those covenants where the prior violation is insignificant or insubstantial as compared to the proposed use.³⁵

3. Changed Conditions. To establish the defense of changed conditions, the homeowner is required to prove that due to new conditions, there is no purpose served by the restrictions.

In *Cowling v. Colligan*, 158 Tex. 458, 312 S.W.2d 943 (1958), the Texas Supreme Court sets out two distinct defenses based on changed conditions. The first is the waiver defense discussed above. The second defense arises when "there has been such a change of conditions ... it that it is no longer possible to secure in a substantial degree the benefits sought to be realized through the covenant."³⁶

4. Estoppel. The affirmative defense of estoppel contains the following elements: (1) a false representation or concealment of material facts; (2) made with actual or constructive knowledge of the facts; (3) to a party without knowledge or the means to obtain knowledge of the real facts; (4) made with the intention that such misrepresentation or concealment should be acted upon; and (5) the party to whom it was made must have relied upon or acted upon it to his prejudice.³⁷

5. Statute of Limitations. Texas law requires that lawsuits be brought within four years when there is not a specific limitations period which applies to that particular subject matter.³⁸ There is no specific statute of limitations for deed restriction enforcement and, therefore, the general four year period applies.³⁹

6. Basic Fairness. Normally, the Association

requests an injunction to remedy the breach of the restrictive covenants. Since an injunction is an equitable remedy,⁴⁰ the court must balance the equities between the parties, weighing the homeowners association's need for enforcement against the hardship to the property owner. However, there must be an imbalance of considerable magnitude in favor of the homeowner in order to justify the denial of an injunction under the balancing test.⁴¹

E. Evidence

1. Deed and Deed Restrictions. A party against whom a restriction is being enforced must have actual or constructive notice of the restriction.⁴² Notice can be established by introducing a certified copy of the deed to the defendant and a certified copy of the deed restrictions.

The deed shows that the defendant owns the property and the deed restrictions show that there is a general plan of development, that the defendant's property is subject to the restrictions and that the deed restrictions were filed prior to the time the defendant purchased the subject property.

"An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument."⁴³ A purchaser of land is charged with notice of the existence, contents and legal effects of all instruments in a chain of title.⁴⁴ It should also be possible to show actual notice of the restrictions through a cross examination of the defendant based on the closing documents from the purchase of the property.

2. Amended Deed Restrictions. If the Association is relying on amended restrictions, it must show three things. First, the original restrictions must provide the right

to amend and the procedure for amending them.⁴⁵ Second, the amendment must be a correction, improvement, or reformation of the declaration rather than a complete destruction of it.⁴⁶ Third, the amendment to the restrictions may not be illegal or against public policy.⁴⁷

3. Association Witnesses. Counsel for the Association should not assume that board members and property managers always understand the key points of the case and what to expect at the hearing or trial. Friendly witnesses should expect to be cross examined by the opposing counsel or pro se property owner and sometimes questioned by the court as well. They may be asked to concede that the violation is not serious or that a remedy not requested in the pleadings would be more appropriate.

4. Defense Witnesses. Homeowners will many times seek to introduce evidence of violations from other parts of the subdivision. Only testimony regarding violations within the defendant's section of the subdivision should be admitted and the burden of proving the location and nature of the violations is on the defendant.

F. Contempt. When drafting a temporary restraining order, a temporary injunction or a permanent injunction, make the order clear as to what the defendant is commanded to do. Once an injunction is ordered by the court, the Association must file a bond, have the injunction issued by the district clerk and then have the injunction personally served on the defendant.

If the homeowner fails to follow the court order, the Association's remedy is to request a show cause order requiring that the defendant show cause why he or she should

not be held in contempt and placed in jail until the order is complied with.⁴⁸ However, the court usually will expect to see a clear order and a clear violation of that order prior to finding the defendant in contempt of court.

