Survey of Texas Case Law Affecting Property Owners Associations

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I. INTRODUCTION AND SCOPE

This article covers reported Texas cases over the last twenty-two years that have involved the law affecting property owners' associations (including condominium associations) and restrictive covenants. Every reported case involving property owners' associations or restrictive covenants over the past twenty-one years has not been included as a few of the reported cases had nothing to do with the law affecting property owners' associations and restrictive covenants. It is also possible some reported cases may have been overlooked. An in-depth discussion of each case is also well beyond the scope of this CLE article and has not been attempted. Rather, the focus of this article is on the significant holdings in each case discussed, as these holdings concern the law governing property owners' associations and restrictive covenants. Many of the facts and holdings in the following cases were so intertwined it was difficult to separate them. Accordingly, no such attempt was made and the facts and holdings are summarized the first time a case is mentioned in this article. Subsequent references to the case refer the reader to the first time the case is discussed in this article. As with most areas of the law, the facts are always important and this concept is particularly true in this area of the law. Indeed, it has been said that the cases regarding restrictive covenants appear to be in hopeless conflict, until the facts in each case are understood. With that, the reader is cautioned to refer to the facts and opinion of any case in question, rather than the synopsis in this article. In summary, this article should be used as a directory of those cases reported over the last twenty-one years that discuss or comment on the law affecting property owners' associations and restrictive covenants.

II. CREATION OF RESTRICTIONS

A. General Plan of Development

1. ***Selected Lands Corp. v. Speich*, 702 S.W.2d 197 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).**

In a declaratory judgment action, the trial court ruled that Selected Lands, a successor developer, could not enforce certain restrictive covenants, specifically those with regard to maintenance assessments, against lot owners in the subdivision. The trial court found that: (1) the restriction did not run with the land; (2) no general plan or scheme was imposed; (3) the maintenance fee provisions were unenforceable; and (4) the previous developer's assignment to Selected Lands of the right to collect assessments violated the statute of frauds and was enforceable.

The court of appeals reversed and rendered judgment, holding that the restrictive covenants did run with the land because the lot owners purchased their property with constructive notice of the restrictions. Further, the restrictive covenants were valid and enforceable as equitable servitudes. The court noted that it is not essential in the execution of a general plan or scheme that every lot in the subdivision be imposed with a restriction. "Where a general plan of development has been maintained and has been understood, accepted, relied upon, and acted upon, it is binding and enforceable so long as the grantee of a lot, which is not specifically restricted, either took with notice of the restriction or with knowledge of the general plan."

B. Implied Negative Reciprocal Covenants

1. ***Evans v. Pollock*, 796 S.W.2d 465 (Tex. 1990).**

The Hornsbys and McCormicks platted a lake front subdivision from property they both owned. The plat itself did not contain any use restrictions. Later, the two families partitioned the subdivision between themselves and then sold most of the remaining parcels of land to third parties or to one another. Each deed contained the same restrictions that limited the land to residential use with only one dwelling and provided that the restrictions could only be changed by a 3/4 vote of the owners of the lake front lots. The Hornsbys retained ownership of several lots for themselves. The Hornsbys later died and that property passed to their heirs. The Hornsbys' heirs then contracted to sell the remaining property for the purpose of building a marina, private club and condominium development. Evans and other owners whose deeds contained restrictions sued for relief under the doctrine of implied

reciprocal negative easements seeking a declaration that the restrictions contained in their deeds were implied upon the property the Hornsbys had retained. The trial court rendered judgment that the restrictions applied to a portion of the Hornsby lots which were lakefront. The court of appeals reversed and rendered judgment that none of the Hornsby lots were restricted because the original grantors did not intend the entire subdivision to be restricted.

In its opinion, the Supreme Court of Texas noted that the central issue in deciding whether the doctrine of implied reciprocal negative easements applies is whether there exists a general plan of development. The question was whether it was intended that all the tracts in the subdivision be subject to the restrictions. The Court upheld the trial court's decision and ruled that the restrictions only applied to the lake front lots since the restrictions clearly gave voting rights only to those lots. The Court noted that "the general plan or scheme may be that the restrictions only apply to certain well-defined similarly situated lots for the doctrine of implied reciprocal negative easements to apply to such lots."

2. ***H.H. Holloway Trust v. Outpost Estates Civic Club Inc.*, 135 S.W.3d 751 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).**

In April 1951, the Chacheres conveyed a 43-acre tract of land to James, Hamilton and Little ("the Developers"). The deed provided for payment in installments and the Chacheres retained a vendor's lien on the property. In May, the Developers and the Chacheres signed a plat of a 53-acre subdivision, which included the 43-acre tract, named Outpost Estates. The plat subdivided the tract into 52 lots (numbered 1-50, 52, and 53). The plat and subdivision were approved by the City of Houston that same month. On August 1, the Chacheres deeded lots 52 and 53 to their daughter, M. Vilven. The deed stated that:

> Said LOT IS RESTRICTED IN ITS USE, AND THE RESTRICTIONS Said [*sic*] ARE FILED WITH THE COUNTY CLERK OF HARRIS COUNTY UNDER FILE NO. _____ IN VOL. ___ PAGE __.

