

**PUBLIC AND PRIVATE LAND USE REGULATION:
ZONING AND DEED RESTRICTIONS**

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I. INTRODUCTION

A. Scope of Article

This Article is intended as a general overview of Texas zoning and deed restriction law, as well as an analysis of their differences. Issues relating to the subdivision of real property, environmental matters, Americans with Disabilities Act or other quasi-land use restrictions will not be addressed. Only deed restrictions in the form of express covenants (as opposed to conditions or implied covenants) affecting surface (not mineral) use and which run with the land are discussed.

B. Reference Materials

1. Zoning. The Bible of Texas Zoning Law is John Mixon's Texas Municipal Zoning Law published by Butterworth Legal Publishers Austin, Texas (referred to herein as Mixon), the only comprehensive analysis of Texas Zoning Law. Arthur J. Anderson (Akin, Gump, Strauss, Hauer & Feld, Dallas, Texas) authored Texas Land Use Law (1989) published by Professional Education Systems, Inc., Eau Claire, Wisconsin (referred to herein as Anderson), which contains a practical analysis of development law issues. Mr. Anderson and William S. Dahlstrom (also of Akin, Gump) authored Texas Zoning and Land Use Forms (Butterworth Legal Publishers, Austin, Texas) which contains forms and discussions on zoning requests.

2. Deed Restrictions. Two excellent articles on deed restrictions are Restrictive Covenants by Charles W. Spencer, University of Houston Law Center Advanced Real Estate Law Course, 1990, and Interplay of Zoning and Restrictions by Bruce W. Merwin, Professional Education Systems, Inc. Texas Land Use Law Seminar, 1991.

C. Acknowledgments

The input and assistance of Professor John Mixon of the University of Houston Law Center and James L. Dougherty, City Attorney for the City of West University Place, was invaluable to the zoning section of this Article. The deed restriction section of this paper is taken substantially from the excellent article by W. Edward Walts, II presented at the 14th Annual

Advanced Real Estate Law Course in 1992. Mr. Walts' article contained a concise discussion of deed restriction issues which could not be substantially improved upon by this author. This paper would not have been possible without the diligent efforts of secretaries Dollie Goren and Vanessa Griffin, paralegal Sheri Gaubatz, law clerk Nicole DeBorde, and associate Daniel J. Reat.

II. DEED RESTRICTIONS

A. Deed Restrictions Defined

Deed restrictions are private, contractual covenants which limit land use. Deed restrictions are placed on real property by affirmative action of the owner of the real property, for the benefit of that property only, with a typical intent to enhance the value of that real property. Deed restrictions affect subsequent owners of the real property for a stated term, and for any extensions. There are no limitations on the nature of deed restrictions except for compliance with laws and public policies.

Private land use restrictions may be imposed upon real property by any owner of real property and such restrictions are enforceable by Texas courts. Enforcement of deed restrictions is typically undertaken by classification into one of three categories:

1. those that have an entity, such as a Texas nonprofit corporation, established to provide for their enforcement on a long-term basis;
2. those that have no such entity, but which instead rely upon private enforcement by individuals such as, initially, the developer and, later, individual landowners; and
3. those enforced by specially authorized counties and the City of Houston. Deed restrictions are enforceable in the City of Houston and its extraterritorial jurisdiction by the City of Houston. Tex. Local Gov't Code Ann. §§ 203.001 et seq. (1991).

Deed restrictions commonly have the following general characteristics: (i) design and construction standards for initial construction within a development, (ii) negative covenants which prohibit various types of construction and uses, (iii) an assessment mechanism and (iv) creation of a private non-profit corporation as the vehicle for enforcement of the restrictive covenants.

B. History of Deed Restrictions

As long as there have been deeds to real property, there have been restrictions placed in those documents for the purpose of limiting future land use.

Until World War II, most deed restrictions were contained in individual deeds rather than in the plat or a comprehensive document affecting an entire subdivision. As the comprehensive development of residential subdivisions evolved, developers created increasingly elaborate schemes of land use. These schemes were adopted through the inclusion of all of the restrictions

in each deed from the developer to initial lot owners. Rarely was a homeowners association created, and, even if created, rarely funded through mandatory assessments.

The developers moved to comprehensive documents covering all restrictions. Many projects were multi-phased with separate plats for each phase. As subdivisions developed, each new section would contain a separate set of comprehensive deed restrictions which, although typically consistent in format and general approach, often contained significant differences in use restrictions and the manner in which the deed restrictions were to be modified or extended. These comprehensive deed restrictions were recorded before any deeds to initial lot owners. Each deed to initial lot owners referenced the comprehensive deed restrictions, but otherwise did not contain a specific recitation of the use restrictions.

Today, some developers adopt master restrictions applicable for an entire development to ensure continuity of use.

Initially, deed restrictions were treated by the law as purely contractual matters between consenting parties. Deed restrictions were strictly construed since they sought to restrict the right of subsequent real property owners to use their property. So long as deed restrictions were lawful, reasonable and not in violation of state or public policy, they were enforced. Over the years, society has determined that certain types of deed restrictions are not enforceable as a matter of public policy (e.g. race restrictions, wood shingles) and that, instead of being strictly construed, they should be liberally construed in order to enforce their intent (See Tex. Prop. Code § 202.003 [Vernon Supp. 1992]). Deed restrictions have now entered into a new era where many legal concepts fundamental to them have been statutorily rejected and the use of even more detailed and restrictive deed restrictions, particularly in large comprehensively planned residential communities, has increased. Over the past five years, some experts estimate that fifty percent of new home construction in Houston occurred in these highly restricted residential subdivisions.

C. General Requirements

The typical land use constraint is characterized as a covenant. Covenants impose obligations upon a landowner either to do, or to refrain from doing, certain acts. Covenants are divided into two types - personal covenants, also known as easements in gross, and those that "run with the land." Personal covenants exist only between the covenantor and the covenantee and are not enforceable by the covenantee's assigns. Rights to fish, bicycle, picnic, and ride horses, absent clear intent to the contrary, would be personal covenants. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196 (Tex. 1962).

Covenants which run with the land are enforceable against the assigns of the parties. Deed restrictions typically contain an express provision that the obligations run with the land. A deed restriction must satisfy the following requirements in order to run with the land:

1. "Touch and Concern" the Land. Deed restrictions are private agreements affecting land. Since, theoretically, land has capacity to exist perpetually and value may be added to it by permitting or restricting certain activities, the law will enforce deed restrictions against persons not involved in making the deed restrictions only if the deed restrictions "touch and concern" the land.

