

Recent Developments in Community Association Law

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CAVEAT: The information contained in this outline and being presented in connection herewith is general legal information and is not legal advice. Each person's situation is unique and the information and suggestions given in this program may change based on the facts of your particular situation. If you have a legal question or problem, you should consult with a private attorney.

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I. Introduction

Houston is one of a few of the major cities in this country that has no zoning. As a result of having no zoning, land use restrictions are generally found in deed restrictions. Houston and the surrounding cities have many community associations. Community associations include condominiums, townhomes, single family subdivisions, and commercial regimes. It is important at the inception of analyzing a legal dispute or problem that the attorney recognize what type of entity he or she is dealing with because different laws apply to each situation depending on the type of community association involved. Additionally, like a contract dispute, the attorney should review the specific dedicatory instruments applicable to the homeowners association because each set of restrictions is unique. There are also a number of different types of dedicatory instruments which need to be examined in order to evaluate the legal issues "involved in a community association dispute. "Dedicatory instruments" include the articles of incorporation, bylaws, declaration or restrictive covenants, rules and regulations, and any applicable individual resolutions. In addition to the dedicatory instruments, the Property Code provides various sections which need to be taken into consideration. The Texas Non-Profit Corporations Act may also apply to a community association dispute because most community associations are incorporated as Texas non-profit corporations. It is often only after all of these documents and laws are reviewed that an attorney can properly advise an association on a community association legal matter.

An association generally needs an attorney's guidance in four major categories. The first and most common area is the assessment collection function. Most homeowner associations require money to operate, care for common elements, and to provide services to the members or owners of the association. There are some associations that do not own common elements and do not have many expenses; in those associations, sometimes the association "dues" are voluntary. In a voluntary assessment situation, you normally do not find the right of foreclosure for nonpayment. Associations that have mandatory assessments usually have an assessment lien which is created by the developer and which must be paid by the homeowners or they will face possible foreclosure and loss of their real estate. There are new laws which are applicable to foreclosures which will be addressed later in this paper.

The second area of most frequent legal work is the general deed restriction enforcement function. This function consists of compelling owners to abide by the use restrictions found in the declaration or restrictive covenants, as may be

interpreted by the board of directors. This could include the prohibition of commercial use, the maintenance and upkeep of the residential dwelling, or other use restrictions involving the owner's home or common property. Again, there is a new statute found in the Texas Property Code which must be followed in order for associations to enforce their use restrictions.

The third type of legal representation often found with associations is general advising of boards of directors. From time to time, boards have legal questions on interpretation of their restrictions or on the application of Texas law. The boards of directors turn to their attorneys to provide guidance, answers, and suggestions. These types of communications between boards of directors and their legal counsel is the only type of communication which is protected from mandatory disclosure to owners. There is a new statute clarifying the fact that homeowners and their representatives have access to association books and records with the one exception of attorney files. As part of the "attorney file" exception, it is my opinion that the attorney-client privilege and attorney work product privilege continue to exist in Texas, but is limited to those two areas. Attorney-client communications which can be found in association minutes should be redacted in order to attempt to preserve the attorney-client privilege communication. Many associations attempt to withhold other documents from homeowners such as financial records, personnel records, individual homeowner assessment account information, vendor information, and other information which the board of directors feel is "sensitive" or protected under a general "privacy" protection. Although boards of directors are generally trying to act in the best interest of the homeowners and the individuals whose records they are trying to protect, I do not believe Texas law provides the board of directors or the association with the ability to keep such information from homeowners or their designated representatives.

The fourth and final category that attorneys often find themselves in when dealing with community association law is defending associations from lawsuits. With the increase of notoriety of suits against associations, more and more homeowners are suing their associations for failing to follow their own dedicatory documents, discriminatory application of those dedicatory documents, improper imposition of assessments, and extreme and outrageous enforcement action against homeowners for relatively minor infractions. I think most people will agree that homeowner associations have gotten a bad name and as a result, associations must "bend over backwards" to appear to be reasonable to its members. Additionally, the new Texas Residential Property Owners Protection Act (Chapter 209, Texas

Property Code) sets forth alternative dispute resolution procedures and opportunities for hearings which must be followed in order for associations to proceed with enforcement action. Likewise, attorney's fees are often incurred which far exceed the amount in controversy. Although most associations carry insurance to defend them from lawsuits, often associations desire that its "general counsel" monitor such suits in the event legal issues arise outside of such insurance defense. Most lawsuits by owners against associations are settled for consideration beyond the mere payment of money.

Community association law is a continuing developing area with some basic principals of notice, reasonableness, and an obligation to follow restrictions. The obligation to follow the association governing documents is a mutual one for both the board of directors and the homeowner. If and when either party acts in an extreme or unreasonable manner, Texas law has generally been available to provide remedies against the wrongdoer and award appropriate damages.

II. Homeowners' Associations

Inherent in the concept of community associations is a public policy which recognizes the overriding advantages to landowners in accepting mutual benefits and burdens regarding their property. The many benefits include establishment and funding of community associations to provide community services such as recreational centers, patrol services, architectural and use regulation, street lighting, etc. Attorneys are perhaps most frequently involved, however, in enforcing the "burdens." These burdens (including assessment collection) are inextricably tied to the benefits - one does not exist without the other.

In the condominium setting the court in *Pooser v. Lovett Square Townhomes Owners' Association*, 702 S.W.2d 226, 231 (Tex. App. -- Houston [1st Dist.] 1985, writ ref'd n.r.e.) described this trade off of benefits and burdens as follows:

"Condominium unit owners constitute a democratic subsociety, of necessity more restrictive in the use of condominium property than might be acceptable given traditional forms of property ownership. Therefore, each constituent must relinquish some degree of freedom of choice and agree to subordinate some of his traditional ownership rights when he elects this type of ownership experience." *Raymond*, 662 S.W.2d at 89; see also *Board of Directors of By The Sea Council of Co-Owners, Inc.*, 644 S.W.2d at 780-81. The relinquishment of certain ownership rights is consistent with the condominium concept in Texas, which envisions the ownership of two estates merged into one: the

fee simple ownership of an apartment or unit in a condominium project and a tenancy in common with other co-owners in the common elements. *Dutcher v. Owners*, 647 S.W.2d 948, 949 (Tex. 1983)."

Although there is a trade off of benefits and burdens in homeowner associations, the "trade off" does not create dependency or an obligatory connection between the two. Texas recognizes the concept of "independent covenants" when it comes to the owner's obligation to pay assessments and the association's duty to provide certain services. *Pooser v. Lovett Square Townhomes Owners Association*, 702 S.W.2d 226 (Tex. App. -- Houston [1st Dist.] 1985, writ ref'd n.r.e.). Often, homeowners intentionally stop paying their required assessments in order to evidence their displeasure with the association's performance in making repairs to their property (most common) or with the association's failure to maintain the common property as a whole. Such conduct usually results in a lawsuit being filed against the homeowner for nonpayment of assessments. In any lawsuit situation, the association should be mindful of potential and anticipated counterclaims. Sometimes, counterclaim liability exceeds the potential benefit of assessment collection. A preferred process would be for the association to fulfill its maintenance obligations and then proceed with its assessment collection process. However, based on the doctrine of "independent covenants," the association may proceed with its assessment suit even if there are outstanding maintenance issues. In the event the owner files a counterclaim against the association (usually based on negligence), the association's insurance company will often hire insurance defense counsel to defend against the counterclaim, while the association's "general counsel" will prosecute the delinquent assessment claim.

III. Association Responsibilities, Powers, and Participants

A. Preliminary Considerations

1. Assemble and review all of the constituent documents applicable to the subject property.
 - a. Deed
 - b. Deed of Trust (with riders)
 - c. Condominium Declaration
 - d. Declaration of Covenants, Conditions and Restrictions
 - e. Articles of Incorporation

- f. Bylaws
 - g. Rules and Regulations
 - h. All amendments to all documents
2. Determine what type of ownership you are dealing with.
 - a. Condominium
 - b. Townhouse
 - c. Single-family
 3. Determine what type of association, if any, you are dealing with.
 - a. Texas non-profit corporation
 - b. Unincorporated association
 - c. Former non-profit corporation
 - d. Check corporate status, registered agent, and officer information.
 4. Review applicable statutory authority, including:
 - a. Texas Non-Profit Corporation Act.
 - b. Texas Property Code
 - (1) Chapter 81 – The Condominium Act
 - (2) Chapter 82 – The Uniform Condominium Act
 - (3) Chapter 201 – Restrictive Covenants Applicable to Certain Subdivisions
 - (4) Chapter 202 – Construction and Enforcement of Restrictive Covenants
 - (5) Chapter 203 – Enforcement of Land Use Restrictions in Certain Counties
 - (6) Chapter 204 – Powers of Property Owners’ Association Relating to Restrictive Covenants in Certain Subdivisions
 - (7) Chapter 205 – Restrictive Covenants Applicable to Revised Subdivisions in Certain Counties
 - (8) Chapter 206 – Extension of Restrictions Imposing Regular Assessments in Certain Subdivisions

(9) Chapter 207 – Disclosure of Information by Property Owners’ Association

(10) Chapter 208 – Amendment and Termination of Restrictive Covenants in Historic Neighborhoods

(11) Chapter 209 – Texas Residential Property Owners Protection Act

5. Assemble and review association specific documents and information.
 - a. Governing documents (covenants and restrictions, articles of incorporation, bylaws, rules and regulations, etc.)
 - b. Association books and records
 - c. Related litigation
 - d. Prior correspondence
6. Understand how the board works, what their duties (and limitations) are, and who you represent.

B. Development of Conditions, Rules, Restrictions, and Regulations

A fundamental rule of community association law is that homeowners are bound by restrictive covenants which apply to their property of which they have actual or constructive notice. *Davis v. Huey*, 620 S.W.2d 561 (Tex. 1981). Without notice, the owner is not bound unless she or he subsequently agrees to be bound (generally under contract principles). Constructive notice is as valid as actual notice for purposes of enforceability of restrictive covenants. Constructive notice is accomplished by recording a document in the Official Public Records of Real Property of the county in which the real property is located. *See* Tex. Prop. Code Ann. Section 13.002 (Vernon 1984). ("An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.").

In addition to the original restrictions, an amendment to the restrictions is enforceable if such amendment is properly enacted pursuant to an amendment provision contained in the original restrictions and such amendment is "commensurate with the purpose and intent of the development." *Harrison v. Air Park Estates Zoning Committee*, 533 S.W.2d 108 (Tex. Civ. App. -- Dallas 1976, no writ).

Winter v. Bean, 2002 WL 188832 (Tex. App. – Houston [1st Dist.]). "In 1970, the Winters purchased a lot in the Lou Al Courts subdivision located in the City of Hedwig Village. The

subdivision was subject to the 1950 deed restrictions filed by the original developer with the Harris County Clerk. In 1997, the Winters attempted to subdivide their lot, and, in response, the appellees, by a simple majority, passed and filed with the county clerk a “1997 AMENDMENT OF RESTRICTIVE COVENANTS OF LOU AL COURTS SUBDIVISION.” The appellees did not notify the Winters of their efforts to pass the 1997 amendments, which (1) prevent property owners from subdividing existing lots and (2) eliminate a racially discriminatory provision in the 1950 deed restrictions.

Property Code section 202.003(a) directs that a restrictive covenant “shall be liberally construed to give effect to its purposes and intent.” Tex. Prop. Code Ann. § 202.003(a) (Vernon 1995). Courts interpret a restrictive covenant using the general rules of contract construction and give the words in the covenant their commonly accepted meanings. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998); *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657-58 (Tex. 1987). One common definition of “amend” is “to change or modify in any way for the better.” Webster’s Third New International Dictionary 68 (Philip Babcock Gov ed., 1961). Accordingly, we conclude there is no merit to the first part of the Winters’ argument that the 1950 deed restrictions did not authorize subsequent amendments.”

C. Construction of Restrictive Covenants

Liberal v. Strict Construction

How deed restrictions are interpreted are vital to understanding exactly what an association is authorized to enforce, and to what degree. Likewise, homeowners need to know the extent to which their use of their property is limited. One might think that a simple reading of the restrictions will inform the association and its owners of the “do’s and don’ts” applicable to a subject property. However, Texas case history demonstrates that such simple approach is far from the usual experience of most restrictive covenant disputes.

In *City of Pasadena v. Gennedy*, 125 S.W.3d 687 (Tex. App. – Houston [1st Dist.] 2003, the court set out the general rules for interpreting restrictive covenants as follows:

“Restrictive covenants are subject to the general rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998); *Bank United v. Greenway Improvement Ass’n*, 6 S.W.3d 705, 707 (Tex. App. – Houston [1st Dist.] 1999, pet. denied). As when interpreting any contract, the court’s primary duty in construing a restrictive covenant is to ascertain the drafter’s intent from

the instrument’s language. *Bank United*, 6 S.W.3d at 708. In ascertaining the drafter’s intent, we must examine the covenant as a whole in light of the circumstances present when the covenant was made. *Pilarcik*, 966 S.W.2d at 478. We must give a restrictive covenant’s words and phrases their commonly accepted meaning. *Truong v. City of Houston*, 99 S.W.3d 204, 214 (Tex. App. – Houston [1st Dist.] 2002, no pet.) . . .

Whether restrictive covenants are ambiguous is a matter of law for the court to decide. *Pilarcik*, 966 S.W.2d at 478; *Samms v. Autumn Run Cmty. Improvement Ass’n. Inc.*, 23 S.W.3d 398, 402 (Tex. App. – Houston [1st Dist.] 2000, pet. denied). A covenant is unambiguous if, after appropriate rules of construction have been applied, the covenant can be given a definite or certain legal meaning. *Pilarcik*, 966 S.W.2d at 478; *Pitman v. Lightfoot*, 937 S.W.2d 496, 517 (Tex. App. – San Antonio 1996, writ denied) (holding same concerning contracts generally). In contrast, if, after appropriate rules of construction have been applied, a covenant is susceptible of more than one reasonable interpretation, the covenant is ambiguous. *Pilarcik*, 966 S.W.2d at 478; *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 157 (1951). Mere disagreement over a restrictive covenant’s interpretation does not necessarily render the covenant ambiguous. *Air Park-Dallas Zoning Cmte.*, 109 S.W.3d at 909.

At common law, covenants restricting the free use of land are not favored, but will still be enforced when they are confined to a lawful purpose and are clearly worded. *E.g.*, *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987). Accordingly, under the common law, a restrictive covenant’s words cannot be enlarged, extended, stretched, or changed by construction. *Id.* All doubts concerning a restrictive covenant’s terms are resolved in favor of the free and unrestricted use of the land, and any ambiguity must be strictly construed against the party seeking to enforce the covenant. *Id.*”

Prior to 1987, it was well established in Texas that restrictive covenants were to be *strictly construed* against the party seeking their enforcement and all doubt had to be resolved in favor of the free use of the property. *DeNina v. Bammel Forest Civic Club*, 712 S.W.2d 195, 198 (Tex. App. -- Houston [14th Dist.] 1986, no writ). *Davis v. Huey*, 620 S.W.2d 561 (Tex. 1981). However, effective June 18, 1987, Chapter 202 of the Texas Property Code was adopted, Section 202.003(a) of which provides “[a] restrictive covenant shall be liberally construed to give effect to its purposes and intent.”

