PRIVATE LAND USE REGULATIONS: DEED RESTRICTIONS

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I. INTRODUCTION

A. Scope of Article

This Article is intended as a general overview of Texas deed restriction law. 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

There is no treatise on Texas deed restriction law. However, there are several excellent seminar articles of note:

1. *Interpreting and Enforcing Deed Restrictions,* Marc D. Markel, 14th Annual Real Estate Conference, South Texas College of Law, July 1998,

2. *Survey of Recent Texas Case Law Affecting Property Owner's Associations,* Roy D. Hailey, Advanced Real Estate Course, State Bar of Texas, June 1998(updated in a April 2001 presentation to the Houston Bar Association Real Estate Law Section),

3. *A Primer for Representing Condominium and Property Owners Associations,* Sharon Rueler and Rosemary B. Jackson, Advanced Real Estate Course, State Bar of Texas, June 2001, and

4. *An Owner's Bill of Rights Within a POA Government,* David Z. Conoly, Mortgage Lending Institute, University of Texas School of Law, October 1997.

II. WHAT ARE RESTRICTIONS?

Deed restrictions are private, contractual covenants which limit land use. They are more appropriately called restrictive covenants, but commonly called deed restrictions or simply restrictions. In this paper, they will be called "Restrictions." The documents containing Restrictions historically were the deeds to the initial property owners in a new development, hence the name "deed restriction." Although that method is still utilized, the more recent approach is to set forth Restrictions in a separate documents entitled "Declaration of Covenants, Conditions and Restrictions"(know by the acronym "CCRs"), "Restrictions", "Restrictive Covenants", "Development Regulations" or similar names. Occasionally, Restrictions are seen on the face of a recorded subdivision plat, but this practice is no longer common.

Restrictions are placed on real property by affirmative action of the owner of the real property, for the

benefit of that property (or the owner's adjacent property) only, with the typical intent to enhance the value of that real property. Occasionally, Restrictions are placed on real property as part of the governmental land use approval process or as a condition to zoning approval. Restrictions normally affect subsequent owners of the real property for a stated term, and for any extensions, but there is no requirement for a limited term. There are no limitations on the subject matter or nature of Restrictions, except for compliance with laws and public policies. Restrictions can limit real property use to a greater extent than zoning, which is limited to issues relating to health, safety and public welfare and related constitutional limits, none of which apply to Restrictions.

Restrictions commonly have the following primary provisions:

- Performance Standards for design and construction,
- Architectural/Design approval committee to approve all construction in order to enforce the Restrictions and, often, to apply aesthetic standards,
- Use Limitations,
- Establishment of a mandatory membership Property Owners' Association with equal voting rights (as to owners) to enforce the Restrictions, manage common areas and act as a quasi-governmental body representing the best interests of the neighborhood,
- Mandatory assessments to fund the Property Owners' Association secured by a lien on the real property of each owner,
- A stated term of existence, usually with automatic extensions, and a right to terminate the Restrictions by a super-majority vote of the owners, and
- A procedure to modify the Restrictions.

III. HISTORY

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 Restrictions were contained in individual deeds rather than on 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 initially 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 Restrictions which, although typically consistent in format and general approach, often contained significant differences in use restrictions and the manner in which the Restrictions were to be modified or extended. These comprehensive Restrictions were recorded before any deeds to initial lot owners. Each deed to initial lot owners referenced the comprehensive 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. Sometimes, there is a "layering" of Restrictions, with specific Restrictions for a subdivision and additional Restrictions for a broader area.

Initially, Restrictions were treated by the law as purely contractual matters between consenting parties. Restrictions were strictly construed, since they sought to limit the right of subsequent real property owners to use their property. However, so long as unambiguous 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 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). 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 Restrictions, particularly in large comprehensively planned residential communities, has increased. In recent years, some experts estimate that 50% of new home construction in Houston occurred in these highly restricted residential subdivisions.

IV. REQUIREMENTS FOR CREATION OF RESTRICTIONS

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. Restrictions typically contain an express provision that the obligations run with the land. Restrictions must satisfy the following requirements in order to run with the land:

A. "Touch and Concern" the Land . 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 Restrictions against persons not involved in making the Restrictions only if the 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.*, 364 S.W.2d at 203*; Clear Lake City Water Authority v. Clear Lake Utils.*, 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 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 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 stated parties and not by their assignees or successors.

B. Privity of Estate . In a concept analogous to standing, the law requires privity of estate before enforcing Restrictions. Texas courts have held that privity of estate is required for Restrictions to run with the land. *Clear Lake Apartments, Inc. v. Clear Lake Utils. Co.*, 537 S.W.2d 48, (Tex. Civ. App.--Houston [14th Dist.] 1976, writ granted), *aff'd at* 549 S.W.2d 385 (Tex. 1977); *Jim Walter Homes v. Youngtown, Inc.*, 786 S.W.2d 10, 11 (Tex. App.--Beaumont 1990, no writ); *Tarrant Appraisal Dist. 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.) discussed the privity requirement. The Evans owned a lot within a subdivision which had a park and playground which could only be used by property owners within the subdivision. The house was rented. 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*, a builder (not in title) was held not liable for violation of Restrictions due to the nature of the structure built. 786 S.W.2d at 11-12.

