



DEED RESTRICTION ENFORCEMENT

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CHAPTER 14

**Deed Restriction Enforcement
Chapter 14**

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DISCLAIMER

This article is not intended to be relied upon as a final analysis in resolving legal questions regarding property owner's associations' and deed restriction enforcement. 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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DEED RESTRICTION ENFORCEMENT**I. SCOPE**

The scope of this paper is to analyze the current state of the law and possible future trends rather than to present a complete history of the law as it relates to restrictive covenants. The areas to be discussed apply to single family homes, condominiums and townhomes, unless otherwise indicated.

II. APPLICABLE LAW & DEFINITIONS

Texas statutes that apply to property owners' associations ("POAs") include but are not limited to the following:

- Texas Government Code, Tex. Gov't. Code §27 (Vernon 2004 & Supp. 2009).
- Texas Property Code, Tex. Prop. Code Ann. § 1.01 *et seq.* (Vernon 1986 & Supp. 2001);
- Texas Condominium Act, Tex. Prop. Code Ann. §81 *et seq.* (Vernon 1983);
- Texas Uniform Condominium Act ("TUCA"), Tex. Prop. Code Ann. §82 *et seq.* (Vernon 1993);
- Texas Business Organizations Code, TBOC § 22 *et seq.* (Vernon 2006);
- Texas Nonprofit Corporation Law & Texas Unincorporated Nonprofit Association Act, TBOC § 22 *et seq.* (Vernon 2006);
- Texas Finance Code, Tex. Fin. Code Ann. §392 *et seq.* (Vernon 1988 & Supp. 1999); and
- Texas Fair Housing Act, Tex. Prop. Code Ann. § 301 *et seq.* (Vernon 1995 & Supp. 2001).

Federal statutes that apply to the enforcement of deed restrictions include but are not limited to the following:

- Federal Fair Debt Collection Practices Act; 15 U.S.C. §1693 *et seq.*;
- 1996 Telecommunications Act; amendment to 47 U.S.C. 151 *et seq.*;
- Americans with Disabilities Act; 42 U.S.C. §12101 *et seq.*; and

- Fair Housing Amendments Act of 1988, 42 U.S.C. §3601 *et seq.*

In addition to the statutory law to be applied to POAs, each property owner association has its own body of law to enforce from its Dedicatory Instruments. "Dedicatory Instruments" are defined in the Texas Property Code, Chapter 202, Section 202.001 (1) as follows:

"Dedicatory 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. Tex. Prop. Code Ann. § 202.001(1).

The Texas Property Code further defines "Property Owners' Association" in Chapter 202, Section 202.001 (2) as follows:

"Property Owners' Association" ("POA") 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. Tex. Prop. Code Ann. § 202.001(2).

POAs defined in Section 202.001 are associations of owners of property and/or varying interests in property. In the case of single family homes, the association is comprised of all of the lot owners within the geographic boundaries of the recorded subdivision. The common elements are owned by the association. Each lot owner is a member of the association and entitled to the benefits afforded by the association while the lot owner is in good standing. In the case of condominiums, each owner of a unit owns his individual apartment (airspace and finished interior

surfaces) and he owns an undivided interest of the common elements in the entire project. The condominium owner has property which is under his sole control and also has the use of common elements and limited common elements. The limited common elements, although owned by all of the owners in their undivided interest, are limited in use to one or more owners but not available to all owners. The townhome owner owns the land that his unit is constructed upon, but not the common elements. The common elements are owned by an association of which all owners are members. Like condominiums, there may be areas considered limited common elements for the use and benefit of one or more, but not all of the owners.

In 1995, the Texas Legislature added another definition of “Property Owners’ Association” to the Texas Property Code. Chapter 204, Section 204.004(a), of the Texas Property Code reads as follows:

(a) A property owners’ association is a designated representative of the owners of property in a subdivision and may be referred to as a “homeowners association,” “community association,” “civic association,” “civic club,” “association,” “committee,” or similar term contained in the restrictions. The membership of the association consists of the owners of property within the subdivision. Tex. Prop. Code Ann. § 204.004(a).

However, this definition applies only to certain Texas counties (currently Harris, Brazoria, Galveston and Montgomery Counties), applies only to residential real estate subdivisions, specifically excludes condominiums,¹ and is retroactive to restrictions regardless of the effective date. Tex. Prop. Code Ann. § 204.002. Additional requirements imposed on POAs by Chapter 204 stipulate that a POA must be a nonprofit and may be incorporated as a Texas nonprofit corporation, and the Board of Directors must be elected or appointed in accordance with the restrictions, certificate of formation (formerly, articles of incorporation) and bylaws. See Tex. Prop. Code § 204.004(b)(c).

II. ENFORCEMENT OF DEED RESTRICTIONS

Restrictive covenants may be enforced by the owner of any “interested” property whose property was

intended for the grantor to benefit from that restrictive covenant. *Giles v. Cardenas*, 697 S.W.2d 422, 427 (Tex.App.—San Antonio 1985, writ ref’d n.r.e.). Commonly, the Dedicatory Instruments of a community vest the POA with the duty and authority to enforce the restrictive covenants through the Dedicatory Instruments. However, there are various defenses to the enforcement of restrictive covenants that POAs should be aware of.

A. Statute of Limitations

The statute of limitations for the enforcement of restrictions is four years. *Girsh v. St. John*, 218 S.W.3d 921 (Tex.App.—Beaumont 2007, no pet.); *Buzbee v. Castlewood Civic Club, et al.*, 737 S.W.2d 366, 368 (Tex.App.—Houston [14th Dist.] 1987, no writ); *Hidden Valley Civic Club v. Brown*, 702 S.W.2d 665, 668 (Tex.App.—Houston [14th Dist.] 1985, no writ); *Colton v. Silsbee State Bank*, 952 S.W.2d 625 (Tex.App.—Beaumont 1997, no writ).

The calculation of the statute of limitations has been held to be a continuous period. If there is a lapse in time when the offensive activity does not occur, the statute of limitations does not toll, but it may begin again. In the *Schoenhals* case, the Schoenhals converted the inside of their garage for use as a beauty shop. *Schoenhals v. Close*, 451 S.W.2d 597 (Tex.Civ.App.—Amarillo 1970, no writ). The beauty shop was in commercial operation from January 1960 until some time in 1964. From 1964 until 1969 the Schoenhals did work for ten church members only on a charitable basis. In 1969, the Schoenhals began preparation for commercial purposes once again, and the court found that the statute of limitations had run by the 1964 date when the commercial activity ceased. However, the court found that the charitable work was a cessation of the activity. When the shop was to begin commercial operation again in 1969, it was a new breach of the restriction and not a continuation. The court reasoned that a small amount of non-profit work done inside one’s home or garage would not violate a residential restrictive covenant. *Id.* at 599.

It is well-settled that the discovery rule is applicable to breach of contract cases. In applying the discovery rule to a breach of contract case, the courts are consistent in holding that a plaintiff’s lack of knowledge could not be the result of the lack of reasonable diligence to discover the breach. *Enterprise-Laredo Ass’n v. Hachar’s Inc.*, 839 S.W.2d 822 (Tex.App.—San Antonio 1992, writ denied per curiam, 843 S.W.2d 476 (Tex. 1992)); See also, *Girsh*, 218 S.W.3d 921. Violations of deed restrictions are treated as breach of contract cases, and courts have specifically applied the discovery rule to deed restriction cases.

¹ Section 204.002 does not apply to condominium developments because they are governed by Title 7 of the Property Code.

The *Park* case is on point to the issue of whether the discovery rule applies to deed restriction cases. *Park v. Baxter*, 572 S.W.2d 794 (Tex.Civ.App.—Tyler 1978, writ ref'd n.r.e). In October 1974, Park, a homeowner, sued his neighbor, Baxter, seeking to enjoin the violation of Baxter's use of his residential property as a swimming school and a music school. The schools began operation in May 1970, and September 1967, respectively.

Although the music school clearly began to operate in 1967, the court held that only business operations after 1968 and 1969 would be considered, because it was only after these years that the commercial businesses were substantial enough that Park was aware, or should have been aware of the breach. *Id.* at 795. The court in *Park* specifically held that the four-year statute of limitations is controlling in suits to enforce restrictive covenants. *Id.*; *Schoenhals*, 451 S.W.2d 597; *City of Fort Worth v. Johnson*, 388 S.W.2d 400 (Tex. 1964); *Keene v. Reed*, 340 S.W.2d 859 (Tex.Civ.App.—Waco 1960, writ ref'd); *Arrington v. Cleveland*, 242 S.W.2d 400 (Tex.Civ.App.—Fort Worth 1951, writ ref'd.). The *Park* court could not have been clearer or more direct in its application of the discovery rule applied to cases involving violations of deed restrictions and covenants.

In *Hidden Valley*, Brown parked a recreational vehicle on his property from April of 1979 until the time of the suit in 1984. *Hidden Valley*, 702 S.W.2d 665. The trial court did not grant an injunction and elected to maintain the status quo. The appeal dealt with the possible abuse of discretion of the lower court. The decision of a trial court may be reversed on appellate review if the reviewing court finds that the trial court abused its discretion. A court abuses its discretion if it reaches a decision without the guidance of legal rules and principles. *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 548 (Tex.App.—Houston [1st Dist.] 1994, no writ). On appeal, the court explained that the trial court found that the appellant's action was barred by the four year statute of limitations. In this regard, the appellant failed to prove a probable right to recover at the trial on the merits. The court held that the trial court did not abuse their discretion in this matter. *Id.* at 668.

The *Malmgren* case involved an attempt by an association to enforce a restriction prohibiting the keeping of hogs and other livestock. *Malmgren v. Inverness Forest Residents Civic Club, Inc.*, 981 S.W.2d 875 (Tex.App.—Houston [1st Dist.] 1998, no writ). The homeowner, Mr. Malmgren, had kept a pet pot-bellied pig for more than four years when the association demanded that the pig be removed from the subdivision pursuant to the restriction prohibiting hogs. The court ruled that the four year statute of limitations

period had run. The association failed in its attempt to enforce the restriction.