The first appellate decision to apply the new standard of liberal construction was *Candlelight*

Hills Civic Association, Inc. v. Goodwin, 763 S.W.2d 474, 477 (Tex. App. -- Houston [14th Dist.] 1988, writ denied). In *Candlelight*, the appellate court commented on the new standard of construction as follows:

“Additional rules of construction have been added to the Property Code by the Texas Legislature, effective June 1987, which apply to "all restrictive covenants regardless of the date on which they were created." § 202.002, Tex. Prop. Code Ann. (Vernon Supp. 1988). A restrictive covenant must now be liberally construed to give effect to its purposes and intent. § 202.003, Tex. Prop. Code Ann. (Vernon Supp. 1988). The covenant should not be hedged about with strict construction, but given a liberal construction to carry out its evident purpose. With the preceding rules of construction in mind, we must look to the entire document and the necessary references within the document's language to discern its purposes and intent.”

Relying in part on Section 202.003(a), the court upheld the validity of expenditure of association maintenance funds for the purchase of real property.

In addition to changing the standard of restrictive covenant construction from strict to liberal, Chapter 202 also created a presumption of reasonableness as to discretionary decisions by associations. Section 202.004(a) states as follows:

(a) 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.

In 1990, the Fourteenth Court of Appeals again embraced the liberal construction standard and also applied the statutory presumption. In *Gettysburg Homeowners Association, Inc. v. Pulte Home Corporation of America*, No. B14-89-00596-CV (unreported), the association rejected architectural plans of a developer to construct six new homes in the subdivision. The trial court granted a summary judgment against the association and the association appealed. The appellate court, citing the "new" liberal construction of restrictions and the "presumed reasonable" conduct of associations, reversed the trial court and remanded the case for trial.

Although it appeared that the standard of liberal construction was taking hold in Texas, two cases raised new questions about its application.

In *Kulkarni v. Braeburn Valley West Civic Association, Inc.*, 880 S.W.2d 277 (Tex. App. -- Houston [14th Dist.] 1994, no writ), an association obtained a temporary injunction requiring removal of a chain link fence in its entirety although the restrictions only prohibited fencing of "sight line" areas. The appellate court reversed and remanded citing a 1987 Texas Supreme Court case (*Wilmoth v. Wilcox*, 734 S.W.2d 656, 657) for the proposition that "[c]ovenants restricting the free use of land are not favored by the courts and are strictly construed." (Emphasis added). The appellate court never addressed the 1987 amendment to the property code.

In another case, *Ashcreek Homeowner's Association, Inc. v. Smith*, 1995 WL 214597 (Tex. App. -- Houston [1st Dist.] 1995), the appellate court specifically addressed the Chapter 202 liberal construction provision but refused to accept that liberal construction has replaced strict construction. Again citing *Wilmoth*, the court stated:

“We are unable to discern a conflict between liberally construing a restrictive covenant to give effect to its purpose, and construing a restrictive covenant either to favor the free and unrestricted use of land or to strictly construe it against the party seeking to enforce it. Furthermore, section 202.003(a) was effective on June 18, 1987 . . . The supreme court decided *Wilmoth* on July 1, 1987, and denied a motion for rehearing on September 16, 1987. In its decision, the supreme court also failed to recognize that the property code had overruled the principles upon which it relied.”

Wilmoth had been tried and was pending decision by the Texas Supreme Court before Section 202.003(a) became effective. The opinion does not in any manner cite or otherwise address that Section. The opinion in *Kulkarni* by the Fourteenth Court of Appeals is dated July 14, 1994, but in another opinion dated August 18, 1994 the same court again states "[t]hese restrictions are to be liberally construed, giving effect to the intent and purposes." *Boudreaux v. Cox*, 882 S.W.2d 543, 547 (Tex. App. -- Houston [14th Dist.] 1994, no writ). *Ashcreek* relies on a footnote in *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 (Tex. App. - Houston [1st Dist.] 1994, writ denied) in which a vigorous dissent noted:

“In resolving this case, we are required to follow section 202.003(a) of the Property Code. Contrary to what the majority states, covenants restricting the free use of land are no longer disfavored; no longer are we to resolve doubts in favor of the free and unrestricted use of premises;

and no longer must we construe the covenant strictly against the party seeking to enforce it.”

Courts continue to apply the liberal construction standard, along with the presumption of reasonableness.

Beadles v. Lago Vista Property Owners Association, Inc., 2002 WL 31476657 (Tex. App. – Austin) (not released for publication):

“This is a declaratory judgment action regarding the scope of a property owners’ association’s discretionary authority. Hugh Beadles (“Beadles”) challenges the authority of the Lago Vista Property Owners Association, Inc. (“the Association”) to purchase and maintain recreational facilities and common areas using “maintenance fees.” Joined by Louis Lopez (“Lopez”), Beadles sought a declaratory judgment that the Association had no such authority on two grounds: (1) the Association’s voting structure, as amended in 1992, was invalid, and (2) the Association’s continuing expenditures violated the terms of express covenants granted in the deeds held by the two appellants.

The legislature has modified the common law rule that restrictive covenants are to be strictly construed. *See* Tex. Prop. Code Ann. § 202.003(a) (West 1995) (“a restrictive covenant shall be liberally construed to give effect to its purpose and intent”). The interpretation of a restrictive covenant is subject to the general rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). We read the entire document as a whole, absent a finding of ambiguity, to determine its meaning as a matter of law. *See id.* at 478; *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997).

The restrictive covenants for the Bar-K and Highland Lake Estates areas explicitly grant the Association the power to spend maintenance fees on any project that is “necessary or desirable.” *See Candlelight Hills Civic Ass’n v. Goodwin*, 763 S.W.2d 474, 478-79 (Tex. App. – Houston [14th Dist.] 1988, writ denied) (restrictive covenants listing purposes for which “maintenance fund” could be used, but stating that fees could be used on anything homeowners’ association found “necessary or desirable,” did not prevent homeowners’ association from purchasing recreational facilities).

The relevant statute requires us to construe the covenants in the light of their “purposes and intent.” Tex. Prop. Code Ann. § 202.003. We therefore hold that it was within the Association’s discretion, as granted by the restrictive covenants, to own, purchase, and maintain the recreational facilities in question using the funds collected as a “maintenance fee.”

In addition to modifying the standard with which we read restrictive covenants, the legislature has granted property owners’ associations special deference. Tex. Prop. Code Ann. § 202.004(a) (West 1995) (“An exercise of discretionary authority by a property owners’ association . . . 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.”). Because the Association had discretion, as a matter of law, to pay for the maintenance of its common-area property and recreational facilities using the maintenance fee assessments, the trial court correctly determined that appellants could not support a claim against the association on that question.”

The dispute between the liberal-construction rule based on Property Code § 202.003(a) and the common law strict-construction rule has not yet been resolved. Some appellate courts have declared both rules in conflict, and other appellate courts (such as the First Judicial Appellate Court in Houston) have held that there is no conflict (i.e., application of the common law rule with some sort of recognition of the liberal construction called for by the Property Code). The Texas Supreme Court has not yet ruled on this apparent conflict, but has been urged to do so. In *City of Pasadena v. Gennedy*, *see supra*, the court urged the Texas Supreme Court to resolve this conflict as follows:

“We respectfully urge the Supreme Court to resolve the differences among the courts of appeals on this issue. However, because we conclude that, under either a liberal or a strict construction of the original deed restrictions in this case, we would reach the same conclusion, we will continue to follow our holdings in *Ashcreek* and *Crispin* – that no discernable conflict exists between the common law and section 202.003(a) – without reconsidering the issue. *See Ashcreek Homeowner’s Ass’n, Inc. v. Smith*, 902 S.W.2d 586, 588-89 (Tx. App. – Houston [1st Dist.] 1995, no writ); *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81, 81 n. 1 (Tex. App. – Houston [1st Dist.] 1994, writ denied).”

D. The Community Association

1. **Board of Directors:** A board of directors may exercise its powers only as a body at duly called and conducted meetings or by unanimous written consent. *American Bank & Trust Co. v. Freeman*, 560 S.W.2d 444 (Tex. App. -- Beaumont 1977, writ ref’d n.r.e.). Under the Texas Non-Profit Corporation Act, meetings may also be conducted by telephone; and pursuant to a 1994 amendment, the articles of incorporation may permit action by written consent of less than

all directors subject to strict notice requirements. Tex. Rev. Civ. Stat. Ann - art. 1396-9.10 (Vernon Supp. 1995).

Each director has a virtually unlimited right to access to all corporate books, records and other information. *Chavco Investment Co. v. Pybus*, 613 S.W.2d 806 (Tex. Civ. App. -- Houston [14th Dist.] 1981, writ ref'd n.r.e.).

No individual director or the board may abdicate or assign by agreement in advance the responsibility to exercise their judgment as managers of the corporation. *Burnett v. Work, Inc.*, 412 S.W.2d 792 (Tex. Civ. App. -- 1967 writ dismissed).

2. **Officers:** Authority of officers must be actual as conferred by statute, the association's Governing Documents or by express delegation by the board, or implied from the nature of the officer's position. Under Texas law, a president has no implied authority merely by virtue of his office. *Templeton v. Nocona Hills Owners Association*, 555 S.W.2d 534 (Tex. Civ. App. -- Texarkana 1977, no writ).

3. **Fiduciary Duties:** Directors and officers (especially managing officers) have as their basis responsibility "the dedication of his uncorrupted business judgment for the sole benefit of the corporation." *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963). The three basic duties of directors and officers are (i) to abide by applicable statutes and the association's Governing Documents, (ii) to manage as a reasonable person in the executive's position would manage, and (iii) to avoid taking personal advantage of corporate opportunities. 1 TEX. CORP. - LAW & PRACTICE § 21.01 (1991). The association itself may also owe a fiduciary duty to its members. *Sossen v. Tanglegrove Townhouse Condominium Association*, 877 S.W.2d 48 (Tex. App. -- Texarkana 1994, no writ) (association breached fiduciary duty to condominium owner and restrictive covenants by failure to properly repair unit after damaged by fire).

E. Court Jurisdiction

1. **District Courts.** District courts have general jurisdiction to enforce restrictive covenants (including the granting of injunctive relief and the foreclosing of assessment liens). Tex. Gov. Code Ann. §§ 24.007 - 24.011 (Vernon 1988).

2. **County Courts.** Constitutional county courts have concurrent jurisdiction with district courts to enforce restrictive covenants falling within its amount in controversy jurisdiction, but

constitutional county courts are limited as to jurisdiction to issue injunctions and may not adjudicate issues of title. Tex. Gov. Code Ann. Section 26.043 (Vernon 1988). *See also Womble v. Harsey*, 118 S.W. 764 (Tex. Civ. App. -- 1909, no writ) (constitutional county court judgment granting foreclosure of lien is void). However, the Texas Government Code provides per a 1991 amendment that Harris County statutory civil courts at law have jurisdiction to decide issues of title to real property and enforce a lien on real property. Tex. Gov. Code Ann. Section 25.1032 (Vernon Supp. 1995). Unquestionably, such Harris County courts may grant foreclosure of association liens so long as the case is within its amount for controversy jurisdiction. It has been successfully argued in such Harris County courts that the amendment also confers jurisdiction to issue injunctions for enforcement of restrictive covenants, but it does not appear any appellate court has decided that issue.

3. **Justice Courts.** Justice courts are by statute denied jurisdiction in suits to enforce a lien on land, Tex. Gov. Code Ann. Section 27.031(b) (Vernon 1994), and justice courts have no jurisdiction to issue injunctions. *Belknap Hardware & Mfg. Co. v. Lightfoot*, 75 S.W.2d 481 (Tex. Civ. App. -- Eastland 1934, no writ).

Section 27.034 of the Texas Government Code permits justice courts in a county with a population of 2.8 million or more to have concurrent jurisdiction with the district courts "of suits relating to enforcement of a deed restriction of a residential subdivision that does not concern a structural change to a dwelling" and confers such jurisdiction "regardless of the amount in controversy."

Section 27.034 of the Government Code does not appear to alter a justice court's lack of jurisdiction to enforce association liens or grant injunctive relief (note that Government Code Section 27.031 was not amended). However, the amount in controversy limit for Harris County justice courts is removed, and such justice courts may be a pragmatic option when foreclosure is not sought and a damages award (including Texas Property Code Chapter 202 "civil damages") may be sufficient to obtain compliance.

IV. Assessment Collection

Assessment collection is the most common legal function performed by legal counsel for an association. Such legal counsel must be mindful of the Federal and Texas Fair Debt Collection Practices Act, and must comply with its requirements. Such requirements include making certain disclosures during each communication with the debtor, certain disclosures at or near the first debt collection communication, and certain

confidentiality requirements. Additionally, § 209.008(a) of the Texas Property Code requires that written notice that “attorney’s fees and costs will be charged to the owner if the delinquency or violation continues after a date certain” be given to an owner before any attorney fees are assessed to the owner. Often, such notice is provided by the association’s “pre-legal” notice or demand letter/s. Owners also have a right to receive copies of invoices for attorney’s fees and other costs relating only to the matter for which the association seeks reimbursement of fees and costs. (Section 209.008(d), Texas Property Code). The Federal Fair Debt Collections Practices Act also give owners a right to dispute debts and request a “verification” of such debt within thirty days of receipt of a debt collection demand.

A. Preliminary Considerations

1. Determine the amount of assessments.
 - a. Annual
 - b. Monthly
 - c. Special
 - d. Late charge
 - e. Interest
 - f. Credits for payments
2. Make independent decision as to the validity of debt.
 - a. Review Governing Documents
 - b. Review account
 - c. Review prior correspondence and history of delinquency
3. Collection should proceed in accordance with a written uniform collection procedure (review Governing Documents and applicable statutes which might effect collection procedure options).
 - a. Association demand
 - b. Attorney demand
 - c. Settlement parameters
 - d. Possible notice of lien
 - e. Possible non-judicial foreclosure
 - f. Possible suit

4. Risks
 - a. No financial benefit
 - b. Partial financial benefit
 - c. Counterclaim for related or independent reason
 - d. Remember Federal Fair Debt Collection Practices Act requirements for all communications with debtor.
5. Interpret the restrictive covenants in question.
 - a. Strict construction
 - b. Liberal construction
 - c. Historical construction by association

B. Selected Assessment Collection Cases

1. **The Assessment Lien:** *Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987). Issues presented were whether a valid lien was established by the restrictions and "whether the Texas homestead laws precluded foreclosure of the association's lien for homeowner's failure to pay the assessments." On the first issue, the court upheld the validity of the assessment lien noting "a contractual lien depends only on evidence apparent from the language of the agreement that the parties intended to create a lien." *Inwood North*, 736 S.W.2d at 634. As to homestead, the *Inwood North* decision makes it clear that prior to property becoming the homestead of a new owner, the property is subject to being encumbered. The Texas Supreme Court held the association's lien was superior to the homestead exemption based on the foregoing rationale:

“The record discloses that the liens were contracted for several years before the homeowners took possession of their houses. Because the restrictions were placed on the land before it became the homestead of the parties, and because the restrictions contain valid contractual liens which run with the land, the homeowners were subject to the liens in question and an order of foreclosure would have been proper.”