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 Restrictions. *Hooper v. Lottman*, 171 S.W.270 (Tex. Civ. App.--El Paso 1914, no writ); *Curlee v. Walker*, 112 Tex. 40, 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. "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*, 171 S.W.2d 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 Restrictions.

C. Notice . An absolute requirement for enforcement of 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 Dist.*, 767 S.W.2d at 235; *Sargent v. Smith*, 863 S.W.2d 242 (Tex. App.--Beaumont 1993, no writ); *Tien Tao Ass'n, Inc. v. Kingsbridge Park Cmty. Ass'n*, 953 S.W.2d 525 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Harris County Flood Control Dist. v. Glenbrook Patiohome Owners Ass'n*, 933 S.W.2d 570 (Tex. App. [Houston 1st Dist.] 1996, writ denied). One who buys land is deemed to have notice of all recorded Restrictions. *Village of Pheasant Run Homeowners Ass'n v. Kastor*, 2001 WL 491654 (Tex. App.--Houston [14th Dist.] 2001, opinion has not been released for publication; subject to revision or withdrawal).

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 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 Restrictions. More commonly, the notice question arises in the context of whether the Restrictions are sufficiently specific to provide adequate notice to a third party. 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 Restrictions. 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).

D. 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 are all 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 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 Restrictions compel or constrain action, but rather whether the Restrictions' demands are reasonable.

V. 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.

A. 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. The distinction between a covenant and a condition is illustrated below:

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

B. 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. *Hearvne v. Bradshaw*, 158 Tex. 453, 312 S.W.2d 948, 951 (1958).

However, if the court concludes that the language is clear and unambiguous, it will enforce a condition subsequent. *Sewell v. Dallas Indep. School Dist.*, 727 S.W.2d 586 (Tex. App.--Dallas 1987, writ ref'd n.r.e.).

VI. INTERPRETATION OF DEED RESTRICTIONS

A. Strict versus Liberal Construction.

1. Traditional Rule for Strict Construction of Restrictions. Restrictions are encumbrances on realty and therefore, under common law, are to be strictly construed in favor of the free use of land. *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981); *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987); *Crispin v. Paragon Homes*, Inc., 888 S.W.2d 78, 81 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Benard v. Humble*, 990 S.W.2d 929 (Tex. App.--Beaumont 1999, writ denied). However, 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.). Restrictions were strictly construed, favoring the grantee and disfavoring the grantor. *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981). Any ambiguity is resolved in favor of the least restrictive reasonable

interpretation. *Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, L.L.P.*, 848 S.W.2d 772 (Tex.App.--Texarkana 1993, writ denied); *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987).

2. Liberal Construction in Favor of 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 § 202.003(a) (West 1999). *See Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474 (Tex. App.--Houston [14th] 1989 writ denied); *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d 524 (Tex. App.–San Antonio 2000, no pet. h.); *SAMMS v. Autumn Run Cmty. Improvement Ass'n.*, 23 S.W.3d 398 (Tex. App.--Houston [1st Dist.] 2000, pet. denied).

3. Conflict in Case Law. Unfortunately, the case law has not uniformly applied strict versus liberal construction. In fact the cases are in hopeless conflict, with some cases applying strict construction based on Section 202.003(a) and others ignoring it all together and referencing the prior common law. *See Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987); *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 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Dyeguard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex App.--Fort Worth 2001, no pet. h.) (explaining that the statutory rule of liberal construction does not trump common law rules of construction).

B. Presumption of Reasonableness of Property Association Action . Also in 1987, the Texas legislature added a new wrinkle regarding enforcement of 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 § 202.004(a) (West 1999).

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).

C. General Plan Required . Whether parties intended to invoke the protection of the 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 Restrictions, no common plan or scheme arises which the court can 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 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).

D. Valid if Not Contrary to Public Policy or Otherwise Illegal . An owner of land may impose Restrictions provided that such restrictions do not contravene public policy and that the contracts are not illegal. *Scoville v. Springpark Homeowner's Ass'n*, 784 S.W. 2d 498, 502 (Tex. App.--Dallas 1990, writ denied); *Texas Comm. on Human Rights v. Kinnear*, 986 S.W.2d 828, 831 (Tex. App.--Beaumont 1999, no writ); *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543 (Tex. App.--Houston [1st Dist.] 1994, no writ). In construing the intent of the parties to the Restrictions, the court will not concern itself with the merits of the

Restrictions, because the parties have the right to adopt any type of restriction they choose. *Silver Spur Addition Homeowners*, 848 S.W.2d at 774.

E. Language Construction.

1. 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 Dist. 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).

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

3. 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*, 763 S.W.2d at 477.

4. Ambiguity is a question of law for the court to decide. *Davis v. Houston*, 869 S.W.2d 493, (Tex. App.--Houston [1st Dist.] 1993, writ denied); *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991); *Altman v. Blake*, 712 S.W.2d 117,118 (Tex. 1986); *Pilarek v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998); *Dyeguard Land P'ship v. Hoover*, 39 S.W.3d 300, 309-10 (Tex App.--Fort Worth 2001, no pet. h.).