G. Rules of Construction

1. The Historical Rule. Texas cases have traditionally held that all doubts about the construction of restrictive covenants must be resolved in favor of the free and unrestricted use of the premises and against the party seeking to enforce the covenants.⁴⁹ In *Wilmoth v. Wilcox*, the Texas Supreme Court stated:

Covenants restricting the free use of land are not favored by the courts, but when they are confined to a lawful purpose and are clearly worded, they will be enforced. All doubts must be resolved in favor of the free and unrestricted use of the premises, and the restrictive clause must be construed strictly against the party seeking to enforce it.⁵⁰

2. The “Liberal Construction” Statute. Pursuant to §202.003(a), Texas Property Code, a restrictive covenant is to be “liberally construed to give effect to its purposes and intent.”⁵¹

3. Attempting to Resolve the Conflict. Many practitioners believed that §202.003(a) overruled the historical judicial disfavor of restrictions. However, several courts found no conflict at all. In *Crispin v. Paragon Homes*, the Houston Court of Appeals (1st District) stated in a footnote that

The dissent characterizes the

adoption of Tex. Prop. Code Ann. 202.003(a)...(providing for a restrictive covenant to be liberally construed to give effect to its purposes and intent) as a reversal of these long-held principles for interpreting deed restrictions.... We disagree. We are unable to discern a conflict between liberally construing a restrictive covenant to give effect to its purpose, and construing a restrictive covenant either to favor the free and unrestricted use of land or to strictly construe it against the party seeking to enforce it.⁵²

In *Hodas v. Scenic Oaks Property Association*,⁵³ the San Antonio Court of Appeals stated:

Restrictive covenants are subject to the general rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). The question of whether a restrictive covenant is ambiguous is a question of law for the court. *Pilarcik*, 966 S.W.2d at 478; *Fisk Elec. v. Constructors & Associates*, 888 S.W.2d 813, 814 (Tex. 1994). On review, this court must attempt to determine the objective intent of the covenant and whether that intent was violated. *Munson v. Milton*, 948 S.W.2d 813, 816 (Tex. App.-San Antonio 1997, writ denied)... We liberally construe the covenant to give effect to its purpose and intent. TEX. PROP. CODE ANN. § 202.003(a) (Vernon 1995); *Pilarcik*, 966 S.W.2d at 478 (stating the entire document must be given effect or provisions are

rendered meaningless); *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997) (holding contracts should be examined as a whole in light of circumstances present when parties entered into agreement).

Mere disagreement over the interpretation of a provision does not make it ambiguous. See *Miller v. Sandvick*, 921 S.W.2d 517, 522 (Tex. App.-Amarillo 1996, writ denied) (citing *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 727 (Tex. 1981)). If a phrase or covenant is so worded that we can give it a certain legal meaning, it is not ambiguous, and we will construe it as a matter of law, giving effect to the objective intent of the drafter as expressed or as is apparent in the provision. *Miller*, 921 S.W.2d at 522...If a covenant is susceptible to more than one reasonable construction, it is ambiguous. See *Pilarcik*, 966 S.W.2d at 478. If ambiguity exists, the covenant will be construed against the party seeking to enforce it. *Wilmoth*, 734 S.W.2d at 657.

In *Quinn v. Harris*,⁵⁴ an unpublished opinion, the Austin Court of Appeals stated:

While the Property Code requires liberal construction of a restrictive covenant's language to ascertain its purpose and intent, Texas common law, prior to the enactment of this section of the Property Code, called for restrictive covenants to be construed in favor of the free and unrestricted use of the premises and

against the party seeking to enforce the covenants. See *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987). There seems to be some confusion as to how to construe restrictive covenants in light of the two standards. For example, cases decided after section 202.003 went into effect have noted that there is no conflict between *Wilmoth* and section 202.003(a), without providing an analysis of how the standards fit together. See *Ashcreek Homeowner's Ass'n v. Smith*, 902 S.W.2d 586, 588-89 (Tex. App.--Houston [1st Dist.] 1995, no writ); *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 n.1 (Tex. App.--Houston [1st Dist.] 1994, writ denied); see also *Tien Tao Ass'n v. Kingsbridge Park Community Ass'n*, 953 S.W.2d 525, 528 (Tex. App.--Houston [1st Dist.] 1997, no pet.) (noting that a restrictive covenant should be construed to give effect to its purpose, without referencing *Wilmoth's* instruction that a restrictive covenant should be construed strictly or the Property Code's instruction that a restrictive covenant should be construed liberally). Other cases seem to discard the concept of strict construction of restrictive covenants in light of section 202.003(a). See *Highlands Management Co., Inc. v. First Interstate Bank*, 956 S.W.2d 749, 752 (Tex. App.--Houston [14th Dist.] 1997, pet. denied). The Texas Supreme Court did not address whether section 202.003(a) supplants *Wilmoth* when that issue

was raised by the respondents in *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). The Fourth Court of Appeals has employed both standards to review a restrictive covenant, finding that the covenant should be liberally construed to determine the framers' intent, and if there is any ambiguity as to that intent, the covenant should then be strictly construed in favor of the free and unrestricted use of the premises. See *Munson v. Milton*, 948 S.W.2d 813, 816 (Tex. App.--San Antonio 1997, pet. denied). We believe the Fourth Court of Appeals has found the proper balance between the two standards that does not conflict with precedent or the Texas Property Code.⁵⁵