B. Laches

Laches is an affirmative defense that, like estoppel, is based on the premise that "because of the staleness of the demand, the defendant would be unconscionably prejudiced if the claim were not cut off." *Preston Tower Condo. Ass'n v. S. B. Realty, Inc.*, 685 S.W.2d 98, 104 (Tex.App.—Dallas 1985, no writ). In order for laches to apply, the party asserting that defense must show that there was an unreasonable delay in asserting a right and that there was a harmful change in position in reliance on the delay. *Id.*

In cases where there is a specific statute of limitations, the defense of laches is not applicable barring some extraordinary circumstance. *Buzbee*, 737 S.W.2d at 369; *Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834 (Tex. 1968). In *Buzbee*, the court found that there was a failure on the part of Buzbee to show that he made a good faith change in position because of the delay of the association in enforcing the restrictions. *Id.* at 370. Additionally, unless there are exceptional circumstances, the defense of laches is inapplicable if the statute of limitations has not run. *Culver v. Pickens*, 176 S.W.2d 167, 170 (Tex. 1943).

C. Standing and Doctrine of Implied Reciprocal Negative Easement

Sometimes individuals file lawsuits against POAs alleging breach of restrictive covenants by the association. In instances where the alleged breach occurred prior to the individual's purchase of his restricted property, an interesting, but older case, should be noted. In 1958, the court in *Fudge* ruled that the only person who may bring a claim for breach of a restrictive covenant is the individual(s) who holds title to the property subject to the restrictions at the time of the alleged breach. *Fudge v. Hogge*, 323 S.W.2d 663, 667 (Tex.Civ.App.—Dallas 1959, no writ). That is, one who acquires title to a lot after the breach of the covenant has no right to maintain a suit for damages for the breach because the conveyance of the fee after such breach does not operate as an assignment of the right of action to the subsequent purchaser. *Id.*

In *Ski Master of Texas v. Heinemeyer*, subdivision residents brought an action to enforce residential use restrictions against Ski Masters, claiming that it was running a business. 269 S.W.3d 662 (Tex.App.—San Antonio 2008, no pet.). Ski Masters purchased property for commercial use, part of which was included in the tract originally platted for the subdivision, and part of which was outside of the originally platted subdivision tract. The subdivision

was subject to a “residential use only” deed restriction. The trial court ruled in favor of the residents.

On appeal, Ski Masters challenged the residents’ standing to enforce the deed restriction due to the fact that all of the residents were outside the tract’s chain of title. Deed restrictions are typically only enforceable by those in direct privity or by the contracting parties. *Id.* at 668. However, the San Antonio Court of Appeals ruled that where there are many property owners interested in a restrictive covenant, any one of them can enforce it. The court went on to note that whether residents have standing to enforce deed restrictions depends on two factors: (1) the existence of a general plan or scheme of development and (2) the general plan or scheme was part of the inducement for the purchasers to buy land within the restricted area. *Id.* at 669. The court explained that the standing to enforce a deed restriction against another similarly situated property owner “does not turn on whether the deed of the owner against whom enforcement is sought contains the restriction.” *Id.* “If the deed of the property owner against whom enforcement is sought contains the restriction, standing is based on an implied mutuality of covenants among the various purchasers.” *Id.* at 670. Thus, if the deed does not contain the restrictions, then grounds for standing are based on the doctrine of implied reciprocal negative easement. *Id.*

D. Arbitrary and Capricious

An exercise of discretionary authority by a POA or other representative designated by an owner of real property concerning a restrictive covenant is **presumed reasonable** unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory. Tex. Prop. Code Ann. §202.004(a). The *Miller* case held that §202.004 of the Property Code establishes a presumption that a POA has acted reasonably when it enforces restrictive covenants. *Miller v. First Colony Cmty. Servs. Ass’n*, No. 01-91-00900, 1993 WL 331092 (Tex.App.—Houston [1st Dist.], December 30, 1993, no writ). The court further held that the homeowner had the burden to rebut the presumption that the association acted reasonably. *Id.*

E. Waiver

A parcel of real property can lose the benefit of its restrictions by failure to enforce them, resulting in the claim that the right to enforce them has been waived. Typically, a claim that asserts that a restrictive covenant has been waived, will also involve the claims of estoppel and laches. A recent case discussed these three claims and set forth a helpful analysis. *Miller v. Sandvick*, 921 S.W.2d 517 (Tex.App.—Amarillo 1996, writ denied). In *Miller*, the court explained that

inaction, to be interpreted as an intention of waiver, “is generally accompanied by other circumstances, such as an unreasonable length of time, evidencing the intent.” *Id.* at 524. In relation to waiver, “estoppel arises when one is not permitted to disavow his conduct which induced another to act detrimentally in reliance upon it.” *Id.* “Laches occurs when one unreasonably delays in asserting his rights against another who in good faith has changed his position to his detriment because of the delay.” *Id.*

To establish a waiver, the plaintiff must prove that one of two rules of law applies:

1. Homeowners have acquiesced to such substantial violations within the restricted area as to amount to an abandonment of the covenant or a waiver of a right to enforce it; or
2. There has been such a change in the conditions in the restricted area or areas surrounding it that it is no longer possible to secure any substantial degree of the benefits sought to be realized through the covenants.

Pilarcik v. Emmons, 966 S.W.2d 474 (Tex. 1998) (citing *Cowling v. Colligan*, 312 S.W.2d 943, 945 (Tex. 1958)).

A finding of waiver requires that a POA voluntarily and intentionally relinquished its right to enforce the restrictive covenants. *Wildwood Civic Ass’n v. Martin*, No. 01-94-01140, 1995 WL 412842 *5 (Tex.App. —Houston [1st Dist.] July 13, 1995, no writ) (citing *Mass. Bond & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967)).

Waiver of restrictions can occur when the POA becomes inactive or complacent as to the enforcement of its dedicatory instruments. Waiver can affect certain sections of the restrictions as well as the entire document. *Giles v. Cardenas*, 697 S.W.2d 422, 427 (Tex.App.—San Antonio 1985, writ ref’d n.r.e.). A restrictive covenant can become unenforceable because of abandonment, acquiescence or waiver. *Schoenhals*, 451 S.W.2d 597. Waiver occurs when there is full knowledge of the known right which vitiates a prior act and where there is an intentional relinquishment of the known right, or intentional recognition of the prior act. *Caldwell v. Callendar Lake Prop. Owners Improv’t Ass’n*, 888 S.W.2d 903, 909 (Tex.App.—Texarkana 1994, writ denied).

In addition to waiver of the entire set of restrictions, the ability to enforce specific restrictions may also be waived in a similar manner. In many cases where an association or group of individuals files a deed restriction violation case, a typical defense is

that the association has waived its right to enforce a particular type of restriction. The *Tanglewood* case set forth the test for waiver or abandonment. *Tanglewood Homes Ass'n, Inc., et al., v. Henke*, 728 S.W.2d 39 (Tex.App.—Houston [1st Dist] 1987, writ ref'd n.r.e.). To establish abandonment, a party must prove that the violations are so great as to lead the mind of the average man to reasonably conclude that the restriction in question has been abandoned. *Id.* at 43.

The *Tanglewood* case dealt with set-back requirements. The Henke's front set back was violated by more than nine feet. There were only five other violations of the front set-back restriction that existed elsewhere in the subdivision in section three and the severity was from 6 to 13.8 inches. The court found that there was no abandonment of the front set-back restriction. However, the court found that there was a waiver of the side set-back requirement. The court found that out of a total of 56 homes in the section, a violation by at least 15 homes was sufficient to prove waiver.

F. Abandonment

The factors to be considered for abandonment 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 666, 669 (Tex.App.—Houston [14th Dist] 1980, no writ). For example, in *Finklestein v. Southampton Civic Club, et al*, the defendant-homeowners, in violation of the restrictive covenants, subdivided their corner lot into two distinct lots, each with its own residence. 675 S.W.2d 271, 272 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Defendants were only able to show two other similar violations within their community. The court that proof of two similar violations reflects, at best, isolated instances of breach of the restriction. Thus, the court held same were "insufficient as a matter of law in number, nature, or severity to constitute waiver of the restrictive covenant's benefits and enforceability." *Id.* at 278.

In a suit to enforce restrictive covenants, the defendant has the burden to prove abandonment or any other defense which he may have to the suit. *Ortiz v. Jeter*, 479 S.W.2d 752 (Tex.Civ.App.—San Antonio 1972, writ ref'd n.r.e.). Also considered in applying the abandonment/waiver defense is the balance of the equities involved and the "average man" test. In considering the equities involved, the fairness to a "lot owner must be weighed against the fairness to other lot owners who have acquired their property on the strength of the restrictions." *Simms v. Lakewood*

Village Prop. Owners Ass'n, Inc., 895 S.W.2d 779, 785 (Tex.App.—Corpus Christi 1995, no writ) (citing *Cowling*, 312 S.W.2d at 946). In considering the "average man" test, a court must determine whether the "average man" would conclude, from looking at the community in question, that the particular restrictions had been abandoned or waived. *Finklestein*, 675 S.W.2d at 278. The *Dempsey* court explained that allowing non-conforming uses on eleven of 2,460 lots, of which 425 had been improved would not, as a matter of law, lead the "average man" to reasonably conclude the restrictions had been abandoned; nor do existing violations, as a matter of law preclude property owners from realizing to a substantial degree the benefits intended through the covenants. *Donald Dempsey v. Apache Shores Prop. Owners Ass'n, Inc.*, 737 S.W.2d 589, 595 (Tex.App.—Austin 1987, no writ). The *Dempsey* case dealt with the placement of mobile homes on lots governed by restrictive covenants which barred mobile homes.

More recently, in *Ski Master of Texas v. Heinemeyer*, the court explained that abandonment occurs when there are substantial violations within the restricted area. 269 S.W.3d 662 (Tex.App.—San Antonio 2008, no pet.). The court noted that the defendant had the burden to "prove that the violations were so great as to lead the mind of the average man to reasonably conclude that the restriction had been abandoned and its enforcement waived." *Id.*

G. Deemed Approval

An association may encounter the issue of deemed approval when it fails to affirmatively approve or deny modification plans submitted by a homeowner. In *Huntington Park Condo. Ass'n v. Van Wayman*, the court extended this rationale to plans submitted by a non-owner. No. 13-05-00464, 2008 WL 522605 *2 (Tex.App.—Corpus Christi, February 28, 2008, no pet.). Specifically, the association sought an injunction against Van Wayman for violating deed restrictions. Prior to becoming an owner, Wayman submitted plans to enclose his patio. The association did not respond because Wayman was not yet an owner. Wayman claimed he had deemed approval of his plans. Three years later Wayman (now an owner) installed the patio enclosure. The trial court allowed the new structure, and was upheld on appeal. *Id.* at *6.