5. If there is no ambiguity, construction of a deed restriction is also a question of law for the court to decide. *Community Improvement Ass'n v. Settler's Vill.*, 828 S.W.2d 182, 184 (Tex.App.--Houston [14th Dist.] 1992, no writ).

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

7. The court will seek to harmonize and give effect to all provisions so that none will be rendered useless. *Scoville v. Springpark Homeowner's Ass'n*, 784 S.W.2d 498, 502 (Tex. App.--Dallas 1990, writ denied).

8. The general rule of construction for contracts apply to Restrictions. *Id.*; *Dyeguard Land P'ship*, 39 S.W.3d at 308; *Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d at 528.

VII. DEFENSES TO ENFORCEMENT

A. Waiver/Abandonment . 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 has been abandoned, and that unsubstantial violations thereof or the fact that a complainant has not objected to previous violations 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 injunctive 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); *Giles v. Cardenas*, 697 S.W.2d 422, 427 (Tex. App.--San Antonio 1985, writ ref'd n.r.e.); *Beare v. Duren*, 985 S.W.2d 243 (Tex. App.--Beaumont 1999, writ denied); *Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845, 851-52 (Tex. App.--Houston [14th Dist.] 2000, no pet.).

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 v. Pickett*, 679 S.W.2d 956, 958 (Tex. 1984). The burden of showing 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 Restrictions. *Finkelstein*, 675 S.W.2d at 279. The burden of proof is upon the party asserting the estoppel. *Dempsey v. Apache Shores Prop. Owners Ass'n*, 737 S.W.2d 589, 595 (Tex. Civ. App.--Austin 1987, no writ); *Jim Rutherford Invs., Inc.*, 25 S.W.3d at 852.

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

- the size of the restricted neighborhood;
- the location of the change with respect to the property in issue;
- the type of the change;
- the conduct of the parties or their predecessors in title;
- the purpose for which the Restrictions were imposed; and
- the remaining term of the Restrictions.

Simon v. Henrichson, 394 S.W.2d 249, 254 (Tex. Civ. App.--Corpus Christi 1965, writ ref'd n.r.e.); *Cowling*, 312 S.W.2d at 946; *Oldfield v. City of Houston*, 15 S.W.3d 219, 228 (Tex. App.--Houston [14th Dist.] 2000, pet. filed) (holding that a party cannot assert "changed conditions" where the conditions changed before the party acquired the property).

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*, 312 S.W.2d at 946; *Independent Am. 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 Restrictions remain enforceable. *Independent Am. Real Estate, Inc.*, 735 S.W.2d at 259-60.

C. Limitations/Laches . The four-year statute of limitation applies to enforcement of Restrictions. TEX. CIV. PRAC. & REM. CODE § 16.051 (West 1999); *Schoenhals v. Close*, 451 S.W.2d 597, 599 (Tex. Civ. App.--Amarillo 1970, no writ); *Park v. Baxter*, 572 S.W.2d 794, 795 (Tex. App.--Tyler 1978, writ ref'd n.r.e.); *Buzbee v. Castlewood Civic Club*, 737 S.W.2d 366, 368 (Tex. App.--Houston [14th Dist.] 1987, no writ); *Malmgren v. Inverness Forest Residents Civic Club, Inc.*, 981 S.W.2d 875 (Tex. App.--Houston [1st Dist.] 1998, 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.); *Rogers v. Ricane Enter, Inc*., 772 S.W.2d 76, 80 (Tex. 1989); *Colton v. Silsbee State Bank*, 952 S.W.2d 625 (Tex. App.--Beaumont 1997, no writ). *But see Jim Rutherford Invs., Inc.*, 25 S.W.3d at 852-53 (holding that where homeowners association gave developer notice of a deed restriction violation within a month of beginning construction on the project, laches did not apply). For a discussion of laches in the context of Restrictions, see *Oak Forest Civic Club v. Duke*, 1991 WL 202720, at *5 (Tex. App.--Houston [1st Dist.] 1991, no writ) (unpublished opinion).

D. 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. McMahon*, 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.).

E. 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 Cmty. Ass'n*, 563 S.W.2d 334 (Tex. Civ. App.--Houston [1st Dist.] 1978, no writ). The court will not enforce supplemental Restrictions filed to keep crippled children from having a hospital in Waco. *Taylor v. McLennan County Crippled Children's 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. *Cox v. Melson-Fulsom*, 956 S.W.2d 791 (Tex. App.--Austin 1997, no writ).

F. 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*, 763 S.W.2d at 481; *Sargent v. Smith*, 863 S.W.2d 242, 250 (Tex. App.--Beaumont 1993, no writ). Attorney fees are recoverable. *Tanglewood Homes Ass'n v. Henke*, 728 S.W.2d 39, 44 (Tex.App.__Houston [1st Dist.] 1987, writ ref'd n.r.e.). Therefore, bringing a declaratory judgement action is a good strategy for an owner challenging the enforcement of Restrictions, since there is no other way for the owner to recover attorneys fees and costs in a Restriction dispute.