On August 14, the Developers and the Chacheres executed a declaration of restrictive covenants for Outpost Estates in order to establish and maintain a general plan for the use of the property. The restrictions provided that: (1) no lot could be used for anything other than residential purposes; (2) the Developers were the sole owners of the property; (3) the Chacheres were the owners of a vendor's lien retained in the deed to the property; and (4) these parties together represented the entire interest in the property. The plat was filed on August 14 and recorded on September 25. The restrictions were filed on September 17 and recorded on October 31. Vilven's deed to lots 52 and 53 was filed on September 21 and recorded on November 8. Vilven sold her lots in 1953, and they eventually came to be owned by H.H. Holloway. In 1988 the executor of the H.H. Holloway estate conveyed lots 52 and 53 to the H.H. Holloway Trust ("the Trust"). In 1998, the trustee informed a member of the architectural committee that he wanted to develop the two lots for commercial purposes. The committee member told the trustee that the subdivision was restricted and that businesses were not allowed. The Trust filed an action for a judgment declaring that lots 52 and 53 fell outside of the deed restrictions of Outpost Estates. The trial court held that that the deed restrictions applied to lots 52 and 53 and the Trust appealed.

The court of appeals affirmed the trial court's judgment. The Trust challenged the trial court's finding that the general plan for Outpost Estates existed before the conveyance of lots 52 and 53 to Vilven and that this was evidenced in the deed that conveyed such title. The court disagreed, pointing out that the general plan for the subdivision (the plat) was signed nearly three months before the tracts were deeded to Vilven. In addition, the deed's description of the property ("lots 52 and 53 in block F of Outpost Estates edition") and the incomplete reference to the filed restrictions was also evidence that the general plan existed prior to the conveyance. The Trust argued that the Developers' intent should not have been admitted evidence because the deed restrictions were unambiguous in their exclusion of lots 52 and 53 from their scope. The court found this argument to be without merit because the evidence was not used to interpret the document itself, but to determine the applicability of the restrictions to lots within the general plan but outside the scope of the document.

Additionally, courts may look at the intent of the developer when determining whether or not to apply the doctrine of implied reciprocal negative easements. The Trust argued that lots 52 and 53 couldn't be bound by the deed restrictions because the deed conveying the lots to Vilven did not specify where the restrictions were recorded. The Trust further argued that the reference to the restrictions was merely a general statement designed to protect a grantor. The court, however, found that the reference to the restrictions was not a general statement meant to protect the grantor, but rather a specific statement inserted by the grantor: "Said lot is restricted in its use…". Despite the fact that the reference to the location of the recorded restrictions was incomplete, the statement was found to be sufficient to put a subsequent purchaser on notice that there were use restrictions that apply to the property. The Trust argued that the doctrine of implied reciprocal negative easements should not apply to the lots because ownership of the lots was not derived from a common grantor, which is a requirement to trigger the doctrine. Citing the Supreme Court of Texas decision in *Evans v. Pollock*, 796 S.W.2d 465 (Tex. 1990), the court gave a general discussion of the doctrine of implied reciprocal negative easements, which doctrine "applies when an owner of real property subdivides the property into lots and sells a substantial number of those lots with restrictive covenants designed to further the owner's general plan or scheme of development." The Court further held under this doctrine the grantees acquire by implication an equitable right to enforce similar restrictions against lots retained or sold by the grantor without such restrictions to a purchaser with actual or constructive notice of the restrictions, which implied right the Court stated is "variously called an implied reciprocal negative easement or an implied equitable servitude." The Trust reasoned that Vilven owned lots 52 and 53 at the time the restrictions were signed, implying that the developers owned the remaining portion of the subdivision, and that consequently there was no common grantor of the entire subdivision. The court disagreed. The Chacheres and the Developers joined together to sign and file the plat of Outpost Estates and the platted tract included the 43 acres conveyed to the developers by the Chacheres and 10 additional acres. The fact that the Chacheres gave two of the platted lots to their daughter and two to their son indicated that they retained some of the platted tract, and there was nothing that indicated there was any other owner of the additional acreage other than the Chacheres. Therefore, the Chacheres and the Developers were common grantors of the related parcels of land. Further, there was evidence that lot owners had actual or constructive notice of the restrictions. Vilven herself testified that she knew at the time the lots were deeded to her that they were subject to restrictions and that the lots could only be used for residential purposes.

C. Personal Covenants or Covenants Running with the Land

1. ***Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657 (Tex. App.—Austin 2005, no pet.).**

In April 1992, litigation before a state agency commission resulted in a settlement between Mobil Oil ("Mobil") and other parties. In the agreed order, the commission found documented contamination on Mobil's property in violation of state regulations. Mobil was ordered to submit a pollution remediation plan with provisions for monitoring of corrective measures and they were required to impose a restrictive covenant prohibiting uses that could create environmental risk before selling the property. In 1997, Mobil sold the property to Pizza Property Partners ("PPP") by special warranty deed with a restrictive covenant that prohibited the property from being used for: (1) anything other than commercial/light industrial purposes; (2) the storage or sale of motor fuels; and (3) residential purposes, healthcare facilities, daycare facilities, schools, and playgrounds. Additionally, irrigation, drinking water wells, and subsurface structures were prohibited. PPP also agreed to bind itself and any subsequent purchaser to submit future construction plans to Mobil to accommodate their corrective action. In January 2000, PPP sold the property to the Voice of the Cornerstone Church Corp. ("Cornerstone"), by warranty deed, subject to "any and all restrictions, encumbrances, easements, covenants and conditions." The deed did not further elaborate on the restrictive covenant or explicitly refer to the instruments filed with the clerk. At the time of purchase, the property contained several old