H. Ratification by the Owners

It is well settled in Texas that the elements of the affirmative defense of ratification are:

1. Approval by act, word, or conduct;
2. With full knowledge of the facts of the earlier act; and

3. With the intention of giving validity to the earlier act.

Motel Enters., Inc., v. Nobani, 784 S.W.2d 545, 547 (Tex.App.—Houston [1st Dist.] 1990, no writ).

1. Approval by Act, Word, or Conduct

In *Simms*, several homeowners challenged the formation of the POA, and consequently its authority to accept the management and ownership of the common areas and to assess maintenance fees. *Simms*, 895 S.W.2d 779. According to the *Simms* court, case law establishes that approval (i.e. ratification) can be express or implied. *Id.* at 785. Ratification may be shown by express act or word, or may be inferred from a party's course of conduct. *Id.*

(a) Express Approval

In addressing the difference between express and implied approval, the *Simms* court listed several examples of each. The court held that homeowners who voted for the acceptance by the association of the common areas, participated in the creation of the corporation (the association), served as officers, or served as board members, expressly ratified the Association's authority to accept the management and ownership of the common areas. *Id.* at 786. Similarly, in the *Caldwell* case, homeowners challenged the POA's increase of maintenance assessments. *Caldwell*, 888 S.W.2d at 910. That court held that the homeowners had ratified the change in assessments by paying their fees without complaint for a period of one year. *Id.*

(b) Implied Approval

The *Simms* court held that those homeowners who worked on committees, attended Association meetings, accepted the board's actions in managing the common areas, or paid assessments fixed by the board for approximately two years, impliedly ratified the board's authority. *Simms*, 895 S.W.2d at 786. Furthermore, the court found that the homeowner's acquiescence to the board's vote to accept the management and ownership of the common areas was evidence of ratification. *Id.* at 784; *Jamail v. Thomas*, 481 S.W.2d 485 (Tex.Civ.App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.) (in an action to recover for tortious interference with an employment contract, the court stated that acquiescence is evidence of ratification.). Therefore, the court held that the homeowners were bound by their actions and thus had ratified the association's acceptance of the management and ownership of the common areas. *Id.*

2. With full knowledge of the facts of the earlier act

In *By the Sea*, condominium owners challenged the condominium's board of directors' right to remove carports. *Bd. of Dirs. of By the Sea Council of Co-Owners v. Sandock*, 644 S.W.2d 774 (Tex.Civ.App.—Corpus Christi 1982, writ ref'd n.r.e.). In its analysis, the court emphasized that at the time of purchase of their units, the owners knew (or should have known) that they bought their units subject to all the provisions of the declaration, including the provision to amend the declaration. *Id.* Similarly, the *Preston Tower* court held that a rule set out in the declaration (of a condominium) is clothed with a strong presumption of validity arising from the fact that each owner purchases the unit knowing and accepting the restrictions imposed. *Preston Tower*, 685 S.W.2d at 102.

Furthermore, the *Pooser* court held that condominium owners accept the terms, conditions, and restrictions in the declaration by acceptance of the deed to the unit. *Pooser v. Lovett Square Townhomes*, 702 S.W.2d 226, 231 (Tex.App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(Condominium unit owners brought suit against owners' association to enjoin collection of past-due maintenance assessments until certain claimed offsets had been satisfied); *Covered Bridge Condo. Ass'n v. Chambliss*, 705 S.W.2d 211, 214 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)(Condominium association brought action for injunctive relief against condominium owners for violation of covenant restricting unit occupancy to those 16 years or older). The *Pooser* court also stated that the purchaser of a condominium unit delegates decision making authority concerning the common areas to the owners' association. *Pooser*, 702 S.W.2d at 231. The court stated:

So long as a condominium association or board of managers has acted reasonably in the exercise of its duties under the condominium declaration, a condominium owner is not entitled to recover damages, or to avoid maintenance assessments, because of his disagreement with the actions taken by the association or board. *Id.*

3. With the intention of giving validity to the earlier act

The intent to give validity to the former transaction may be inferred from the existing facts and circumstances. *Motel Enterprises, Inc. v. Nobani*, 784 S.W.2d 545, 547 (Tex.App.—Houston [1st Dist.] 1990, no writ). "A party who retains the benefits of an unauthorized transaction affecting his interest, after acquiring full knowledge of all relevant facts, may be

held to have ratified the otherwise invalid transaction.” *Id.* at 548. The *Wetzel* court also addressed this third element of ratification stating, “[r]atification occurs when a party recognizes the validity of a contract by acting under, performing under it, or affirmatively acknowledging it.” *Wetzel v. Sullivan, King & Sabom*, 745 S.W.2d 78, 81 (Tex.App.—Houston [1st Dist.] 1988, no writ). In *Wetzel*, a firm was denying the existence of an agreement it entered into with its shareholders. The court reasoned that because the firm had accepted the benefits of shareholder and compensation agreements and treated the agreements as valid for approximately two years, ratification was established as a matter of law. *Id.* at 83.

4. Permissibility of Partial Ratification

In equity, ratification extends to the entire transaction, not just to “those parts of the transaction which are beneficial and disavowing those which are detrimental.” *Land Title Co. of Dallas v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 757 (Tex. 1980); *Accord Plains Cotton Cooperative Ass’n. v. Wolf*, 553 S.W.2d 800, 804 (Tex.Civ.App.—Amarillo 1977, writ ref’d n.r.e.). In *Stigler*, a principal attempted to disaffirm part of a transaction by his agent which resulted in his lien being subordinated to another lien, while seeking to affirm the loan which resulted from the same transaction. *Id.* at 757. The court held that ratification extended to the entire transaction. *Id.*

5. Burden on Association

In *Caldwell*, owners of subdivision lots sued the POA claiming same had violated the deed restrictions in increasing maintenance fees. *Caldwell*, 888 S.W.2d 903. In holding that the homeowners ratified the assessments by paying the fees, the court found that waiver and ratification are often used interchangeably by courts and elicit the same factual elements:

(1) there must be full knowledge of the known right which vitiates a prior act, and (2) there must be an intentional relinquishment of the known right, or intentional recognition of the prior act, depending upon the user’s choice of words. While to relinquish is the gist of “waiver” and to approve is the gist of “ratification,” to relinquish a known right is to give validity to the prior act and to approve a prior act is to relinquish a known right. *Caldwell*, 888 S.W.2d at 910.

The court further stated that while normally waiver is considered a question of fact, “the question becomes one of law if the facts and circumstances are admitted or are clearly established.” *Id.*

I. Business or Incidental Use

A community’s ability to enforce the residential use restrictions in its dedicatory instruments may be subject to another defensive argument that the offending business use is merely “incidental” to the use of the property as a residence.

A POA should be careful to limit the eruption of these businesses lest they eventually result in a waiver, discussed above, of the residential use restrictions. Properties subject to residential use restrictions sometimes encounter “home businesses” such as daycare operations and beauty salons. In a case specifically considering daycare facilities, the appellate court upheld the lower court’s ruling that:

...as a matter of law, that the nature of the appellants’ activity violated the deed restriction. The appellants’ full-time operation of a commercial child care facility constituted an ongoing business, which was conducted entirely on their residential premises. When the children were being delivered and picked up, traffic increased in the cul-de-sac, and that fact indicated, as did the appellants’ backyard play-ground facility, that appellants were conducting a business on their premises.

Mills v. Kubena, 685 S.W.2d 395, 397 (Tex.App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.).

Similar activities have been held to constitute prohibited activities in violation of residential subdivision restrictions. *See, e.g. Park*, 572 S.W.2d 794, 795 (use of home for swimming lessons); *Fowler v. Brown*, 535 S.W.2d 46 (Tex. Civ. App.—Waco 1976, no writ) (use of garage as florist shop); *Sumerlin v. Cox*, 344 S.W.2d 742, 743 (Tex.Civ.App.—Eastland 1961, writ ref’d.) (use of home a music school); *Mills*, 685 S.W.2d at 397 (use of home as daycare).

In construing “incidental use,” courts have compared the commercial uses complained of to the use of the premises as a residence. *Davis v. Hinton*, 374 S.W.2d 723 (Tex.Civ.App.—Tyler 1964, writ ref’d n.r.e.); *Burhart v. Christian*, 315 S.W.2d 668 (Tex.Civ.App.—Waco 1958, writ ref’d n.r.e.); *Baker v. Brackeen*, 354 S.W.2d 660 (Tex.Civ.App.—Amarillo 1962, no writ). Overruling a lower court’s holding, the Fort Worth Court of Appeals in *Arrington* reasoned that incidental uses must be so incidental to the extent such uses are consistent with the meaning and spirit of the covenant. *Arrington*, 242 S.W.2d at 402. The court added that “to hold otherwise would permit the operation of any character of a business enterprise,

provided the owner occupied a portion of the establishment as a bedroom.” *Id.*

In determining whether a commercial use is “incidental” to a residential property, Texas courts have considered the commercial practice in contention. In so doing, the courts examine the following aspects of the business:

1. Whether a use is commercial or residential by determining whether one’s income is derived primarily from the operation of the business activity;

In *Hicks*, the homeowner derived almost all of his income from machine shop activities conducted in his residence. The court concluded such a use was not incidental to residential living. *Hicks v. Loveless*, 714 S.W.2d 30, 34 (Tex.App.—Dallas 1986, writ ref’d n.r.e.); *See also Vaccaro v. Rougeou*, 397 S.W.2d 501 (Tex.Civ.App.—Houston 1965, writ ref’d n.r.e.) (holding that a defendant should be enjoined if he is using his dwelling house primarily as a source of financial gain rather than as a residence.).