H. Lis Pendens. The Association might consider filing a lis pendens against the property which is the subject of a deed restriction enforcement suit. This prevents a third party from acquiring the property without notice of the deed restriction violation.⁵⁶ A lis pendens may be filed where suit is for enforcement of an encumbrance against real property.⁵⁷ An "encumbrance" may be defined as anything that impairs the use of real estate and is more comprehensive than a lien. It includes all burdens which interfere with the free enjoyment of the property.⁵⁸ Restrictive covenants have been held to be encumbrances by Texas courts.⁵⁹

I. Suits Against Tenants. Tenants are also subject to restrictive covenants because they are in privity with the property owner and take the leasehold with constructive notice of, and subject to, the restrictions.⁶⁰

J. Attorney's Fees. If it prevails in its lawsuit to enforce the restrictions, the Association is entitled to its reasonable attorney's fees pursuant to Texas Property Code Section 5.006 and Texas Civil Practices and Remedies Code Section 37.009. The award of reasonable attorney's fees under Section 5.006, Texas Property Code, is mandatory, not discretionary.⁶¹

K. Civil Penalties. The Court may award, at its discretion, civil penalties up to \$200.00 per day, as authorized in Section 202.004(c), Texas Property Code, for each day that the violation of the deed restrictions has been present.

L. Declaratory Judgments. Sometimes the threat of a lawsuit by the homeowners association precipitates a preemptive declaratory judgment action or counterclaim for declaratory judgment by the homeowner. Any action which seeks to declare restrictive covenants invalid would appear to require personal service on all persons who own property within the land subject to the restrictions.⁶²

M. Enforcement of Deed Restrictions by Municipalities. If a uniform ordinance is passed for the enforcement of restrictions, municipalities with a population of 1.5 million or more, or municipalities which do not have zoning, can enforce deed restrictions. Pursuant to §230.003, Texas Local Government Code, a

municipality may sue in any court of competent jurisdiction to enjoin or abate a violation of a restriction contained or incorporated by reference in a properly recorded plan, plat, or other instrument that affects a subdivision located inside

the boundaries of the municipality.⁶³

N. Jury or Bench Trial. Many times it is left up to the homeowners association's attorney to determine whether to have a jury trial. The reason many lawyers prefer a bench trial is that it is faster, cheaper and easier to present technical legal arguments. In addition, the jury may view the association as a relatively larger, more powerful organization taking advantage of a homeowner. Be aware, however, that many, if not most, judges live within community associations and some judges have been involved in disputes or lawsuits with their associations.

O. Problem Areas

1. Antennas and Satellite Dishes. The Telecommunications Act of 1996 gave the FCC the authority to issue administrative rules which preempt⁶⁴ deed restrictions regulating certain antennas.

The FCC issued rules which override the deed restrictions in four areas: (a) antennas designed to receive direct broadcast satellite service, if the dish is one meter or less in diameter; (b) antennas designed to receive video programming via multipoint distribution services, if the dish is one meter or less in diameter; (c) antennas designed to receive television broadcast signals; and (d) a mast supporting one of these antennas.⁶⁵

A deed restriction is only preempted to the extent that it impairs the installation, maintenance or use of the antenna or mast. An unacceptable impairment is defined as something which unreasonably delays or prevents installation, maintenance or use, unreasonably increases the cost of such

installation, maintenance or use, or precludes the reception of an acceptable quality signal.⁶⁶

2. Inoperable Vehicles. Vehicles which do not run and which are stored in public view are typically prohibited by the restrictions. Counsel for the Association should take the position that if the vehicle cannot legally be operated on the public streets (i.e., lacking a valid inspection or valid license plates), it is in violation of the inoperable vehicle restriction.