industrial warehouses. Cornerstone, after receiving permits from the city, converted the largest into a sanctuary, removing walls to create space and constructed a kitchen to provide meals on Sundays. Cornerstone also created a baptismal pool from one of the fuel storage tanks. Cornerstone did not seek Mobil's permission to engage in any of these renovations or construction projects. In a smaller building on the property, Cornerstone ran a printing press to provide financial support to the church and Ramos, Cornerstone's pastor, operated an appliance repair shop and retail store on the property to help pay the congregation's monthly expenses. In May 2000, after learning of Cornerstone's activities, Mobil informed Cornerstone of its belief that their use violated the restrictive covenant. The parties were unable to come to an agreement and in 2001, ExxonMobil (Mobil Oil became ExxonMobil after a series of mergers) filed suit, alleging that Cornerstone's activities breached the restrictive covenant, access agreement, and the use agreement Mobil signed with PPP in 1997. ExxonMobil also sued PPP and the real estate agent who arranged the sale to Cornerstone.

After a series of cross motions for summary judgment, the district court granted ExxonMobil's motion without stating the grounds. Subsequently, Cornerstone, for the first time, filed a declaratory judgment counter-claim seeking declaratory relief, cancellation or modification of the restrictive covenant based on changed circumstances or ambiguity, and they also asserted various new affirmative defenses. After trial on the claim between ExxonMobil and PPP, the court rendered final judgment incorporating all of its previous rulings and permanently enjoined Cornerstone from using the property for church services or anything else other than commercial or light industrial purposes and from using the baptismal pool on the property. The court also prohibited Cornerstone from violating the terms of the restrictive covenant, the use agreement, and the access agreement. Finally, the court prohibited any construction activity without first allowing ExxonMobil to review the plan to ensure that they accommodated the corrective action.

The court of appeals affirmed the judgment of the trial court. Cornerstone argued that ExxonMobil lacked standing to seek enforcement of the restrictive covenant, but the court disagreed. It was undisputed that ExxonMobil was Mobil's successor in interest and therefore stood in the shoes of the original grantor. The original grantor of property is entitled to enforce a restrictive covenant on that property. One way a restrictive covenant can bind a successor to the land is if it runs with the land. The court determined that the covenant ran with the land and thus held ExxonMobil could enforce the covenant. Cornerstone next argued that the trial court incorrectly interpreted the restrictive covenant to bar its church activities because: (1) those activities were merely incidental to the commercial use of the property; (2) the covenant did not specifically exclude church uses from appropriate uses; and (3) the baptismal pool was created from an "already existing concrete hole" as opposed to being a new subsurface structure prohibited by the covenant. The court disagreed. The court noted that when a covenant restricts the use of property to residential uses, additional uses may be permitted if they are reasonably incidental to the prescribed uses and of such nominal or inconsequential breach of the covenants as to be in substantial harmony with the purpose of the parties in the making of the covenants. Although the restrictive covenant did not expressly prohibit worship services or related church activities, it unequivocally prohibited any use of the property other than commercial or light industrial purposes. Given the context in which the covenant was created, it was not necessary for ExxonMobil to enumerate every conceivable non-commercial, non-industrial use for the limitation to be effective. The court was bound to give effect to the clear intent of the drafters. Additionally, the church uses of the property were neither nominal nor inconsequential to the permitted uses. While church services constituted only 17% of the time the property was used for activities, they formed the fundamental core of Cornerstone's use of the property. The printing press and appliance and repair shop were conducted for the purpose of supporting the church's religious mission. Thus, the court concluded that Cornerstone's use of the property for church purposes was a distinct, substantial breach of the restrictive covenant. The court also rejected Cornerstone's argument that the baptismal pool was an already existing concrete hole that did not violate the prohibition of

subsurface structures because of the broad definition of the term structure—"any production or piece of work artificially built up, or composed of parts joined together in some definite manner; any construction." Here, Cornerstone did not just use the hole that already existed; they removed sand from the hole, used cement to form the floor and walls of the pool and tiled the circumference of the hole. Lastly, Cornerstone argued that enforcement of the covenant would violate its rights to religious freedom. The court disagreed, noting that Texas courts have routinely rejected the notion that a facially neutral, otherwise valid restrictive covenant violates constitutional religious freedom protections if applied against a church.

2. ***Rolling Lands Invs., L.C. v. Northwest Airport Mgmt., L.P.*, 111 S.W.3d 187 (Tex. App.—Texarkana 2003, pet. denied).**