2. The effect of the business use to determine whether the use is merely incidental; and

In *Vaccaro*, the court held that an incidental commercial practice in a residence, not constituting the operation of a business, is a permissible residential use of the premises. *Vaccaro*, 397 S.W.2d at 504. In applying same to the facts of the case, the *Vaccaro* found that the use of part of a house as a beauty parlor combined with the threatened continuation of this use as a full time occupation, constituted a violation of the restrictive covenants and the trial court erred in failing to enjoin such use. *Id.*

3. The extent to which the activity is taking place.

In *Davis*, the court held that the nature and extent of the use of premises for purposes other than residential purposes, will determine whether such use violates the restrictions. *Davis*, 374 S.W.2d at 726; *See also Davis v. City of Houston*, 869 S.W.2d 493 (Tex.App.—Houston [1st Dist.] 1993, writ denied). In interpreting the meaning of “residential purposes”, the dissent in a San Antonio case held “residential purposes” precluded uses of a tract that would implicate business or commercial purposes, such as a machine shop, commercial child care facility, florist shop, beauty shop, or an animal clinic. *Munson v. Milton*, 948 S.W.2d 813 (Tex.App.—San Antonio 1997, writ denied).

Additionally, courts reviewing restrictive covenant waiver cases have been reluctant to find that a waiver exists. *Garlington v. Boudreaux*, 921 S.W.2d 550, 553 (Tex.App.—Beaumont 1996, no writ). The *Garlington* court explained that:

[A]uthorities have made a distinction between the rights of a proprietor, such as the subdivider, and the rights of an individual lot owner.” *Id.* A proprietor is one who is interested in violations of a covenant on any part of the entire tract, and acquiescence on his part may deny him an equitable right to enforce the covenants; a violation of a restrictive covenant that is of no interest to an individual lot owner, however, cannot appropriately call for an affirmative action on his part. *Id.* Therefore, an individual lot owner is not under penalty of waiving his right to the enforcement of a restrictive covenant by his failure to take notice of such violations as do not affect him. *Id.*

In order to avoid such issues with business uses, POAs, it is pertinent to remember that it is more difficult to shut down a going concern than to prevent its appearance. A POA should engage in a routine system of deed restriction observance to prevent small business operations from interfering with the residential quality of the neighborhood and from potentially waiving residential use restrictions.

J. Condominiums: Relationship Between Unit Owners

Governing documents for a condominium project play an important role in the relationship between unit owners. In *Schindler v. Baumann*, a downstairs condominium unit owner brought suit against the upstairs condominium owner for flood damages to his unit due to the upstairs owner’s water filtration unit leak. *Schindler v. Baumann*, 272 S.W.3d 793 (Tex.App.—Dallas 2008, no pet.). The court held that the condominium declaration and annexation declaration for the condominium project did not create a contract between unit owners, and ordered that the downstairs unit owner take nothing. *Id.*

In *Allan v. Nersesova*, the appellant brought a suit against appellee for breach of contract and negligence. 307 S.W.3d 564 (Tex.App.—Dallas 2010, no pet.). Appellant claimed that her condominium unit suffered water and sewage incursion as a result of plumbing problems and misuse of appliances in appellee’s unit. *Allan v. Nersesova*, 307 S.W.3d 564 (Tex.App.—Dallas 2010, no pet.). The appellate court held that the trial court erred in granting appellee owner’s motion for

judgment notwithstanding the verdict on the breach of contract claim. *Id.* The governing documents made appellant an intended creditor beneficiary of the contract between the appellee owner and the association and thereby granted her authority to bring suit for appellee owner's breach of those documents. *Id.*

K. Easements

In *Gray v. Key Ranch at the Polo Club Home Owners Ass'n, Inc.*, the court found that easements to streets and roads granted by a developer were invalid, because the developer's rights to grant the easements were extinguished by a previous dedication of the land to the HOA through the declaration and subdivision plats. *Gray v. Key Ranch at the Polo Club Home Owners Ass'n, Inc.*, No. 03-09-00145, 2010 WL 143421 *3 (Tex.App.—Austin, January 12, 2010, no pet.). The developer unsuccessfully argued that the transfer of property to the HOA was invalid under the doctrine of public dedication because real property cannot be transferred between private parties through a dedication. *Id.* at *5. In finding that the term "dedication" was not intended to implicate the doctrine of public dedication, the court construed its meaning taking into account the Declaration in conjunction with the subdivision plats. *Id.* Evidence indicated that the streets and roads were given to the HOA for the common use and enjoyment of property owners within the subdivision and not meant as a public dedication.

L. Mobile and Modular Homes

Courts have recently been faced with interpreting the meaning of mobile and modular homes in light of deed restrictions regulating same. In *Jennings v. Bindseil*, neighboring property owners brought an action against another property owner seeking a declaration that the owner's construction of a modular home on his property violated deed restrictions against mobile homes. *Jennings v. Bindseil, et al*, 258 S.W.3d 190 (Tex.App.—Austin 2008, no pet.). The trial court granted plaintiffs summary judgment; however, the ruling was reversed and remanded on appeal. The appellate court found a fact issue as to whether or not a modular home is a generic successor of a mobile home. *Id.* at 198.

In *Letkeman v. Reyes*, neighbors sued a homeowner for cutting their home in half and moving it to a new lot. The court of appeals considered the definition of a "pre-fabricated" home. *Letkeman v. Reyes*, 299 S.W.3d 482 (Tex.App.—Amarillo 2009, no pet.). In finding against the homeowner, the court determined that the term applied to structures that were previously made (whether it is made as a whole or in

parts for later assembly) as opposed to something that is erected from scratch. *Id.* at 485.

M. Special Assessments

In *Zuehl Airport Flying Comm. Owners Ass'n, Inc., et al. v. Phil Meszler, et al.*, the increase of a special assessment on property by the board of directors of a POA was invalid since the board failed to get approval from the association's members. No. 04-09-00028, 2010 WL 454931 (Tex.App. —San Antonio, February 10, 2010, reh'g overruled, May 4, 2010, rev denied, October 22, 2010). In *Zuehl*, the declaration of the association required that in order to levy any special assessment, same must be limited to a certain period of time and the written approval of three-fourths of the board and the members must be obtained. *Id.* at *1. However, the special assessment was levied without the members and was not limited to a certain time period. Thus, the assessment increase was void. *Id.* at *5.

N. Termination by Judicial or Legislative Action

A portion of a dedicatory instrument can also be waived by judicial or legislative action. An example of such Texas legislative modification is section 5.025 of the Texas Property Code which voids the enforceability of deed restrictions mandating the use of wood shingle roofs:

To the extent that a deed restriction applicable to a structure on residential property requires the use of a wood shingle roof, the restriction is void. Tex. Prop. Code Ann. § 5.025.

Such a modification by legislation does not mean that a court will reform a section of the deed restriction to permit another type of roof not permitted by the restrictions. The *Hoye* court dealt such a restriction which stated, "[a]ll roofs shall be wood shingle, slate or other permanent type." *Hoye v. Shepherds Glen Land Co., Inc.*, 753 S.W.2d 226, 228 (Tex.App.—Dallas 1988, writ denied). The Hoyes attempted to utilize Property Code section 5.025 to allow their use of a composition roof. However, the court found that even if it were to strike the portion of the restrictions pertaining to wood shingles, the Hoyes could alternatively use "slate or other permanent type" of roofing. *Id.* at 228. The court further held that even if the only permitted type of roof were wood, the holding would depend on the procedure for approval of construction materials and improvements to realty, as set out in the Architectural Control Committee or similar committee.

IV. INTERPRETATION

A. Free Use of Land Interpretation

For many years the law as to enforcement of Deed Restrictions was (and still may be) to favor free use of land and against those who seek to restrict the use of the property in cases of ambiguity. *Wilcox v. Wilmoth*, 734 S.W.2d 656, 657 (Tex. 1987). Barring ambiguity, the court will look to and enforce the plain meaning of the restrictions. *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 (Tex.App.—Houston [1st Dist.] 1994, writ denied); *Covered Bridge Condo. Ass'n*, 705 S.W.2d at 213. Further, in considering parties' positions, it is of primary concern to a deciding court to ascertain and give effect to the intentions of the parties drafting the document and to examine and consider the entire instrument so that none of the provision will be rendered meaningless. *Crispin*, 888 S.W.2d at 81.

In the *Wilcox* case, the question was whether a double wide mobile home with an attached porch was considered a house trailer. The restrictions to be enforced read as follows:

1. No building, house or cabin shall be moved onto any lot in this addition from other location, unless they are new construction.
2. No tents, house trailers or temporary structures shall be permitted to remain on any lot for more than 30 days. *Wilcox*, 734 S.W.2d at 657.

The house consisted of two 12' x 48' units which were joined together and placed on concrete beams. The wheels and axles were removed, a skirt was attached to the bottom, and a covered porch was attached to the side.

Despite the court finding that restrictive covenants should be construed in favor of the free use of land and against the party attempting to enforce such restriction, the court weighted such presumptions against its task to determine the intent of the drafters. The *Wilcox* court held the "intent of the restriction was to prohibit house trailers, mobile homes and manufactured homes." *Id.* at 658.

In *DeNina*, the court considered the installation of a satellite dish. *DeNina v. Bammel Forest Civic Club*, 712 S.W.2d 195 (Tex.App.—Houston [14th Dist.] 1986, no writ). The court found that the restrictions did not authorize satellite dishes per the restrictions which prohibited the use of "television or radio aerial wires...on any portion of any lot forward of the front building line of any lot in subdivision. *Id.* at 198. The case went on to hold the dish to be an improvement to realty and as such required prior architectural approval. A subsequent, but unpublished, case relied upon *DeNina's* holding that the satellite dish was an

"improvement" requiring ACC pre-approval. *Miller*, 1993 WL 331092, at *2.