3. Failure to Paint/Repair. Many times the deed restrictions do not specifically state that the property will be maintained in good condition. However, the ACC sections usually state that a building may not be altered without ACC approval. Counsel for the Association can argue that the failure to maintain the property has resulted in an impermissible alteration of the property. In addition, a poorly maintained house is arguably a "nuisance and annoyance," and prohibited under the general nuisance clause of the restrictions.

4. General Nuisance. In unincorporated areas of counties having a population of 125,000 or more, there are statutory restrictions on certain defined 'public nuisances.'⁶⁷ These nuisances include unenclosed refuse or debris, unsanitary conditions which cause mosquitoes, rodents, vermin, or disease-carrying pests, weeds, unsafe or poorly maintained buildings and other items.

5. Single Family. Courts have distinguished between single-family use⁶⁸ and single-family construction,⁶⁹ enforcing well written restrictions which clearly relate to the use of the property and not enforcing restrictions which appear only to relate to construction or ACC matters.

6. Tractor Trailers. Parking tractor-trailer trucks in subdivisions between 10:00 p.m. and 6:00 a.m. is contrary to statute in counties with a population greater than 220,000.⁷⁰ Unfortunately, the law requires that a sign be posted at each entrance to the subdivision stating that such parking is prohibited. Counsel for the Association should also determine whether a local municipal ordinance prohibits truck parking in a neighborhood.

Additionally, parking a large commercial truck in front of the restricted property is usually directly contrary to the deed restrictions. Even if there is not a clear limitation in the vehicles section of the restrictions, the parking of a large truck in the subdivision is a commercial or business use of the property and a “nuisance and annoyance to the neighborhood,” both of which are usually prohibited.

7. Commercial Vehicles in Daily Use. This paragraph refers to vehicles smaller than tractor-trailer trucks but larger than noncommercial vehicles. For example, where the property owner drives a large company-owned truck to and from work and parks it in his or her driveway at night. It is possible that this practice is expressly prohibited by the restrictions. Even without a specific vehicle restriction which addresses such parking, counsel for the Association should take the position that the storage of the truck overnight in the subdivision constitutes a commercial or nonresidential use of the property as well as a nuisance.

8. Nonresidential Use of the Property. Generally, nonresidential, business or commercial uses of the property are prohibited by the deed restrictions. This applies to churches,⁷¹ church parking lots,⁷²

beauty shops,⁷³ music lessons,⁷⁴ child care,⁷⁵ and swimming lessons.⁷⁶

9. Federal Fair Housing Act. Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act") prohibits discrimination in the sale, rental and financing of dwellings based on race, color, religion or national origin. Proscription of discrimination based on sex was added in 1974. Title VIII was amended in 1988 (effective March 12, 1988) by the Fair Housing Amendments Act (the "FHAA") which, among other things, expanded the coverage of the Fair Housing Act to prohibit discrimination based on disability.

While the United States Department of Housing and Urban Development ("HUD") has had a lead role in the administering the Fair Housing Act since its adoption in 1966, the FHAA greatly increased HUD's enforcement role. Complaints filed with HUD are investigated by the Office of Fair Housing and Equal Opportunity ("FHEO"). If the complaint is not successfully conciliated, then FHEO determines whether reasonable cause exists to believe that a discriminatory housing practice has occurred. Where reasonable cause is found, the parties to the complaint are notified and a hearing is scheduled before a HUD administrative law judge. The matter may alternatively be litigated in Federal court.

As stated above, the FHAA prohibits discrimination in housing against persons with handicaps⁷⁷ and recovering alcoholics and drug addicts are included in the protected class of disabled persons. Discrimination can occur by disparate treatment or by disparate impact.⁷⁸

Discrimination also results from the refusal to make "reasonable accommodations" in rules, policies, practices, or services, when

such accommodations may be necessary to afford a handicapped person with an equal opportunity to use or enjoy a dwelling.⁷⁹ This can require changing a rule that normally applies to everyone else so as to make the rule's burden less onerous on the handicapped person.⁸⁰

The requirement of a reasonable accommodation does not mean that every rule must be changed to accommodate the disabled⁸¹ and accommodation is not reasonable if it imposes undue financial or administrative burdens.⁸² However, the attempt to enforce restrictive covenants so as to bar the operation of a group home for developmentally disabled adults was found to be a refusal to make a reasonable accommodation and thus discrimination under the FHAA.⁸³ In that case, the Court found that the enforcement of a restriction which called for "residential only" buildings and barred the use of lots for a trade or business would have a discriminatory effect on developmentally disabled adults as residents of a group home.⁸⁴ Other cases have reached the same conclusion.⁸⁵