However, the necessary parties to a declaratory judgement action challenging the validity of Restrictions include **all** owners in the neighborhood and the failure to join those necessary parties will result in the dismissal of the action. *Dahl v. Hartman*, 14 S.W.3d 434 (Tex. App.--Houston[14th] 2000, pet. denied). *See also Riddick v. Quail Harbor Condo. Ass'n*, 7 S.W.3d 663 (Tex. App.--Houston [14th] 1999, no pet.) (same result in condominium context); TEX. PROP. CODE § 201.010(b) (West 1999)

(requiring all owners in a subdivision to be parties to a declaratory judgement action, either individually or as part of a class). This holding makes a frontal challenge to the validity of Restrictions almost cost prohibitive in a large subdivision. On the other hand, if the owner wins, they should recover the costs in the judgement.

VIII. ENFORCEABLE RESTRICTIONS

The following are examples of issues which where the enforceability of Restrictions has been considered:

A. Residential Use . *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, writ ref'd n.r.e), *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.

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 Ctrs. for Mental Health & 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 section 202.003(b) of the Texas Property Code which codifies the holding in *Permian Basin Centers*.

B. Mobile Homes/Manufactured Housing . Manufactured and modular homes violate a covenant prohibiting mobile homes. *Dempsey v. Apache Shores Prop. Owners Ass'n*, 737 S.W.2d 589 (Tex.App.--Austin 1987, no writ). *Currey v. Roark*, 635 S.W.2d 641 (Tex.App.--Amarillo 1982, no writ) (mobile home is a residence). *Schultz v. Zoeller*, 568 S.W.2d 677 (Tex. Civ. App.--San Antonio 1978, writ ref'd n.r.e.) ("No structures or house trailers of any kind may be moved onto the property," barred a party from buying a house, and presumably a mobile home/manufactured home, and having it moved onto the property). *Hussey v. Ray*, 462 S.W.2d 45 (Tex. Civ. App.--Tyler 1970, no writ) ("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"does not exclude "mobile home").

C. Lot Subdivision/Replatting . *Baskin v. Jeffers*, 653 S.W.2d 480 (Tex. Civ. App.--Beaumont 1982, writ ref'd n.r.e.) ("No lot shall be used except for single family residential purposes" did not apply to raw acreage to prevent replatting for townhouse development);
MacDonald v. Painter, 441 S.W.2d 179, 182 (Tex. 1969) (a plat showing lots of a particular size was not a Restriction which could be enforced to preclude resubdivision of the lots to new lots of a smaller size). However, it is almost without question that a specific prohibition against subdividing a lot is enforceable.

D. Structure . *Stewart v. Welsh*, 142 Tex. 314, 178 S.W.2d 506 (1944) (fence is a structure). *Able v. Bryant*, 353 S.W.2d 322 (Tex. Civ. App.--Austin 1962, no writ) (air conditioners are structures). *Turner v. England*, 628 S.W.2d 213 (Tex. App.--Eastland 1982, writ ref'd n.r.e.) (tennis court is <u>not</u> a structure).

E. Parking Lots . *H.E. Butt Grocery Co. v. Justice*, 484 S.W.2d 628 (Tex. Civ. App. --Waco 1972, writ ref'd n.r.e.) (restrictions prohibited a supermarket prevent a parking lot for a supermarket). *City of Jersey Vill. v. Texas No. 3 Ltd.*, 809 S.W.2d 312 (Tex. App.--Houston [14th Dist.] 1991, no writ) (parking lot is a structure under a zoning ordinance). *Braes Manor Civil Club v. Mitchell*, 368 S.W.2d 860 (Tex. Civ. App.--Waco 1963, writ ref'd n.r.e.) ("residential use only" prohibited parking for an apartment complex). *Eakens, v. Garrison*, 278 S.W. 2d 510 (Tex. Civ. App.--Amarillo 1955, writ ref'd n.r.e.) (residential use only prevents a nightclub parking lot). *Highlands Mgmt. Co. v. First Interstate Bank of Texas*, 956 S.W.2d 749 (Tex. App.--Houston [14th Dist.] 1997, pet. denied) (use of lot restricted against sexual oriented business for parking for such a business was prohibited).

F. Water Wells. *Dyeguard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex App.–Fort Worth 2001, no

pet. h.) (prohibition against drilling for “minerals” did not prohibit water wells).
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G. Antennae . *Gunnels v. North Woodland Hills Cmty. Ass’n*, 563 S.W.2d 334 (Tex. Civ. App.–Houston [1st Dist.] 1978, no writ) (regulation of antennae enforced).

H. Treehouse . *Winn v. Ridgewood Dev. Co.*, 691 S.W.2d 832 (Tex. App.--Fort Worth 1985, writ ref’d n.r.e.) (treehouse allowed as incidental to residential use).