Texas courts have recognized that not all covenants run with the land. *See Drye v. Eagle Rock Ranch, Inc., supra; Clear Lake City Water Authority v. Clear Lake Utilities*, 549 S.W.2d 385 (Tex. 1977); *Montgomery v. Creager*, 22 S.W. 2d 463 (Tex. Civ. App.--Eastland 1929, no writ). In *Clear Lake City Water Authority*, the Texas Supreme Court held that deed restrictions requiring that a tract of land receive its water from the given utility was not enforceable since it only collaterally affected the use of land. Since the deed restrictions did not touch and concern the land, they created no privity of estate and therefore were not enforceable against assignees. In like manner, a purchaser's agreement to require third parties to provide road, water and sewage connections to an adjoining tract within four years of sale is a personal covenant and not a covenant running with the land under Texas law. *Dryden v. Calk*, 771 F. Supp. 181 (S.D. Tex. 1991).

Most covenants do touch and concern real estate. However, since personal covenants do exist, the practitioner should review any covenants to determine if the parties intended to create an obligation that could only be properly performed by the initial parties and not by their assignees or successors.

2. Privity of Estate. In a concept analogous to standing, the law requires privity of estate before enforcing deed restrictions. Texas courts have held that privity of estate is required for deed restrictions to run with the land. *Clear Lake Apartments, Inc. v. Clear Lake Utilities Co.*, 537 S.W.2d 48 (Tex.Civ.App.--Amarillo 1942, writ ref'd w.o.m.). *Jim Walter Homes v. Youngtown, Inc.*, 786 S.W.2d 10, 11 (Tex.App.--Beaumont 1990, no writ); *Tarrant Appraisal District v. Colonial County Club*, 767 S.W.2d 230, 235 (Tex.App.--Fort Worth 1989, writ denied).

Evans v. Southside Place Park Ass'n., 154 S.W.2d 914 (Tex.Civ.App.--Galveston 1941, writ ref'd w.o.m.), illustrates this requirement. Plaintiffs owned a lot, within a subdivision, which had a park and playground which could only be used by property owners within the addition. Plaintiffs leased their house to a renter. The renter was denied the use of the park since, as a lessee, the renter was not a property owner. The court upheld the denial of park privileges to the renter, finding that the term "property owners" was synonymous with "purchasers of home sites." *Id.* at 917. Since the renter was not an owner, he lacked the necessary privity of estate required as a prerequisite to the right to use the park. In *Jim Walters Homes, supra*, a builder was held not liable for violation of deed restrictions due to the nature of the structure built.

Usually, in order to create privity of estate, there must be a common grantor who clearly expresses an intent to benefit land through the use of restrictive covenants. *Hooper v. Lottman*, 171 S.W.270 (Tex.Civ.App.--El Paso 1914, no writ); *Curlee v. Walker*, 112 Tex. 4, 244 S.W. 497 (1922); *Finley v. Carr*, 273 S.W.2d 439 (Tex.Civ.App.--Waco 1954, writ ref'd). A general scheme or plan of development connected with the property may also provide the necessary privity of estate. In *Hooper*, the court stated, "Whether a person not a party to a restrictive covenant has a right to enforce it depends upon the intention of the parties in imposing it. This intention is to be ascertained from the language of the deed itself, construed in connection with the circumstances existing at the time it was executed." *Hooper, supra*, at 271.

If no common grantor exists, or if no common plan or scheme of development affecting all properties is involved, then privity of estate is not satisfied, and there is no standing to maintain suit for enforcement of the deed restrictions.

3. Notice. An absolute requirement for enforcement of deed restrictions is that notice of such covenants' existence be given to the landowner. *Davis v. Huey*, 620 S.W.2d 561 (Tex. 1981); *Tarrant Appraisal District, supra*. Chapter 11 of the Texas Property Code sets forth the provision for recording documents in the County Clerk's records. The date of filing of the deed restrictions determines notice. *Gettysburg Homeowners Ass'n. v. Olson*, 768 S.W.2d 369, 372 (Tex. App.--Houston [14th Dist.] 1989, no writ). Such recordation is generally essential to provide the necessary notice of the existence of deed restrictions. More commonly, the notice question arises in the context of whether the deed restrictions are sufficiently specific to provide adequate notice to a third party. Deed restrictions should have a legally sufficient property description defining the area to which they apply. Otherwise, the statute of frauds will bar enforcement of the deed restrictions. Deed restrictions imposed subsequent to the severance of the mineral estate do not limit the surface use rights of the mineral estate owner. *Property Owners v. Woolf & Magee, Inc.*, 786 S.W.2d 757, 760 (Tex.App.--Tyler 1990, no writ).

4. Reasonableness. One may encounter the Old English common law concept that a covenant requiring a landowner not to do a given act was enforceable, while a covenant requiring a landowner to do a given act was not. *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (QB. 1583). Such a distinction would clearly not be recognized by Texas Courts. See *Frey v. DeCordova Bend Estates Owners Ass'n.*, 647 S.W.2d 246 (Tex. 1983). Maintenance of premises, payment of assessments, and general maintenance should all be enforceable duties since such covenants are mutually beneficial to lands subject to a general plan or scheme of development. However, whether a covenant mandates action or inaction, it must still be reasonable. If deed restrictions (historically referred to as "equitable servitudes") appear to be unreasonable, then it may be possible to get a court to characterize them as "involuntary servitudes", which are unenforceable. The issue is not whether the deed restrictions compel or constrain action, but rather whether the deed restrictions' demands are reasonable.

D. Conditions versus Covenants

Documents entitled "Declaration of Covenants, Conditions and Restrictions" are typical in modern subdivisions. While the title may be reminiscent of the general legal propensity to never use one word when three will do, there is a distinction between covenants and conditions.

1. Distinction. Both covenants and conditions are private agreements concerning realty. Covenants are typically enforced through injunctive relief. Conditions, however, depending on their nature, may be enforced through trespass to try title actions, declaratory judgments or other causes of action which seek to effect the status of title to real property.

a. Covenant

"The property conveyed herein shall never be used for purposes of a junk yard, pool hall, or similar activities" creates a covenant.

b. Condition

“But in the event that the property conveyed herein should ever be used for a junk yard, pool hall, or similar activities, then ownership of the realty conveyed herein shall immediately revert to A, his heirs, successors and assigns” creates a condition.