The United States Supreme Court, in the case of *City of Edmonds v. Oxford House, Inc.*,⁸⁶ considered a city's attempt to close a group home for 10 to 12 adults recovering from alcoholism and drug addiction. The city argued that the residents were not a "family" within the meaning of the city's zoning code. The group home asked the city to make an exception, or accommodation, for them, but the city refused to do so. The Supreme Court ruled that a city's occupancy rule designed to preserve the residential character of the neighborhood is not exempt from FHAA antidiscrimination provisions.⁸⁷

Additionally, it should be noted that

individual board members can be liable under the FHAA. In one case, the Court said that a condominium board could be liable if they were in a position to deny or make unavailable a portion of a building to a disabled owner, or otherwise discriminate against the owner in the provision of housing services or facilities.⁸⁸ Also, the discriminatory statements of neighbors and persons involved in the restriction enforcement attempts are admissible as evidence of discriminatory intent.⁸⁹

10. State Fair Housing Issues. The State of Texas also limits restrictions based on civil rights and fair housing issues. Section 202.003, Texas Property Code, states

(b) In this subsection, "family home" is a residential home that meets the definition of and requirements applicable to a family home under the Community Homes for Disabled Persons Location Act (Article 1011n, Vernon's Texas Civil Statutes). [FN1] A dedicatory instrument or restrictive covenant may not be construed to prevent the use of property as a family home. However, any restrictive covenant that applies to property used as a family home shall be liberally construed to give effect to its purposes and intent except to the extent that the construction would restrict the use as a family home.

The Texas Fair Housing Act,⁹⁰ provides that

(a) A person may not refuse to sell or rent, after the making of a bona fide offer, refuse to negotiate for the sale or rental of, or in any other

manner make unavailable or deny a dwelling to another because of race, color, religion, sex, familial status, or national origin.

(b) A person may not discriminate against another in the terms, conditions, or privileges of sale or rental of a dwelling or in providing services or facilities in connection with a sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin.⁹¹

The Act also forbids discrimination based on disability.⁹² In addition, Texas cases have held that the Federal Fair Housing Act prohibits deed restrictions against group homes.⁹³

11. Architectural Control Committee Deemed Approval. Most sets of restrictions create an architectural control committee (“ACC”) to review the plans for new construction and architectural alterations within the subdivision. Usually the restrictions contain a provision approving plans automatically if not denied within a certain number of days after the ACC received the application.

Some deed restrictions only give 10 days for a response from the ACC and some restrictions grant automatic approval to an alteration if suit is not filed prior to the completion of the construction.⁹⁴

Where the application is deemed approved by a lapse of time, the court will treat the application as approved.⁹⁵

III. Conclusion

Experience has shown deed restrictions to be an effective method of regulating land use. The case law is replete with examples of successful enforcement actions by associations as well as extensive due process protections for homeowners.

The restrictions protect land developers during development and thereafter protect property owners, lenders and mortgage insurers. This private enforcement scheme also benefits cities and counties because it allows a wide variety of land use control levels, giving people more choices in the type of neighborhood in which to live.

Private restrictions are enforced with private funds, not tax dollars. Enforcement decisions are made by the board of a nonprofit corporation that has been elected by the property owners within the subdivision. This places the management of neighborhoods, with home values amounting to billions of dollars nationally, in the hands of those most interested in, and capable of, managing them, the property owners themselves.