I. Fences . *Collum v. Neuhoff*, 507 S.W.2d 920 (Tex. Civ. App.--Dallas 1974, no writ) (fence regulations enforced despite zoning regulation requiring fencing); *Shepler v. Falk*, 398 S.W.2d 151 (Tex. Civ. App.--Austin 1965, writ ref’d n.r.e.); *Giles v. Cardenas*, 697 S.W.2d 422 (Tex. App.--San Antonio 1985, writ ref’d n.r.e.); *Stewart v. Welsh*, 142 Tex. 314, 178 S.W.2d 506 (1944) (fence is a structure).

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

K. Restrictions as Non-Competition Agreements . *Bent Nail Developers, Inc. v. Brooks*, 758 S.W.2d 692 (Tex. App.--Fort Worth 1988, writ denied) (restrictions inconsistent with zoning held to be analogous to a non-competition agreement and subject to similar limitations).

L. Churches . *Protestant Episcopal Church Council v. McKinney*, 339 S.W.2d 400 (Tex. Civ. App.--Eastland 1960, writ ref’d) (church and related uses prohibited by residential Restrictions).

M. Roofs . *Hoye v. Shepherd's Glen Land Co.*, 753 S.W.2d 226 (Tex. App.--Dallas 1988, writ denied) (roof material limitation enforced).

N. Businesses . *Clements v. Taylor*, 184 S.W. 2d 485 (Tex. Civ. App.--Eastland 1944, no writ) (“No noxious or offensive trade or activity shall be carried on upon the lot” did not prohibit a small upholstery business); *Guajardo v. Neece*, 758 S.W.2d at 698 (a dog kennel is an offensive trade or activity barred by Restrictions).

O. Beauty Parlor. *Harham v. Reames*, 366 S.W.2d 257 (Tex. Civ. App.--Ft. Worth 1963, no writ).

P. Building and Architectural Approvals . *Gettysburg Homeowner's Ass’n v. Olson*, 768 S.W.2d 369, 371 (Tex. App.--Houston [14th Dist.] 1959, no writ). TEX. PROP. CODE § 202.004(a) (West 1999).

Q. Foreclosure . *Inwood N. Homeowners' Ass’n v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987) (foreclosure is upheld and is not barred by homestead rights).

R. Late Charges . *Lee v. Braeburn Valley W. Civic Ass’n*, 794 S.W.2d 44, 46 (Tex. App.--Eastland 1991, writ denied) (late charges are not interest).

S. Attorney's Fees . *Inwood N. Homeowners Ass’n v. Meier*, 625 S.W.2d 742 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ) (Provisions in Restrictions for recovery of attorney's fees are enforceable, but there must be a finding that the attorney's fees are reasonable); *Fonmeadow Prop. Owners Ass’n v. Franklin*, 817 S.W.2d 104, 106 (Tex. App.--Houston [1st Dist.]1991, no writ).

T. Assessments. *Hodas v. Scenic Oaks Prop. Ass’n*, 21 S.W.3d 524 (Tex. App.--San Antonio 2000, no pet. h.) (assessments for security guard, controlled access, road and drainage upheld).

U. Bright Colors. *Village of Pheasant Run Homeowners Ass’n v. Kastor*, 2001 WL 491654 (Tex. App.–Houston [14th Dist.] 2001, opinion has not been released for publication; subject to revision or

withdrawal) (prohibition against painting house in “bright” colors enforced).

IX. ENFORCEMENT

A. Who Enforces Restrictions?

Since Restrictions are not self-operative, someone must seek to enforce them. The following parties may enforce Restrictions:

1. the developer of the project (usually called the "declarant" in the Restrictions) who executed the Restrictions;

2. a "property owners' association" (pursuant to Texas Property Code, section 204.010(a)(4)) ["property owner's association" being defined in section 204.004 as a "designated representative of the owners of property in a subdivision...."("subdivision" is defined in section 201.003 of the Texas Property Code)];

3. a "property owners' association or other representative designated by an owner of real property"(pursuant to Texas Property Code, section 202.004(b)) ["property owner's association being defined in section 202.001(2) as an entity "...through which the owners...manage or regulate the ... development"];

4. any person identified in the Restrictions with authority to enforce the Restrictions (usually an owners association, but could be a city);

5. a property owner in the area affected by the Restrictions;

6. certain cities (particularly the City of Houston) (Texas Local Government Code, section 230.001); or

7. counties with populations exceeding two million people (particularly Harris County) (Texas Property Code, section 203.003).

B. Issues in Enforcement

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 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 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 Cmty. Ass'n*, 563 S.W.2d at 336-37; *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, section 202.004(b) (West 1999), 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." However the definition of "property owners' associations" requires an entity "... through which the owners...manage or regulate the...development..." Some owners' associations will have difficulty meeting this test, where there is no common area property and little or no language in the Restrictions setting forth the powers of the owners' association. The advent of Texas Property Code, section 204.010(4) in 1997 helps as it specifically authorizes a property owners' association to "...institute, defend, intervene in, settle, or compromise litigation or administrative proceedings on matters affecting the subdivision...." The definition of "property owners' association" is different from section 202 and only requires an entity which is a "designated representative of the owners of a subdivision...." A simple reference to the owners' association in the Restrictions should be sufficient, but if the owners' association is not specifically referenced in the Restrictions, section 204.010(4) does not apply.