This is a “subsequent condition,” since it serves to defeat an estate that has previously been vested in the grantee. A “condition precedent” exists where the condition has the effect of preventing passage of title until the condition has been fulfilled.

1. Covenant Favored. Texas courts will try to interpret a provision as a covenant rather than as a condition. The Texas Supreme court stated:

“Conditions subsequent are not favored by the courts, and the promise or obligation of the grantee will be construed as a covenant unless an intention to create a conditional estate is clearly and unequivocally revealed by the language of the instrument. In cases where the intention is doubtful, the stipulation is treated as a covenant rather than as a condition subsequent with the right to defeat the conveyance.”

Heavynne v. Bradshaw, 158 Tex. 453, 312 S.W.2d 948, 951 (1958). However, if the court concludes that the language is clear and unambiguous, then it will enforce a condition subsequent. *Sewell v. Dallas Independent School District*, 727 S.W.2d 586 (Tex.App.--Dallas 1987, writ ref'd n.r.e.).

E. General Rules for Interpretation of Deed Restrictions

1. Traditional Rule for Strict Construction of Deed Restrictions. Deed restrictions are encumbrances on realty and therefore, under common law, are to be strictly construed in favor of the free use of land. *Levine v. Turner*, 264 S.W.2d 478 (Tex.Civ.App.--El Paso 1954, writ dismissed); *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981). However, deed restrictions are enforced as written where the language and intent is clear. *WLR, Inc. v. Borders*, 690 S.W.2d 663, 667 (Tex. App.--Waco 1985, writ ref'd n.r.e.). Deed restrictions were strictly construed, favoring the grantee and disfavoring the grantor. *Baker v. Henderson*, 137 Tex. 466, 153 S.W.2d 465 (1941). Any ambiguity is resolved in favor of the least restrictive reasonable interpretation. *Silver Spur Addition Homeowners v. Clarksville Seniors Apartments*, 848 S.W.2d 772 (Tex.App.--Texarkana, 1993).

2. Liberal Construction in Favor of Deed Restrictions Required by Statute. In 1987, the Texas legislature reversed years of well settled case law by requiring: “A restrictive covenant shall be liberally construed to give effect of its purposes and intent.” Tex. Prop. Code Ann. § 202.003(a) (Vernon Supp. 1992). The full effect of this reversal is unclear, as only one reported case has relied on this section. See *Candlelight Hills Civic Ass’n., Inc. v. Goodwin*, 763 S.W.2d 474 (Tex.App.--Houston [14th] 1989 writ denied).

Courts will probably be required to apply these new rules to two typical fact situations. One situation arises where neither the developer, nor any private property owners, association enforces deed restrictions; but, enforcement has instead been left to the property owners themselves. In this case, there may be legitimate arguments of waiver and estoppel. Depending on the factual circumstances, the court's outcome may appear to follow the *Baker v. Henderson* rule more than § 202.003. This may occur because the facts will be sufficiently confused on the common law issues of waiver and estoppel versus enforcement that a ruling akin to *Baker v. Henderson* will look more equitable than trying to enforce an ill-defined "purpose and intent" of a given covenant. However, if the individual property owners have not allowed widespread violation of the deed restrictions, then § 202.003 should support the property owner's claim. In the second situation, enforcement is brought by a duly elected or appointed representative of a property owner's association which has exercised some degree of diligence in its affairs. There, the court will probably use § 202.003, buttressed by Tex. Prop. Code § 202.004 (discussed below) to uphold the ruling of the property owner's association, absent evidence of an emotional or vindictive basis for the property owner association's action.

3. Presumption of Reasonableness of Property Association Action. Also in 1987, the Texas legislature added a new wrinkle regarding enforcement of deed restrictions requiring discretionary action by a property owner's association by stating:

An exercise of discretionary authority by a property owners association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.

Tex. Prop. Code Ann. § 202.004(a) (Vernon Supp. 1992).

Prior case law dictated that property owners association actions and rules will be upheld so long as they are reasonable. *Frey v. De Cordova Ben Estate Owners' Ass'n.*, 632 S.W.2d 877, 880 (Tex.App.--Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ; *Holleman v. Mission Trace Homeowners' Ass'n.*, 556 S.W.2d 632, 635 (Tex.Civ.App.--San Antonio 1977, no writ) .

4. General Plan Required. Whether parties intended to invoke the protection of the deed restrictions for the purpose of the property within the area covered by the covenants is commonly tested by looking for evidence of a general plan or scheme of development. *Lehmann v. Wallace*, 510 S.W.2d 675 (Tex.Civ.App.--San Antonio 1974, writ ref'd n.r.e.). If, however, a declarant reserves the unlimited right, at any time, to change the deed restrictions, then no common plan or scheme arises which the court could enforce. *Gray v. Lewis*, 241 S.W.2d 313 (Tex.Civ.App.--Galveston 1951, writ ref'd n.r.e.). A developer may, however, reserve the unlimited right to change the deed restrictions for a part of property covered by a common plan or scheme of development, provided such right and the method for change are clearly contained in the declaration of restrictions. *Baldwin v. Barbon Corp.*, 773 S.W.2d 681 (Tex.Civ.App.--San Antonio 1989, writ denied).

5. Valid if Not Contrary to Public Policy or Otherwise Illegal. An owner of land may impose deed restrictions provided that such restrictions do not contravene public policy

and that the contracts are not illegal. *Bein v. McPhaul*, 357 S.W.2d 420 (Tex.Civ.App.--Amarillo 1952, no writ). *Scoville v. Springpark Homeowner's Ass'n., Inc.*, 784 S.W. 2d 498, 502 (Tex.App.--Dallas 1990, writ denied). In construing the intent of the parties to the deed restrictions, the court will not concern itself with the merits of the deed restrictions because the parties have the right to adopt any type of restriction they choose. *Silver Spur Addition Homeowners, Id.*

6. Equitable Considerations. Injunctive relief will not be denied simply because one landowner may suffer a greater injury by reason of enforcement. *Gunnels v. North Woodland Hills Community Ass'n.*, 563 S.W.2d 334 (Tex.Civ.App.--Houston [1st Dist.] 1978, no writ). The court will not enforce supplemental deed restrictions filed to keep crippled children from having a hospital in Waco. *Taylor v. McLennan County Crippled Childrens Ass'n.*, 206 S.W.2d 632 (Tex.Civ.App.--Waco 1947, writ ref'd n.r.e.). Injunctive relief, the most commonly requested remedy in deed restriction enforcement actions, is equitable in nature. To request equity, one must be prepared to do equity.