1. TEX. PROP. CODE ANN. § 202.001(2) (Vernon's 1995).
2. Young, Dana, Common Interest Developments An Historical Overview of CID Development, Public Law Research Institute, University of California Hastings College of the Law.
[Http://www.uchastings.edu/plri/96-97tex/cid.htm](http://www.uchastings.edu/plri/96-97tex/cid.htm).
3. RESTATEMENT (THIRD) PROPERTY (SERVITUDES) § 1.8.
4. TEX. PROP. CODE ANN. § 202.001(2) (Vernon's 1995).
5. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), Introduction, Vol. 1, page 5.
6. Community Associations Institute, <http://www.caionline.org/about/facts.cfm>.
7. William V. Dorsaneo, III *et al.*, TEXAS LITIGATION GUIDE § 285.01.
8. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), Foreword, Vol. 1, page IX.
9. TEX. PROP. CODE ANN. § 204.002(a) (Vernon's Supp. 2000).
10. TEX. PROP. CODE ANN. §. 204.010(a)(11) (Vernon's Supp. 2000).
11. TEX. PROP. CODE ANN. § 204.010(a)(12) (Vernon's Supp. 2000).
12. TEX. GOV'T CODE ANN. § 27.034 (Vernon's Supp. 2000).
13. *See* TEX. PROP. CODE ANN. § 202.004(c) (Vernon's 1995).
14. TEX. GOV'T CODE ANN. § 27.034(j) (Vernon's Supp. 2000).
15. *Curlee v. Walker*, 244 S.W. 497, 498 (Tex. 1922).
16. ***FOXWOOD HOMEOWNERS ASS'N V. RICLES***, 673 S.W.2D 376 (TEX. APP. -- HOUSTON [1ST DIST.] 1984, WRIT REF'D N.R.E.).
17. ***DAVIS V. HUEY***, 620 S.W.2D 561 (TEX. 1981).
18. ***INWOOD NORTH HOMEOWNERS ASSOCIATION V. MEIER***, 625 S.W.2D 742 (TEX. CIV. APP. -- HOUSTON [1ST DIST.] 1981, NO WRIT).
19. ***MORRIS V. COLLINS***, 881 S.W.2D 138 (TEX. APP. -- HOUSTON [1ST DIST.] 1994, REHEARING DENIED, AND ERROR DENIED).
20. ***GUAJARDO V. NEESE***, 758 S.W.2D 696, 698 (TEX. APP. -- FORT WORTH 1988, NO WRIT); ***GUNNELS V. NO. WOODLAND HILLS COMMUNITY ASS'N.***, 563 S.W.2D 334, 337 (TEX. CIV. APP. -- HOUSTON [1ST DIST.] 1978, NO WRIT); ***PROTESTANT EPISCOPAL CHURCH COUNCIL V. MCKINNEY***, 339 S.W.2D 400,

403 (TEX. CIV. APP. -- EASTLAND 1960, WRIT REF'D).

21. *UNIVERSITY OF TEXAS MEDICAL SCHOOL AT HOUSTON V. THAN*, 834 S.W.2D 425 (TEX. APP. -- HOUSTON [1ST DIST] 1992, NO WRIT).

22. *Davis v. Huey*, 571 S.W.2d 859, 861-62 (Tex. 1978); *Lund v. Leibl*, 1999 Tex. App. LEXIS 5536, (Tex. App. – Austin, 1999, no writ).

23. *TEXAS INDUS. GAS V. PHOENIX METALLURGICAL CORP.*, 828 S.W.2D 529 (TEX. APP. -- HOUSTON [1ST DIST.] 1992, NO WRIT).

24. *CITY OF ARLINGTON V. CITY OF FORT WORTH*, 873 S.W.2D 765 (TEX. APP. -- FORT WORTH 1994, REHEARING OVERRULED, AND DISMISSED W.O.J.).

25. *GUNNELS V. NO. WOODLAND HILLS COMMUNITY ASS'N*, 563 S.W.2D 334 (TEX. CIV. APP. -- HOUSTON [1ST DIST.] 1978, NO WRIT).

26. *Rogers v. Ricane Enter., Inc.*, 772 S.W.2d 76, 80 (Tex. 1989); *Caldwell v. Barnes*, 975 S.W.2d 535 (Tex. 1998).

27. *Culver v. Pickens*, 142 Texas 87, 91, 176 S.W. 2d 167, 170 (Tex. 1943).

28. *Turner v. Hunt*, 131 Texas 492, 116 S.W. 2d 688, 117 A.L.R. 1066 (Tex. 1938); *Ross' Estate v. Abrams*, 239 S.W. 705 (Tex. Civ. App. – San Antonio 1922) affirmed *Abrams v. Ross' Estate*, 250 S.W. 1019; 30 C.J.S. 522, 531, Sec. 116 (Tex. Comm'n App. 1923).

29. See *Cox v. Melson-Fulsom*, 956 S.W.2d 791, 794 (Tex. App.--Austin 1997, no pet.).

30. *Cowling v. Colligan*, 312 S.W. 2d 943, 945 (Tex. 1958).

31. *Finkelstein v. Southampton Civic Club*, 675 S.W.2d 271, 278 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd, n.r.e.).

