



**“ASSIGNMENT OF DECLARANT RIGHTS AND
COMMON AREA DEEDS”**

State Bar of Texas
24th Annual
ADVANCED REAL ESTATE DRAFTING COURSE
March 7-8, 2013
Houston, Texas

CHAPTER 20

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DISCLAIMER

This article is not intended to be relied upon as a final analysis in resolving legal questions regarding the assignment of declarant rights and conveyance of common areas to community associations. The information presented herein is intended to identify some of the issues surrounding this matter. Due to the summary nature of the article, the level of detail necessary for a proper legal analysis of any particular situation cannot be reached. There is no substitute for a thorough review of the relevant statutes and cases of a particular jurisdiction and the facts of a particular case by an experienced and competent attorney.

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“ASSIGNMENT OF DECLARANT RIGHTS AND COMMON AREA DEEDS”

I. SCOPE

The scope of this paper is to summarize the assignment of declarant rights and conveyance of title from declarant to community associations, rather than to present a complete analysis of the law as it relates to these topics. The areas to be discussed apply to single family homes and townhomes. This article uses the terms “declarant” and “developer” interchangeably. Additionally, references to the term “common area” is used as a generic term to include landscape, open space, detention reserves, as well as recreational facilities and other subdivision amenities and facilities.

II. THE DEVELOPMENT PROCESS

The 82nd legislative session resulted in sweeping changes to community association law. There were 5,796 bills filed, 1,379 (24%) of which were passed. There were approximately 140 community association bills filed, 19 (13.5%) were passed, 5 of which were bracketed. The stated purpose behind much of the legislation was to encourage transparency in the governing of community associations. The new legislation also addressed developer control issues regardless of the provisions in the governing documents. This practitioner has identified some drafting traps related to existing provisions in governing documents. Where possible, drafting tips are suggested for addressing these traps.

The assignment of declarant rights and title to common areas are typically addressed by developers as they approach the end of the development of the community. While wrapping up developer control is essential to successful completion of the development of a community, thought should be given to the process at the first steps of the development process. There are advantages to partially assigning declarant rights and divesting the declarant of title to common areas during the development process. Rights and procedures to accomplish such assignment and transfer of title facilitate the process if they are adequately addressed in the restrictive covenants encumbering the community. Each community is different and unique, not just in size, but in the extent of common area, and length of development period. However, the issues are surprisingly similar regardless of whether the community is very small or a very large master planned subdivision.

Many developers and homeowners find themselves embroiled in great controversy surrounding the transition of the control of a community from the developer to the homeowners. There is also an increasing number of lawsuits brought by homeowners against the developer due to an unsuccessful transfer. While no one has all of the answers to eliminate the numerous controversies that can emerge, much can be learned from developers who have successfully made the transition. While all of the suggestions provided in this article may not be possible or practical given the unique qualities of each community, careful consideration of implementing some of these ideas may make for a smoother transition and decreased risk of litigation.

III. ASSIGNMENT OF DECLARANT RIGHTS

Developers typically try to retain declarant rights until the end of the development of the community to enable the developer to control the appearance and administration of the community. However, there are certain instances where it may be beneficial for a developer to assign all or a portion of its declarant rights to another party during the development period. The transition from developer control to homeowner control can be done in phases during the development period if the declarant has been properly vested with the authority to partially assign its rights. The right to such assignment can be addressed while drafting the restrictive covenants. As the development of a community progresses, it may become beneficial for the declarant to assign portions of its rights, while retaining other declarant rights. The following is suggested language that allows the declarant to assign whatever declarant rights it desires at any time:

Notwithstanding anything contained herein to the contrary, the Declarant may assign, temporarily or permanently, all or a portion of its rights as Declarant to any person(s).

By specifically stating that such partial assignment may be temporary, it allows the declarant to resume all declarant rights in the event that becomes necessary to complete the development.