Northwest Airport Management, L.P., d/b/a David Wayne Hooks Memorial Airport ("Northwest"), owned and operated a private airport located in Harris County. In 1983, Northwest's predecessor in interest sold an eight-acre subdivision (the "Tract") to Northwest Jet ("Jet"), a predecessor in interest to Rolling Lands Investments, L.C. ("Rolling Lands"). The Tract was located adjacent to the airport. At the time of the sale, the Tract was burdened by deed restrictions, including a restriction that prohibited access to the airport and from ever being used for the storage or sale of automotive gasoline or related petroleum products, aviation gasoline, diesel fuel, jet fuel, lubricating oil, or other petroleum products which in any manner would constitute any form of competition with the normal and usual business operations of the airport without the express prior written permission of the airport. In 1984, pursuant to the deed restrictions, the parties entered into an agreement ("1984 Agreement"), which granted Jet fueling and access rights to the airport and its facilities. The 1984 Agreement was scheduled to expire on May 31, 1996. If Jet or its successor was not in default on May 31, 1996, however, the 1984 Agreement was subject to successive, automatic one-year renewal terms that would continue unless Northwest gave notice of termination at least ninety days before the anniversary date, in which case the contract would terminate on that anniversary date. In 1985, as security for a loan, Jet transferred its fueling and access rights to First Interstate Bank (now Wells Fargo Bank), and the Bank properly perfected its security interests. To clarify the rights of each party, Northwest and Jet entered into an agreement in 1989 ("1989 Agreement") that provided the parties would be governed by the terms of the original 1984 Agreement, including the above-mentioned durational terms. Further, Northwest and Jet made the 1989 Agreement binding only if the Bank consented to its terms ("1989 Consent"). In order to obtain the Bank's consent, Northwest and Jet agreed to the additional provisions of the 1989 Consent. In 1992, the Bank foreclosed on the Tract and subsequently purchased it at the foreclosure sale. In 1993, the Bank filed a lawsuit against Northwest, seeking access to the airport. In that 1993 suit, the Bank did not address the fueling rights restrictive covenant in the deed. The Bank also did not demand new agreements pursuant to the 1989 Consent. Before that suit was tried, the parties entered into a settlement agreement ("1993 Agreement") that included an agreed dismissal of the 1993 lawsuit with prejudice. The 1993 Agreement gave the Bank, in common with others authorized to do so, the right to access and use the facilities and appurtenant areas of the airport. The 1993 Agreement also: (1) gave the Bank the right to assign or otherwise transfer the Bank's rights; and (2) explicitly stated it constituted a novation and replacement of all previous license agreements. After 1993, the Tract went unused until Rolling Lands purchased it from the Bank in 2001. Shortly before Rolling Lands purchased the Tract, Northwest gave notice of termination on October 18, 2000. On January 30, 2001, Rolling Lands demanded a new fueling rights agreement pursuant to the 1989 Consent and sought access rights pursuant to the 1993 Agreement. Northwest refused to comply with the demand, and Rolling Lands brought this suit to enforce those agreements. Northwest filed a motion for summary judgment contending Rolling Lands' claims were barred by res judicata, statute of limitations, contract interpretation, and statute interpretation. In response, Rolling Lands filed its own motion for summary judgment seeking declaratory relief, specific performance, and attorney's fees. The trial court granted Northwest's summary judgment motion and denied Rolling Land's summary judgment motion.

The court of appeals reversed and rendered judgment. Rolling Lands argued that the fueling rights deed restriction, prohibiting fuel sales without permission from Northwest, was unenforceable, among other reasons because it was an unreasonable restraint on competition. The court had already determined that Rolling Lands was not barred by res judicata from asserting its claim that the fueling rights restriction was unenforceable. Nonetheless, the court found that Rolling Lands failed in its assertions that the fueling deed restriction was unenforceable because the restriction was an unreasonable covenant not to compete. The court held the fueling rights restriction was a restraint on the use of a single parcel of real property and thus should not be reviewed as a non-competition contract. Rather, the deed restriction was a covenant running with the land and should be analyzed as such. In Texas, a real property covenant runs with the land when it touches and concerns the land, it relates to a thing in existence or specifically binds the parties and their assigns, it is intended by the parties to run with the land, and the successor to the burden has notice. There must also be privity of estate between the parties when the covenant was made. The restriction at issue here did touch and concern the land because it limited the use to which the land can be put. The written restriction specifically bound the parties and their assigns, and evidenced an intent that the restriction run with the land. It was undisputed that Rolling Lands had actual and constructive notice of the deed restrictions before purchasing the Tract. There was also privity of estate when the covenant was established. Thus, the covenant restricting fueling rights on the Tract met the requirements for a covenant running with the land and should be enforced.

3. ***A.C. Musgrave, Jr. v. Owen*, 67 S.W.3d 513 (Tex. App.—Texarkana 2002, no pet.).**

In the suit (Musgrave II), Musgrave, as the developer, filed suit against Brookhaven Lake Property Owners Association and all lot owners seeking a declaratory judgment to ascertain certain rights and responsibilities under the restrictive covenants. Musgrave and the association were involved in prior litigation (Musgrave I) wherein the association brought suit against Musgrave complaining that the restrictive covenants obligated Musgrave to perform certain duties and to enjoin him from certain actions. Musgrave presented several counterclaims in Musgrave I. In Musgrave II, the trial court determined that Musgrave should have brought this action in the prior suit and granted summary judgment in favor of the association on the grounds of res judicata. Musgrave appealed.

The court of appeals reversed and remanded. The court explained that Texas follows the transactional approach to claim preclusion, or res judicata, in that the courts must examine the facts and circumstances surrounding the claim, not the legal theories presented. The court stated that "[t]he main concern is whether the cases share the same nucleus of operative facts." On appeal, Musgrave complained that although Musgrave I and Musgrave II shared common circumstances, the claims in Musgrave I did not arise from the same transaction as those raised in Musgrave II. In reversing the court held that there was a legal relationship between Musgrave and the lot owners by virtue of the restrictive covenants. The court, however, found that res judicata does not apply to claims that are not mature at the time of the prior proceeding and the claims presented in Musgrave II were not mature during Musgrave I. Additionally, the court held that Musgrave's successor in interest was entitled to same relief as given to Musgrave even though the successor in interest did not appeal the suit's dismissal by the trial court.

[Editor's Note: There is a third case (Musgrave III), which is summarized later in this article.]