Before you can presume that your situation is the same as *Inwood North*, you must consider the particular document which purports to create the assessment lien. Several matters you should watch out for include the following:

- a. When was the lien established? Was the lien created and effective on the date the declaration was recorded or does the declaration state that the lien is effective upon a delinquency?
- b. What sum of money is included in the assessment lien? The assessment lien may be limited to the unpaid assessments only in which case the lien may not secure payment of attorney fees, interest, "late charges," etc.
- c. The recording of the notice of lien does not establish the lien, it only gives notice of delinquency in payment. When payment is made, cancel the notice regarding the prior delinquency - don't release the underlying continuing lien.

The Texas Uniform Condominium Act (applicable to condominiums only) also discusses association liens for assessments. Section 82.113(c) states the "association's lien for assessments is created by recordation of the declaration . . .". The Act further specifically authorizes and sets forth certain procedures for non-judicial foreclosure, and establishes a right of redemption exercisable not later than 90 days after the date of the foreclosure sale.

Boudreaux Civic Association v. Cox, 882 S.W.2d 543 (Tex. App. -- Houston [1st Dist.] 1994, no writ) demonstrates that *Inwood North* is not applicable in all cases. The association obtained an injunction and judgment for recovery of attorney fees against the owner. The original restrictions established a continuing lien and provided for foreclosure of same, but the lien did not apparently purport to cover attorney's fees. In a rather unusual fact setting, after judgment the association sought under the turnover statute to require the owner to "turnover" the deed to their property to satisfy the judgment for attorney's fees asserting the amendment permitted "foreclosure" as to attorney's fees. The court discussed, but did not decide, the issue of whether the amendment created a new lien or whether the amendment was merely a modification of the preexisting lien. The court ultimately held that since the attorney fees were awarded by the trial court based solely on Section 5.006 of the Texas Property Code (and not the restrictions), the association lien did not arise prior to and therefore was not superior to the foregoing in the owner's homestead rights. The concurring opinion, however, expressly took the view the amendment "created a new lien subsequent to [the homeowner's] homestead declaration; therefore it is not enforceable."

2. Construction: Whether the declaration is ambiguous is a question of law. If the declaration is not ambiguous, its construction is also a question of law. If the declaration is ambiguous,

its construction is a question of fact and parol evidence is admissible to show the intent of the parties. *Settlers Village Community Improvement Association, Inc. v. Settlers Village 5.6, Ltd., et al.*, 828 S.W.2d 182 (Tex. App. -- Houston [14th Dist.] 1992, no writ), the appellate court held that "a summary judgment based on the interpretation of an ambiguous document without the consideration of the intent of the parties is not proper." The summary judgment was reversed and remanded.

3. Governing Documents Control: Associations must comply with governing documents in determining liability for assessments and may not assess charges not expressly authorized thereby. *Frey v. De Cordova Bend Estates Owners Association*, 647 S.W.2d 246 (Tex. 1983) (building permit, transfer and lease fees all invalid as not authorized by condominium declaration).

4. "Pro Rata Share": Texas Property Code Section 81.204 provides condominium owners shall pay their "pro rata share of . . ." common expenses. While not yet addressed by Texas courts, it is likely Texas will follow a Florida case holding a similar Florida statutory pro rata requirement prohibited equal assessment as to units owning different interests in common elements. See *Suntide Condominium Ass'n, Inc. v. Division of Florida Land Sales & Condominium Dept. of Business Regulations*, 463 So.2d 314 (Fla. App. 1984).

5. Doctrine of Independent Covenants: A common excuse given by owners for the failure to pay assessments is the alleged failure of the association to maintain the property. However, the obligation to pay assessments is independent of obligations of the association. *Pooser v. Lovett Square Townhomes Owners' Association*, 702 S.W.2d 226 (Tex. App. -- Houston [1st Dist.] 1985, writ ref'd n.r.e.).

6. Interest and Late Fees: According to Section 82.102(12) of the Texas Uniform Condominium Act (applicable to condominium associations only), an association, acting through its board, may impose interest and late charges for late payments of assessments. Note that the statute does not set a rate of interest or set any amount as to late charges. Presumably, the board is authorized to do both (within usury law limits).

Section 204.010(10) was enacted in 1995, and authorized association boards to impose interest, late charges, and, if applicable, returned check charges for late payments of regular assessments or special assessments.

Outside Sections 82.102(12) and 204.010, an association is not authorized to collect interest

unless authorized by the governing documents, by statute or by agreement of the parties; and late charges may be authorized only in the governing documents or by agreement. *See Frey v. De Cordova Ben Estates Owners Association*, 647 S.W.2d 246 (Tex. 1983) (building permit, transfer and lease fees all invalid as not authorized by condominium declaration). *Cf. Lee v. Braeburn Valley West Civic Ass'n*, 794 S.W.2d 44 (Tex. App. -- Eastland 1990, writ denied) (late charges and interest properly authorized by declaration). When not otherwise authorized, pre-judgment interest at the rate of six percent can be recovered "ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable." Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (Vernon 1987). *See also Concrete Construction Supply, Inc. v. M.F.C., Inc.*, 636 S.W.2d 475 (Tex. App. 1982, no writ) (any interest charged during statutory interest free period is more than double the permitted rate and therefore subjected creditor to penalties of forfeiture of all principal, double the usurious interest charged, and payment of debtor's costs and attorneys fees).

It has been held summarily that community association late charges do not constitute interest. *Lee v. Braeburn Valley West Civic Association*, 794 S.W.2d 44 (Tex. App. -- Eastland, 1990, writ denied). The underlying rationale is that late charges collected by associations are not interest because there is no charge being assessed for the use, forbearance or detention of a lender's money. *Tygrett v. University Gardens Homeowners' Association*, 687 S.W.2d 481 (Tex. App. -- Dallas, 1985, writ ref'd n.r.e.) (upholding \$5.00 per day late charge on \$228.48 per month condominium assessment). However, an unreasonable late charge may still be subject to challenge as a "penalty". *See Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991).

7. Ratification: In *Caldwell v. Callender Lake Property Owners Improvement Association*, 888 S.W.2d 903 (Tex. App. -- Texarkana 1994, writ denied), lot owners filed suit against an association alleging that an increase in the amount of assessments was not done in accordance with the restrictions. The Association filed a counterclaim seeking a declaratory judgment as to the validity of the assessment increase. The case presents an interesting discussion of the affirmative defense of ratification. By paying certain assessments without resistance or objection, the court found that certain assessment increases had been ratified. *Simms v. Lakewood Village Property Owners Association, Inc.*, 895 S.W.2d 779 (Tex. App. -- Corpus Christi 1995, no writ) (ratification found based on lot owners having worked on committees, attended association meetings, and paid assessments fixed by the board).

8. Non-Judicial Foreclosure: *Inwood North, supra*, generally validated association liens. *Johnson v. First Southern Properties, Inc.*, 687 S.W.2d 399 (Tex. App. -- Houston [14th Dist.] 1985, writ ref'd n.r.e.) upheld the validity of a non-judicial foreclosure by a condominium association which was attacked on procedural (lack of proper notice) grounds. It does not appear however that any Texas case has directly decided the validity of non-judicial foreclosure provisions in restrictive covenants. The Texas Uniform Condominium Act appears to resolve the issue as to condominiums by specifically conferring a power of sale, and authorizing the board to appoint a trustee and the association to non-judicially foreclose its lien. Tex. Prop. Code Ann. Section 82.113(d)-(j) (Vernon 1995).

Pragmatically, virtually no title company in the Houston area has been willing to issue title insurance on a resale by an association of property acquired through non-judicial foreclosure. Whether the Texas Uniform Condominium Act will change this policy at least as to condominiums remains to be seen. Judicial foreclosure may still be the safer approach as in any event it is less subject to procedural defects attack, and a writ of possession can be incorporated in the judgment thus avoiding the need for eviction proceedings subsequent to non-judicial foreclosure.

With the foregoing (and other) caveats in mind, at least the following matters should be considered in undertaking non-judicial foreclosure of an association lien:

- a. Determine legal ability to proceed with such remedy under governing documents.
- b. Require verification of all components of the "debt".
- c. Get authorization to proceed by board after disclosure of all potential risks.
- d. Strictly comply with all requirements of the governing documents and Texas Property Code Section 51.002.
- e. Obtain appointment of trustee and record.
- f. Remember right to redeem property pursuant to Texas Uniform Condominium Act. (Section 82.113).

9. Judicial Foreclosure Via Judgment: Another common method of foreclosure is through a writ of execution and order of sale granted in a judgment at the conclusion of formal legal action. This method is felt to be safer and less risky (although more time consuming) than non-judicial foreclosure. It is also important to be

cognizant of § 209.011's right of redemption after foreclosure.

Although the right to foreclose an assessment lien is now well established by the Texas Supreme Court (*Inwood North, supra*), and by the Texas Uniform Condominium Act (Section 82.113, Texas Property Code), and by Chapter 209 of the Texas Property Code, some judges are apprehensive to grant the right of foreclosure against owners due to the political and public pressure which may result by foreclosing on a member of the community. However, appellate courts have recognized that without the right of foreclosure, many owners would simply refuse to pay the assessments, retain their property without paying anything, and not pay the financial judgment due to being "judgment proof." Recognizing this potential legal and financial dilemma, appellate courts have made it clear that an assessment lien may be foreclosed for nonpayment of assessments.

Cottonwood Valley Home Owners Association v. Hudson, 75 S.W.3d 601 (Tex. App. – Eastland 2002):

"On May 18, 2000, the Association sued Hudson to collect unpaid homeowners' assessments. Hudson owned property located at 1217 Travis Circle South in Irving. The property is part of Cottonwood Valley Addition, a development subject to homeowners' assessments as stated in a Declaration filed in the deed of records. The Declaration provides for recovery of interest, collection costs, attorney fees, and expenses in collecting delinquent assessments.

Default judgment was granted in favor of the Association. The judgment granted the amount represented to be due and owing to the Association in the judgment and attorney fees. The judgment did not provide for foreclosure on the assessment lien. The Association filed a motion to modify the judgment, asking the court to grant foreclosure on the assessment lien against Hudson's property. The motion to modify was overruled by operation of law. The Association appeals.

As an inherent part of the property interest, the purchase of a lot in a subdivision with deed restrictions carries the obligation to pay association fees for maintenance and ownership of common facilities and services. *Inwood North Homeowners' Association v. Harris*, 736 S.W.2d 632, 636 (Tex. 1987). The remedy of foreclosure is an inherent characteristic of that property right. *Inwood North Homeowners' Association v. Harris, supra* at 636."

See the following sections related to non-condominium foreclosures:

1. Section 209.009 – Foreclosure Sales Prohibited in Certain Circumstances

2. Section 209.010 – Notice After Foreclosure Sale

3. Section 209.011 – Right of Redemption After Foreclosure

V. Attorney Fees

A. Bases for Recovery

More often than not, the ultimate issue fueling many community association cases to trial is a dispute about attorney fees. Most community association documents contain a provision authorizing the association to collect attorney fees in cases of violation of the restrictive covenants. Sometimes, attorney fees are included in the formula comprising the assessment lien. Regardless of whether the declaration gives the association the right to collect attorney fees, the Texas Property Code and the Texas Civil Practice and Remedies Code both have applicability to recovery of attorney fees in these types of cases.

The Texas Property Code provides as follows:

§ 5.006. Attorney's Fees in Breach of Restrictive Covenant Action

(a) In an action based on breach of a restrictive covenant pertaining to real property, the court **shall** allow to a prevailing party who asserted the action reasonable attorney's fees in addition to the party's costs and claim.

(b) To determine reasonable attorney's fees, the court shall consider:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the expertise, reputation, and ability of the attorney; and
- (4) any other factor.

Section 38.001 of the Texas Civil Practice and Remedies Code provides "a person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . (a) an oral or written contract." "Agreements such as the restrictions and accompanying enforcement mechanism in this case are treated as contracts among the parties." *Boudreaux Civic Assoc. v. Cox, supra*, 882 S.W.2d at 547. *Accord. Selected Lands Corporation v. Speich*, 702 S.W.2d 197 (Tex. Civ. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.).

B. Mandatory Award of Attorney Fees

Recovery of attorney's fees by a prevailing party in action to enforce restrictive covenants under Texas Property Code, Section 5.006 is mandatory. *Nelson v. Jordan*, 663 S.W.2d 82 (Tex. App. -- Austin 1983, writ ref'd n.r.e.). Tender of payment of assessments only after suit does not relieve the defaulting owner of liability for the association's attorney's fees. *Briargrove Park Property Owners, Inc. v. Riner*, 847 S.W.2d 265 (Tex. App. -- Texarkana 1992), rev'd on other grounds, 858 S.W.2d 370 (Tex. 1993), after remand, 867 S.W.2d 58 (Tex. App. -- Texarkana 1993, no writ).

A homeowner who successfully defends an action to enforce restrictive covenants does not "assert" or "prevail" in an action to enforce restrictive covenant and therefore is not entitled to recover attorney's fees under Texas Property Code Section 5.006. *Meyerland Community Improvement Association v. Belilove*, 624 S.W.2d 620 (Tex. App. -- Houston [14th Dist.] 1981, writ ref'd n.r.e.). However, a homeowner is entitled to recover attorney's fees upon proof the association violated the restrictive covenants. *Sossen v. Tanglegrove Townhouse Condominium Association, supra*, 877 S.W.2d at 493.

C. Amount of Attorney Fees is Discretionary With Court

Even when the evidence is uncontroverted, the amount of the attorney fee award is discretionary with the court. *Fonmeadow Property Owners' Association, Inc. v. Franklin*, 817 S.W.2d 104 (Tex. App. -- Houston [1st Dist.] 1991, no writ).

VI. Enforcement of HOA Rules, Regulations and Restrictions (other than for assessments)

A. Preliminary Considerations

1. Review restrictions to understand parameters of authority.
2. Recognize authorized body.
3. Establish uniform enforcement procedure and follow it.
4. Timeliness is key.
 - a. Regular inspections
 - b. Document inspections
 - c. Association demand letter
 - d. Attorney demand letter
 - e. Legal action

B. Temporary Injunction.

In order to enforce restrictive covenants, associations must often act quickly to avoid the possible defenses of waiver, laches, and estoppel. The use of temporary restraining orders and temporary injunctions is often used by associations to preserve the status quo until a trial on the merits can be had.

Daniels v. Balcones Woods Club, Inc., 2002 WL 31426294 (Tex. App. -- Austin):

"The decision to grant or deny a temporary injunction lies within the trial court's sound discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). In an appeal from an order granting or denying a request for a temporary injunction, appellate review is confined to the validity of the order that grants or denies the relief. *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 576 (Tex. App. -- Austin 2000, no pet.). The test for determining whether a party is entitled to a temporary injunction is whether the movant demonstrates both a probable right to recovery and a probable, irreparable injury in the absence of interim relief. *Walling*, 863 S.W.2d at 57; *Texas Alcoholic Beverage Comm'n v. Amusement & Music Operators, Inc.*, 997 S.W.2d 651, 657 (Tex. App. -- Austin 1999, pet. dismissed w.o.j.). Proof that the applicant ultimately will prevail at trial is not required. *Robertson Transp. v. Robertson Transp.*, 152 Tex. 551, 261 S.W.2d 549, 552 (Tex. 1953).