A. BIFURCATED ARCHITECTURAL REVIEW RIGHTS

In a large community with a long development period, the declarant may wish to assign architectural review committee ("ARC") rights for modifications to a modifications committee, and retain the ARC rights for new construction. The discretion to do so can be established in the restrictive covenants as shown in the following Drafting Tip.

DRAFTING TIP: The following language can establish the assignment of rights, and still preserve the rights the declarant desires to retain:

The ARC shall be a committee of the Board. The initial ARC shall be composed of three (3) individuals designated by Declarant, one of whom may be designated as representative to act on behalf of the ARC. The Declarant reserves the right to appoint replacements as necessary by reason of resignation, removal or incapacity. The Declarant shall retain the right of ARC appointment until the first to occur of the following:

1. *the Declarant no longer owns any portion of the Property, or*
2. *the Declarant so desires to relinquish its authority over ARC appointment, or*
3. *From and after the twenty-fifth (25th) anniversary of the date this Declaration is recorded in the Real Property Records of _____ County, Texas.*

At any time prior to the happening of (1), (2), or (3) above, the Declarant may, without obligation, assign to the Board, or such other person the Declarant deems appropriate, all or a portion of Declarant's ARC rights and/or the responsibility for review and approval of modifications to existing Dwellings.

The ARC shall have the authority, but not the obligation, to delegate review and approval or denial of plans for modifications of existing improvements within the Subdivision to a Modifications Committee. The members of the Modifications Committee shall be appointed, and may be removed, by the Declarant for so long as Class B Membership exists, and thereafter by the Board. A denial by the Modifications Committee, if it is created, may be appealed to the ARC.

B. PRESERVATION OF DECLARANT RIGHTS

It should be noted in the provision cited above in subsection number 1, that the termination of the declarant's control over the ARC can be drafted so that it continues until the declarant no longer owns any portion of the property. Similar language can be used to establish the declarant's authority to appoint all, or at least 2/3rd of the members of the board of directors of the association. It is very common to see these provisions drafted such that the declarant's control continues until the declarant no longer owns a lot or annexable land in the subdivision. As the developer approaches sell out, it is not uncommon to see that the developer is able to obtain adjacent property that it would like to annex into the subdivision. If this provision is tied to the sale of lots, and the developer sells the last lot before the new section is annexed into the subdivision, the declarant can lose association and ARC control if the declaration is not carefully drafted.

DRAFTING TIP: Draft the declarant control of the association as well as the ARC so that it will continue until the declarant no longer owns any property (not lot) in the subdivision. This enables the continuation of declarant control of the association (i.e. to appoint at least 2/3rd of the directors of the association) and ARC control, until the declarant has completed the entire development. There have been instances where a developer sold the last lot thereby terminating declarant control, then attempted to annex the next section into the subdivision which had to be accomplished without declarant rights. Additionally, it is not uncommon for the developer to forget to deed a reserve such as a drainage ditch, or landscape reserve, to the association until after the control period had terminated. After the termination of declarant control, the association may be able to refuse to accept title to the declarant's remaining property, and the developer remains the owner of a useless parcel, unable to declare nominal tax value as it is not "common area" owned by the association, should insure, and must maintain, all in a subdivision that was completely sold out and the development completed.

C. FAILURE TO TRANSFER

Often the declarant may fail to transfer some or all of its rights prior to the termination of declarant control. A troublesome provision that appears often is the obligation to have the declarant approve amendments to the declaration. After termination of declarant control, which often means the developer entity is dissolved, it is often impossible to get the declarant's

approval of an amendment. Additionally, while the declarant typically has the right to annex additional property into the subdivision, that right is often not vested in the association. If the declarant fails to transfer all of its rights upon completing the development, it can create problems for the association. The failure to transfer rights can be addressed with an automatic transfer clause.