B. Liberal Interpretation

Prior to 1987, the Texas Property Code provided that courts were to interpret restrictive covenants strictly. In 1987, the Texas Legislature dramatically altered this statutory mandate through its creation of Section 202.003(a) which states:

A restrictive covenant shall be liberally construed to give effect to its purposes and intent. Tex. Prop. Code Ann. § 202.003(a)

There has been a string of cases post-1987 interpreting this section. *Wilcox* was decided on July 1, 1987, approximately two weeks after the effective date of the statute and appeared to ignore the changed statutory law. *Wilcox*, 734 S.W.2d at 657. As aforementioned, the court held that intent of the restriction banning tents, house trailers and temporary structures, was meant to prohibit mobile homes and manufactured homes." *Id.* The Texas Supreme Court affirmed the trial court holding, stating that all doubts must be resolved in favor of the free and unrestricted use of the premises, and the restrictive clause must be *construed strictly* against the party seeking to enforce it. *Id.* at 658.

There continue to be some courts which rely on *Wilcox* and continue to strictly construe restrictive covenants. See e.g. *Ashcreek Homeowner's Ass'n, Inc. v. Smith*, 902 S.W.2d 586 (Tex.App.—Houston [1st Dist.] 1995, no writ). For instance, the *Simon Property* court, relying on *Wilcox*, held that covenants restricting the free use of land are not favored by the courts, and common law of Texas is clear, all doubts are to be resolved in favor of free and unrestricted use of premises. *Simon Prop. Group v. Dillard Dept. Stores, Inc.*, 943 S.W.2d 64, 71 (Tex.App.—Corpus Christi 1997, no writ). That court held that the existence of Chapter 202 of the Texas Property Code requiring restrictive covenants to be liberally construed giving effect to purpose and intent of the drafters, does not preclude consideration of longstanding equitable principles favoring free and unrestricted use of land. *Id.*

Following shortly after the *Wilcox*, the *Candlelight Hills* case was heard. *Candlelight Hills Civic Ass'n v. Goodwin*, 763 S.W.2d 474, 477 (Tex.App.—Houston [14th Dist.] 1988, writ denied). However, the *Candlelight Hills* appellate court appeared to follow the spirit of the legislative change in §202.003(a). In *Candlelight Hills*, a subdivision homeowner brought a suit for declaratory judgment to determine whether the homeowners association could

use maintenance funds to purchase a recreational facility. The trial court narrowly construed the subdivision's restrictive covenants and found them not to permit the use of the maintenance fund to purchase real property. The court of appeals reversed, in part, holding that the restrictive covenant did permit such purchase. In its analysis, the court of appeals relied on §202.003 of the Property Code. The court held that a restrictive covenant must be *liberally construed* to give effect to its purposes and intent. *Id.* at 477.

One year before the “strict” *Ashcreek* opinion (discussed *infra*), the *Miller* case was heard by the same court as the *Ashcreek* case. The *Miller* court, in an unpublished opinion, relied on §202.003 in holding that restrictive covenants are to be liberally construed to give effect to their purposes and intent. *Miller*, 1993 WL 331092, at *4. Again in 1994, in another unpublished opinion, the same court relied on §202.003 to liberally construe a restrictive covenant. *H. C. Elliott Homes v. Greenbriar North Ass'n, Inc.*, No. 01-93-01113, 1994 WL 543302 (Tex.App.—Houston [1st Dist.] October 6, 1994, writ denied). And in a third unpublished opinion, the same court again relied on §202.003 to liberally construe a restrictive covenant. *Wildwood Civic Ass'n*, 1995 WL 412842.

Further causing the split of authority on §202.003(a) to deepen, the *Kinnear* court on June 9, 1994, promulgated a holding which favored the strict interpretation of restrictive covenants. *Deep East Texas Reg'l Mental Health & Mental Retardation Servs. v. Kinnear*, 877 S.W.2d 550 (Tex.App.—Beaumont 1994, no writ), *rev'd in part on other grounds by Kinnear v. Tex. Commission on Human Rights*, 14 S.W.2d 299 (Tex. 2000). Mr. Kinnear, a neighboring property owner, sought an injunction to prevent construction of a community home for mentally handicapped individuals in his subdivision. The court of appeals reversed the trial court holding, stating that restrictive covenants must be *stringently and rigorously construed*, favoring the grantee; and any doubt and all doubt must be resolved in favor of the autarchical use of property. *Id.* at 554. [Note: this court relied on a 1959 case and made no reference to property code §202.003.]

The *Boudreaux* case was decided approximately two months after the Beaumont court decided *Kinnear*. *Boudreaux Civic Ass'n*, 882 S.W.2d at 547. In *Boudreaux*, the HOA which was awarded attorneys' fees in a previous action against a homeowner for violation of a deed restriction, sought to foreclose on the homeowner's property to recover those attorneys' fees. The trial court refused to order the homeowner to turn over his deed. The court of appeals affirmed the holding based on the fact that the right to collect

attorneys' fees did not preexist the homestead declaration made by the homeowner. *Id.* at 546.

In its analysis, the court relied on Property Code §202.003, and the *Candlelight Hills* case. *Id.* The court found the homeowner took his property subject to a maintenance fee, a lien securing that maintenance fee, and a method for amending the restrictions and held that these restrictions were to be *liberally construed*, giving effect to the intent and purposes of the restrictions. *Id.* at 547.

In the same year, the appellate court for the 14th District in Houston recited the opposing strict constructionist philosophy articulated in *Wilcox*, that “[c]ovenants restricting the free use of land are not favored by the courts and are strictly construed. *Wilcox*, 734 S.W.2d at 657. The Houston court held that all doubts must be resolved in favor of the free and unrestricted use of the premises. *Kulkarni v. Braeburn Valley Civic Ass'n, Inc.*, 880 S.W.2d 277, 278 (Tex.App.—Houston [14th Dist.] 1994, no writ).

In *Ashcreek*, the HOA sued homeowners, seeking damages and attorney fees for violation of the association's deed restrictions. *Ashcreek Homeowner's Ass'n, Inc.*, 902 S.W.2d at 586. The association alleged two violations: the absence of a backboard on a homeowner's basketball goal and a broken fence slat. The court of appeals affirmed the trial court's holding for the homeowners.

In its analysis, the court of appeals referenced the revised Texas Property Code §202.003 and made the following conclusions of law:

1. The provisions of §202.003(a), requires that restrictive covenants be liberally construed to give effect to their purposes and intent. The word “liberally” in the property code is not useful in construing those provisions, because the meaning and significance of that word are subjective.
2. The §202.003 provision compels a conclusion of law that plaintiff's Declaration's provisions should be construed to place *specific restrictions* on the property to ensure the preservation of a uniform plan, which was the Declaration's stated purpose. *Id.* at 588.

The court of appeals relied on the Supreme Court holding in *Wilcox* to construe a restrictive covenant strictly against the party seeking to enforce it. *Id.* at 589. Most notable was that the appellate court found *no conflict* between the liberal constructionist requirements of §202.003 and the strict constructionist principles upon which it relied in its decision. *Id.*

In *Miller*, the court ruled that because §202.003 provided for liberal construction of restrictive covenants, the arguably ambiguous language of restrictive covenants was not arbitrary, capricious or discriminatory. *Miller*, 1993 WL 331092, at *1.

Illustrative of the continued confusion surrounding §202.003 is the following language from the *Herbert* case:

The association argues that this standard of review [i.e.: strict interpretation] was legislatively overruled by §202.003, which requires us to give effect to their purposes and intent. Even though *Wilmoth* was decided after the effective date of §202.003, the association argues that issue was never raised in that case. Copies of the briefs filed before the supreme court in *Wilmoth* show that the effect of §202.003 was not an issue. The association is correct about the adoption of §202.003 and the *Wilmoth* case.

Even after the enactment of §202.003, this Court stated that covenants restricting the free use of land were not favored. It is not necessary for us to resolve such discrepancies today because under either approach we would reach the same result in this case.

Herbert v. Polly Ranch Homeowners Ass'n., 943 S.W.2d 906, 907-908 (Tex.App.—Houston [1st Dist.] 1996, no writ).

In 1997, the *Highland* court completely disregarded the common-law strict construction requirements in lieu of the liberal construction set forth in §202.003. The *Highland* court relied on §202.003(a) to uphold a restrictive covenant preventing a landowner from leasing property for use as a parking lot for a sexually oriented business on adjacent property. *Highland Mgmt Co. v. First Interstate Bank of Texas*, 956 S.W.2d 749, 752-753 (Tex.App.—Houston [14th Dist.] 1997, pet. denied). The court reasoned that “an ambiguity exists in a restrictive covenant when it is susceptible of two or more meanings.” *Id.* at 752 n.1. “Once it is determined that a covenant is not ambiguous, the issue of proper construction of the covenant is a matter of law and not a question of fact.” *Id.*

The *Highlands* court explained that “in construing a restrictive covenant, the court’s primary task is to determine the intent of the framers of the restriction.” *Id.* To determine the intent, the court held that the covenant’s language must be liberally construed to give effect to its purposes and intent. *Id.* Further, the

paramount issue to be resolved in any case involving the interpretation of a restrictive covenant is intent. *Id.* at 753. The court reasoned that *Wilcox* did not create a new standard for interpreting restrictive covenants; rather, the strict construction rule existed at common law and predates *Wilcox*. *Id.* at 754. *Wilcox* requires courts to first ascertain the intent of the parties when construing a restrictive covenant. *Id.*

The *Devonshire* court set out a helpful analysis of the statutory and common law requirements:

...In construing deed restrictions, our primary concern is to determine the intent of the framers. We look at the objective intent of the parties as expressed or made apparent in the instrument. We examine and consider the entire instrument so that none of the provisions will be rendered meaningless. The meaning of the instrument is not to be determined from a single word, clause, or part, but from the entire instrument.

Devonshire Place Neighborhood Ass'n v. Devonshire Place, Ltd., No. 01-98-00732, 1999 WL 82617 (Tex.App.—Houston [1st Dist.] February 4, 1999, pet. denied).

The Austin court of appeals recognized the apparent conflict between common law strict construction and statutory liberal construction. *Quinn v. Harris*, No. 03-98-00117, 1999 WL 125470 (Tex.App.—Austin, March 11, 1999, pet. denied). The *Quinn* court reasoned that:

[w]hile the Property Code requires liberal construction of a restrictive covenant’s language to ascertain its purpose and intent, Texas common law, prior to the enactment of this section of the Property Code [202.003], called for restrictive covenants to be construed in favor of the free and unrestricted use of the premises and against the party seeking to enforce the covenants. There seems to be some confusion as to how to construe restrictive covenants in light of the two standards.