The party requesting the temporary injunction must also show a probable, irreparable injury. *Walling*, 863 S.W.2d at 57. To demonstrate a probable, irreparable injury, a party must show an injury for which there is no real legal measure of damages or none that can be determined with a sufficient degree of certainty. See *Universal Health Servs., Inc.*, 24 S.W.3d at 577. A temporary injunction serves to preserve the status quo. *Walling*, 863 S.W.2d at 57. The status quo is defined as "the last, actual, peaceable, noncontested status which preceded the pending controversy." *Robertson Transp.*, 261 S.W.2d at 553-54. Thus, "if an act of one party alters the relationship between that party and another, and the latter contests the action, the status quo cannot be the relationship as it exists after the action." *Universal Health Servs., Inc.*, 24 S.W.3d at 577. In deciding to grant the temporary injunction, a district court "balances the equities of the parties and the resulting conveniences and hardships." *Id.* at 578.

Bankler v. Vale, 75 S.W.3d 29 (Tex. App. -- San Antonio 2001, reh'g overruled). A party requesting injunctive relief must plead it will suffer a probable injury. Probable injury includes

imminent harm, irreparable injury, and no adequate remedy at law. *Blackthorne v. Bellush*, 61 S.W.3d 439, 444-45 (Tex. App. – San Antonio, July 5, 2001, no pet. h.). Demonstrable intent to breach a restrictive covenant will support an injunction without any showing of irreparable injury or imminent harm. E.g., *Jim Rutherford Invs., Inc. v. Terramar Beach Comty. Ass'n*, 25 S.W.3d 845, 848 (Tex. App. – Houston [14th Dist.] 2000, pet. denied); *Munson*, 948 S.W.2d at 815; *Guajardo v. Neece*, 758 S.W.2d 696, 698 (Tex. App. – Fort Worth 1988, no writ).”

C. Substantial Violation Required

Restrictive covenants may be enforced by injunctive relief upon proof of a substantial violation; proof of particular damages or irreparable injury is not required. *Stergios v. Forrest Place Homeowners' Association, Inc.*, 651 S.W.2d 396 (Tex. App. -- Dallas 1983, writ ref'd n.r.e.); *Gunnels, et ux v. North Woodland Hills Community Association*, 563 S.W.2d 334, 337 (Tex. Ap. -- Houston [1st Dist.] 1978, no writ).

D. Minor Violations Irrelevant

Violation of a restriction will not be enjoined by a court unless the violation is "substantial," but failure to take action as to minor violations does not prohibit subsequent enforcement of a substantial violation. *Sharpstown Civic Association, Inc. v. Pickett*, 679 S.W.2d 956 (Tex. 1984).

E. Number of Violations is Relevant

Assuming other substantial violations, the number of such violations becomes important. E.g.: *Tanglewood Homes Association, Inc. v. Henke*, 728 S.W.2d 39 (Tex. App. -- Houston [1st Dist.] 1987, writ ref'd n.r.e.) (15 garages violating setback restriction in 56 lot subdivision established abandonment as to garages, but 5 main residences of 56 lots violating setback restriction did not as to main residences).

F. Mandatory Injunction

The granting of a mandatory injunction ordering the removal of non-conforming structures (such as the removal of a second story of a garage) is a proper way to enforce restrictive covenants. *Radney v. Clear Lake Forest Community Association, Inc.*, 681 S.W.2d 191, 198 (Tex. App. -- Houston [14th Dist.] 1984, writ ref'd n.r.e.).

G. Civil Damages

In addition to injunctive relief and attorney fees, a court may also assess "civil damages" for violation of a restrictive covenant pursuant to Tex.

Prop. Code ann. Section 202.004(c) (Vernon 1995) which provides "[a] court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed \$200 for each day of the violation."

H. Standing of Association

Prior to 1987, some cases held a community association did not have standing to maintain a suit to enforce restrictive covenants if the association did not own real property affected by its violation. All community associations now have standing per Tex. Prop. Code Ann. Section 202.004(b) (Vernon 1995) which provides:

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

VII. New Provisions and Procedures Under Section 209 of the Texas Property Code Relating to Deed Restriction Enforcement, ADR, and Attorney Fees

CHAPTER 209.

TEXAS RESIDENTIAL

PROPERTY OWNERS PROTECTION ACT

§ 209.001. SHORT TITLE. This chapter may be cited as the Texas Residential Property Owners Protection Act. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.002. DEFINITIONS. In this chapter: (1) "Assessment" means a regular assessment, special assessment, or other amount a property owner is required to pay a property owners' association under the dedicatory instrument or by law. (2) "Board" means the governing body of a property owners' association. (3) "Declaration" means an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision. (4) "Dedicatory instrument" means each governing instrument covering the establishment, maintenance, and operation of a residential subdivision. The term includes restrictions or similar instruments subjecting property to restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association, to properly adopted rules and regulations of the property owners' association, and to all lawful amendments to the covenants, bylaws, rules, or regulations. (5) "Lot" means any designated parcel of land located in a residential subdivision, including any improvements on the designated parcel. (6) "Owner" means a person who holds

record title to property in a residential subdivision and includes the personal representative of a person who holds record title to property in a residential subdivision. (7) "Property owners' association" or "association" means an incorporated or unincorporated association that: (A) is designated as the representative of the owners of property in a residential subdivision; (B) has a membership primarily consisting of the owners of the property covered by the dedicatory instrument for the residential subdivision; and (C) manages or regulates the residential subdivision for the benefit of the owners of property in the residential subdivision. (8) "Regular assessment" means an assessment, a charge, a fee, or dues that each owner of property within a residential subdivision is required to pay to the property owners' association on a regular basis and that is designated for use by the property owners' association for the benefit of the residential subdivision as provided by the restrictions. (9) "Residential subdivision" or "subdivision" means a subdivision, planned unit development, townhouse regime, or similar planned development in which all land has been divided into two or more parts and is subject to restrictions that: (A) limit a majority of the land subject to the dedicatory instruments, excluding streets, common areas, and public areas, to residential use for single-family homes, townhomes, or duplexes only; (B) are recorded in the real property records of the county in which the residential subdivision is located; and (C) require membership in a property owners' association that has authority to impose regular or special assessments on the property in the subdivision. (10) "Restrictions" means one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the real property records or map or plat records. The term includes any amendment or extension of the restrictions. (11) "Restrictive covenant" means any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative. (12) "Special assessment" means an assessment, a charge, a fee, or dues, other than a regular assessment, that each owner of property located in a residential subdivision is required to pay to the property owners' association, according to procedures required by the dedicatory instruments, for: (A) defraying, in whole or in part, the cost, whether incurred before or after the assessment, of any construction or reconstruction, unexpected repair, or replacement of a capital improvement in common areas owned by the property owners' association, including the necessary fixtures and personal property related to the common areas; (B) maintenance and improvement of common areas owned by the property owners' association; or (C) other purposes of the property owners' association as

stated in its articles of incorporation or the dedicatory instrument for the residential subdivision. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.003. APPLICABILITY OF CHAPTER. (a) This chapter applies only to a residential subdivision that is subject to restrictions or provisions in a declaration that authorize the property owners' association to collect regular or special assessments on all or a majority of the property in the subdivision. (b) This chapter applies only to a property owners' association that requires mandatory membership in the association for all or a majority of the owners of residential property within the subdivision subject to the association's dedicatory instruments. (c) This chapter applies to a residential property owners' association regardless of whether the entity is designated as a "homeowners' association," "community association," or similar designation in the restrictions or dedicatory instrument. (d) This chapter does not apply to a condominium development governed by Chapter 82. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.004. MANAGEMENT CERTIFICATES. (a) A property owners' association shall record in each county in which any portion of the residential subdivision is located a management certificate, signed and acknowledged by an officer or the managing agent of the association, stating: (1) the name of the subdivision; (2) the name of the association; (3) the recording data for the subdivision; (4) the recording data for the declaration; (5) the mailing address of the association or the name and mailing address of the person managing the association; and (6) other information the association considers appropriate. (b) The property owners' association shall record an amended management certificate not later than the 30th day after the date the association has notice of a change in any information in the recorded certificate required by Subsection (a). (c) The property owners' association and its officers, directors, employees, and agents are not subject to liability to any person for a delay in recording or failure to record a management certificate, unless the delay or failure is wilful or caused by gross negligence. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.005. ASSOCIATION RECORDS. (a) A property owners' association shall make the books and records of the association, including financial records, reasonably available to an owner in accordance with Section B, Article 2.23, Texas Non-Profit Corporation Act (Article 1396-2.23, Vernon's Texas Civil Statutes). (b) An attorney's files and records relating to the association, excluding invoices requested by an owner under Section 209.008(d), are not: (1) records of the

association; (2) subject to inspection by the owner; or (3) subject to production in a legal proceeding. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.006. NOTICE REQUIRED BEFORE ENFORCEMENT ACTION. (a) Before a property owners' association may suspend an owner's right to use a common area, file a suit against an owner other than a suit to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for a violation of the restrictions or bylaws or rules of the association, the association or its agent must give written notice to the owner by certified mail, return receipt requested. (b) The notice must: (1) describe the violation or property damage that is the basis for the suspension action, charge, or fine and state any amount due the association from the owner; and (2) inform the owner that the owner: (A) is entitled to a reasonable period to cure the violation and avoid the fine or suspension unless the owner was given notice and a reasonable opportunity to cure a similar violation within the preceding six months; and (B) may request a hearing under Section 209.007 on or before the 30th day after the date the owner receives the notice. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.007. HEARING BEFORE BOARD; ALTERNATIVE DISPUTE RESOLUTION. (a) If the owner is entitled to an opportunity to cure the violation, the owner has the right to submit a written request for a hearing to discuss and verify facts and resolve the matter in issue before a committee appointed by the board of the property owners' association or before the board if the board does not appoint a committee. (b) If a hearing is to be held before a committee, the notice prescribed by Section 209.006 must state that the owner has the right to appeal the committee's decision to the board by written notice to the board. (c) The association shall hold a hearing under this section not later than the 30th day after the date the board receives the owner's request for a hearing and shall notify the owner of the date, time, and place of the hearing not later than the 10th day before the date of the hearing. The board or the owner may request a postponement, and, if requested, a postponement shall be granted for a period of not more than 10 days. Additional postponements may be granted by agreement of the parties. The owner or the association may make an audio recording of the meeting. (d) The notice and hearing provisions of Section 209.006 and this section do not apply if the association files a suit seeking a temporary restraining order or temporary injunctive relief or files a suit that includes foreclosure as a cause of action. If a suit is filed relating to a matter to which those sections apply, a party to the suit may file a motion to compel mediation. The notice and

hearing provisions of Section 209.006 and this section do not apply to a temporary suspension of a person's right to use common areas if the temporary suspension is the result of a violation that occurred in a common area and involved a significant and immediate risk of harm to others in the subdivision. The temporary suspension is effective until the board makes a final determination on the suspension action after following the procedures prescribed by this section. (e) An owner or property owners' association may use alternative dispute resolution services. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.008. ATTORNEY'S FEES. (a) A property owners' association may collect reimbursement of reasonable attorney's fees and other reasonable costs incurred by the association relating to collecting amounts, including damages, due the association for enforcing restrictions or the bylaws or rules of the association only if the owner is provided a written notice that attorney's fees and costs will be charged to the owner if the delinquency or violation continues after a date certain. (b) An owner is not liable for attorney's fees incurred by the association relating to a matter described by the notice under Section 209.006 if the attorney's fees are incurred before the conclusion of the hearing under Section 209.007 or, if the owner does not request a hearing under that section, before the date by which the owner must request a hearing. The owner's presence is not required to hold a hearing under Section 209.007. (c) All attorney's fees, costs, and other amounts collected from an owner shall be deposited into an account maintained at a financial institution in the name of the association or its managing agent. Only members of the association's board or its managing agent or employees of its managing agent may be signatories on the account. (d) On written request from the owner, the association shall provide copies of invoices for attorney's fees and other costs relating only to the matter for which the association seeks reimbursement of fees and costs. (e) The notice provisions of Subsection (a) do not apply to a counterclaim of an association in a lawsuit brought against the association by a property owner. (f) If the dedicatory instrument or restrictions of an association allow for nonjudicial foreclosure, the amount of attorney's fees that a property owners' association may include in a nonjudicial foreclosure sale for an indebtedness covered by a property owners' association's assessment lien is limited to the greater of: (1) one-third of the amount of all actual costs and assessments, excluding attorney's fees, plus interest and court costs, if those amounts are permitted to be included by law or by the restrictive covenants governing the property; or (2) \$2,500. (g) Subsection (f) does not prevent a property owners' association from recovering or

collecting attorney's fees in excess of the amounts prescribed by Subsection (f) by other means provided by law. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.009. FORECLOSURE SALE PROHIBITED IN CERTAIN CIRCUMSTANCES. A property owners' association may not foreclose a property owners' association's assessment lien if the debt securing the lien consists solely of: (1) fines assessed by the association; or (2) attorney's fees incurred by the association solely associated with fines assessed by the association. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.010. NOTICE AFTER FORECLOSURE SALE. (a) A property owners' association that conducts a foreclosure sale of an owner's lot must send to the lot owner not later than the 30th day after the date of the foreclosure sale a written notice stating the date and time the sale occurred and informing the lot owner of the owner's right to redeem the property under Section 209.011. (b) The notice must be sent by certified mail, return receipt requested, to the lot owner's last known mailing address, as reflected in the records of the property owners' association. (c) Not later than the 30th day after the date the association sends the notice required by Subsection (a), the association must record an affidavit in the real property records of the county in which the lot is located, stating the date on which the notice was sent and containing a legal description of the lot. Any person is entitled to rely conclusively on the information contained in the recorded affidavit. (d) The notice requirements of this section also apply to the sale of an owner's lot by a sheriff or constable conducted as provided by a judgment obtained by the property owners' association. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