7. Language Construction.

a. Deed restrictions are to be given their plain, grammatical, ordinary and commonly accepted meaning unless to do so would defeat the intent of the parties as clearly evidenced by the same document. *Travis Heights Improvement District v. Small*, 662 S.W.2d 406 (Tex.App.--Austin 1983, no writ) ; *Jim Walter Homes, Inc. v. Youngtown, Inc.*, 786 S.W.2d 10, 12 (Tex.App.--Beaumont 1990, no writ).

b. A reasonable interpretation standard will be applied. *Randney v. Clear Lake Forest Community Ass'n., Inc.*, 681 S.W.2d 191, 195, (Tex.App.--Houston [14th Dist. 1984] writ ref'd n.r.e.).

c. Where the deed restriction is ambiguous, the entire document is reviewed to determine the intent of the portions without parol evidence (even from the original developer). *Candlelight Hills, supra* at 477.

d. Ambiguity is a question of law for the court to decide. *Community Imp. Ass'n. v. Settler's Village*, 828 S.W.2d 182, 184 (Tex.App.--Houston [14th Dist.] 1992, no writ).

e. If there is no ambiguity, construction of a deed restriction is also a question of law for the court to decide. *Id.*

f. If there is ambiguity, parol evidence is advisable to show the intent of the parties. *Id* at 185.

g. The court will seek to harmonize and give effect to all provisions so that none will be rendered useless. *Scoville, supra.*

h. The general rule of construction for contracts apply to deed restrictions. *Id.*

8. Waiver/Abandonment. Deed restrictions may be waived. The rule for waiver of a deed restriction has been stated as follows:

Restrictions may be waived, but in order to establish a waiver of a general scheme or plan for the development of particular area, it must be shown that such plan has been violated to such an extent as to reasonably lead to the conclusion that it in fact had been abandoned, and that unsubstantial violation thereof or the fact that a complainant has not objected to previous violation of such restrictions, particularly where they did not immediately affect the enjoyment of his own premises, will not prevent him from maintaining an action for injunction relief to prevent substantial violations thereof, or a violation which would materially affect his own premises.

Barham v. Reames, 366 S.W.2d 257, 259 (Tex.Civ.App.--Fort Worth 1963, no writ).

Evidence of a prior violation which no longer continues is not evidence of waiver or abandonment. *Finkelstein v. Southampton Civic Club*, 675 S.W.2d 271, 278 (Tex.Civ.App.--Houston [1st Dist.] 1984 writ ref'd n.r.e.). Where a particular violation has been waived, such waiver will protect any new violation which is substantially the same as the prior violation, but it will not extend to a greater violation. *Sharpstown Civic Ass'n., Inc. v. Pickett*, 679 S.W.2d 956, 958 (Tex. 1984). The burden to show waiver or abandonment is on the party asserting it. *Cowling v. Colligan*, 312 S.W.2d 943, 946, 158 Tex. 458 (Tex. 1958).

Estoppel may be an equitable defense to the enforcement of deed restrictions. *Finkelstein, supra* at 279. The burden of proof is upon the party asserting the estoppel. *Dempsey v. Apache Shores Property Owners Ass'n., Inc.*, 737 S.W.2d 589, 595 (Tex.Civ.App.--Austin 1987, no writ).

9. Changed Conditions. Changed conditions in an area subject to deed restrictions may preclude the enforcement of those deed restrictions. The factors used in determining whether the conditions have sufficiently changed such that the benefits of the deed restrictions are no longer possible to any substantial degree include:

- a. the size of the restricted neighborhood;
- b. the location of the change with respect to the property in issue;
- c. the type of the change;
- d. the conduct of the parties or their predecessors in title;
- e. the purpose for which the deed restrictions were imposed; and
- f. the remaining term of the deed restrictions.

Simon v. Henrichson, 394 S.W.2d 249, 254 (Tex.Civ.App.--Corpus Christi 1965, writ ref'd n.r.e.); *Cowling, supra*.

Conditions outside a deed restricted area may change and have an adverse effect upon the area subject to a general plan or scheme of development. However, even upon a showing of such changed conditions, courts will enforce restrictions as to "border" tracts if the benefits of the original plan can still be realized for the interior lots. *Cowling, supra; Independent American Real Estate, Inc. v. Davis*, 735 S.W.2d 256 (Tex.App.--Dallas 1987, no writ). Commercial development outside the deed restricted area, zoning changes to a lot within the deed-restricted area, and the increased value of property within the deed-restricted area if commercial development is permitted are not relevant to the question of whether the deed restrictions remain enforceable. *Independent American Real Estate, Inc., supra*.

10. Limitations/Laches. The four-year statute of limitation applies to enforcement of deed restrictions. Tex. Civ. Prac. & Rem. Code Ann. § 16.051 (Vernon 1987), *Schoenhals v. Close*, 451 S.W.2d 597, 599 (Tex.Civ.App.--Amarillo 1970, no writ).

The doctrine of laches may prevent enforcement, but only if the property owner has been prejudiced by the delayed enforcement. *Keene v. Reed*, 340 S.W.2d 859, 860 (Tex.Civ.App. --Waco 1960, writ ref'd n.r.e.). For a recent discussion of laches in the context of deed restrictions, see *Oak Forest Civic Club v. Duke*, 1991 WL 202720 *5 (App.--Houston [1st Dist.] 1991, no writ) (unpublished opinion).

11. Substantial Compliance. Where a property owner alleges substantial compliance with a deed restriction, but strict compliance is being sought, the property owner may defeat the request for strict compliance when the harm resulting from strict enforcement would substantially outweigh the benefits derived. *Townplace Homeowners' Ass'n. v. McMahan*, 594 S.W.2d 172, 176 (Tex.Civ.App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.). The burden of proof is on the property owner alleging substantial compliance. *Mills v. Kubena*, 685 S.W.2d 395, 398 (Tex.App.--Houston [1st Dist.] 1985 writ ref'd n.r.e.).

12. Declaratory Judgment. An action for declaratory judgment is an appropriate means for seeking a determination of the validity, applicability or enforceability of a deed restriction. *Candlelight Hills, supra* at 481.