DRAFTING TIP: The following is suggested language that can be used to provide for the automatic transfer of declarant rights to the association:

Declarant shall retain the authority to appoint all members of the Board of Directors of the Association until the later to occur of the following:

- (1) On or before the 120th day after the date that seventy-five percent (75%) of the lots that may be created and made subject to the declaration are conveyed to owners other than the declarant; at which time one-third (1/3) of the board members (who must be members of the association) must be elected by the owners other than the declarant; or*
- (2) From and after the tenth (10th) anniversary of the date this declaration is recorded in the Real Property Records of _____ County, Texas; at which time one-third (1/3) of the board members (who must be members of the association) must be elected by the owners other than the declarant; or*
- (3) The declarant assigns to the association its authority to appoint all members of the board of directors of the association. If such assignment occurs prior to the termination of declarant's control under subsections (1) and (2) immediately above, the assignment must be evidenced by an instrument recorded in the Real Property Records of _____ County, Texas.*

Declarant shall retain the authority to appoint two-thirds (2/3) of the members of the board of directors of the association until such time as declarant no longer owns any portion of the property.

Upon termination of declarant's control and authority to appoint two-thirds (2/3) of the members of the board of directors of the association, any remaining Class B Members shall be converted to Class A Members and elections shall be held to elect the members of the board of directors of the association (who must be members of the association) pursuant to the provisions of the certificate of formation and the bylaws of the association. In the event Class B Membership terminates pursuant to the above provisions, and thereafter additional property is annexed into the jurisdiction of the association, which results in the declarant owning property in the subdivision, declarant's Class B Membership shall be restored until it again terminates as specified in (1), (2) or (3) above. Notwithstanding anything contained herein to the contrary, the declarant may assign, temporarily or permanently, all or a portion of its rights as declarant to any person(s).

IV. COMMON AREA DEEDS

A. TIMING OF CONVEYANCE

Most developers today convey common areas to the associations at the earliest possible time. This is advantageous for many reasons. Once conveyed, the association can declare nominal tax value with the applicable appraisal district and typically vastly reduce the amount of ad valorem taxes due. Additionally, liability and the obligation to insure, will be transferred to the association as well as title to the property. Once conveyed to the association, the board of directors of the nonprofit association enjoy certain statutory immunities that the for profit developer entity is not entitled to. So long as the developer holds a majority of the seats on the board of directors, and remains in control of the ARC, it will not lose control of the deeded common areas.

B. SAMPLE PROVISIONS

It is recommended that the deeds contain certain provisions that anticipate certain issues and clarify the obligations of the parties. The following are samples of provisions that can be used in a deed without warranty, a special warranty deed, or gift deed conveying common areas to the association. Because, the deeds contain certain obligations and agreements between the developer and the association, it is recommended that the association sign the deeds as the grantee.

DRAFTING TIP: The following are suggestions that can be included in the deed to the association:

THIS CONVEYANCE IS MADE SUBJECT TO:

1. All easements, restrictions, building set-back lines and other matters appearing of record in _____ County, Texas, and affecting the above described property or any part thereof.
2. Grantor hereby retains an easement for ingress and egress across the Property.
3. Grantee hereby assumes any and all tax obligations for the calendar year 20__ and all years thereafter on the Property.
4. Grantor hereby retains the right to grant additional easements.
5. Grantor hereby retains all minerals rights in, on, and under the Property.
6. Grantee's sole permitted use of the property shall be as designated on the recorded plat for _____, Section __, which plat and reserves are more particularly described on the attached Exhibit "A".

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THIS GIFT DEED IS MADE AND ACCEPTED (A) WITHOUT RECOURSE ON GRANTOR

AND (B) WITHOUT REPRESENTATION AND WARRANTY OF ANY KIND (WHETHER EXPRESS, IMPLIED OR STATUTORY) BY GRANTOR. GRANTOR IS CONVEYING THE PROPERTY COVERED BY THIS DEED ON AN “AS IS, WHERE IS” BASIS, WITH ALL FAULTS, AND WITHOUT REPRESENTATION OR WARRANTY (ALL OF WHICH GRANTOR DISCLAIMS).