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. In recent years, Houston-area master-planned communities had a larger number of sales than any state except California and Texas. URBAN LAND, *Home Sales in Master-Planned Communities*, June 1992, at page 26.

Texas Property Code, Chapter 203 permits Restrictions to be enforced by the County Attorney. Texas Local Government Code, Chapter 230 provides special deed restriction enforcement powers to any city with a population greater than 1.5 million or a population greater than one million and no zoning. These powers extend to the city limits, 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 Restrictions also have the right to seek enforcement of them since they are in privity of estate with any violator. *See supra* Part III.C.2.

C. Attorneys Fees

Attorney's fees may be recovered under contract provisions in Restrictions or independently under the Texas Property Code, section 5.006 (West 1999), 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 section 5.006 is mandatory. *City of Houston v. Muse*, 788 S.W.2d 419, 424 (Tex. App.--Houston [1st Dist.] 1990, no writ). A city can recover under section 5.006 as a prevailing party. *Id.*

D. Indirect Enforcement.

Restrictions are indirectly enforced by denial of government approvals for platting and building permits. Texas Local Government Code, section 212.014(3) precludes approval of a residential replat which "attempts to amend or remove covenants or restrictions." The City of Houston, and some other cities, construe that statute to prevent approval of a plat which has the effect of violating existing

Restrictions, such as, for example, lot size or shape. Also a city may require an affidavit swearing to the personal knowledge of the affiant that there are no Restrictions relating to property or that the Restrictions are not violated, as a condition to issuance of a building permit. *See City of Houston v. Walker*, 615 S.W.2d 831 (Tex. App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.) (upholding the City of Houston's ordinance requiring an affidavit stating that a proposed that a proposed project will not violate any deed restriction). If the affidavit is later shown to be untrue, whether or not innocently given, the building permit may be revoked.

X. MODIFICATION/EXTENSION

A. General Rule . Most modern 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 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 Restrictions. *Nelson v. Flache*, 487 S.W.2d 843, 843 (Tex. Civ. App.--Amarillo 1972, 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 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. 1981). 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 Comm.*, 533 S.W.2d 108, 111 (Tex. Civ. App.--Dallas 1976, 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 Univ.*, 10 S.W.2d 973, 974 (Tex. Comm'n App. 1928, judgmt adopted).

This may be another area where the Texas Property Code, section 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 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 Association 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 Restrictions. Unfortunately, the court in *Scoville* made no reference to section 202.003.

B. 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. However, non- consenting owners may "opt out" of the new Restrictions. Chapter 201 is discussed in *Drafting and Maintaining Deed Restriction for Existing Neighborhoods*, a presentation by the author available at www.wcgf.com or from the Houston Bar Association (December 1997 Continuing Legal Education seminar). Due to the recent adoption of Chapter 204 discussed below, Chapter 201 should not be used except to create Restrictions or to modify Restrictions in neighborhoods where a property owners' association is not politically acceptable.

C. Texas Property Code, Chapter 204 . Effective September 1, 1997, Chapter 204 allows an alternative statutory procedure to modify, but not create, Restrictions. This applies only to neighborhoods with existing residential Restrictions and a property owners association. However, an existing neighborhood may use Chapter 204 to establish the required property owners association by a 60% vote, then move on to a second step and modify the Restrictions using the statutory procedure. Further, Chapter 204 can be used to supplement the procedures for modification set forth in Restrictions, provided that any specific provision as to modification controls over the procedures of Chapter 204. Chapter 204 is discussed in *Drafting and Maintaining Deed Restriction for Existing Neighborhoods.* Since there is no "opt-out," Chapter 204 should be used whenever possible, even if a two step procedure is required to first create a property owners association and, second, to modify the Restrictions

D. Texas Property Code, Chapters 205-07 . The Texas Legislature has passed several statutory

amendment procedures since 1997 to address specific problems of neighborhoods with unique problems. The procedures have limited applicability, but should be reviewed if Chapter 204 does not apply to a neighborhood.

XI. COMPARISON OF ZONING WITH 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. Restrictions. The basis for 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. Restrictions. The goal of 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, yet it is still stated that the regulation of aesthetics alone, without other substantive purposes, is not allowed.

2. Restrictions. Restrictions, as a matter of private contract, can cover any matters which are not illegal or against public policy. The interpretation of Restrictions under common law was to enforce clearly drafted Restrictions even though Restrictions were not favorites of the law. By legislative action, the Texas Legislature now mandates the liberal construction of 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 Restrictions. Although the full scope of these actions is not yet clear, it is certain that the burden of defeating a 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. Restrictions. 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 Restrictions on behalf of the entire subdivision in order to maintain property values. Private causes of action by individual property owners are allowed since 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 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 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 Restrictions being enforced as public policy. In large master planned communities, with extensive Restrictions and adequate funding through assessments, the property owners association will take on many of the characteristics of a municipal government, particularly when enforcing Restrictions. Texas Property Code section 202.002(a) gives a property owners association's actions a presumption of validity similar to that accorded to a municipality in enforcing Restrictions. Where 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.