32. *New Jerusalem Baptist Church, Inc. v. City of Houston*, 598 S.W.2d 666, 669 (Tex. Civ. App.--Houston [14th Dist.] 1980, no writ).

33. *Id.* at 669.

34. *Sharpstown Civic Association, Inc. v. Pickett*, 679 S.W.2d 956 (Tex. 1984).

35. *Sharpstown Civic Ass'n, Inc.*, 679 S.W.2d at 958.

36. *Id.*

37. *Oldfield v. City of Houston*, 2000 Tex. App. LEXIS 1579, citing *Pebble Beach Property Owners' Ass'n v. Sherer*, 2 S.W.3d 283, 291 (Tex. App.--1999, pet. denied).

38. TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon's 1997).
39. *Schoenhals v. Close*, 451 S.W.2d 597, 599 (Tex. Civ. App. -Amarillo 1970, no writ).
40. TEX. CIV. PRAC. & REM. CODE ANN. § 65.011 (Vernon's 1997).
41. *City of Houston v. Muse*, 788 S.W.2d 419, 424 (Tex. Civ. App. - Houston [1st Dist.] 1990, no writ).
42. *Davis v. Huey*, 571 S.W.2d 859, 1978 Tex. LEXIS 395, 22 Tex. Sup. Ct. J. 8 (Tex. 1978).
43. TEX. PROP. CODE ANN. § 13.002, (Vernon's 1984).
44. *Giles v. Cardenas*, 697 S.W. 422 (Tex. App. – San Antonio, 1985, writ ref'd, n.r.e.).
45. *Miller v. Sandvick*, 921 S.W.2d 517, 521 (Tex. App.--Amarillo 1996, writ denied).
46. *Id.*
47. See *Gennedy v. City of Pasadena*, 1999 Tex. App. Lexis 7310, (Civ. App. – Houston [1st Dist.] 1999, pet. denied).
48. See *In Re Paul E. Nunu*, 960 S.W.2d 649 (Tex. 1997).
49. See *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987).
50. *Id.* at 657 (citations omitted).
51. *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547 (Tex.App.--Houston [1st Dist.] 1994, no writ).
52. *Crispin v. Paragon Homes*, 888 S.W.2d 78, 1994 Tex. App. LEXIS 2173 (Tex. App. – Houston [1st Dist.] 1994, writ denied).
53. *Hodas v. Scenic Oaks Prop. Ass'n*, 2000 Tex. App. Lexis 2690 (Tex. Civ. App. – San Antonio April 26, 2000).
54. *Quinn v. Harris*, 1999 Tex. App. LEXIS 1576 (Tex. App. – Austin 1999, unpublished, pet. den.).
55. *Id.*
56. TEX. PROP. CODE ANN. § 13.004 (Vernon's 1995).
57. TEX. PROP. CODE ANN. § 12.007 (Vernon's 1995).
58. *Latham v. Miller*, 250 S.W.2d 302, 304 (Tex. Civ. App. – Austin 1952, no writ).