The Fourth Court of Appeals has employed both standards to review a restrictive covenant, finding that the covenant should be liberally construed to determine the framers’ intent, and if there is any ambiguity as to that intent, the covenant should then be strictly construed in favor of the free and unrestricted use of the premises. *Id.*

One month after the *Quinn* case, the *Benard* case was heard by the Beaumont Court of Appeals. *Benard v. Humble*, 990 S.W.2d 929 (Tex.App.—Beaumont 1999, pet. denied). In *Benard*, the court upheld the enforcement of the single-family residential purposes restriction by preventing vacation rentals. The *Benard* court found that “it is the duty of the trial court to review the wording of the restrictive language and determine therefrom, the intent of the drafter.” *Id.* at 930. Though statutorily courts are required to liberally construe the questioned language, the *Benard* court stated that “liberality must be toned to the given facts” while not losing sight of legislative intent. *Id.* To that end, the Court noted that the legislature in its enactment of §202.003(a) intended that restrictive covenants be construed in a manner which may occasionally run hard afoul of strict common law requirements, i.e., strict construction. *Id.* Moreover, the statutory language of §202.003(a) does not mesh with established common law contract principles, creating a perpetual need for reconciliation.

Courts appear to be reconciling the liberal versus strict dilemma by using a two-step analysis. To determine the intent of the restriction, the courts liberally construe the meaning of the restriction to determine the intent. Once the intent has been determined, the restriction will be strictly construed to enforce that purpose. This analysis was used in a recent case where the court reasoned as follows:

If there is no ambiguity in the restrictions, the court must decide their intent from the language used in the document...[r]estrictive covenants must be liberally construed to give effect to their purpose and intent. Deed restrictions subjecting property to maintenance fees, liens securing a maintenance fee, and a method for amending restrictions are to be liberally construed, giving effect to the intent and purposes of the restrictions.

Samms v. Autumn Run Cmty. Improv't Ass'n, 23 S.W.3d 398, 402 (Tex.App.—Houston [1st Dist.] 2000, pet. denied).

More recently, in *Letkeman v. Reyes*, the court in analyzing restrictive covenants in the context of Section 202.003(a) explained the court must apply the general rules of contract construction and must apply the common meaning of words. *Letkeman v. Reyes*, 299 S.W.3d 482 (Tex.App.—Amarillo 2009, no pet.). Likewise, in *Sharp v. deVarga*, the court considered two conflicting interpretations of a deed. *Sharp v. deVarga*, No. 03-05-00550, 2010 WL 45871 (Tex.App.—Austin, January 8, 2010, pet. denied). In

Sharp, the deed stated that only one house could sit on a lot. Property owners unsuccessfully argued, such a restriction prohibiting the replatting of property. The court analyzed the restriction within the framework that all doubts should be resolved in favor of the free, unrestricted use of land. *Id.* at *6. The court found that the restrictive covenant expressly listed prohibited certain other actions and as there was no such prohibition against replatting or subdividing, it was permissible to replat or subdivide one’s property. *Id.*

C. The Cost of Enforcement

The legislature has imposed deterrents on property owners who consider not complying with the dedicatory instruments. Section 202.004 of the Texas Property Code provides teeth to POAs authority to enforce deed restrictions:

- (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 \$200.00 for each day of the violation. Tex. Prop. Code Ann. § 202.004.

Until 1998, there were no reported cases on the award of these types of damages. In *Dickerson v. Debarbieris*, the court upheld the trial court’s award of \$12,000.00 in civil damages pursuant to §204.004(c), in favor of the HOA for a resident’s parking violation that lasted sixty days. *Dickerson v. Debarbieris*, 964 S.W.2d 680, 689 (Tex.App.—Houston [14th Dist.] 1998, no pet.). The trial court reasoned that the damages afforded by §202.004(c) will not always correspond to the actual damages suffered by the HOA; however, the amount is warranted due to the need to “effectively deter such actions in the future.” *Id.* at 689-90. It is interesting to note that the *Dickerson* court cited no case law in its opinion, and

held that the issue had been tried by consent at the trial court level due to a lack of timely objection. A note of caution is necessary regarding relying on this case to enforce §204.004(c).

The Texas Uniform Condominium Act (“TUCA”), effective January 1, 1994, specifically states that a condominium association may impose interest and late charges for delinquent assessments and, if notice and an opportunity to be heard are given, reasonable fines for violation of the declaration, by-laws and rules of the association. Tex. Prop. Code Ann. §82.102(a)(12). However, before such a fine may be imposed, the association must give the owner written notice describing the violation and the amount of the fine, allowing the owner 30 days to request a hearing to contest the fine, and allowing the owner reasonable opportunity to cure the violation. Tex. Prop. Code Ann. §82.102(d).

Texas Property Code §204.010, sets out a process by which an association governing a single-family residential community can charge various costs to an owner as follows:

- (a) Unless otherwise provided by the restrictions or the association’s articles of incorporation or bylaws, the property owners’ association, acting through its board of directors or trustees, may:
 - (9) impose and receive payments, fees, or charges for the use, rental, or operation of the common area and for services provided to property owners;
 - (10) impose interest, late charges, and, if applicable, returned check charges for late payments of regular assessments or special assessments;
 - (11) if notice and an opportunity to be heard are given, collect reimbursement of actual attorney’s fees and other reasonable costs incurred by the property owners’ association relating to violations of the subdivision’s restrictions or the property owners’ association’s bylaws and rules;
 - (12) charge costs to an owner’s assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments;
 - (13) adopt and amend rules regulating the collection of delinquent assessments and the application of payments; or
 - (14) impose reasonable charges for preparing, recording, or copying amendments to the restrictions, resale certificates, or

statements of unpaid assessments. Tex. Prop. Code Ann. §204.010(a)(9-14).

D. Jurisdictions Available for Judicial Enforcement

An Act of the Texas Legislature approved and effective on June 17, 1995, opened justice courts as a means for POAs seeking to enforce deed restriction violations. Tex. Gov’t Code Ann. § 27.034. This section is limited to Texas counties of 2.8 million or more (i.e. Harris County) and provides justice courts with concurrent jurisdiction with district courts in suits relating to enforcement of a deed restriction of a residential subdivision that does not concern a structural change to a dwelling. *Id.* The justice courts were also endowed with the jurisdiction to refer these cases to alternate dispute resolution, such as mediation, and their jurisdiction was not limited by the amount in controversy. It is important to note, however, that the justice courts were distinctly not provided with injunctive power, and a POA seeking injunctive relief must still file its complaint with the district or county courts. Equally important is the statutory appeal provided from a justice court is trial de novo, to a county court at law.

E. Injunctive Relief

In an action resulting from a deed restriction violation, the relief often sought is injunctive relief. Injunctive relief, being relief sought in equity, is an extraordinary remedy. The court grants injunctive relief when it feels that the party seeking injunctive relief of another probably will prevail at a trial on the merits of its case and that an injury may occur in the interim if the relief requested is not granted. *Hidden Valley*, 702 S.W.2d at 668; *See also Gettysburg*, 768 S.W.2d at 371. Once an injunction is granted, a trial date must be assigned and a bond (as set by the court) must be posted. The elements of injunctive relief include: (1) the existence of a wrongful act, (2) imminent harm, (3) irreparable injury, and (4) an absence of an adequate remedy at law. *See Indian Beach Prop. Owners’ Ass’n v. Linden*, 222 S.W.3d 682, 690 (Tex.App.—Houston [1st Dist.] 2007, pet. denied). A party must substantially violate a deed restriction before the trial court may issue a permanent injunction. *Id.*

In *Whorton*, the trial court rendered judgment for a homeowner, but enjoined the homeowner from conducting certain functions relating to his business from his home. *Whorton v. Point Lookout West, Inc.*, 750 S.W.2d 309 (Tex.App.—Beaumont 1988, writ denied). The association requested the homeowner be wholly enjoined from operating his business, but the trial court concluded that, consistent with the deed

restrictions, the homeowner could *store* the goods that he was engaged in selling at his residence. Therefore, the trial court denied the injunctive relief requested. However, the trial court also found that the ingress and egress of trucks involved an impermissible commercial use of the property, or otherwise violated the restrictions at issue. *Id.* at 278. Here, the court was able to render a verdict which did not grant the injunctive relief desired by the association, but was able to provide some level of relief.

Recently, in *Webb v. Glenbrook Owners Ass'n, Inc.*, the association sued homeowners for breach of the deed restrictions and sought an injunction to prevent them from building a shed on their property for which they had failed to obtain prior approval. 298 S.W.3d 374 (Tex.App.—Dallas 2009, no pet.) The trial court granted permanent injunctions. The court of appeals overruled, reversed and remanded several of the injunctions on the grounds that the relief granted was not supported by the trial court.

In *Letkeman*, the court of appeals found that the trial court properly issued a permanent injunction. 229 S.W.3d 482. The court explained that moving a house onto the property at issue constituted a breach of the deed restrictions and the trial court did not abuse its discretion. The court also noted that the complaining owners did not have the burden of proving any actual harm.

F. Foreign Language Requirement

The Texas Property Code requires that if negotiations that precede the execution of an executory contract are provided primarily in a foreign language, the seller must provide a copy of all written documents in that language as well. Tex. Prop. Code Ann. §5.068. Such documents, as set forth in the Code include: the contract, disclosure notices, annual accounting statements, and notice of default.

V. MISCELLANEOUS

A. Termination of Services

The Texas Uniform Condominium Act, §82.102(a)(14) of the Texas Property Code, provides that:

unless otherwise provided by the declaration, the association, acting through its board, may adopt and amend rules regulating the termination of utility service to a unit, the owner of which is delinquent in the payment of an assessment that is used, in whole or in part, to pay the cost of that utility. Tex. Prop. Code Ann. §82.102(a)(14).