XII. USE OF RESTRICTIONS IN ZONING

A. Restrictions As Conditions In Discretionary Approvals

A city could require as a condition to certain conditional approvals (planned development districts, planned unit developments, variances, special exceptions, special use permits and the like) that the owner restrict the property in certain ways. Care should be given to considering the practical aspects of enforcement of the Restrictions. If the city is intended to have a right to enforce the required Restriction, the city must be specifically granted that right contractually in the Restriction.

B. Conditional Zoning

Conditional zoning is the rezoning of property conditioned upon the owner restricting the property or entering into another contractual agreement with the city. *See* Rohan, ZONING AND LAND USE CONTROLS, Chapter 5; *Conditional Zoning in Texas*, 57 TEX. L. REV. 829 (1979). Conditional zoning is contrasted to illegal contract zoning in that under contract zoning the city agrees to rezone in the future if the owner restricts the use of their property in a manner more restrictive than the zoning classification, whereas in conditional zoning, the city actually rezones contingent upon the restriction being established and therefore does not contractually agree to a future action. The distinction has been characterized as the difference between a bilateral contract (contract zoning) and a unilateral contract (contingent zoning). The author believes that a requirement by a city as part of a rezoning request that the owner restrict its property would be improper. However, if the owner proffers a Restriction as part of the rezoning process (whether in its application, by letter to the city or at the public hearing), a city should be able to "conditionally" approve the rezoning subject to the drafting, signature and recording of a Restriction consistent with the rezoning ordinance (with some specific delegation of authority to city staff).

XIII. QUESTIONS AND ANSWERS REGARDING ZONING AND DEED RESTRICTIONS

The following represent questions which have arisen in the author's experience relating to the interaction/conflict between Restrictions (private land use regulation) and zoning/subdivision/code compliance (public land use regulation). The answers reflect the author's opinion only.

1. Should a zoned city enforce Restrictions?

NO. A zoned city has a comprehensive land use regulatory scheme embodied in a zoning ordinance, subdivision ordinance, building code, etc. This land use scheme is based upon protecting the health, safety and public welfare. Restrictions are a matter of private contract typically established by developer and occasionally by reciprocal agreement of property owners. The scope of Restrictions encompasses all matters which are not illegal or against public policy, being broader than public land use regulation scope. The city should not place its power behind private contracts when it already has a comprehensive land use regulatory scheme.

2. Should an unzoned city enforce Restrictions?

MAYBE. Houston's history in this area is illustrative. Houston has repeatedly rejected comprehensive zoning. In the most recent election where zoning was on the ballot in 1993, a major argument against zoning was the existence of Restrictions covering a significant percentage of Houston residential neighborhoods. As a matter of public policy, the City of Houston has been enforcing residential restrictions limited to use, height, setback, lot size and size, type and number of dwellings since the 1960's. In effect, Houston has two land use zones: (1) a residential only zone where privately adopted Restrictions are enforced by the City of Houston; and (2) another zone where there are no use regulations adopted by the City of Houston (which areas include residential areas without Restrictions).

The Houston philosophy appears to be that the government will not impose residential use Restrictions on property owners, but if property owners voluntarily establish those Restrictions, the city will enforce them. Further, the city has restricted the types of Restrictions to be enforced to those considered most critical to the preservation of the residential character of neighborhoods: use, height, setback, lot size and size, type and number of dwellings. That authority does not extend to architecturally related issues, fencing, vehicle usage and signage.

Following the Houston template, an unzoned city could decide to enforce Restrictions of a certain type and character. A home rule city could rely upon its broad home rule powers to allow it the authority to enforce Restrictions, although the City of Houston obtained specific authority. Texas Local Government Code, section 230. Non home rules cities will probably need to obtain specific authority to enforce Restrictions.

3. Should a city require compliance with Restrictions as part of permitting?

NO. Requiring compliance with Restrictions in order to obtain zoning, platting and other permitting in the development process is a de facto adoption of the Restrictions as part of the city's land use regulatory scheme. Unfortunately, many citizens expect that the city will be aware of Restrictions (particularly in residentially developed neighborhoods) and require new developments to comply with those Restrictions. This is particularly true as older established neighborhoods transitioning to higher intensity residential uses or from residential to commercial uses.

4. What should city staff tell citizens concerned with an alleged violation of Restrictions?

The city staff should explain that a city only enforces public land use regulations, not private land

use regulations. The distinction should be carefully explained. Where the question is a common one, materials should be made available to distribute to citizens. If there is a property owner's association or civic club in a neighborhood, the citizen should be referred to that organization. If there is not one, the citizen should be referred to the local bar association, phone book or Martindale.com (a national listing of attorneys) to find an attorney knowledgeable in Restriction law to consult. The citizen should be clearly informed that the city does not have the authority to enforce Restrictions (unless the city has established a different policy), since it is not a party to the Restrictions. The citizen should be encouraged to assert their private legal rights under the Restrictions. The citizen should be clearly informed that city staff has no place in providing advice, counsel or support in the enforcement of Restrictions.