4. ***Musgrave v. Brookhaven Lake Prop. Owners Ass'n.*, 990 S.W.2d 386 (Tex. App.—Texarkana 1999, pet. denied).**

Anderson and Basham recorded plats covering several hundred acres that they owned in Wood County. In the plats, they reserved for the owners of lots in each section the recreation and roadway areas as shown on the plats and recorded a document entitled "Declaration of Restrictive Use." The declaration stated that no use shall ever be made of the platted property which would interfere with the rights and privileges of the lot owners to use the land for hunting, fishing and recreation, and that the property shall never be used for commercial purposes or private gain. Basham then sold his one-

half interest to Anderson. Thereafter, Anderson conveyed the property to Robison and Robison executed a document entitled "Assumption of Liabilities and Declaration of Indemnity." In that document, Robison agreed to take on the responsibilities of Anderson and Basham, and to have the sole and complete responsibility for the maintenance of all roads, streets, lakes and recreation areas. The agreement further said that it would be enforceable by any lot holder within the development. Audie Musgrave and his wife then acquired the property from Robison. The property acquired included a lodge building that had been previously built. The Musgraves created the Brookhaven Retreat, which operated on the property. From June of 1984 to October of 1995, the lodge building was rented to the general public. Logging operations were also permitted on the tract. In August of 1994, a group of lot owners and the Brookhaven Lake Property Owners Association filed suit against Musgrave and Brookhaven Retreat seeking an injunction to stop them from interfering with the exclusive rights of the lot owners to use the lakes, roadways and recreational areas, and to prohibit guests of Brookhaven Retreat who were not lot owners to use the property.

The trial court granted an injunction in favor of the lot owners and the association. The trial court awarded damages and attorney's fees. The trial court also awarded attorney's fees in the event of an appeal.

The court of appeals found that the association had standing to sue Musgrave and Brookhaven Retreat, that the covenants originally recorded against the land ran with the land (even though the standard "his heirs and assigns" language was absent), and that the property owners' testimony was sufficient to establish damages. The court held that the provisions requiring the maintenance were filed of record, and, therefore, Musgrave had constructive knowledge of their contents. The court found that Musgrave and Brookhaven Retreat were required to maintain the roads, lake and recreational areas and that, therefore, Musgrave and Brookhaven Retreat were liable to the association for expenses of the association in maintaining the common areas and roads. The court found that the amount of attorney's fees awarded by the trial court was excessive. In determining whether the trial court abused its discretion in awarding the attorney's fees, the court looked at: (1) the nature of the case, including its difficulties, complexities and importance; (2) the amount of money involved and the client's interest at stake; (3) the amount of time necessarily spent by the attorney on the case and the skill and experience reasonably needed to perform the services; and (4) the entire record of the case, as determined by the common knowledge of the justices of the court and their experience as lawyers and judges.

5. ***Wimberly v. Lone Star Gas Co.*, 818 S.W. 2d 868 (Tex. App.—Fort Worth 1991, writ denied).**

Lone Star Gas and a previous owner of the Wimberlys' property entered into a contract for the purchase of water from the Wimberly well. The term of the contract was for so long as Lone Star operated its plant. Prior to the Wimberlys' purchase of their property, they read this contract and performed its obligations for twenty-four years before notifying Lone Star that the contract was terminated and Lone Star filed suit. The trial court ruled in favor of Lone Star and enjoined the Wimberlys from stopping the flow of water to Lone Star.

The court of appeals affirmed the trial court's judgment, holding that because the Wimberlys complied with the terms of the contract for twenty-four years, there was an implied contract. Further, the court disagreed with the Wimberlys' contention that the covenant did not run with the land because it only conferred a benefit to Lone Star's land and not to theirs. The court stated, "[w]e find no such requirement... . The definition merely requires that the covenant touch upon the land."

6. ***Tarrant Appraisal Dist. v. Colonial Country Club*, 767 S.W.2d 230 (Tex. App.—Fort Worth 1989, writ denied).**

Colonial Country Club filed suit protesting a determination by the appraisal district that it was not entitled to special appraisal based on an act which offered favorable tax treatment to those willing to commit the use of their land to scenic, park or recreational use. The appraisal district contended that Colonial's restrictions were invalid and unenforceable because, among other things, they were based on a personal covenant.

The court of appeals stated that, "[t]he primary distinction between real and personal covenants is that real covenants run with the land, binding the heirs and assigns of the covenanting parties, and personal covenants do not." The court held that in order to run with the land, a covenant must be made by parties in privity of estate at the time of conveyance. Further, personal covenants bind only the actual parties to the covenant and those who purchase the land with notice of the restrictive covenant, if the restrictions concern land or its use. The court also held that the fact that the restrictions were based on personal covenant did not affect their validity.

III. CREATION OF ASSOCIATIONS

A. No Limitation on Developer

1. ***Simms v. Lakewood Village Prop. Owners Ass'n, Inc.*, 895 S.W.2d 779 (Tex. App.—Corpus Christi 1995, no writ).**

The developer of a subdivision began selling lots for mobile homes, modular homes and RVs. Each deed from the developer stipulated that the purchaser had read and accepted the restrictions, which were attached to the deed. The attachment contained provisions for annual assessments. Later, an advisory board was formed which began making assessments. The restrictions were not recorded until about three years after the first lots were sold. The bank took over the unsold portions of the subdivision and later turned the common areas over to the association, which filed articles of incorporation and began making assessments in its name. After discovering that the association was assessing some lots incorrectly, the association changed their method of assessment. A group of subdivision property owners then filed suit against the association seeking to: (1) enjoin the enforcement of the restrictions and assessment of fees; (2) declare the restrictions void; and (3) recover damages and attorney's fees. The association counterclaimed for delinquent assessments, interest and attorney's fees. The trial court found in favor of the association, holding that the covenants were valid and enforceable against all of the property owners.