§ 209.011. RIGHT OF REDEMPTION AFTER FORECLOSURE. (a) A property owners' association or other person who purchases occupied property at a sale foreclosing a property owners' association's assessment lien must commence and prosecute a forcible entry and detainer action under Chapter 24 to recover possession of the property. (b) The owner of property in a residential subdivision may redeem the property from any purchaser at a sale foreclosing a property owners' association's assessment lien not later than the 180th day after the date the association mails written notice of the sale to the owner under Section 209.010. (c) A person who purchases property at a sale foreclosing a property owners' association's assessment lien may not transfer ownership of the property to a person other than a redeeming lot owner during the redemption period. (d) To redeem property purchased by the property

owners' association at the foreclosure sale, the lot owner must pay to the association: (1) all amounts due the association at the time of the foreclosure sale; (2) interest from the date of the foreclosure sale to the date of redemption on all amounts owed the association at the rate stated in the dedicatory instruments for delinquent assessments or, if no rate is stated, at an annual interest rate of 10 percent; (3) costs incurred by the association in foreclosing the lien and conveying the property to the redeeming lot owner, including reasonable attorney's fees; (4) any assessment levied against the property by the association after the date of the foreclosure sale; (5) any reasonable cost incurred by the association, including mortgage payments and costs of repair, maintenance, and leasing of the property; and (6) the purchase price paid by the association at the foreclosure sale less any amounts due the association under Subdivision (1) that were satisfied out of foreclosure sale proceeds. (e) To redeem property purchased at the foreclosure sale by a person other than the property owners' association, the lot owner: (1) must pay to the association: (A) all amounts due the association at the time of the foreclosure sale less the foreclosure sales price received by the association from the purchaser; (B) interest from the date of the foreclosure sale through the date of redemption on all amounts owed the association at the rate stated in the dedicatory instruments for delinquent assessments or, if no rate is stated, at an annual interest rate of 10 percent; (C) costs incurred by the association in foreclosing the lien and conveying the property to the redeeming lot owner, including reasonable attorney's fees; (D) any unpaid assessments levied against the property by the association after the date of the foreclosure sale; and (E) taxable costs incurred in a proceeding brought under Subsection (a); and (2) must pay to the person who purchased the property at the foreclosure sale: (A) any assessments levied against the property by the association after the date of the foreclosure sale and paid by the purchaser; (B) the purchase price paid by the purchaser at the foreclosure sale; (C) the amount of the deed recording fee; (D) the amount paid by the purchaser as ad valorem taxes, penalties, and interest on the property after the date of the foreclosure sale; and (E) taxable costs incurred in a proceeding brought under Subsection (a). (f) If a lot owner redeems the property under this section, the purchaser of the property at foreclosure shall immediately execute and deliver to the owner a deed transferring the property to the redeeming lot owner. If a purchaser fails to comply with this section, the lot owner may file a cause of action against the purchaser and may recover reasonable attorney's fees from the purchaser if the lot owner is the prevailing party in the action. (g) If, before the expiration of the redemption period, the redeeming lot owner fails to record the deed from the foreclosing purchaser

or fails to record an affidavit stating that the lot owner has redeemed the property, the lot owner's right of redemption as against a bona fide purchaser or lender for value expires after the redemption period. (h) The purchaser of the property at the foreclosure sale or a person to whom the person who purchased the property at the foreclosure sale transferred the property may presume conclusively that the lot owner did not redeem the property unless the lot owner files in the real property records of the county in which the property is located: (1) a deed from the purchaser of the property at the foreclosure sale; or (2) an affidavit that: (A) states that the lot owner has redeemed the property; and (B) contains a legal description of the property. (i) If the property owners' association purchases the property at foreclosure, all rent and other income collected by the association from the date of the foreclosure sale to the date of redemption shall be credited toward the amount owed the association under Subsection (d), and if there are excess proceeds, they shall be refunded to the lot owner. If a person other than the association purchases the property at foreclosure, all rent and other income collected by the purchaser from the date of the foreclosure sale to the date of redemption shall be credited toward the amount owed the purchaser under Subsection (e), and if there are excess proceeds, those proceeds shall be refunded to the lot owner. (j) If a person other than the property owners' association is the purchaser at the foreclosure sale, before executing a deed transferring the property to the redeeming lot owner, the purchaser shall obtain an affidavit from the association or its authorized agent stating that all amounts owed the association under Subsection (e) have been paid. The association shall provide the purchaser with the affidavit not later than the 10th day after the date the association receives all amounts owed to the association under Subsection (e). Failure of a purchaser to comply with this subsection does not affect the validity of a redemption by a redeeming lot owner. (k) Property that is redeemed remains subject to all liens and encumbrances on the property before foreclosure. Any lease entered into by the purchaser of property at a sale foreclosing an assessment lien of a property owners' association is subject to the right of redemption provided by this section and the lot owner's right to reoccupy the property immediately after the redemption. (l) If a lot owner makes partial payment of amounts due the association at any time before the redemption period expires but fails to pay all amounts necessary to redeem the property before the redemption period expires, the association shall refund any partial payments to the lot owner by mailing payment to the owner's last known address as shown in the association's records not later than the 30th day after the expiration date of the redemption period. (m) If a lot owner sends by

certified mail, return receipt requested, a written request to redeem the property on or before the last day of the redemption period, the lot owner's right of redemption is extended until the 10th day after the date the association and any third party foreclosure purchaser provides written notice to the lot owner of the amounts that must be paid to redeem the property. (n) After the redemption period and any extended redemption period provided by Subsection (m) expires, the association or third party foreclosure purchaser shall record an affidavit in the real property records of the county in which the property is located stating that the lot owner did not redeem the property during the redemption period or any extended redemption period. (o) The association or the person who purchased the property at the foreclosure sale may file an affidavit in the real property records of the county in which the property is located that states the date the citation was served in a suit under Subsection (a) and contains a legal description of the property. Any person may rely conclusively on the information contained in the affidavit. (p) The rights of a lot owner under this section also apply if the sale of the lot owner's property is conducted by a constable or sheriff as provided by a judgment obtained by the property owners' association. Added by Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

VIII. Restriction Enforcement Defenses

The most common defenses to enforcement of restrictive covenants are the legal concepts of waiver, laches, estoppel and abandonment which center around "unreasonable" delays in enforcement. *E.g. Stergios, supra; Ortiz v. Jeter*, 479 S.W.2d 752 (Tex. Civ. App. -- San Antonio 1972, writ ref'd n.r.e.).

1. **Waiver:** "In order to establish the affirmative defense of waiver in a deed restriction case, the non-conforming user must prove that the violations then existing are so great as to lead the mind of the 'average man' to reasonably conclude that the restriction in question has been abandoned and its enforcement waived". *New Jerusalem Baptist Church, Inc. v. City of Houston*, 598 S.W.2d 666, 669 (Tex. Civ. App. -- Houston [14th Dist.] 1980, no writ) *citing Garden Oaks Board of Trustees, et al. v. Gibbs*, 489 S.W.2d 133 (Tex. Civ. App. -- Houston [1st Dist.] 1972, writ ref'd n.r.e.).

Waiver Factors: "Among the factors to be considered by the 'average man' are the number, nature, and severity of the then existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant." *New Jerusalem Baptist Church, Inc. v. City of Houston*, 598

S.W.2d at 669; *citing Cowling v. Colligan*, 312 S.W.2d 943 (Tex. 1958).

Selective Waiver: The waiver of one restriction does not constitute the waiver of all restrictions. Likewise, a prior violation, if insignificant or insubstantial, does not constitute the waiver of the restriction as applied to a new and greater violation. *Sharpstown Civic Association, Inc. v. Pickett*, 679 S.W.2d 956 (Tex. 1984).

Renewal of Waived Restriction: Once a violation of a restriction ceases, the applicability of the restriction is renewed. *Finkelstein v. Southampton Civic Club*, 675 S.W.2d 271, 278 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.); *New Jerusalem Baptist Church v. City of Houston*, 598 S.W.2d at 669.

2. **Estoppel:** Estoppel has been defined as:

“[t]he effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy. *Finkelstein v. Southampton Civic Club*, 675 S.W.2d at 278; *citing Farmer v. Thompson*, 289 S.W.2d 351 (Tex. Civ. App. -- Fort Worth 1956, writ ref'd n.r.e.).”

3. **Lack of Clean Hands:** In order to obtain injunctive relief, the party seeking such an equitable remedy must come into court with "clean hands". For example, if the party seeking equitable relief has been inconsistent in the application or enforcement of the restriction, or if the association has been discriminatory in its enforcement, the court may deny the association the requested equitable relief. *Foxwood Homeowners Association v. Ricles*, 673 S.W.2d 376, 379 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.).

4. **Statute of Limitations:** Four year statute of limitations applies to assessment collection and restrictions enforcement. *Buzzbee v. Castlewood*, 737 S.W.2d 366 (Tex. App. -- Houston [14th Dist.] 1987, no writ). However, Tex. Civ. Prac. & Rem. Code Ann. § 16.069 (Vernon 1986) may permit a counterclaim or cross claim to recover delinquent assessments if filed not later than the 30th day after the party's answer is due. *Briargrove Park Property Owners, Inc., supra*, 867 S.W.2d at 62-63.

5. **Laches:** Laches is an affirmative defense requiring proof of an unreasonable delay in asserting known legal or equitable rights, and a good faith change of position by the party asserting same to their detriment in reliance upon the delay. Laches generally does not apply if the party asserting same has acted in open and known hostility to the plaintiff's rights and such party has not been misled by the plaintiff's apparent acquiescence. *City of Houston v. Muse*, 788 S.W.2d 419 (Tex. App. -- Houston [1st Dist.] 1990, no writ) (also discussing applicability of laches and statute of limitations when city is enforcing restrictive covenants).

IX. Litigation and Ethical Considerations

A. General Considerations

1. Before you file suit:
 - A. Who is your client?
 - B. Reasonable person test
 - C. Attorney fee awakening
 - D. Collectability analysis
 - E. Board consideration
 - F. Paper trail/evidence and witness check
2. When filing suit
 - A. What if a provision of the governing documents conflicts with the law?
 - B. Check corporate status
 - C. Court analysis
 - D. Realize counterclaim potential
 - E. Mediation complications
3. After suit is filed
 - A. Jury appeal (pictures; remember the little guy; demonstrate board interest)
 - B. Attorney fee dilemma
 - C. Discovery and the pro se defendant
 - D. Counterclaim reaction

4. Judgment and Post-Judgment
 - A. Drafting an enforceable judgment
 - B. Possible appeal
 - C. Post-judgment discovery
 - D. Collection after foreclosure

B. Selected Miscellaneous Litigation Cases

1. (Judgment lien against homestead property). *Matter of Henderson*, 18 F.2d 1305 (5th Cir. 1994). This is a bankruptcy case which addresses the issue of whether a judicial lien should be released from homestead property if the lien is unenforceable. The fifth circuit affirmed the district court's decision that the existence of a judgment lien, although not attaching to exempt homestead property, impairs the property by creating a cloud on the title to the homestead. This decision is important when attempting to collect a monetary judgment against a defendant involving homestead property other than the "homestead" property made the basis of the assessments which resulted in the delinquency.

2. (Insurance defense for association). *Clemons v. State Farm Fire and Casualty Co.*, 879 S.W.2d 385 (Tex. App. -- Houston [14th Dist.] 1994, no writ). Certain homeowners filed suit against other homeowners for violation of restrictions relating to the construction of their house and garage. The plaintiffs alleged that the conduct of the defendants constituted negligence, breach of a fiduciary duty, failure to perform their respective trustee duties and gross negligence. The defendants requested State Farm Lloyds to defend them. After determining that none of the plaintiffs' allegations alleged damages for "property damage" or "bodily injury" as defined by the insurance policies, the insurance company denied the request for a defense and indemnity.

"The duty to defend is determined by the allegations of the third-party petition, considered in light of the policy provisions and without reference to the truth or falsity of the allegations." (Citing *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973). "In considering such allegations, their meaning should be given a liberal interpretation." (Citing *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex. 1965)). "However, if the petition only alleges facts excluded by the policy, then the insurer is not required to defend." (Citing *Fidelity & Guar. Ins. Underwriters v. McManus*, 633 S.W.2d 787, 788 (Tex. 1982)).

3. (Liability for review of ACC plans). *Hubbard, et al. v. Dalbosco*, 888 S.W.2d 224 (Tex. App. -- Houston [1st Dist.] 1994, writ denied per curiam). Two members of the ACC were sued for denying approval of certain construction plans. The defendants were sued under a theory of tortious interference with a contract for telling a prospective builder that they would not approve certain plans. The defendants pleaded the affirmative defense of justification, excuse or privilege to interfere. The trial court rendered the judgment for the plaintiff. The appellate court reversed and rendered judgment that the plaintiff take nothing stating:

A party is privileged to interfere with another's contract when either of the following is true: (1) the interference is done in a bona fide exercise of the interfering party's rights, or (2) the interfering party has an equal or superior interest in the subject matter to that of the other party. The defense of legal justification exists only to protect good faith assertions of legal rights. Even a doubtful claim of a legal right can justify interference with a contract, as long as it asserted a "colorable legal right." (Citations omitted).

4. (Towing liability). *River Oaks Townhomes Owners' Association, Inc. v. Bunt*, 712 S.W.2d 529 (Tex. App. -- Houston [14th Dist.] 1986, writ ref'd n.r.e.). A homeowner was awarded damages against an association for the towing of his two Corvettes in violation of the Texas law which sets forth specific requirements for the towing of vehicles. Before towing any vehicle from association property, all conditions precedent for towing must be met.

5. (Utility cut off for non-payment of assessments). *San Antonio Villa Del Sol Homeowners Association v. Miller*, 761 S.W.2d 460 (Tex. App. -- San Antonio 1988, no writ). In response to an owner's refusal to pay certain assessments and interest, an association partially disconnected the gas and water utilities to an owner's condominium unit. In reversing the trial court's judgment, and upholding the association's authority to terminate the owner's utilities, the appellate court stated:

Clearly, a condominium dweller who does not pay his share of the maintenance fee, admits that the other owners are in essence paying his way, and fails to respond to notice of disconnection is in violation of the meaning and intent of the Bylaws. The Association took appropriate action to abate this condition. Its actions were neither arbitrary nor capricious and fit squarely within the reasonableness standard set out in *Pooser and Raymond*.

Although there is some authority for the termination of utilities (when provided for in the

constituent documents), an association should be cautioned that such self-help remedy has inherent risks and liabilities due to the potential damages which may result if the utilities (i.e., gas, electricity, and water) are disconnected. The disconnecting of access to cable is often an advised less risky alternative.

6. (Joinder of all owners required by declaratory judgment action against association). *Dahl v. Hartman*, 14 S.W.3d 434 (Tex. App. – Houston [14th Dist.] 2000). This case demonstrates a recent trend of lawsuits against associations seeking a declaratory judgment due to alleged errors or improper conduct committed by association boards. So far, most cases have been dismissed due to the failure of the suing homeowner to join all other owners in the suit.

“Dahl, a resident of the subdivision, filed a declaratory judgment action against the Association and the Committee, claiming that the Committee did not properly follow the Texas Property Code in extending the restrictions or forming the POA. He also claimed that portions of Chapter 204 of the Property Code were unconstitutional. The defendants filed a plea in abatement, claiming the 333 real property owners in the community were necessary parties who had not been served. Agreeing, the trial court abated the case and ordered Dahl to serve all affected property owners within ninety days. Dahl failed to comply with this order and the trial court dismissed his case, including his constitutional challenge to the Property Code, without prejudice.”

However, in *Simpson v. Afton Oaks Civic Club, Inc.*, 117 S.W.3d 480 (Tex. App. – Texarkana 2003, writ granted), the Texas Supreme Court has agreed to hear this case and is expected to issue an opinion on whether mandatory joinder of all owners is necessary. In the *Simpson* case, the appellate court held as follows:

. . . there is sound policy behind the mandatory joinder rules. These provisions are designed to avoid a multiplicity of suits, since a declaratory judgment does not prejudice the rights of a person not a party to the proceeding. *See Dahl*, 14 S.W.3d at 436. Although this might be an onerous burden in some cases, there seems to be no alternative for those who seek declaratory judgment relief but to join all those persons “who have or claim any interest that would be affected by the declaration . . .” Tex. Civ. Prac. & Rem. Code Ann. § 37.006(a).

Because we conclude the other property owners are necessary parties to the underlying action and were not joined, we hold the trial court was without jurisdiction. Therefore, this Court is

without jurisdiction and the appeal is dismissed without prejudice.”

Accordingly, we will need to wait and see if the Texas Supreme Court upholds the recent trend of mandatory joinder, or if it determines that individual owners may maintain suits that effect the entire agreement.