F. Types of Enforceable Deed Restrictions

1. Residential Use Restrictions. A residential-only use restriction will be enforced. *Betha v. Lockhart*, 127 S.W.2d 1029 (Tex.Civ.App.--San Antonio 1939, writ ref'd); *Wald v. West MacGregor Protective Ass'n.*, 332 S.W.2d 338 (Tex.Civ.App.--Houston 1960, writ ref'd n.r.e.); *Ireland v. Bible Baptist Church*, 480 S.W.2d 467 (Tex.Civ.App.--Beaumont 1972), cert. denied, 411 U.S. 906 (1973). The terms "residence purposes" and "residences" require the use of property for living purposes as distinguished from uses for business or commercial purposes. *MacDonald v. Painter*, 441 S.W.2d 179, 182 (Tex. 1969). The use of the phrase "the main residence" suggests more than one residence and permits the construction of duplexes. *Id.* at 183.

Manufactured and modular homes violate a covenant prohibiting mobile homes. *Dempsey v. Apache Shores Property Owners Ass'n., Inc.*, 737 S.W.2d 589 (Tex.App.--Austin 1987, no writ).

A “residential only” deed restriction which prohibited the erection of any structure other than a detached single-family dwelling did not preclude the use of a single-family dwelling as a family home for six mentally retarded adults. *Permian Basin Centers for Mental Health and Mental Retardation v. Alsobrook*, 723 S.W.2d 774 (Tex.App.--El Paso 1986, writ ref’d n.r.e.). To clarify some confusion in lower court rulings on this point, the Texas legislature in 1987 enacted § 202.003(b) of the Property Code which codifies the holding in *Permian Basin Centers*, Tex. Prop. Code Ann § 202.003(b) (Vernon Supp. 1992).

2. Raw Acreage Not a Lot. Developers wanted to construct townhouses in an area platted simply as raw acreage. The plaintiff sought to enforce a residential area covenant which provided, “No lot shall be used except for single family residential purposes.” The court held that raw acreage was not a lot and, since the covenant applied only to lots, they did not apply to raw acreage. *Baskin v. Jeffers*, 653 S.W.2d 480 (Tex.Civ.App.--Beaumont 1982, writ ref’d n.r.e.).

3. Definition of a Structure. A fence is a structure within the scope of deed restrictions prohibiting structures in specific areas. *Stewart v. Welsh*, 142 Tex. 314, 178 S.W.2d 506 (1944). Air conditioners are structures within the prohibition against erecting structures nearer than five feet to any side lot line. *Able v. Bryant*, 353 S.W.2d 322 (Tex.Civ.App.--Austin 1962, no writ). However, a concrete slab for a tennis court was not a “structure” for purposes of setback restrictions established by deed restrictions. *Turner v. England*, 628 S.W.2d 213 (Tex.App.--Eastland 1982, writ ref’d n.r.e.). An unpaved parking lot of improved materials was considered a structure under a zoning ordinance in *City of Jersey Village v. Texas No. 3 Ltd.*, 809 S.W.2d 312 (Tex.App.--Houston [14th] 1991 no writ).

4. Mobile Homes. Where a deed restriction required any residence constructed to have a minimum floor space of 1500 square feet with at least 80% masonry construction, a mobile home did not meet these requirements even though the mobile home owners argued that the mobile home was not a residence within the meaning of the deed restriction. *Currey v. Roark*, 635 S.W.2d 641 (Tex.Civ.App.--Amarillo 1982, no writ). Deed restrictions providing that, “No structures or house trailers of any kind may be moved onto the property,” barred a party from buying a house and having it moved onto the property. *Schultz v. Zoeller*, 568 S.W.2d 677 (Tex.Civ.App.--San Antonio 1978, writ ref’d n.r.e.).

However, mobile home owners can take heart from *Hussey v. Ray*, 462 S.W.2d 45 (Tex.Civ.App.--Tyler 1970, no writ). In *Hussey*, the following deed restriction applied to a subdivision in the town of Winona: “No trailer, tent, shack, stable or barn shall be placed, erected or be permitted to remain on any lot, nor shall any residence of a temporary character be used at any time as a residence.” *Id.* at 45. The court concluded that the word “trailer” does not include “mobile home” and thus, occupancy of a mobile home was a permissible use. *Id.*

5. Parking Lots. A parking lot is an integral part of a supermarket, therefore, where deed restrictions prohibited the use of land for purposes of a supermarket, the use of the land as a parking lot for a supermarket was also prohibited. *H.E. Butt Grocery Co. v. Justice*, 484 S.W.2d 628 (Tex.Civ.App. --Waco 1972, writ ref’d n.r.e.).

Even though adjacent apartment complexes were not subject to a “residential use only” deed restriction, such deed restriction prohibited the use of lots subject to a restriction for purposes of parking for the apartment complex. *Braes Manor Civil Club v. Mitchell*, 368 S.W.2d 860 (Tex.Civ.App.--Waco 1963, writ ref’d n.r.e.). Likewise, lots restricted to residential use only could not be used as a parking lot for a nightclub. *Eakens, v. Garrison*, 278 S.W. 2d 510 (Tex.Civ. App.--Amarillo 1955, writ ref’d n.r.e.).

6. Beauty Parlors. Despite a showing that another beauty parlor had been operated for more than four years within the residential area approximately one block away from the property in question, the court enjoined use of a portion of their property as a beauty parlor. *Barham v. Reames, supra*.

7. Antennae. A deed restriction barring the erection of an antenna on the roof of a house except to the rear of the roof ridge line, so that the antenna could not be seen, was enforceable. *Gunnels v. North Woodland Hills Community Ass’n., supra*.

8. Treehouse. A developer sought the removal of a treehouse from a vacant lot in the subdivision arguing that the treehouse was not for “private residential purposes only” as required by the deed restrictions. The court found that the lot was being used for “living purposes” since there was no evidence of any business or commercial use and, consequently, the treehouse was permitted to remain as being in conformance with the residential use restrictions. *Winn v. Ridgewood Dev. Co.*, 691 S.W.2d 832 (Tex.App.--Fort Worth 1985, writ ref’d n.r.e.).