In arguing that the association was not validly formed, the property owners argued that the association was not formed in accordance with the restrictions because there was not a vote to create the association. The applicable covenant stated:

> Should the Declarant elect to form a Property Owners' Association prior to the sale of all of the lots as herein provided, Declarant may submit By-laws and Regulations to the Owners of the lots at that time and such Associations may be formed by a majority vote of the Owners prior to the sale of all lots by Declarant.

The court of appeals rejected this argument, however, holding that the word "may" meant that the developer was not limited to this method of creating an association. There was also evidence that: (1) some of the property owners involved in this action had attended a meeting of the association which discussed the bank's desire to transfer ownership and management of the common areas to the association; and (2) the property owners were either directly involved in the association or accepted the association's authority. The court also noted that the formation of the association was not challenged until the method of assessment was changed. To that end, the court stated that, "[t]he balance of the appellants by working on committees, or by attendance at association meetings, or by acceptance of the board's actions in managing the common areas, or by payment of assessments fixed by the board, for approximately two years, impliedly recognized, acknowledged, and ratified the board's authority to accept the management and ownership of the common areas." With regard to those owners who purchased lots prior to the recordation of the restrictions, the court held that they were put on notice of those covenants and that there was evidence of a general plan and scheme for the subdivision at the time they purchased their property. Furthermore, they also participated in the association.

IV. ARCHITECTURAL/USE RESTRICTIONS

A. Residential Use

1. ***Point Lookout W., Inc. v. Whorton*, 742 S.W.2d 277 (Tex. 1987).**

The association brought suit against Whorton to enjoin him from operating a mail order business

from his home in the subdivision in violation of a residential use only restriction. The trial court refused to wholly enjoin Whorton from operating his business; however, he was ordered not to ship or receive goods at his residence by means of truck lines or parcel post services.

The court of appeals reversed the portion of the trial court judgment that enjoined Whorton from shipping and receiving goods at his home and affirmed the remainder of the judgment. The Supreme Court of Texas reversed the court of appeal's decision and remanded because it said that the court of appeals failed to find all facts deemed against Whorton and in support of the portion of the judgment from which he appealed. As such, the court of appeals failed to apply the correct standard of review as neither party requested findings of fact and conclusions of law.

On remand, the court of appeals in *Whorton v. Point Lookout West, Inc.*, 750 S.W.2d 309 (Tex. App.—Beaumont 1988, no writ), affirmed the decision of the trial court. Whorton could, consistent with the restrictions, store the goods that he was engaged in selling at his residence. The traffic of commercial trucks to and from his residence, however, involved an impermissible commercial use of the property.

2. ***Sharpstown Civic Ass'n, Inc. vs. Pickett*, 679 S.W.2d 956 (Tex. 1984).**

The association sued Pickett, the owner of two adjoining lots in the subdivision, to enjoin him from building a commercial car wash on his lots. Prior to Pickett becoming the owner of the lots in question, one of the lots was used for a one-story office building occupied by a real estate agent, insurance salesman and attorney. Pickett also used the office building on one of the lots, prior to turning it into a used car lot. The jury found for Pickett at trial, holding that enforcement of the covenants was barred by the statute of limitations and waiver.

The court of appeals reversed the trial court's judgment and rendered judgment granting the injunction. The court rejected Pickett's argument that the use of one of the lots as an office building constituted a use of both lots for that purpose. The court held that the plat indicated that the two lots were separate and distinct and that whether a violation of the restrictive covenants existed must be determined based upon the use made of each lot. Accordingly, Pickett failed to prove any non-residential use of the lot which did not contain the office building. Next, the court rejected Pickett's contention that any non-residential use was sufficient to support every non-residential use of a lot. The court stated that "the prior violation which has been carried on without objection, if insignificant or insubstantial when compared to the proposed or new use, will not support a waiver of the new and greater violation". In its opinion, the court used the analogy of turning a residence used for giving piano lessons into a gas station.

3. ***Lee v. Perez*, 120 S.W.3d 463 (Tex. App.—Houston [14th Dist.] 2003, no pet.).**

Eric Perez leased two lots on the 7400 block of Long Point Road to operate a used car lot. He signed a commercial lease for three years, beginning on March 1, 2000. The lease limited his use of the lots to the sale, financing, and insuring of autos. Two months after the lease commenced, an attorney for the city sent a letter to Perez informing him that he was in violation of a deed restriction that limited the property to residential use. The applicable deed restriction provided:

> All lots in the Addition, except Lots One (1) through Eleven (11), both inclusive, in Block One (1), shall be known and described as residential lots. No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two stories in height and a private garage for not more than three cars, and other out buildings incidental to residential use of the plot. Business buildings may be constructed on said Lots One (1) through Eleven (11), both inclusive, in Block One (1), and such properties may be used only for retail business, professional offices, and service business, and no noxious or offensive trade or activity shall be carried on upon said business lots, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood…

The lots leased by Perez were not among those designated for retail business. The letter threatened a lawsuit unless Perez shut down his business within 15 days. Perez complied, and then sued James Lee, Grace Real Estate Management, and Grace Real Estate Management Corporation for damages.