5. How should Restrictions be construed in a residential replat?

The Texas Subdivision Act (Texas Local Government Code, Chapter 212) prohibits approval of a residential replat which attempts to "amend or modify" established Restrictions. Some cities construe this language to prevent the approval of a replat which violates Restrictions. (For example, lot size or dimension). However, this interpretation effectively causes the city to become an enforcer of Restrictions, and therefore the author believes it is improper. Only where the plat is modifying or removing Restrictions which were on the face of the prior plat, should it be denied.

6. Are setback lines on a plat Restrictions which can be enforced by owners?

NO. Although there is disagreement among private and municipal law practitioners, the author believes that setbacks established by plats are public requirements, not private requirements. Therefore the author believes that setback lines on plats may be modified through the platting process, without consent from other owners. This position is accepted by the City of Houston, but many smaller cities in Harris County take a different position. In those cities, a replat to change (reduce) setbacks will be denied, unless consented to by all affected area property owners (usually all owners of lots shown on the plat).

7. What role should a city have in educating its citizens regarding restrictions?

Where there are repeated conflicts between Restrictions and zoning, it is important for city staff to become knowledgeable enough to discuss these conflicts with citizens and to have materials to distribute to citizens. Assistance in establishing Restrictions can be appropriate. The City of Houston Department of Planning and Development has joined a public/private partnership with the Houston Bar Association to assist residential neighborhoods in implementing Restrictions, distributing materials regarding Restrictions and sponsoring seminars/conferences on Restrictions.

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PROFESSIONAL

Shareholder, Wilson, Cribbs, Goren & Flaum, P.C. 1985-
Board Certified in Commercial Real Estate Law since 1986
Assistant City Attorney - City of Seabrook, 1979-84, Municipal Prosecutor, 1979-81 [while associate at Saccomanno & Clegg law firm]

EDUCATION

University of Texas (B.B.A. in Finance/Real Estate with Honors, 1975)
University of Texas Graduate School of Business (1976)
University of Texas Law School (J.D., 1979)

PRACTICE AREAS

Commercial Real Estate Law- all areas
Land Use Law- zoning (rezoning, variances, specific use permits, special exceptions, interpretations), platting (legal issues and variances), government regulation, state land easements including Texas General Land Office easements for public waters, title issues, abandonment and acquisition of public land, streets and easements, dedications, economic development incentives, tax abatements, industrial districts, negotiation with government entities on land use issues, property owner association law, creation, modification and extension of restrictive covenants, interpretation and enforcement of restrictive covenants, statutory issues relating to restrictive covenants, new legislation.

LAND USE PRESENTATIONS

Platting, State Bar of Texas Advanced Real Estate Law Course, June 2001

Zoning, CLE International Land Use Law Conference, April 2001

The Mysteries of Platting, Houston Bar Association Real Estate Section, October 2000

Fundamentals of Zoning, University of Texas Land Use Planning Law Conference, March 1999 & February 2000

Land Use Law and Deed Restrictions, Texas Real Estate Practice for Paralegals, October, 1999
Pipeline Siting: Land Use Issues, Texas Oil & Gas Association Annual Conference- Pipeline Committee, September, 1999

Development/Land Use Law, South Texas College of Law and Texas Real Estate Center of Texas A&M University, Commercial Real Estate Course, October 1998

Texas Land Use Law, Houston Bar Association Real Estate Law Section Seminar, September 1998

Deed Restrictions, City of Houston Neighborhood Connections Conference, September 1998

Texas Land Use Law, South Texas College of Law Real Estate Conference, June 1998

Drafting, Maintaining & Enforcing Deed Restrictions, Houston Bar Association Continuing Legal Education Seminar, December, 1997

Land Use Law- The Basics, State Bar of Texas, Advanced Real Estate Law Seminar for Attorneys, Legal Assistants & Other Professionals, October 1997

LAND USE RELATED PUBLICATIONS

The "Z" Word - An Introduction to Zoning Law
The Houston Lawyer - Nov/Dec 1990

Houston's Central Business District: How Will Its Future Affect Yours?
The Houston Lawyer - Sept/Oct 1991

Houston Land Use Regulation Without Zoning
Houston Economics [UH Center for Public Policy] - February 1994

"Where to Put a Pipe"- Common Land Use Law Considerations
Landman [American Association of Professional Landmen] - May/June 2000

LAND USE RELATED COMMUNITY AND PROFESSIONAL SERVICE

West U 20/20, City of West University Place(Comprehensive Planning Committee), 1998-9

Founder and Head - Houston Bar Association Pro Bono Deed Restrictions Project (provides free legal services to low income neighborhoods) 1995 - Current

Chair - Zoning Study Group, 1992 - 1993 (20+ attorneys representing most major Houston firms - organized and funded by the Houston Bar Association Real Estate Section)

Chairman, Planning & Zoning Commission, City of West University Place, 1985 - 1991 (Redrafted 50-yr. old zoning ordinance and comprehensive plan)

Charter Commission, City of West University Place, 1982 (Drafted new city charter - 15 members)

LEGISLATION

Texas Property Code Chapter 206- Proposed legislation and concept - Passed May 1997

Texas Property Code Chapter 207- Proposed, drafted, testified for and sheparded through passage legislation Houston historic preservation association - Passed May 1999