9. Fences. Where deed restrictions prevented the erection of a fence within 25- feet of the property line on certain lots, plaintiff was entitled to an injunction requiring removal of a fence constructed within the 25-foot setback. The fact the fence was necessary to comply with zoning requirement for a swimming pool that had already been installed did not sway the court. *Collum v. Neuhoff*, 507 S.W.2d 920 (Tex.Civ.App.--Dallas 1974, no writ).

Likewise, the Austin Court of Appeals held that a fence erected in violation of a deed restriction barring erection of fences “which interfere with the full and free use” of a given area must be removed. *Shepler v. Falk*, 398 S.W.2d 151 (Tex.Civ.App.--Austin 1965, writ ref’d n.r.e.).

Fences lost again in *Giles v. Cardenas*, 697 S.W.2d 422 (Tex.App.--San Antonio 1985, writ ref’d n.r.e.). In *Giles* the appellate court upheld a trial court injunction ordering the removal of a fence erected in violation of recorded deed restriction, where there was no evidence of abandonment.

10. Age Restrictions. Age restrictions on residents within a condominium association are not per se unconstitutional, and may be enforced. *Covered Bridge Condominium Ass’n., Inc. v. Chambliss*, 705 S.W.2d 211 (Tex.App.--Houston [14th Dist.] 1985, writ ref’d n.r.e.); *Preston Tower Condominium Ass’n. v. S.B. Realty, Inc.*, 685 S.W.2d 98 (Tex.App.--Dallas 1985, no writ). The constitutionality of a private covenant concerning age must be reviewed to determine (i) whether the restriction, under the particular circumstances of the case, is reasonable, and (ii) whether it is discriminatory, arbitrary or oppressive in its application.

11. Dog Kennels. In *Guajardo v. Neece*, 758 S.W.2d 696 (Tex.App.--Fort Worth 1988, no writ), Defendant purchased undeveloped property in Tranquil Acres for the purpose of constructing and operating a breeding and boarding dog kennel. Plaintiff sued for an injunction to prevent further construction of the dog kennel, citing the following deed restriction: "No noxious or offensive trade or activity shall be carried on upon any lot, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood." The trial court found that the operation of dog kennel would violate the deed restriction. The trial court upheld the temporary injunction granted by the trial court, finding that the evidence supported the trial court's conclusion that a dog kennel would constitute an offensive trade in a residential community. *Id.* at 699.

12. Private Streets. In a non-deed restriction case involving a demonstration on a private street which resulted in a conviction for criminal trespass, the Dallas Court of Appeals held that freedom of expression is not protected on a private street. *Gibbons v. State*, 775 S.W.2d 790, 793 (Tex.App.--Dallas 1989, no writ). This decision may be useful for developments with private streets.

13. Non-Compete Agreements. In *Bent Nail Developers, Inc. v. Brooks*, 758 S.W.2d 692 (Tex.App.--Fort Worth 1988, writ denied), Plaintiff purchased certain property from Defendant which, as a condition of such sale, was deed restricted for residential purposes only. The property in the City of Watauga, Texas, was zoned for commercial use. The commercial use zoning did not permit residential uses. Defendants had insisted on a residential use restriction because they did not want the Plaintiff to compete with other property owned by Defendants which was being used for commercial purposes. Plaintiff tried to get the zoning changed, but was unsuccessful in doing so. Plaintiff then filed suit asking for a declaratory judgment to cancel the deed restrictions, and thereby permit use of the land for commercial purposes. Plaintiff argued that the deed restrictions were, in reality, a non-competition agreement which was void because it was not reasonably limited as to time. The appellate court reversed a summary judgment in favor of the Defendant holding that a fact issue existed as to whether a reasonable time had passed since the creation of the deed restriction. The appellate court held that the trial court must reform deed restrictions used as non-competition agreements to impose a time limit providing for their expiration. *Id.* at 694.

14. Churches. Residential only deed restriction prohibited use of property by religious order for a religious student center and related purposes. *Protestant Episcopal Church Council v. McKinney*, 339 S.W.2d 400 (Tex.Civ.App.--Eastland 1960, writ ref'd).

15. Roofs. Section 5.025 of the Texas Property Code states: "To the extent that a deed restriction applicable to a structure on residential property requires the use of a wood shingled roof, it is void." Tex. Prop. Code Ann. § 5.025 (Vernon 1984). In *Hoye v. Shepherd's Glen Land Co.*, 753 S.W.2d 226 (Tex.App.--Dallas 1988, writ denied), the trial court entered an order requiring the defendants to remove a composition roof because it breached a restrictive covenant which read: "All roofs shall be wood shingled, slate or other permanent type." The defendants argued that the only practical economic alternative to a composition roof was a wood shingle roof, and that to require wood shingle roofs violates the Texas Property Code § 5.025. The appellate court upheld the trial court's order requiring defendants to replace their roof. *Id.* at 230. In the court's opinion, the practical disadvantages to wood shingle alternatives does not require one to install wood shingles. *Id.* The court noted, parenthetically, that the Hoyes had

been informed by the developer prior to construction that their plans to construct a composition shingle roof violated the restrictive covenants. In spite of this warning, they proceeded with construction. *See also, Stergios v. Forest Place Homeowners' Ass'n., Inc.*, 651 S.W.2d 396 (Tex.App.--Dallas 1983, writ ref'd n.r.e.).

16. Trade or Business. A deed restriction stating "No noxious or offensive trade or activity shall be carried on upon the lot" did not bar a small upholstery business in a 14-foot by 16-foot shed. *Clements v. Taylor*, 184 S.W. 2d 485 (Tex.Civ.App.--Eastland 1944, no writ). The operation of a dog kennel may constitute an offensive trade or activity barred by deed restrictions. *Guajardo v. Neece, supra*.

17. Building Approvals. Architectural control and review committees are established pursuant to many modern deed restrictions. These committees exercise approval functions regarding matters which are generally aesthetic in nature. Failure to secure the approval of such a committee can lead to a suit for injunctive relief to compel compliance. *See Gettysburg Homeowner's Ass'n., Inc. v. Olson*, 768 S.W.2d 369, 371 (Tex.App.--Houston [14th Dist.] 1959, no writ). The action of a committee is enforceable, unless it n be shown that the committee's decision was "arbitrary, capricious, or discriminatory" under Tex. Prop. Code Ann. § 202.004 (a) (Vernon Supp. 1992). (See § III.E.3. *supra*).