C. Conflict Resolution

A. Inspection of Books and Records

In *Burton v. Cravey*, 759 S.W.2d 160 (Tex. App. -- Houston [1st Dist.] 1988, no writ), the court held the right to inspect an association's books and records by members of the association included the association attorney's files and records relating to the association's suit against the members. In *Citizens Association for Sound Energy v. Boltz*, 886 S.W.2d 283 (Tex. App. -- Amarillo 1994, writ denied), the court held the furnishing of a financial statement of the corporation in lieu of the original financial records was not sufficient to satisfy the right to inspect the books and records. The corporation must allow the books and records to be copied at the member's expense. However, in *Leary Cox v. Boudreaux Civic Association, Inc., et al.*, Cause No. 01-90-00657-CV, (Tex. App. -- Houston [1st Dist.] 1991) (not reported), the trial court held that a portion of the association's records were privileged and not subject to discovery based on the attorney-client privilege and the attorney work product doctrine. The appellate court agreed holding that "the right of a member to inspect the corporate records is not absolute." The trial court held that a portion of the association's records were protected from discovery based on the attorney-client privilege and the attorney work product doctrine.

Most association books and records should be open to inspection by its members. *Burton v. Cravey* is probably limited to its facts (the court specifically pointed out it was bound by an unchallenged finding of fact that the attorney's files were books and records of the association). In any event, the cases do indicate the need where possible to spell out confidential or privileged matters in the governing documents and for clear designation and segregation from other books and records of documents falling within those matters. Of course, inspection can also be denied if requested for an "improper purpose." *E.g. Perry v. Perry Brothers, Inc.*, 753 S.W.2d 773 (Tex. App. -- Dallas 1988, no writ) (the jury found demand to inspect the books and records was made in bad faith or for an improper purpose).

Section 209.005 of the Texas Property Code also addresses this issue of Association books and records.

D. Liability Issues

The focus of liability for criminal conduct of third parties is whether the association had the right to control the alleged security defects which led to injury; mere right of control over general operations is not in itself sufficient. *Exxon Corporation v. Tidwell*, 867 S.W.2d 19 (Tex. 1993); rev'd, 816 S.W.2d 455 (Tex. App. -- Dallas 1991).

Many restrictive covenants or other governing documents contain general purposes language to the effect the association is to "promote the health, safety and welfare of its residents." In *Southwest Industries Investment Company v. Greene Home Owners Association, Inc.*, 608 S.W.2d 758, 762 (Tex. App. -- Dallas 1980, no writ), the court held similar language did not impose a duty upon the association to prevent damages to lots from vandalism and theft noting:

"Apparently, Southwest would read the quoted words so as to make the Association treat the assessment as a premium to insure that the residents would be free from theft and vandalism and to assure that the resident's lot, and improvements thereon, would be readily salable. We find that the construction urged by Southwest cannot be supported by any fair reading of the words employed and hold that the construction given by the trial court, as a legal conclusion, was correct and warranted the summary disposition of Southwest's counterclaim."

E. Constitutional Challenges

Increasingly, courts have held community associations must comply with at least minimum constitutional standards. On purely constitutional grounds this requires a finding of "state action". That finding originated in a 1948 United States Supreme Court case which declared judicial enforcement of restrictive racial covenants to be unconstitutional. State action was found to be present because the court system was being used to seek enforcement of the covenant. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

Florida has lead the way in more recent times in extending constitutional due process requirements of notice and opportunity to be heard and equal protection rights to homeowners. *White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346 (Fla. 1979) (holding selective enforcement of restrictions violated due process and equal protection). Cf: *Majestic View Condominium Assoc., Inc. v. Bolotin*, 429 So. 2d 438 (Fla. App. 1983) (condominium association not required by due process clause to hold adversary proceeding before enforcing restrictions). Application of constitutional due process requirements to private

community associations center around the concept of community associations as a form of "quasi-government" or "mini-government." E.g. *Holleman v. Mission Trace Homeowners Association*, 556 S.W.2d 632 (Tex. Civ. App. -- San Antonio 1977, no writ). Florida has also extended constitutional protections of free speech and assembly to homeowners. *Zimmerman v. DCA at Welby, Inc.*, 505 So.2d 1371 (Fla. App. 1987) (holding board rule unreasonably restricted unit owners from inviting public officers or candidates for public office to appear and speak in common areas).

A state district court in Houston recently followed the trend in holding a restriction prohibiting any signs except for sale or for rent signs of a certain size was unconstitutional insofar as it applied to political signs promoting a political candidate, party or issue. *DuBose v. Meyerland Community Improvement Assoc.*, Case No. 94-009758 (Oct. 14, 1994) (the court also awarded plaintiffs over \$33,000.00 attorney's fees, but the court did uphold the sign restriction as to security, commercial or other signs). See also *City of Landue v. Gilleo*, 114 S.Ct. 2038 (1994) (holding city ordinance banning all residential signs except those coming within one of ten exceptions was unconstitutional as a violation of the homeowner's right to free speech).

F. Fair Housing Amendment Act of 1988

Under the Federal Fair Housing Act, "discrimination" is prohibited on the basis of race, color, sex, natural origin and, by way of the 1988 amendment, familial status and handicap status. Under FHAA enforcement of restrictions or other community association actions may be held discriminatory and therefore prohibited if (i) the action or restriction is motivated (in whole or in part) by a discriminatory intent, or (ii) regardless of intent the action or restriction has a discriminatory effect. 42 U.S.C. Section 3604(f)(1) & (2) (West 1994). See also *United States v. Scott*, 788 F. Supp. 1555 (D. Kan. 1992) (finding no discriminatory intent but barring enforcement of restriction due to discriminatory effect). As to the handicapped, FHAA includes in its prohibition against discrimination any "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling . . .". 42 U.S.C. Section 3604(f)(3) (West 1994).

In a typical case involving restrictions, the court held single-family only and prohibition of business or commercial use restrictions could not be enforced under FHAA to prohibit the state of Missouri from operating a group home for six mentally retarded males and two supervisors. The

court stated discriminatory intent was shown because the homeowners continued to oppose the group home even though the state had given the homeowners reasonable assurances it would address the stated concerns of the residents. The court found discriminatory effect because enforcement of such restrictions would force such homes to cluster in non-restricted areas and defeat the state's goal of integrating the mentally ill into society. The court also found the group operated as a functional family and that no adverse impact on real estate values had been shown. The court concluded a reasonable accommodation was available simply by not seeking the enforcement of the restriction. *Martin v. Constance*, 843 F. Supp. 1321 (E.D. Mo. 1994).

FHAA can be enforced either by the Secretary of Housing and Urban Development or by a private person. 42 U.S.C. §§ 3612 & 3613 (West 1994). Penalties for violation of FHAA are severe and a wide range of relief can be granted. These include injunctive relief, actual and punitive damages, civil penalties up to \$50,000.00 and recovery of attorney's fees by a prevailing party other than the United States. 42 U.S.C. §§ 3612(g), (k) & (p) & 3613(c) (West 1994).

A Texas case has broadly recognized the applicability of FHAA. *See Deep East Texas Regional Mental Health & Retardation Services v. Kinnear*, 877 S.W.2d 550 (Tex. App. -- Beaumont 1994, no writ). The Texas Fair Housing Act was also adopted effective September 1, 1993. Tex. Prop. Code Ann. ch. 301 (Vernon 1995).

G. Disputes Between Individual Owners and Disruptive Owners

In every community association, there are always a few people who are never happy with anything the Board of Directors decides to do. These same people often are unable or unwilling to get elected to the Board, and therefore, spend their time and the Association's energy and money in often wasteful and hostile adventures. The law provides some tools for dealing with disruptive owners.

Terrorist Threat. *Neagle v. Texas*, 91 S.W.3d 832 (Tex. App. -- Fort Worth 2002).

"Appellant owned property in the Rolling Hills Shores subdivision in Hood County. In early 1999, the Rolling Hills homeowners' association filed suit against appellant for violating the deed restrictions on his property. On February 13, 1999, appellant attended the monthly meeting of the homeowners' association and expressed anger at the association's legal action against him. Although attendees attempted to explain their actions to appellant, his anger intensified. Appellant then referred to a murder/suicide that

had occurred in the subdivision approximately one year earlier stating that if the suit continued against him, "he would make Martin look like a Sunday school teacher." As a result, appellant was arrested and charged with making a terroristic threat. After a trial, the jury found appellant guilty.

A person makes a terroristic threat if he threatens to commit any offense involving violence to any person or property with the intent to place any person in fear of imminent serious bodily injury. Tex. Penal Code Ann. § 22.07(a)(2) (Vernon 1994). Imminent means "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." Black's Law Dictionary 750 (6th ed. 1990).

Here, eight witnesses testified about the effect appellant's words had on them. Many were afraid that appellant would commit acts similar to those committed by Don Martin. One board member stated that she understood his statements to be a threat on her life and believed that his actions would come relatively soon. Another testified that appellant's remarks terrified her to the point of causing her to stop sleeping in her front bedroom. Yet another board member testified that he believed the appellant would actually shoot him relatively soon. Other members resigned their board positions or discontinued attending meetings after this incident for fear that appellant might carry out his threats.

We conclude that the evidence is both legally and factually sufficient to establish the "imminent" element of the offense."

Defamation. *Double Diamond, Inc. and R. Mike Ward v. Van Tyne*, 109 S.W.3d 848 (Tex. App. -- Dallas 2003):

"Dick Van Tyne is a property owner in White Bluff. Van Tyne became dissatisfied with Double Diamond's and Ward's management of White Bluff. He organized a group of property owners, known as the White Bluff Group Trust, for the purpose of running a slate of candidates, including himself, for election to the association's board of directors. As part of his effort to elect these candidates, Van Tyne prepared three documents criticizing Double Diamond's management and development of the resort: a letter dated April 24, 2000 that was mailed to White Bluff property owners, a letter dated May 14, 2000 that may have been mailed to property owners, and a flier dated May 17, 2000 that was handed out at a property owners' association annual meeting.

Each document contained statements that Double Diamond and Ward contend are defamatory. They sued Van Tyne for defamation

and sought a declaratory judgment as to the truth of the statements and Van Tyne's right to publish derogatory statements about the resort.

We construe the alleged defamatory publication as a whole, in light of the surrounding circumstances, based upon how a person of ordinary intelligence would perceive it. *Id.* A statement may be false, abusive, unpleasant or objectionable to the plaintiff and still not be defamatory in light of the surrounding circumstances. *Durckel v. St. Joseph Hosp.*, 78 S.W.3d 576, 583-84 (Tex. App. – Houston [14th Dist.] 2002, no pet.). The threshold question, then, is whether the complained-of statements are reasonably capable of a defamatory meaning. *Musser v. Smith Protective Servs.*, 723 S.W.2d 653, 655 (Tex. 1987).

Unquestionably, the statement is opinionated criticism. But criticism alone is not necessarily defamatory. *See Durckel v. St. Joseph Hosp.*, 78 S.W.3d at 583-84. The statement made is not so egregious that it tends to impeach Double Diamond's honesty, integrity, virtue, or reputation. And it does not subject Double Diamond to public hatred, contempt, ridicule, or financial injury. We conclude this statement is not defamatory as a matter of law.

We fail to see how a person of ordinary intelligence could attribute a defamatory meaning to this statement, which appears to be true. We conclude this statement is not reasonably capable of a defamatory meaning.”

X. Selected Property Code Chapters

CHAPTER 201. RESTRICTIVE COVENANTS APPLICABLE TO CERTAIN SUBDIVISIONS

§ 201.001. APPLICATION. (a) This chapter applies to a residential real estate subdivision that is located in whole or in part: (1) within a city that has a population of more than 100,000, or within the extraterritorial jurisdiction of such a city; (2) in the unincorporated area of: (A) a county having a population of 2,400,000 or more; or (B) a county having a population of 190,000 or more that is adjacent to a county having a population of 2,400,000 or more; or (3) in the incorporated area of a county having a population of 190,000 or more that is adjacent to a county having a population of 2,400,000 or more. (b) The provisions of this chapter relating to extension of the term of, renewal of, or creation of restrictions do not apply to a subdivision if, by the express terms of the instrument creating existing restrictions, some or all of the restrictions affecting the real property within the subdivision provide: (1) for automatic extensions of the term of the restrictions for an indefinite number of

successive specified periods subject to a right of waiver or termination, in whole or in part, by a specified percentage of less than 50 percent plus one of the owners of real property interests in the subdivision, as set forth in the instrument creating the restrictions; or (2) for an indefinite number of successive extensions of the term of the restrictions by written and filed agreement of a specified percentage of less than 50 percent plus one of the owners of real property interests in the subdivision, as authorized by the instrument creating the restrictions. (c) The provisions of this chapter relating to addition to or modification of existing restrictions do not apply to a subdivision if, by the express terms of the instrument creating the restrictions, the restrictions affecting the real property within the subdivision provide for addition to or modification of the restrictions by written and filed agreement of a specified percentage of less than 75 percent of the owners of real property interests in the subdivision, as set forth in the instrument creating the restrictions. A subdivision is excluded under this subsection regardless of whether a provision in the restrictions requires the consent of the developer of the subdivision or an architectural control committee for an addition to or modification of the restrictions. (d) A residential real estate subdivision that is or was subject to this chapter at any time remains subject to this chapter regardless of a change in circumstances that removes the subdivision from the applicability requirements of Subsection (a). Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 712, § 2, eff. June 18, 1987; Acts 1989, 71st Leg., ch. 556, § 1, eff. June 14, 1989; Acts 1991, 72nd Leg., ch. 821, § 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 451, § 1, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 451, § 2, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 1127, § 1, eff. Sept. 1, 1999.

§ 201.002. FINDINGS AND PURPOSE. (a) The legislature finds that: (1) the pending expiration of property restrictions applicable to real estate subdivisions in municipalities and in the extraterritorial jurisdiction area of municipalities where there is no zoning creates uncertainty in living conditions and discourages investments in affected subdivisions; (2) owners of land in affected subdivisions are reluctant or unable to provide proper maintenance, upkeep, and repairs of structures because of the pending expiration of the restrictions; (3) financial institutions cannot or will not lend money for investments, maintenance, upkeep, or repairs in affected subdivisions; (4) these conditions cause dilapidation of housing and other structures and cause unhealthful and unsanitary conditions in affected subdivisions, contrary to the health, safety, and welfare of the citizens; and (5) the existence of racial covenants in subdivisions, regardless of their unenforceability, is offensive,

repugnant, and harmful to members of racial or ethnic minority groups, and public policy requires that these covenants be deleted. (b) The purpose of this chapter is to provide a procedure for extending the term of, creation of, additions to, or modification of restrictions and to provide for the removal of any restriction or other provision relating to race, religion, or national origin that is void and unenforceable under either the United States Constitution or Section 5.026. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985.

§ 201.003. DEFINITIONS. In this chapter: (1) "Restrictions" means one or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the county real property records, map records, or deed records. (2) "Residential real estate subdivision" or "subdivision" means: (A) all land encompassed within one or more maps or plats of land that is divided into two or more parts if the maps or plats cover land within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land encompassed within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; or (B) all land located within a city, town, or village, or within the extraterritorial jurisdiction of a city, town, or village that has been divided into two or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county. (3) "Owner" means an individual, fiduciary, partnership, joint venture, corporation, association, or other entity that owns record title to real property in a subdivision, or the personal representative of an individual who owns record title to subdivision property. (4) "Petition" means one or more instruments, however designated or entitled, by which one or more of the purposes authorized by this chapter are sought to be accomplished. (5) "Real property records" means the applicable records of a county clerk in which conveyances of real property are recorded. (6) "Lienholder" means an individual, corporation, financial institution, or other entity that holds a vendor's or deed of trust lien secured by land within the subdivision. (7) "Petition committee" or "committee" means a group of three or more owners who file with the county clerk a notice as required by Section 201.005(a) and who prepare and circulate a petition as allowed under this chapter. Added by Acts 1985, 69th Leg., ch. 309,

§ 1, eff. Sept. 1, 1985. Amended by Acts 1991, 72nd Leg., ch. 822, § 2, eff. Sept. 1, 1991.