The trial court found that the defendants breached the commercial lease and awarded Perez $17,605 in actual damages and $12,000 in attorney's fees, but did not award him attorney's fees for an appeal. The defendants appealed.

The court of appeals reformed and affirmed the trial court's judgment. The appellants argued that the deed restriction did not limit use of the lots to residential purposes—it limited only the buildings that can be constructed, not the activities that can be conducted. Acting in accordance with Tex. Prop. Code Ann. § 202.003(a), which requires courts to construe restrictive covenants liberally and give full effect to their purpose and intent, the court disagreed with the appellants and found the restriction to prohibit the use of the lots as a used car lot. The appellants alternatively argued that the deed restriction was waived as a matter of law. The court noted that deed restrictions may be waived under certain circumstances, but remained unconvinced that this occurred after reviewing evidence that focused on prior acts of enforcement. The court's position was cemented by Lee's admission that the prior tenant of one of the lots left when he received a similar letter from the city objecting to the use of the lot for a tire business—this evidence showed that waiver did not occur and thus the appellants' did not establish waiver as a matter of law. The appellants argued that no breach occurred because the lease did not contain an express warranty concerning the suitability of the property. However, because Texas law provides an implied warranty of suitability for commercial leases and the deed restriction rendered the lots unsuitable for the purpose designated in the lease, the appellants were in breach. Appellants argued that Perez had constructive notice because the deed restrictions appeared in the county real property records, but the court refused to impose an irrebuttable presumption of notice on parties other than the purchasers of real property—to do so would mean every prospective tenant would have to obtain a title opinion. Appellants then pointed to five other provisions of the lease, arguing that they disavowed any implied warranty: (1) the lease included a provision indicating that the tenant accepted the property "as is;" (2) the lease contained a merger provision voiding any prior agreements; (3) the lease contained a provision requiring Perez to "comply with all law, orders, and requirements of all governmental entities with reference to the use… of the premises;" (4) the lease contained a provision that limited Perez's remedies to termination or making repairs for the landlord's account; and (5) the lease only showed "Grace Real Estate Management" as the landlord so judgment against any other party was improper. The court rejected all arguments. First, they interpreted the "as is" provision to relate only to the physical condition of the property, not restrictions on the property that could not be disclosed by physical examination of the premises. Second, they considered the implied warranty as part of the contract itself, not a prior agreement. Additionally, because the lease itself stated that the lots would be used for a commercial purpose, no prior understanding was necessary.

4. ***Benard v. Humble*, 990 S.W.2d 929 (Tex. App.—Beaumont 1999, pet. denied).**

Asa Humble and Point Lookout Owners Association filed suits against three different lot owners. The suits were eventually consolidated as one action. The deed restrictions stated that no lot shall be used except for single family residence purposes. At issue was whether renting homes to various families on a weekly or weekend basis was in violation of that provision. The trial court found that the renting of a residence for weekly or weekend purposes was in violation of the single-family residence language.

The court of appeals affirmed the decision of the trial court. The court reviewed several Texas Supreme Court cases that state that restrictive clauses and instruments concerning real estate must be construed strictly, and all doubt should be resolved in favor of the free and unrestricted use of land. The court noted that Tex. Prop. Code Ann. § 202.003(a) does not mesh with established common law contract principals, which creates a perpetual need for reconciliation. The court reviewed, from a

common sense purpose, the decision of the trial court since there was nothing in the restrictions that spoke to renting on a weekly or weekend basis. The court noted that the trial court, among other things, had reviewed Tex. Fam. Code Ann § 6.301 which requires ninety days to establish residency for purposes of filing a divorce action. The court also looked at provisions of the Texas Elec. Code to determine what is a residence and noted that the term is an elastic one which is extremely difficult to define. This case presented an excellent discussion of the effect of Texas Prop. Code Ann. § 202.003(a) which provides that a restrictive covenant shall be liberally construed to give effect to its purposes and intent. The court stated, "[t]hough statutorily we are to liberally construe the questioned language, liberality must be toned to the given facts." The court referred to this as "judicial toning." Because the petition history of this case indicated that the Supreme Court of Texas denied review, this is good law and should be very beneficial to associations and practitioners in future deed restriction cases. Justice Burgess dissented, relying on the old common law rule of law allowing for "free and unrestricted use of property."

5. ***Tien Tao Ass'n, Inc. v. Kingsbridge Park Cmty. Ass'n, Inc.*, 953 S.W.2d 525 (Tex. App.—Houston [1st Dist.] 1997, no pet.).**

Tien Tao Association was the corporate owner of two adjacent homes. The previous owners of the two homes deeded the properties to Tien Tao; however, they still resided at the properties. One of the owners sought and obtained architectural control committee ("ACC") approval for a game room at one of the properties. When the building visibly varied from the approved plans, the ACC sought additional information but eventually approved the altered plans as well. The association filed suit against Tien Tao as several changes were made without any attempts to obtain ACC approval. Among the evidence presented at trial were photographs of the interior of the added room, which clearly showed that the room was being used for worship services. Additionally, neighbors had complained of increased traffic, a recreational vehicle being parked in the driveway, drainage problems created by the replacement of the back lawn with limestone and caliche, and more than one family being housed at the properties. The trial court rendered judgment in favor of the association, ordering Tien Tao to cure all of the violations as well as to use the property "in a manner consistent with single family residential use" and to cease using it to house "more than one family." The applicable restriction provided:

> Section 1. Single family residential construction.
>
> No building shall be erected, altered, or permitted to remain on any Lot other than one detached, single-family dwelling used for residential purposes only, and not to exceed two and one-half (2 1/2) stories in height.
>
> As used herein, the term "residential purposes" shall...be construed to prohibit mobile homes or trailers being placed on the Lots, or the use of said Lots for garage apartments, or apartment houses; and no Lot shall be used for business or professional purposes of any kind, nor for any commercial or manufacturing purposes.