18. Foreclosure Rights for Failure to Pay Assessments. Where deed restrictions secure payment of the assessment with a "continuing vendor's lien," foreclosure of such lien is authorized and is not barred by a claim of homestead. *Inwood North Homeowners' Ass'n., Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

19. Late Charges for Assessments. Late charges on assessments are enforceable as a penalty for failing to pay an assessment in a timely manner. Late charges do not constitute interest and do not violate the constitutional equal protection guarantees. *Lee v. Braeburn Valley West Civic Association*, 794 S.W.2d 44, 46 (Tex.App.--Eastland 1991, writ denied).

20. Attorney's Fees. Provisions in deed restrictions allowing recovery of attorney's fees from a violator of the deed restriction are enforceable, but the party seeking recovery must request a finding that the attorney's fees are reasonable. *See, Inwood North Homeowners Ass'n., Inc. v. Meier*, 625 S.W.2d 742 (Tex.Civ.App.--Houston [1st Dist.] 1991, no writ); *Fonmeadow Property Owners Ass'n., Inc. v. Franklin*, 817 S.W.2d 104, 106 (Tex.App.--Houston 1991, no writ).

Attorney's fees may be recovered independently under Tex. Prop. Code Ann. § 5.006 (Vernon Supp. 1992), which allows recovery of reasonable attorney's fees by a prevailing party in an action based on the breach of a deed restriction. Section 5.006 considers, among others, the following factors in determining the reasonableness of the attorney's fees:

- a. the time and labor required;
- b. the novelty and difficulty of the question; and
- c. the expertise, reputation and ability of the attorney.

The application of § 5.006 is mandatory. *City of Houston v. Muse*, 788 S.W.2d 419, 424 (Tex.App.--Houston [1st Dist.] 1990, no writ). The City of Houston can recover under § 5.006 as a prevailing party. *Id.*

G. Enforcement Entity

Since deed restrictions are not self-operative, someone must seek to enforce them. Typically, that person will represent one of the following interests:

1. the developer of the project;
2. the representative of a corporation set up to represent the property owners;
3. an individual property owner;
4. the City of Houston (pursuant to Tex. Loc. Gov. Code Ann. § 201.001 et. seq. (Vernon 1987 and Supp. 1992); or
5. counties with populations exceeding two million people (pursuant to Texas Prop. Code § 203.003.

Attitudes towards enforcement may be affected by the enforcing party. The developer's interest will obviously be most intense during the development phase of the project and may be heavily influenced by marketing considerations. Enforcement actions by a homeowner are typically narrow in scope (i.e., only that property which immediately affects the homeowner) and are sometimes characterized by emotional considerations. Conversely, a corporate property owners' association enforcement efforts tend to be more structured.

The original declarant, commonly the developer, is permitted to enforce deed restrictions where they have retained any property benefitted by such restrictions. The developer commonly retains certain special rights of enforcement and approvals for a majority, if not all, of the estimated buildout period for the development.

Prior to 1987, a question sometimes existed as to whether a property owners' association had authority to enforce deed restrictions absent an express grant of the power to do so in the documents creating the property owners' association or the association's legal ownership of the property in question. See *Gunnels v. North Woodland Hills Community Ass'n.*, *supra*. *Peterson v. Greenway Parks Homeowners' Ass'n.*, 408 S.W.2d 261 (Tex.Civ.App.--Dallas 1966, writ ref 'd n.r.e.). That issue was resolved in 1987 by Texas Property Code § 202.004(b), which states:

A property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation or any administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument.

Typically, the incorporated property owners' associations are found in master-planned communities. According to the June 1992 edition of Urban Land, a publication of the

Urban Land Institute, Texas ranks second in the United States for total property sales in master-planned communities. Interestingly, in recent years, Houston-area master-planned communities had a larger number of sales than any state except California and Texas “Home Sales in Master-Planned Communities,” June 1992 edition of Urban Land, at page 26.

In Harris County, Tex. Prop. Code, Chapter 203 (1992) permits deed restrictions to be enforced by the County Attorney. Likewise, Tex. Prop. Code, Chapter 201 (1992) provided special deed restriction enforcement powers to the City of Houston for its city limits, its extraterritorial jurisdiction, and any unincorporated area in Harris County. For an interpretation of this legislation as initially enacted, see Comment, 44 Tex. L. Rev. 741 (1966).

Property owners who are subject to the deed restrictions also have the right to seek enforcement of them since they are in privity of estate with any violator. See Section III.C.2.

H. Modification/Extension

1. General Rule. Most modern deed restrictions specifically contain a provision for extension of the duration of the term of the deed restriction or for modification of specific provisions of the deed restrictions. To be utilized, these provisions typically require an affirmative vote by a “super majority” of property owners within the effective area. Without a specific provision to the contrary, the consent of all of the affected property owners is required to modify deed restrictions. *Nelson v. Flache*, 487 S.W.2d 843, 843 (Tex.Civ.App.--Amarillo 1973, writ ref'd n.r.e.). Status as original developer of the subdivision does not provide special standing for the purpose of modification or enforcement of deed restrictions, unless the developer retains ownership of property in the subdivision. *Davis v. Huey*, 608 S.W.2d 944, 956 (Tex.Civ.App.--Austin 1980, rev'd on other grounds 620 S.W.2d 561 Tex. 1991). Current case law is unclear whether modifications must be consistent with the plan of development for the subdivision or whether the modification need only comply with procedural requirements, whereupon the effects (even to the point of removing significant restrictions) are irrelevant. See *Scoville v. Springpark Homeowner's Ass'n.*, 784 S.W.2d 498, 504 (Tex.App.--Dallas 1990, writ denied); *Baldwin v. Barbon*, 773 S.W.2d 681, 685 (Tex.Civ.App.--San Antonio 1989, writ denied); *Harrison v. Air Park Estates Zoning Committee*, 533 S.W.2d 108, 111 (Tex.Civ.App.--Dallas 1977, no writ); *Hachette v. East Sunny side Civic League*, 696 S.W.2d 613, 615 (Tex.Civ.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.); *French v. Diamond Hill-Jarvis Civic League*, 724 S.W.2d 921, 924 (Tex.Civ.App.--Fort Worth 1987, writ ref'd n.r.e.); and *Couch v. Southern Methodist University*, 10 S.W.2d 973, 974 (Tex.Comm.App. 1928, judgment adopted) .