In some circumstances, a POA may have a right to terminate certain utility services paid by the association

out of the maintenance fund. In a San Antonio case, the court allowed the termination of water and gas service after proper notice for non-payment of assessments. *San Antonio Villa Del Sol Homeowners' Ass'n v. Miller*, 761 S.W.2d 460, 464 (Tex.App.—San Antonio 1988, no writ). The court held that the association had a valid right to cut off the utility services finding that a condominium owner, 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. *Id.* at 465.

Prior to terminating any utility service, it is pertinent to: 1) review the dedicatory instruments to establish the association has the authority; 2) give proper and effective notice of the future termination; and 3) and determine what action by the property owner is necessary to regain the use of the utility service to avoid termination.

B. Attorney's Fees

Recovery of attorney's fees by POAs from homeowners in breach of restrictive covenant actions is governed by both statutory law and case law. Section 5.006 of the Texas Property Code states as follows:

(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 cost 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. Tex. Prop. Code Ann. § 5.006 .

Judicial opinions have determined that it is the *prevailing* party which, in a cause of action based on violation of a deed restriction, is entitled to recover attorney's fees. *Boudreaux*, 882 S.W.2d at 549. In *Rosas*, the court held that "allowance of attorney's fees rests in the sound discretion of the trial court, and its judgment will not be reversed without a showing of abuse of discretion." *Rosas v. Bursey, et al.*, 724 S.W.2d 402, 410 (Tex.App.—Fort Worth 1986, no writ). It is discretionary with the trial court whether to award provisional attorney's fees in case of appeal. *Id.*

In *Rosas*, a deed restriction case, the amount of fees in question was \$22,000.00 with additional fee awards of \$5,000.00 and \$2,500.00 if there was an appeal. *Id.* at 411.

In *Giles*, the court found the amount of attorney's fees requested to be unreasonable. *Giles*, 697 S.W.2d 422. The *Giles* trial lasted two days. The statement of facts contained 94 pages. Counsel for appellees testified that his charge per hour was \$100.00, that such charge is reasonable, that his law firm had accumulated a total approximately 192 hours preparing for and trying the case, that the total hours "billed" and "unbilled" to appellees up to the time of trial was 83.7 hours, and that he spent 25 hours in trial preparation and attendance. The total time charged to the case was 108.7 hours with a total amount charged of \$10,870.39, which was awarded to appellees in the judgment. The evidence was uncontroverted by appellants at the trial, nor was counsel for appellees cross-examined by counsel for appellants.

The court found that in allowing sixteen hours (two days) for trial, the record showed that counsel devoted 92.7 hours (11.6 working days) in investigating the case, consulting with appellees and their witnesses, researching the law, and generally preparing the case for trial. In finding that although appellees were well represented by their attorneys, spending 92.7 hours was over-preparing the case, and appellants should not be held liable for attorney's fees due to over-preparing. *Id.* at 430. The appellate court reduced the amount of attorney's fees by \$5,000.00 citing lack of complexity, the law and the record.

Although the prevailing party that brings a deed restriction case shall recover attorney's fees, it is not the only way to collect attorney's fees in association matters. Courts have also allowed attorneys fees in declaratory judgment actions. *Tanglewood*, 728 S.W.2d 39. An award of attorney's fees under the Declaratory Judgment Act is not limited to the prevailing party. Under the circumstances of the case, the court could not say that the trial court abused its discretion in awarding the appellees \$6,500.00 in attorney's fees. *Id.* at 45.

In *Haas v. Ashford Hollow Cmty. Improvement Ass'n, Inc.*, the court considered the issue of reasonableness of the attorney's fees awarded. 209 S.W.3d 875, 886 (Tex.App.—Houston [14th Dist.] 2006, no pet.) The court held that the fees were reasonable pursuant to Section 5.006(b) of the Texas Property Code because the jurisdictional issues and Section 209.008(a) were unusual, and the attorney had to perform extensive legal analysis regarding these issues. *Id.* Moreover, it was unusual for a defendant to challenge jurisdiction and proceed to trial, especially when the defendant has admitted that the assessments,

interest, late charges and reasonable attorney's fees were secured by a lien on the property. *Id.*

Additionally, the Texas Uniform Condominium Act also provides for recovery of attorney's fees. Section 82.161 of the Act provides:

- (a) If a Declarant or any other person subject to this chapter violates this chapter, the declaration, or the bylaws, any person or class of persons adversely affected by the violation has a claim for appropriate relief.
- (b) The prevailing party in an action to enforce the declaration, bylaws, or rules is entitled to reasonable attorney's fees and costs of litigation from the nonprevailing party. Tex. Prop. Code Ann. 82.161.

Similarly, Section 204.010(a) of the Property Code also allows for the recovery of attorney's fees. Specifically, Section 204.010(a) provides that:

POAs, unless otherwise provided by the restrictions or the associations' articles of incorporation or bylaws, the property owners' association, acting through its board of directors or trustees may:

- (4) institute, defend, intervene in, settle, or compromise litigation or administrative proceedings on matters affecting the subdivision;
- (5) make contracts and incur liabilities relating to the operation of the subdivision and the property owners' association;
- (11) if notice and opportunity to be heard are given, collect reimbursement of actual attorney's fees and other reasonable costs incurred by the property owners' association relating to violations of the subdivisions restrictions or the property owners' association's bylaws and rules;
- (12) charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments. Tex. Prop. Code Ann. § 204.010(a)(4-5)(11-12).

C. Other Monetary Awards

Attorney's fees and other costs may also be assessed against a party as a monetary penalty for the assertion of a frivolous claim. Tex. R. Civ. P. §§ 13, 141; Tex. Civ. Proc. & Rem. Code, Chap. 10 *et seq.* Texas Rules of Civil Procedure 13 and 141 provide for such penalties upon a showing of good cause, as does Chapter 10 *et seq.* of the Texas Civil Practice &

Remedies Code. In addition, appellate courts may assess monetary penalties for the assertion of a frivolous appeal. Acting to prevent future spurious appeals and to punish an individual asserting such an appeal, the First Court of Appeals in Houston assessed a penalty of ten times the total taxable costs against a pro se litigant. *McGuire v. Post Oak Lane Townhome Owners Ass'n, Phase II*, 794 S.W.2d 66 (Tex.App.—Houston [1st Dist.] 1990, writ denied). Although the appellate court acted on its own authority under Texas Rules of Appellate Procedure 84 and without a request for such penalty from the appellee, a better practice may be to incorporate such a cross point in all arguably frivolous appeals.

VI. RECORDS OF POAs

POAs, if incorporated, are required under Texas Law to keep and make available all of its books and records to members. The following is applicable Texas law governing the record keeping practice of property owners associations.

A. CONDOMINIUMS

The Texas Property Code, §81.209 provides the following as to condominiums:

- (a) The administrator or board of administration of a condominium regime or a person appointed by the bylaws of the regime shall keep a detailed written account of the receipts and expenditures related to the building and its administration that specifies the expenses incurred by the regime.
- (b) The accounts and supporting vouchers of a condominium regime shall be made available to the apartment owners for examination on working days at convenient, established, and publicly announced hours.
- (c) The books and records of a condominium regime must comply with good accounting procedures and must be audited at least once each year by an auditor who is not associated with the condominium regime. Tex. Prop. Code. Ann. . § 81.209.

B. The Texas Business Organizations Code

The Texas Business and Organizations Code (“TBOC”) generally effective January 1, 2006 combined a number of Texas statutes (including the Texas Non-Profit Corporation Act, the Texas Unincorporated Non-Profit Association Act, Texas Business Corporation Act, etc.) is now effective as to all entities. TBOC provides the following:

1. Member’s Right to Inspect Books and Records.

A member of a corporation, on written demand stating the purpose of the demand, is entitled to examine and copy at the member's expense, in person or by agent, accountant, or attorney, at any reasonable time and for a proper purpose, the books and records of the corporation relevant to that purpose. TBOC § 22.351.

2. Financial Records and Annual Reports.

(a) A corporation shall maintain current and accurate financial records with complete entries as to each financial transaction of the corporation, including income and expenditures, in accordance with generally accepted accounting principles.

(b) Based on the records maintained under Subsection (a), the board of directors of the corporation shall annually prepare or approve a financial report for the corporation for the preceding year. The report must conform to accounting standards as adopted by the American Institute of Certified Public Accountants and must include:

- (1) A statement of support, revenue, and expenses;
- (2) A statement of changes in fund balances;
- (3) A statement of functional expenses; and
- (4) A balance sheet for each fund. TBOC § 22.352.

3. Availability of Financial Information for Public Inspection.

(a) A corporation shall keep records, books, and annual reports of the corporation's financial activity at the corporation's registered or principal office in this state for at least three years after the close of the fiscal year.

(b) The corporation shall make the records, books, and reports available to the public for inspection and copying at the corporation's registered or principal office during regular business hours. The corporation may charge a reasonable fee for preparing a copy of a record or report. TBOC § 22.353.

4. Exemptions from Certain Requirements Relating to Financial Records & Annual

Sections 22.352, 22.353, and 22.354 do not apply to:

- (1) A corporation that solicits funds only from members of the corporation; and
- (2) A corporation that does not intend to solicit and receive and does not actually raise or receive during a fiscal year contributions in an amount exceeding \$10,000 from a source other than its own membership. TBOC § 22.355.

C. Texas Case Law

In the *Shioleno* case, a board member sought to compel inspection of the association's books. *Shioleno v. Sandpiper Condos. Council of Owners*, No. 13-07-00312, 2008 WL 2764530 (Tex.App.—Corpus Christi, July 17, 2008. no pet). The trial court held in favor of the association and granted attorneys fees. *Id.* The appellate court reversed and remanded and ruled that the board member had a right to inspect all books and records upon his first request. *Id.*

D. Texas Property Code: Resale Certificate

Texas Property Code at §207.003(a) requires a property owners association to provide, when requested, within 10 days certain information a "Resale Certificate".

§207.003(b) sets out a laundry list of requirements that must be included in the Resale Certificate. However, the POA may charge a reasonable fee to assemble, copy, and delivery the information required by this section. Tex.Prop.Code Ann. §207.003(c). If the POA fails to deliver the requested information after a second request, it may be subject to a fine of not more than \$500.00, and a judgment against the POA for court costs and attorneys' fees. Tex.Prop.Code Ann. §207.004(b).