59. See *City of Beaumont v. Moore*, 202 S.W.2d 448, 454 (Tex. 1947); *Jordan v. Hood*, 610 S.W.2d 215 (Tex. Civ. App. – Houston [1st Dist.] 1980, no writ.)
60. See *Bank United v. Greenway Improvement Ass'n*, 6 S.W.3d 705, (Tex. App. – Houston [1st Dist.] 1999, pet. denied).
61. *Inwood North Homeowners' Asso. v. Meier*, 625 S.W.2d 742, 1981 Tex. App. LEXIS 3769 (Tex. Civ. App. – Houston [1st Dist.] 1981, no writ).
62. *Dahl v. Hartman*, 14 S.W.3d 434 (Tex. Civ. App. – Houston [14th Dist.] 2000, petition for review filed March 14, 2000); see also *Riddick v. Quail Harbor Condominium Ass'n, Inc.*, 7 S.W.3d 663, 1999 (Tex. App.--Houston [14th Dist.] October 28, 1999, no pet. h.).
63. TEX. LOC. GOV'T CODE ANN. § 230.003 (Vernon's 1999); see *Oldfield v. City of Houston*, 15 S.W.3d 219 (Tex. App. – Houston [14th Dist.] March 9, 2000) for a discussion of municipal enforcement issues.
64. For a general discussion of federal preemption of state law under the Telecommunications Act of 1996, see *Kansas ex rel. Stovall v. Home Cable Incorp.*, 35 F. Supp. 2d 783 (D. Kan. 1998).
65. 47 CFR 1.400.
66. *Id.*
67. TEXAS HEALTH AND SAFETY CODE ANN. § 343.011 (Vernon's Supp. 2000).
68. *Tien Tao Association, Inc. v. Kingsbridge Park Community Association, Inc.*, 953 S.W.2d 525, 528 (Tex. App. – Houston [1st Dist.] 1997, no writ).
69. *Collins v. City of El Campo*, 684 S.W.2d 756 (Tex. App. – Corpus Christi 1984, ref'd, n.r.e.)
70. TEXAS TRANSP. CODE ANN. § 545.307 (Vernon's 2000).
71. *Cowling v. Colligan*, 312 S.W.2d 943, 946 (Tex. 1958).
72. *Calvary Baptist Church at Tyler v. Adams*, 570 S.W. 2d 469, 474 (Civ. App. – Tyler 1978, no writ).
73. *Schoenhals v. Close*, 451 S.W. 2d 597-600 (Civ. App. – Amarillo 1970, no writ).
74. *Sumerlin v. Cox*, 344 S.W.2d 742,743 (Civ. App. – Eastland 1961, writ ref'd).
75. *Mills v. Kubena*, 685 S.W. 2d 395-398 (Tex. App. – Houston [1st Dist.] 1985, ref'd, n.r.e.).
76. *Park v. Baxter*, 572 S.W.2d 794, 795 (Civ. App. – Tyler 1978, ref'd, n.r.e.).
77. *Meadowbriar Home for Children, Inc. v. Gunn*, C.A. 5 (Tex.) 1996, 81 F.3d 521.

78. *U.S. v. Hillhaven Corp.*, D. Utah 1997, 960 F. Supp. 259.
79. *Alliance for Mentally Ill v. City of Naperville*, N.D. Ill. 1996, 923 F. Supp. 1057.
80. *Id.*
81. *Erdman v. City of Ft. Atkinson*, C.A. 7 (Wis.) 1996, 84 F.3d 960, rehearing and suggestion for rehearing *en banc* denied.
82. *Judy B. v. Borough of Tioga*, M.D. Pa. 1995, 889 F. Supp. 792.
83. *Martin v. Constance*, M.D. Mo. 1994, 843 F. Supp. 1321.
84. *Id.*
85. *U.S. v. Scott*, D. Kan. 1992, 788 F. Supp. 1555; *Rhodes v. Palmetto Pathway Homes, Inc.*, 1991, 400 S.E.2d 484, 303 S.C. 308.
86. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S. Ct. 1776, 131 L. Ed.2d 801, 9 A.D.D. 402 (1995).
87. *Id.*
88. *Schroeder v. De Bartolo*, D. Puerto Rico 1995, 879 F. Supp. 173.
89. *U.S. v. City of Taylor, Mich.*, E.D. Mich. 1995, 872 F. Supp. 423, affirmed in part, reversed in part, 102 F.3d 781.
90. TEX. PROP. CODE ANN. § 301.001, *et seq.* (Vernon's 1995).
91. TEX. PROP. CODE ANN. § 301.021 (Vernon's 1995).
92. TEX. PROP. CODE ANN. § 301.025 (Vernon's 1995).
93. *Deep E. Tex. Regional Mental Health Mental Retardation Servs. v. Kinnear*, 877 S.W.2d 550, 1994 Tex. App. LEXIS 1398, 5 Am. Disabilities Dec. 998 (Tex. App. – Beaumont 1994, no writ); for further discussion see *Kinnear v. Texas Comm'n on Human Rights*, 14 S.W.3d 299, 2000 Tex. LEXIS 42, 43 Tex. Sup. Ct. J. 654 (Tex. 2000).
94. *Foxwood Homeowners Asso. v. Ricles*, 673 S.W.2d 376, 1984 Tex. App. LEXIS 5655 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd, n.r.e.).
95. *Bank United & Utah State Retirement Inv. Fund v. Greenway Improvement Ass'n*, 6 S.W.3d 705, 1999 Tex. App. LEXIS 8289, 1999:46 Tex. Civil Op. Serv. 35 (Tex. App. – Houston [1st Dist.] 1999, pet. den.).