§201.004. EXTENSION, RENEWAL, CREATION, MODIFICATION OF, OR ADDITION TO, RESTRICTIONS. (a) A petition may be filed under this chapter to extend or renew an unexpired restriction, to create a restriction, or to add to or modify an existing restriction. (b) A petition is not effective to extend, renew, create, add to, or modify a restriction unless the petition is filed with the county clerk's office in the county where the subdivision is located before the second anniversary of the date the committee files with the county clerk the notice required by Section 201.005(a). (c) If a petition meeting the requirements of this chapter is filed with the county clerk within the required period, the provisions of the petition extending, renewing, creating, adding to, or modifying a restriction apply to and burden all of the property in the subdivision except property excluded under Section 201.009. If a petition contains provisions extending or renewing the term of a restriction, the petition may provide for an initial extension or renewal period of not more than 10 years and additional automatic extensions of the term for not more than 10 years each. The extension, renewal, creation, or modification of, or addition to, a restriction takes effect on the later of the dates the petition is filed with the county clerk or a date specified in the petition. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985. Amended by Acts 1991, 72nd Leg., ch. 822, § 3, eff. Sept. 1, 1991.

§201.005. PETITION COMMITTEE. (a) At least three owners may form a petition committee. The committee shall file written notice of its formation with the county clerk of each county in which the subdivision is located. (b) A notice filed under this chapter must contain: (1) a statement that a petition committee has been formed for the extension of the term of, creation of, addition to, or modification of one or more restrictions; (2) the name and residential address of each member of the committee; (3) the name of the subdivision to which the restrictions apply and a reference to the real property records or map or plat records where the instrument or instruments that contain the restrictions sought to be extended, added to, or modified are recorded or, if the creation of a restriction is proposed, a reference to the place where the map or other document, if any, is recorded; (4) a general statement of the matters to be included in the petition; (5) if the creation of a restriction for a subdivision is proposed, a copy of the proposed petition creating the restriction; and (6) if the amendment or modification of a restriction is proposed, a copy of the proposed instrument creating the amendment or modification, containing the original restriction that is affected and indicating by appropriate

deletion and insertion the change to the restriction that is proposed to be amended or modified. (c) Each member of the committee must sign and acknowledge the notice before a notary or other official authorized to take acknowledgments. (d) The county clerk shall enter on the notice the date it is filed and record it in the real property records of the county. (e) An individual's membership on the committee terminates if the individual ceases to own land in the subdivision. If a vacancy on the committee occurs, either because a member ceases to own land in the subdivision or because a member resigns or dies, a majority of the remaining members may appoint as a successor an individual who owns land in the subdivision and who consents to serve as a committee member. If one or more successor committee members are appointed, the surviving committee members shall file written notice of the name and address of each successor committee member with the county clerk not later than the 10th day after the date of the appointment. (f) After August 31, 1989, only one committee in a subdivision may file to operate under this chapter at one time. Before September 1, 1989, there is no limit on the number of committees in a subdivision with power to act under this chapter at one time. If more than one committee in a subdivision files a notice after August 31, 1989, the committee that files its notice first is the committee with the power to act. A committee that does not effect a successful petition within the time provided by this chapter is dissolved by operation of law. Except as provided by Section 201.006(c), a new committee for that subdivision may not be validly created under this chapter before the fifth anniversary of the date of dissolution of the previous committee. A petition circulated by a dissolved committee is ineffective for any of the purposes of this chapter. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 712, § 3, eff. June 18, 1987.

§ 201.0051. SPECIAL PETITION APPROVAL REQUIRED FOR CERTAIN RESTRICTIONS. A right created or an obligation imposed by an existing restriction that relates to the developer of the subdivision or an architectural control committee established by the instrument creating the restriction cannot be altered unless the person who has the right or obligation signs and acknowledges the petition. Added by Acts 1997, 75th Leg., ch. 451, § 3, eff. Sept. 1, 1997.

§ 201.006. PETITION PROCEDURE. (a) A petition may be circulated, signed, acknowledged, and filed by or on behalf of owners at any time during the circulating committee's existence. The petition must conform to the requirements of Section 201.007. (b) The petition may be filed not later than one year after the date on which the notice required by Section 201.005(a) is filed. The

petition must be signed and acknowledged by owners who own, in the aggregate: (1) a majority of the total number of lots in the subdivision, in order to extend, renew, or create restrictions; (2) a majority of the total number of separately owned parcels, tracts, or building sites in the subdivision, whether or not the parcels, tracts, or building sites contain part or all of one or more platted lots or combinations of lots, in order to extend, renew, or create restrictions; (3) a majority of the square footage within all of the lots in the subdivision, excluding any area dedicated or used exclusively for roadways or public purposes or by utilities, in order to extend, renew, or create restrictions; (4) at least 75 percent of the total number of lots in the subdivision, in order to modify or add to existing restrictions; (5) at least 75 percent of the total number of separately owned parcels, tracts, or building sites in the subdivision, whether or not the parcels, tracts, or building sites contain part or all of one or more platted lots or combination of lots, in order to modify or add to existing restrictions; or (6) at least 75 percent of the square footage within all of the lots in the subdivision, excluding any area dedicated or used exclusively for roadways or public purposes or by utilities, in order to modify or add to existing restrictions. (c) If, after August 31, 1988, a court of competent jurisdiction holds any provision of a restrictive covenant affecting a subdivision to which this chapter applies invalid, a petition committee authorized by this chapter may file a petition not later than one year after the date on which the judgment is rendered. For this purpose, the five-year limitation period in Section 201.005(f) does not apply. (d) The petition is effective if signed and acknowledged by the required number of owners of any one of the classifications of property specified in Subsection (b) and is filed as provided by Subsection (f). (e) After an owner signs a petition, the fact that the owner subsequently conveys the land in the subdivision does not affect the previous signing of the petition. (f) The petition must be filed with the county clerk of each county in which the subdivision is located. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 712, § 4, eff. June 18, 1987; Acts 1991, 72nd Leg., ch. 822, § 4, eff. Sept. 1, 1991.

§ 201.007. CONTENTS OF PETITION. (a) A petition filed under this chapter must contain or be supplemented by one or more instruments containing: (1) the name of the subdivision; (2) a reference to the real property records or map or plat records where the instrument or instruments that contain any restriction sought to be extended, added to, or modified are recorded or, in the case of the creation of a restriction, a reference to the place where the map or other document identifying the subdivision is recorded; (3) a

verbatim statement of any provisions for extension of the term of, or addition to, the restriction; (4) if a restriction is being amended or modified, the text of the proposed instrument creating the amendment or modification, together with a comparison of the original restriction that is affected indicating by appropriate deletion and insertion the change to the restriction that is proposed to be amended or modified; (5) if a restriction is being created, the text of the proposed instrument creating the restriction; (6) original acknowledged signatures of the required number of owners as provided by Section 201.006; (7) alternate boxes, clearly identified in a conspicuous manner next to the place for signing the petition, that enable each record owner to mark the appropriate box to show the exercise of the owner's option of either including or excluding the owner's property from being burdened by the restrictions being extended, created, added to, or modified; (8) a statement that owners who do not sign the petition must file suit under Section 201.010 before the 181st day after the date on which the certificate called for by Section 201.008(e) is filed in order to challenge the procedures followed in extending, creating, adding to, or modifying a restriction; and (9) a statement that owners who do not sign the petition may delete their property from the operation of the extended, created, added to, or modified restriction by filing a statement described in the fourth listed category in Section 201.009(b) before one year after the date on which the owner receives actual notice of the filing of the petition authorized by this chapter. (b) If a restriction being added to, modified, or extended contains any provision relating to race, religion, or national origin that is void and unenforceable under either the United States Constitution or Section 5.026, the void and unenforceable restriction shall, by the provisions of the petition, be declared to be deleted from the restriction as if the provision had never been contained in the restriction. (c) Each petition filed under this chapter must contain an assertion from the signing owners that they own record title to property within the subdivision, and the legal description and street address of the property of each signing owner must be shown beside or above the signature. If there is more than one record owner of a tract, each record owner must sign the petition before the property can be counted as a part of the number required by Section 201.006. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985.

§ 201.008. NOTICE AND CERTIFICATE OF COMPLIANCE. (a) Not later than the 60th day after the date on which a petition that meets the requirements of this chapter is filed, the committee shall give notice directed to all persons who then are record owners of property in the subdivision. The notice must contain: (1) the name of the subdivision covered by the petition;

(2) a copy of the petition; (3) a statement that the proper number of property owners in the subdivision have signed and acknowledged the petition; and (4) the date the petition was filed with the county clerk. (b) Except as provided by Subsection (d), the notice required by Subsection (a) must be: (1) published once a week for two consecutive weeks in a newspaper of general circulation in the county or counties where the subdivision is located; and (2) sent by certified mail, return receipt requested, to each person who owned land in the subdivision as of the date the notice is given, excluding the owners of land dedicated for public use or for use by utilities. (c) If the committee acts in good faith in determining ownership and giving notice as required by this section, the failure to give personal notice to an owner does not affect the application of an extension, modification, or creation of, or addition to, a restriction under this chapter to the property of a person who signed the petition. (d) Instead of the information required by Subsection (a)(2), a notice published as required by Subsection (b)(1) may contain a general description of the purpose and effect of the petition. (e) On compliance with the notice requirements of this section, a majority of the members of the committee shall execute a certificate of compliance and file the certificate with the county clerk of each county where the subdivision is located. (f) The county clerk of each county shall record the certificate in the real property records of the county. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985.

§ 201.009. PROPERTY WITHIN SUBDIVISION NOT AFFECTED BY PETITION. (a) The procedures called for under this chapter are considered complete and regular in all respects unless challenged by a declaratory judgment suit under Section 201.010. (b) A restriction added, modified, created, or extended under this chapter does not affect or encumber property within the subdivision that is included within one of the following categories: (1) property exclusively dedicated for use by the public or for use by utilities; (2) property of an owner who elected in the petition to exclude the property from the restriction; (3) property of an owner who did not sign the petition and has not received actual notice of the filing of the petition; (4) property of an owner who did not sign the petition and who files, before one year after the date on which the owner received actual notice of the filing of the petition, an acknowledged statement describing the owner's property by reference to the recorded map or plat of the subdivision and stating that the owner elects to have the property deleted and excluded from the operation of the extended, modified, changed, or created restriction; and (5) property owned by a minor or a person judicially declared to be incompetent at the time the certificate is filed, unless: (A) actual notice of the filing of the petition is given to a guardian of the minor or

incompetent person, and the guardian has not filed the statement described in the fourth listed category in this subsection; (B) a predecessor in title to the minor or incompetent person signed a petition that was filed while the property was owned by the predecessor; or (C) the incompetent person signed a petition that was filed before the judicial declaration of the person's incompetency. (c) The county clerk shall file a statement described in the fourth listed category in Subsection (b) in the same manner as the petition and certificate. Substantial compliance by an owner with the requirements for the statement prevents the owner's property from being burdened by an extended, created, added to, or modified restriction if the statement is filed within the time required. (d) A lienholder whose lien was established before the effective date of a petition is not bound by the petition unless the lienholder signs it and it is later filed. If such a lienholder who does not sign the filed petition later acquires title to the property in the subdivision through foreclosure, the acquisition is free of the restrictions added, modified, created, or extended by the petition. However, if any other person acquires the title to the property at a foreclosure sale, that person takes the property subject to the restriction added, modified, created, or extended by the petition, if any prior owner of the foreclosed property signed and acknowledged the petition. (e) Notwithstanding any other provision of this chapter, property that is excluded in any manner from the operation of restrictions that are modified, added to, or created by a petition under this chapter is, unless the petition expressly provides otherwise, subject to those restrictions, if any, affecting the excluded property as the restrictions existed immediately before the effective date of the petition, and those restrictions are continued in effect to the extent originally applicable to the excluded property. After the filing of such a petition, those restrictions may be added to, modified, or extended by a specified percentage of the owners of real property interests in accordance with this chapter or the instruments evidencing the restrictions as they existed immediately before the effective date of the petition, if otherwise still applicable. Any petition filed under this chapter that creates, adds to, or modifies restrictions may provide for the subsequent addition to or extension, creation, or modification of, the resulting restrictions by a specified percentage of the owners of real property interests in the subdivision as set forth in the instruments evidencing the continued restrictions. This subsection does not abrogate, alter, affect, or impair the rights of a lienholder under Subsection (d) to not be bound by a petition adopted under this chapter when the lienholder subsequently acquires title to the excluded property through foreclosure. Added by Acts 1985, 69th Leg., ch.

309, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 712, § 5, eff. June 18, 1987.

§ 201.010. ACTION AND LIMITATIONS OF REMEDIES. (a) If an owner and the owner's predecessors in interest neither signed the petition nor filed the statement described in the fourth listed category in Section 201.009(b), the owner may file a suit for declaratory judgment in a court of competent jurisdiction: (1) to challenge the completeness or regularity of the procedures leading to the recordation of a certificate, if the suit is filed before the 181st day after the date on which the certificate is filed with the county clerk; or (2) to exclude the owner's property from the operation of the extended, modified, added to, or created restriction. (b) A suit for a declaratory judgment must name as defendants the final members of the petition committee who are owners of property in the subdivision at the time of the filing of the suit. In addition, a suit for a declaratory judgment must name all other owners of property in the subdivision as defendants, either as individuals or as members of a class. (c) An owner who files a suit for the second listed purpose in Subsection (a) is entitled to relief only if the owner pleads and establishes that the conditions of land use within the subdivision at the time the certificate was filed were incompatible with the restriction. As an alternative to excluding a specific parcel of land from the operation of the restriction, a court may alter the restriction as it applies to the parcel to better conform to the incompatible conditions. (d) The remedies in this section are exclusive of all others in actions brought to challenge a restriction extended, modified, added to, or created under this chapter. The filing of an action for the first listed purpose in Subsection (a) does not prevent the restriction from taking effect in accordance with its terms pending a final judgment. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985.

§ 201.011. PROHIBITION OF CLAIM OF LACK OF MUTUALITY. If a petition procedure is completed under this chapter, the owners of property within the subdivision whose property is covered by the petition may not raise in any judicial proceeding the issue that the restrictions added, modified, created, or extended under this chapter are not enforceable on the grounds that the restrictions are not applicable to all of the property in the subdivision. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985.

§ 201.012. MULTIPLE FILING; COMPUTATION OF FILING DATE. For purposes of this chapter, an instrument required to be filed with the clerk of more than one county is considered filed on the date on which the last

required filing is made. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985.

§ 201.013. CUMULATIVE EFFECT. The procedure prescribed by this chapter for adding to, modifying, creating, or extending the term of a restriction is cumulative and not in lieu of other methods of adding to, modifying, creating, or extending a restriction. Added by Acts 1985, 69th Leg., ch. 309, § 1, eff. Sept. 1, 1985.