This may be another area where Tex. Prop. Code § 202.003 and its mandate for liberal construction might be cited to support the argument that “modification” of a deed restriction does not contemplate complete abolition of its fundamental provisions (such as types of use). Under the historic treatment of deed restrictions as encumbrances on real property which were to be strictly construed, an argument that technical compliance with procedural provisions for modification alone are sufficient, without regard to the substance of the modification, might be upheld, but that may no longer be true. See *Candlelight Hills Civic Ass'n., Inc. v. Goodwin*, 763 S.W.2d 474 (Tex.App.--Houston [14th Dist.] 1989, writ denied) for an example on a court giving expansive reading to the intent of deed restrictions. Unfortunately, the court in *Scoville* made no references to § 202.003.

2. Texas Property Code Chapter 201. The Texas Property Code was amended effective September 1, 1985 to provide a procedure for extension or renewal of an existing unexpired deed restriction, to create a new deed restriction, or to add to or modify an existing deed restriction, independent of the text of the deed restriction involved. Chapter 201 has limited application as follows:

a. It applies to a “residential real estate subdivision” which, however, is broadly defined to include land burdened by residential use only deed restrictions limiting fifty percent (50%) or more of land area, excluding streets and public uses;

b. It applies only to a city or extra-territorial jurisdiction thereof which has a population of more than 1,600,000 or in the unincorporated area of a county having a population of 2,400,000 or more;

c. Where the subdivision has existing deed restrictions which automatically extend for an indefinite number of specified terms, subject to waiver of termination by a specified percentage of less than fifty percent (50%) plus one of the owners or where the deed-restrictions may be added to or modified by less than seventy percent (70%) of the owners, the provisions of Chapter 201 do not apply for the purpose of extension of the term of or renewal of existing restrictions or the creation of additional restrictions; and

d. It does apply to any subdivision that was at any time subject to Chapter 201, notwithstanding that the subdivision later becomes ineligible. Tex. Prop. Code Ann. § 201.001 (Vernon Supp. 1992).

Chapter 201 provides for a petition committee, notice to property owners, a petition to be signed by a requisite number of property owners, and the binding nature of the resulting deed restrictions on all property owners who do not affirmatively file notice of rejection of the proposed deed restrictions. A lienholder is not bound by the petition unless the lienholder signs it, and it is later filed.

The goal of Chapter 201 is to enable the adoption, extension or modification of deed restrictions by less than all of the property owners in an area, but which will be effective against all property owners who do not affirmatively object. Chapter 201 deals with the problem that property owner associations have experienced where a large number of property owners will not take action, whether affirmatively or negatively, upon a proposed deed restriction issue. Under Chapter 201, failure to affirmatively object will cause a property owner's property to be encumbered by the deed restrictions so long as the requisite percentage of other property owners have signed the petition.

III. COMPARISON OF ZONING WITH DEED RESTRICTIONS

A. Basis

1. Zoning. The basis for zoning is the police power of a municipality to protect the health, safety and public welfare of the community. This is a legislative power exercised by a governmental entity.

2. Deed Restrictions. The basis for deed restrictions is the right of private contract. Property owners may consent to the encumbrance of their real property rights in any manner so long as it does not violate law or public policy.

B. Goals

1. Zoning. The goal of zoning is the protection of the community through regulation of land use by individuals. These are societal goals focusing on the benefit to the whole community, despite the fact that individuals' rights are limited and, in many cases, their property values reduced.

2. Deed Restrictions. The goal of deed restrictions is, generally, to enhance the value of property being subdivided by the developer for sale to a number of end users. This focuses on the benefit to the property encumbered without the intent to effect, negatively or positively, adjacent property in any way.

C. Interpretation

1. Zoning. Zoning regulations must have a substantial relationship to a community's health, safety, morals and general welfare. over the years, the subject matter which may be covered by zoning has broadened, although it is still stated that the regulation of aesthetics alone, without other substantive purposes, is not allowed.

2. Deed Restrictions. Deed restrictions, as a matter of private contract, can cover any matters which are not illegal or against public policy. The interpretation of deed restrictions under common law was to enforce clearly drafted deed restrictions even though deed restrictions were not favorites of the law. By legislative action, the Texas Legislature now mandates the liberal construction of deed restrictions in order to enforce their intent and has mandated a strong presumption in favor of property owners' associations' actions in the enforcement and interpretation of deed restrictions. Although the full scope of these actions is not yet clear, it is certain that the burden of defeating deed restriction enforcement action has become more difficult.

D. Enforcement

1. Zoning. Zoning restrictions are typically enforced by municipalities. Violations usually constitute Class C misdemeanors. Many zoning violations are picked up through the building code and the occupancy permitting process. The private cause of action for an individual property owner to enforce a zoning ordinance is limited to situations of "special injury" and standing is rarely granted by the courts.

2. Deed Restrictions. Deed restrictions are typically enforced by incorporated property owners, associations (once a subdivision is established) , and by the developers (while the subdivision is in the development stages). Both have a vested interest in

the enforcement of these deed restrictions on behalf of the entire subdivision in order to maintain property values. Private causes of action by individual property owners are allowed since deed restrictions are contractual and the parties are in privity of estate. The City of Houston and Harris County both have statutorily provided rights to enforce deed restrictions.

E. The Blurring Of Zoning Law And Deed Restriction Law

Zoning law and deed restriction law, although both affecting private land use, come from different ends of the legal spectrum. Nonetheless, recent legislative forays into deed restriction law and the development of large scale planned developments have imported a number of zoning law procedures and concepts to deed restriction law.

The governmental entities of the City of Houston and Harris County now enforce certain deed restrictions, although this could be considered a historic anomaly since Houston has never had zoning. The idea that a municipality should enforce private land use covenants implies the municipality's adoption of the deed restrictions being enforced as public policy. In large master planned communities, with extensive deed restrictions and adequate funding through assessments, the property owners association will take on many of the characteristics of a municipal government, particularly when enforcing deed restrictions. Texas Property Code § 202.002(a) gives a property owners association's actions a presumption of validity similar to that accorded to a municipality in enforcing deed restrictions. Where deed restrictions in a master planned community are comprehensive and consistent in scope as to a large development, the enforcement goals of the property owners association take on many of the goals of zoning in seeking to benefit the community as a whole, rather than a particular piece of property.

Despite these significant developments, it still remains unlikely that either zoning law or deed restriction law will look to the other for legal support in the resolution of legal issues. Although they both impact land use, their basis, basic goals, interpretation and enforcement are fundamentally different from a legal perspective.