DRAFTING TIP: The advantage of using a gift deed, rather than a deed without warranty or a special warranty deed, is a matter of the consideration. Most deeds recite boilerplate language such as “ten dollars and other good and valuable consideration” as the consideration to support the transfer of title. There have been instances where the ten dollar consideration was never actually paid by the association to the developer, and the transfer was challenged for lack of consideration. If the association actually pays the ten dollars, then the transfer is supported by the recited consideration. A gift deed does not require monetary consideration, and lessens the chances of a challenge. A gift deed has the added benefit of appearing to be a benevolent gift from the developer to the community and may help to build good will.

DRAFTING TIP: The deed should convey title to the property as well as all improvements located on the property. The following is sample language that can be used in a gift deed:

That, _____ Development, Inc., a Texas corporation, hereinafter called “Grantor”, with full intention of conveying the property hereinafter described as a gift, with no reversionary interests whatsoever in favor of Grantor, by these presents does GIVE and CONVEY unto _____ Association, Inc., a Texas non-profit corporation, hereinafter called “Grantee”, all of Grantor’s right, title and interest in and to that certain real property located in _____ County, Texas, and more particularly described on Exhibit A attached hereto and by this reference incorporated herein for all purposes, together with all of Grantor’s interest in and to all improvements situated on the real property described on Exhibit A (such interest in the real property and improvements situated thereon hereinafter referred to as “Property”).

In subdivisions that have multiple sections, it is recommended that the common areas within each section, as well as the streets if they are private, be deeded as soon as the plat is recorded and development begins of that section begins. Once deeded to the association, the common area can then be maintained by the association’s vendors rather than the developer’s vendors. Additionally, in subdivisions with multiple sections, it is recommended that the common area in each section be conveyed via a separate deed. The legal description for the property being conveyed can be taken from the recorded plat.

DRAFTING TIP: The following is suggested language that can be used as the legal description when conveying a common area:

EXHIBIT “A”

Restricted Reserve “C”, 3.191 acres, _____, Section 1, restricted to open space, utilities and drill site, according to the plat thereof recorded under Clerk’s File Number _____ of the Map records of _____ County, Texas.

C. FAILURE TO CONVEY VIA DEED

In subdivisions with private streets it is not uncommon that developers fail to record a deed conveying those private streets to the association. An Austin court recently addressed this issue and held that a “dedication” on the plat was sufficient to convey title to the association.

Gray v. Key Ranch at the Polo Club Home Owners Ass'n, Inc., 2010 WL 143421, (Tex. App.— Austin) 2010 (no pet) Not Designated for Publication

The court reasoned as follows:

. . . a dedication generally refers to the “donation of land or creation of an easement for public use.” [citations removed]. The Association responds, however, that the use of the term “dedication” here is not meant to implicate the doctrine of *public* dedication, but rather it refers to how Rooster Springs, LP “defined and consistently used that term in the Declaration” as a way of transferring ownership of the “Common Area” to the Association. In other words, the Association asserts that Rooster Springs, LP, as “Declarant,” intended and agreed that the “Common Area,” which included streets and roadways, would be “conveyed to the Association *by Plat dedication*” in the manner described in the Declaration. We conclude that the record contains sufficient evidence to support the Association’s argument.

The transfer of title via a plat dedication does not contain the beneficial language that is discussed above. A deed clearly transferring title to the streets to the association can dispel uncertainties that may arise in the future.

V. CONCLUSION

Transfer of declarant rights, as well as the retention of some or all of the declarant’s rights are steps along the development timeline that can be controlled by the developer and timed to the advantage of the developer. There is a benefit to the developer to transfer title to common areas to the association. The drafting of the deeds to accomplish the transfer of title can contain language that is helpful to both the developer and the association. The transfer of declarant rights and transfer of title to common areas can establish clear terms as to those issues, and may clarify uncertainties that would occur without that language.