Texas Property Code at §207.003 requires a POA to provide an updated resale certificate no later than seven days after a written request is received:

- (f) Not later than the seventh day after the date a written request for an update to a resale certificate delivered under Subsection (a) 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 an updated resale certificate that contains the following information:

- (1) if a right of first refusal or other restraint on sale is contained in the restrictions, a statement of whether the property owners' association waives the restraint on sale;
- (2) the status of any unpaid special assessments, dues, or other payments attributable to the owner's property; and
- (3) any changes to the information provided in the resale certificate issued under Subsection (a).

- (g) Requests for an updated resale certificate pursuant to Subsection (f) must be made within 180 days of the date a resale certificate is issued under Subsection (a). The update request may be made only by the party requesting the original resale certificate. Tex. Prop. Code. Ann. §§207.003 (f)(1-3),(g).

Section 207.004(b) of the Texas Property Code sets out the remedies available to an owner for a POA's failure to timely deliver an updated resale certificate after a proper request has been made. Section 207.004(c) provides that if the POA fails to timely deliver the updated resale certificate, the POA cannot hold liable the buyer, lender, title insurance company, or its agents for any money due to the POA before the date that the owner provides the buyer an affidavit stating that after two written requests, the POA did not timely provide the resale certificate. Specifically, Section 207.004 provides the following:

- (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 POA to furnish the required information;
- (B) a judgment against the POA for not more than \$500;
- (C) a judgment against the POA 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 POA;
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 POA 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 POA on the date the affidavit was prepared; and

(B) any debt to the POA or claim by the POA that accrued before the date the affidavit was prepared; and

(2) the POA's lien to secure the amounts due the POA on the owner's property on the date the affidavit was prepared shall automatically terminate. Tex. Prop. Code. Ann. §§ 207.004(b)(1-2),(c)(1-2).

E. RECORDING OF DEDICATORY INSTRUMENTS

Section 202.006 of the Texas Property Code requires the recording of all dedicatory instruments relating to the subdivision as follows:

A POA 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.

As stated herein, Section 202.001 provides a definition of "dedicatory instrument":

"Dedicatory 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. Texas. Prop. Code Ann. § 202.001 (1).

The *Goddard* appellate court held that the HOA's bylaws authorized the association's board to establish the annual assessment. *Goddard v. Northhampton Homeowners Ass'n*, 229 S.W.3d 353, 357 (Tex.App.—Amarillo 2007, no pet.). The court reasoned that since the association recorded the bylaws in the real property records, as required by §202.001 of the Texas Property Code, the bylaws became a "dedicatory instrument" as defined in the Property Code. *Id.* The court held that all dedicatory instruments must be construed together, and together they control the operation of the association. *Id.*

In *Burton*, the court ordered the production of the books and records of the association to be made available for inspection and copying. *Burton and Galleria Diplomat Ass'n, Inc., v. Cravey*, 759 S.W.2d 160 (Tex.App.—Houston [1st Dist.] 1988, no writ.). Included with the materials to be produced, the court found that Burton, an attorney, had been hired by the board of directors on numerous occasions and that his books and records relating to the representation of the association were the books and records of the association. The right of condominium owners to inspect the books and records, like the comparable right to inspect granted shareholders in corporations, is limited by the requirement that the inspection be for any "proper purpose." *Id.* at 162. For some reason, Burton did not contest that the inspection was for an improper purpose. The court examined the issue of attorney-client privilege and the court stated that the issue of privilege is not considered when there is a statutory right to examine the books of the association.

Moreover, if the attorney-client privilege did apply, the court stated it would hold that the trial court did not abuse its discretion in ordering the inspection of Burton's records. The attorney-client privilege is not absolute; appellants' interest in the nondisclosure of communications protected by the privilege would have to be balanced by the inspection rights of the members of the non-profit corporation. *Id.*

Ideally, if properly asserted, the books and records of the association's attorney would not be made available to his adversary in a pending matter that would be prejudicial to the association's case. The

Burton case involved disgruntled property owners concerned with fees that Burton had charged the association for representation in past matters. Legislation has been recommended by interested attorneys for a property code amendment excluding attorneys' files from the books and records of the association.

Additionally, the appellate court in Amarillo has decided that (i) the inspection of books by a member of a non-profit corporation was not unconstitutional; (ii) persons who had resigned from the board of directors of the non-profit corporation were still members entitled to inspect the books and records; (iii) in the absence of a showing that the right of inspection has been used by a member for harassment or to impede the management of the corporation, the right of inspection is not limited in number; and (iv) the statutory amendment clarifying that the right to inspect included the right to copy was applicable to a request made prior to the amendment. *Citizens Ass'n. for Sound Energy v. Boltz*, 886 S.W.2d 283 (Tex.App.—Amarillo 1994, writ denied).

VII. SECTION 209 TEXAS PROPERTY CODE

A. Applicability

This Act became effective on January 1, 2002, has amendments effective as of September 1, 2009, and applies to all residential subdivisions with restrictions that authorize a POA to collect assessments. However, it does **not** apply to condominium developments.

B. Requirements

1. Record A Management Certificate

If a POA has not already done so, it is now required to record a Management Certificate in each county where the subdivision is located. The Management Certificate must also be amended and recorded within 30 days of any changes to this information. The Management Certificate must be signed by an officer or the managing agent, be notarized, and contain the following information:

- a. Name of subdivision;
- b. Name of association;
- c. Recording data for subdivision;
- d. Recording data for declaration;
- e. Mailing address of the association or the managing agent of the association or the association's designated representative; and
- f. Any other information the association considers appropriate.

2. Give Owners Notice Under The Following Circumstances:

- a. When charging an owner for property damage;
- b. When levying a fine for a violation of the restrictions, bylaws or rules; or
- c. When filing a lawsuit, except for:
 - 1) Lawsuits to collect regular or special assessments;
 - 2) Lawsuits where one of the causes of action is foreclosure under an Association lien; or
 - 3) Lawsuits for a temporary restraining order or temporary injunction.

Caveat: Advance notice of attorney fees is required in order to collect from an Owner.

- d. When suspending an Owners right to use a common area, except for:
 - 1) a temporary suspension of a person's right to use common area if the violation involved a significant and immediate risk of harm to others in the subdivision.

C. Remedies

If the POA fails to record a management certificate or an amended management certificate as required in the Texas Property code, the purchaser, lender, or title insurance company or its agent is not liable to the POA for:

1. Any amount due to the POA on the date of transfer to a bona fide purchaser; and
2. Any debt to or claim of the POA that accrued before the date of the transfer.

A lien of a POA that fails to file a management certificate or amended management certificate to secure an amount due on the effective date of a transfer is enforceable only for an amount due after the effective date of sale.

A POA that exists on September 1, 2009, must file the information required to be in the management certificate as per the changes in Texas Property Code § 209.004, no later than May 1, 2010, or the POA will be at risk of losing any amounts owed to the POA before a transfer of the property.

D. Notice Requirements

In order to fine a homeowner for violation of the deed restrictions, section 209 imposes strict notice requirements that must be satisfied by the association. In the mandatory violation of deed restrictions letter to a homeowner, the association must include in the notice the following:

1. A description of the violation, property damage, fine or charges;
2. State any amount due the POA; and
3. Include a statement which informs the owner:
 - a) They are entitled to a reasonable time to cure the violation and avoid the fine or suspension (*unless Owner has already been given notice & opportunity to cure a similar violation within the preceding six months*);
 - b) They may request in writing a hearing before the Board or designated committee on or before the 30th day after the date the Owner receives the notice; and
 - c) That if the hearing is before a designated committee, then the Owner has to right to appeal the decision of the committee to the Board by written notice to the Board.

E. Hearing Requirements

Per the notice, if a hearing is requested by an owner as described above, then the POA must:

1. Hold a hearing within 30 days from the date of receipt of the Owners request for a hearing;
2. Notify the Owner of the date, time and place of the hearing not later than the 10th day before the hearing;
3. If a postponement of the hearing is requested by either the Board or Owner, it must be granted for a period of not more than 10 days and additional postponements may be granted by agreement of the parties;
4. An Owner or POA may make an audio recording of the hearing; and
5. An Owner need not be present in order to hold a hearing.

The hearing should be held in a non-adversarial manner, and to that end attendance by attorneys should

be avoided. The POA should approach the hearing with the attitude that it is there to listen to the owner and should afford the owner adequate time to fully explain his/her position.

F. Reimbursements of Fees and Costs

1. Reimbursement Allowed

A POA may collect reimbursement of its reasonable attorney fees and costs relating to collection and damages for enforcement of its Declaration of Covenants, Conditions and Restrictions (“dedicatory instruments”), but only if it first gives the Owner written notice stating that attorney fees and costs will be charged to the owner if the delinquency or violation continues after a date certain. This is why notice is given before commencing a lawsuit.

2. Reimbursement Disallowed

An owner will not have to pay for attorney fees that are incurred *before* the conclusion of the hearing or the date by which an Owner could have requested a hearing (which is 30 days after the date the Owner receives the notice). Thus, if an attorney sends letters prior to a hearing requested by an owner or an attorney participates at such a hearing, attorney fees will not be reimbursable by the owner.

3. Amounts Collected

All attorney fees, costs, and other amounts collected from an owner must be deposited into an account maintained at a financial institution in the name of the POA or its managing agent.

4. Copy of Invoices

Upon written request from an owner, a POA must provide copies of invoices for attorney fees and other costs relating to the matter for which the POA is seeking reimbursement of fees and costs. Therefore, it is important for the attorney to keep confidential information off invoices.

G. Reimbursement of Attorneys Fees for Non-Judicial Foreclosure

The statute provides detailed requirements for notices after a non-judicial sale and the owners’ right to redeem.

VIII. CONCLUSION

Property owners’ associations have become an important and pervasive force in today’s society. Associations are generally led by groups of volunteer homeowners. When buying property in a restricted subdivision or project, an owner consents to be “ruled,” in a sense, by the law laid down in the dedicatory instruments and by the men and women

chosen to serve on the association's board of directors. Understanding the ins and outs of this "law" and that the main purpose of a property owners association is to protect and preserve property values will lead to a greater understanding of property owners' associations which have become a permanent part of our society.