CHAPTER 202. CONSTRUCTION AND ENFORCEMENT OF RESTRICTIVE COVENANTS

§ 202.001. DEFINITIONS. In this chapter: (1) "Dedictory instrument" means each governing instrument covering the establishment, maintenance, and operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association, to properly adopted rules and regulations of the property owners' association, or to all lawful amendments to the covenants, bylaws, instruments, rules, or regulations. (2) "Property owners' association" means an incorporated or unincorporated association owned by or whose members consist primarily of the owners of the property covered by the dedicatory instrument and through which the owners, or the board of directors or similar governing body, manage or regulate the residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development. (3) "Petition" means one or more instruments, however designated or entitled, by which one or more actions relating to restrictive covenants are sought to be accomplished. (4) "Restrictive covenant" means any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative. Added by Acts 1987, 70th Leg., ch. 712, § 1, eff. June 18, 1987.

§ 202.002. APPLICABILITY OF CHAPTER. (a) This chapter applies to all restrictive covenants regardless of the date on which they were created. (b) This chapter does not affect the requirements of the Community Homes for Disabled Persons Location Act (Article 1011n, Vernon's Texas Civil Statutes). Added by Acts 1987, 70th Leg., ch. 712, § 1, eff. June 18, 1987.

§ 202.003. CONSTRUCTION OF RESTRICTIVE COVENANTS. (a) A restrictive covenant shall be liberally construed to give effect to its purposes and intent. (b) In this subsection, "family home" is a residential home that meets the definition of

and requirements applicable to a family home under the Community Homes for Disabled Persons Location Act (Article 1011n, Vernon's Texas Civil Statutes). A dedicatory instrument or restrictive covenant may not be construed to prevent the use of property as a family home. However, any restrictive covenant that applies to property used as a family home shall be liberally construed to give effect to its purposes and intent except to the extent that the construction would restrict the use as a family home. Added by Acts 1987, 70th Leg., ch. 712, § 1, eff. June 18, 1987.

§ 202.004. ENFORCEMENT OF RESTRICTIVE COVENANTS. (a) 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. (b) A property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument. (c) A court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed \$200 for each day of the violation. Added by Acts 1987, 70th Leg., ch. 712, § 1, eff. June 18, 1987.

§ 202.005. WITHDRAWAL OF SIGNATURE. (a) A signature may be withdrawn from a petition authorized to be filed in connection with terminating restrictive covenants, as provided by this section. (b) To withdraw a signature, the signer must request that the signature be withdrawn. (c) To be effective, a withdrawal request must: (1) be in writing and be signed and acknowledged by the signer of the petition; (2) be filed with the authority with whom the petition is required to be filed not later than the day before the petition filing deadline, if any; and (3) be delivered in the form of a copy of the request to the circulator of the petition not later than the date the request is filed or by the effective date of this chapter, whichever is later. (d) A withdrawal request or copy filed or delivered by mail is considered to be filed or delivered at the time of its receipt by the appropriate person. (e) The filing of an effective withdrawal request nullifies the signature on the petition and places the signer in the same position as if the signer had not signed the petition. Added by Acts 1987, 70th Leg., ch. 712, § 1, eff. June 18, 1987.

§ 202.006. PUBLIC RECORDS. A property owners' association shall file the dedicatory instrument in the real property records of each

county in which the property to which the dedicatory instrument relates is located. Added by Acts 1999, 76th Leg., ch. 1420, § 2, eff. Sept. 1, 1999.

§ 202.007. CERTAIN RESTRICTIVE COVENANTS PROHIBITED. (a) A property owners' association may not include or enforce a provision in a dedicatory instrument that prohibits or restricts a property owner from: (1) implementing measures promoting solid-waste composting of vegetation, including grass clippings, leaves, or brush, or leaving grass clippings uncollected on grass; (2) installing rain barrels or a rainwater harvesting system; or (3) implementing efficient irrigation systems, including underground drip or other drip systems. (b) A provision that violates Subsection (a) is void. (c) A property owners' association may restrict the type of turf used by a property owner in the planting of new turf to encourage or require water-conserving turf. (d) This section does not: (1) restrict a property owners' association from regulating the requirements, including size, type, shielding, and materials, for or the location of a composting device, rain barrel, rain harvesting device, or any other appurtenance if the restriction does not prohibit the economic installation of the device or appurtenance on the property owner's property where there is reasonably sufficient area to install the device or appurtenance; (2) require a property owners' association to permit a device or appurtenance described by Subdivision (1) to be installed in or on property: (A) owned by the property owners' association; (B) owned in common by the members of the property owners' association; or (C) in an area other than the fenced yard or patio of a property owner; (3) prohibit a property owners' association from regulating the installation of efficient irrigation systems, including establishing visibility limitations for aesthetic purposes; (4) prohibit a property owners' association from regulating the installation or use of gravel, rocks, or cacti; or (5) restrict a property owners' association from regulating yard and landscape maintenance if the restrictions or requirements do not restrict or prohibit turf or landscaping design that promotes water conservation. (e) This section does not apply to a property owners' association that: (1) is located in a municipality with a population of more than 175,000 that is located in a county in which another municipality with a population of more than one million is predominantly located; and (2) manages or regulates a development in which at least 4,000 acres of the property is subject to a covenant, condition, or restriction designating the property for commercial use, multifamily dwellings, or open space. Added by Acts 2003, 78th Leg., ch. 1024, § 1, eff. Sept. 1, 2003.

CHAPTER 206.
EXTENSION OF RESTRICTIONS IMPOSING

REGULAR ASSESSMENTS IN CERTAIN
SUBDIVISIONS

§ 206.001. DEFINITIONS. In this chapter: (1) "Community association" means an incorporated association created to enforce restrictions. (2) "Dedicatory instrument" and "restrictive covenant" have the meanings assigned by Section 202.001. (3) "Lienholder," "owner," "real property records," "residential real estate subdivision," and "restrictions" have the meanings assigned by Section 201.003. (4) "Regular assessment" means an assessment, charge, fee, or dues that each owner is required to pay to the community association on a regular basis and that is to be used by the association for the benefit of the subdivision in accordance with the original, extended, added, or modified restrictions. Added by Acts 1997, 75th Leg., ch. 1249, § 1, eff. Sept. 1, 1997.

§ 206.002. APPLICABILITY OF CHAPTER. This chapter applies only to: (1) a residential real estate subdivision that: (A) consists of at least 4,600 homes; (B) is located in whole or in part in a municipality with a population of more than 1.6 million located in a county with a population of 2.8 million or more; and (C) has restrictions the terms of which are automatically extended but has a regular assessment that is established by a separate document that permits the assessment to expire and does not provide for extension of the term of the assessment; or (2) a residential real estate subdivision that: (A) consists of at least 750 homes; (B) is located in two adjacent municipalities in a county with a population of 2.8 million or more; and (C) has use restrictions the terms of which are automatically extended but has a regular assessment that is established by two separate documents that permit the assessment to expire and do not provide for extension of the term of the assessment. Added by Acts 1997, 75th Leg., ch. 1249, § 1, eff. Sept. 1, 1997. Amended by Acts 2001, 77th Leg., ch. 597, § 1, eff. Sept. 1, 2001.

§ 206.003. EXTENSION OF RESTRICTION IMPOSING REGULAR ASSESSMENT. (a) A community association may approve and submit to a vote of the owners an extension of a restriction imposing a regular assessment. (b) The extension of a restriction imposing a regular assessment is approved if a majority of the owners in the subdivision who vote on the issue in accordance with Section 206.004 vote in favor of the extension. (c) An extension approved in accordance with this section and Section 206.004 applies to all real property in the subdivision, including residential and commercial property. (d) A document certifying that a majority of the owners voting on the issue approved the extension of the restriction must be recorded in the real property records of the county in which the

subdivision is located. Added by Acts 1997, 75th Leg., ch. 1249, § 1, eff. Sept. 1, 1997.

§ 206.004. METHOD OF VOTING. (a) An extension of a restriction that imposes a regular assessment must be voted on: (1) by a written ballot that states the substance of the amendment extending the restriction and specifies the date by which the community association must receive a ballot for the ballot to be counted; or (2) at a meeting of the property owners in the subdivision. (b) The community association shall provide for mailing to each owner, as applicable: (1) the ballot under Subsection (a)(1); or (2) notice of the meeting under Subsection (a)(2) that states the purpose of the meeting. (c) In conjunction with a vote by ballot or at a meeting under Subsection (a), the community association may provide for circulation of a petition in the subdivision. (d) The vote of multiple owners of a property may be reflected by the signature or vote of one of the owners. (e) The community association shall record a copy of the ballot or petition in the real property records in the county in which the subdivision is located prior to submission of the extension to a vote of the owners. Added by Acts 1997, 75th Leg., ch. 1249, § 1, eff. Sept. 1, 1997.

CHAPTER 207. DISCLOSURE OF INFORMATION BY PROPERTY OWNERS' ASSOCIATIONS

§ 207.001. DEFINITIONS. In this chapter: (1) "Restrictions" has the meaning assigned by Section 201.003. (2) "Dedictory instrument," "property owners' association," and "restrictive covenant" have the meanings assigned by Section 202.001. (3) "Owner" means a person who owns record title to property in a subdivision or the personal representative of an individual who owns record title to property in a subdivision. (4) "Regular assessment" and "special assessment" have the meanings assigned by Section 204.001. (5) "Resale certificate" means a written statement issued, signed, and dated by an officer or authorized agent of a property owners' association that contains the information specified by Section 207.003(b). (6) "Subdivision" means all land that has been divided into two or more parts and that is or was burdened by restrictions limiting at least the majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county. Added by Acts 1999, 76th Leg., ch. 1198, § 1, eff. Sept. 1, 1999.

§207.002. APPLICABILITY. This chapter applies to a subdivision with a property owners' association that is entitled to levy regular or

special assessments. Added by Acts 1999, 76th Leg., ch. 1198, § 1, eff. Sept. 1, 1999.

§ 207.003. DELIVERY OF SUBDIVISION INFORMATION TO OWNER. (a) Not later than the 10th day after the date a written request for subdivision information is received from an owner, owner's agent, or title insurance company or its agent acting on behalf of the owner, the property owners' association shall deliver to the owner, owner's agent, or title insurance company or its agent: (1) a current copy of the restrictions applying to the subdivision; (2) a current copy of the bylaws and rules of the property owners' association; and (3) a resale certificate that complies with Subsection (b). (b) A resale certificate under Subsection (a) must contain: (1) a statement of any right of first refusal or other restraint contained in the restrictions or restrictive covenants that restricts the owner's right to transfer the owner's property; (2) the frequency and amount of any regular assessments; (3) the amount of any special assessment that is due after the date the resale certificate is prepared; (4) the total of all amounts due and unpaid to the property owners' association that are attributable to the owner's property; (5) capital expenditures, if any, approved by the property owners' association for the property owners' association's current fiscal year; (6) the amount of reserves, if any, for capital expenditures; (7) the property owners' association's current operating budget and balance sheet; (8) the total of any unsatisfied judgments against the property owners' association; (9) the style and cause number of any pending lawsuit in which the property owners' association is a defendant; (10) a copy of a certificate of insurance showing the property owners' association's property and liability insurance relating to the common areas and common facilities; (11) a description of any conditions on the owner's property that the property owners' association board has actual knowledge are in violation of the restrictions applying to the subdivision or the bylaws or rules of the property owners' association; (12) a summary or copy of notices received by the property owners' association from any governmental authority regarding health or housing code violations existing on the preparation date of the certificate relating to the owner's property or any common areas or common facilities owned or leased by the property owners' association; (13) the amount of any administrative transfer fee charged by the property owners' association for a change of ownership of property in the subdivision; (14) the name, mailing address, and telephone number of the property owners' association's managing agent, if any; and (15) a statement indicating whether the restrictions allow foreclosure of a property owners' association's lien on the owner's property for failure to pay assessments. (c) A property owners' association may charge a

reasonable fee to assemble, copy, and deliver the information required by this section and may charge a reasonable fee to prepare and deliver an update of a resale certificate. (d) The property owners' association shall deliver the information required by Subsection (a) to the person specified in the written request. A written request that does not specify the name and location to which the information is to be sent is not effective. The property owners' association may deliver the information required by Subsection (a) and any update to the resale certificate by mail, hand delivery, or alternative delivery means specified in the written request. (e) Unless required by a dedicatory instrument, neither a property owners' association or its agent is required to inspect a property before issuing a resale certificate or an update to a resale certificate. Added by Acts 1999, 76th Leg., ch. 1198, § 1, eff. Sept. 1, 1999.

§ 207.004. OWNER'S REMEDIES FOR FAILURE BY PROPERTY OWNERS' ASSOCIATION TO TIMELY DELIVER INFORMATION. (a) If a property owners' association does not timely deliver information in accordance with Section 207.003, the owner, owner's agent, or title insurance company or its agent acting on behalf of the owner may submit a second request for the information. (b) If a property owners' association fails to deliver the information required under Section 207.003 before the seventh day after the second request for the information was mailed by certified mail, return receipt requested, or hand delivered, evidenced by receipt, the owner: (1) may seek one or any combination of the following: (A) a court order directing the property owners' association to furnish the required information; (B) a judgment against the property owners' association for not more than \$500; (C) a judgment against the property owners' association for court costs and attorney's fees; or (D) a judgment authorizing the owner or the owner's assignee to deduct the amounts awarded under Paragraphs (B) and (C) from any future regular or special assessments payable to the property owners' association; and (2) may provide a buyer under contract to purchase the owner's property an affidavit that states that the owner, owner's agent, or title insurance company or its agent acting on behalf of the owner made, in accordance with this chapter, two written requests to the property owners' association for the information described in Section 207.003 and that the association did not timely provide the information. (c) If the owner provides a buyer under contract to purchase the owner's property an affidavit in accordance with Subsection (b)(2): (1) the buyer, lender, or title insurance company or its agent is not liable to the property owners' association for: (A) any money that is due and unpaid to the property owners' association on the date the affidavit was prepared; and (B) any debt to the property owners'

association or claim by the property owners' association that accrued before the date the affidavit was prepared; and (2) the property owners' association's lien to secure the amounts due the property owners' association on the owner's property on the date the affidavit was prepared shall automatically terminate. Added by Acts 1999, 76th Leg., ch. 1198, § 1, eff. Sept. 1, 1999.

§ 207.005. EFFECT OF RESALE CERTIFICATE; LIABILITY. (a) A property owners' association may not deny the validity of any statement in the resale certificate. The property owners' association's lien to secure undisclosed amounts due the property owners' association on the date the resale certificate is prepared shall automatically terminate as a lien securing the undisclosed amount. A buyer, buyer's agent, owner, owner's agent, lender, and title insurance company and its agent are not liable for any debt or claim existing on the preparation date of the resale certificate that is not disclosed in the resale certificate. (b) A resale certificate does not affect: (1) the right of a property owners' association to recover debts or claims that arise or become due after the date the resale certificate is prepared; or (2) a lien on a property securing payment of future assessments held by the property owners' association. (c) The owner's agent and the title insurance company and its agent are not liable to a buyer for any delay or failure by the property owners' association in delivering the information required by Section 207.003. (d) Except as provided by Section 207.004, the property owners' association is not liable to an owner selling property in the subdivision for delay or failure to deliver the information required by Section 207.003. An officer or agent of the property owners' association is not liable for a delay or failure to furnish a resale certificate. Added by Acts 1999, 76th Leg., ch. 1198, § 1, eff. Sept. 1, 1999.