On appeal, Tien Tao contended, among other things, that the restriction governing "use" of the property was an architectural form restriction, governing construction, but not residential use. The court of appeals disagreed, holding that the restriction dealt with the use of the residence and not merely its construction. The court based its decision on the following: (1) the restriction was located under the heading, "Use Restrictions"; (2) the restriction used the term "single-family dwelling" as well as "single-family construction"; and (3) the restriction had an express prohibition against using the lot for business purposes. Tien Tao also complained that it did not have actual or constructive notice of any of the restrictions. The court disagreed, however, and held that Tien Tao had constructive notice as the restrictions were filed of record prior to its becoming owner of the property. Furthermore, the original owner who still resided at the property had actual notice of the restrictions because he had previously applied to the ACC for approval of the room addition. The court held that this knowledge of the restrictions should be imputed to Tien Tao because he continued to act on behalf of the corporation. Tien Tao also claimed that the trial court's judgment

was against public policy and violated the federal and Texas Fair Housing Acts (FHA). The federal and Texas FHA make it unlawful to deny or "otherwise make unavailable" a dwelling to any person because of religion. The court disagreed, stating:

> The record makes it clear Kingsbridge sought to enforce its deed restrictions not to abridge Tien Tao's right to religious freedom, or to exclude Taoist believers from the community, but to abate a nuisance. ...Tien Tao's activities were indistinguishable from those that could ensue from any nonresidential use. ... That the nuisance stemmed from a gathering of a religious nature does not exclude it from coverage by the restrictions.
>
> In urban areas without zoning, homeowners have increasingly come to rely on use restrictions to maintain the residential nature of their neighborhoods. Although such restrictions may have an impact on the manner in which homeowners observe their religions, this does not automatically equate to religious discrimination.

6. ***Munson v. Milton*, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied).**

The Munsons were sued by other lot owners in their subdivision for violating a residential use only restriction. The Munsons were renting their house out to vacationers through a professional rental agent for two to five days at a time. The applicable restriction prohibited business use and further stated that, "[m]otel, tourist courts, and trailer parks shall be deemed to be a business use." The trial court granted a temporary injunction enjoining the Munsons from "renting and/or leasing said property to the public for lodging, vacation and recreation purpose."

The court of appeals noted the general exception that a movant seeking a temporary injunction to enforce a restrictive covenant is not required to show proof of irreparable injury. The court further upheld the temporary injunction, stating that the additional sentence of the restrictions which prohibited motels, tourist courts and trailer parks clarified the framer's intent and that the rental activity in this case was the type of transient housing that the restriction was intended to prohibit.

7. ***Davis v. City of Houston*, 869 S.W.2d 493 (Tex. App.—Houston [1st Dist.] 1993, writ denied).**

Davis operated a beauty salon out of a house located in a restricted subdivision. The restrictions specified that the lot in question could be used only for single family "dwellings." The restrictions also specifically reserved other lots for "commercial" use, such as retail businesses and professional offices. Davis did not live in the house, and she admitted to knowing about the restrictions when she purchased the house. The city sued to enforce the restriction by permanent injunction, and the trial court found in favor of the city.

On appeal, Davis argued that: (1) the city had no authority to enforce the restriction; and (2) the term "dwelling" should be construed to mean buildings *built* for residential use, but that those structures could be used for other purposes afterwards. After ruling that Davis had failed to preserve the argument on the city's authority, the court of appeals held that: (1) "dwelling" meant residential use and Davis' definition of dwelling was not reasonable when the residential lot restrictions were read together with the "commercial" use reservations; and (2) Davis was in violation of the restrictions. The court affirmed the permanent injunction.

8. ***Kinkaid Sch., Inc. v. McCarthy*, 833 S.W.2d 226 (Tex. App.—Houston [1st Dist.] 1992, no writ).**

Adjoining homeowners brought suit and obtained an injunction against the Kinkaid School enjoining Kinkaid from continuing construction of a new middle school building on its campus. In order to obtain a permit for its building, Kinkaid had to get a city permit, which required notice and a hearing. The particular city ordinance required 10 days' notice of the hearing sent to owners of real property lying within 200 feet of the subject property, according to the last tax roll and further required that the notice be published in the newspaper. These particular owners did not purchase their property until after the last tax roll was approved.

The court of appeals reversed the trial court's injunction, holding that the homeowners and the homeowners association lacked standing to complain

of lack of notice because they were not indicated as owners as of the last property tax roll.

9. ***City of Houston v. Muse*, 788 S.W.2d 419 (Tex. App.—Houston [1st Dist.] 1990, no writ).**
At the time the Muses purchased their lot, they had actual notice of the restrictions prohibiting operation of a business. The Muses spent a large amount of money repairing and remodeling and then used the property solely as an appliance service and sales business. Objecting to the business, the association notified the City of Houston of the violation and the city sued the Muses. The trial court granted a temporary injunction; however, the Muses continued to operate the business. The trial court ultimately found in favor of the city except on the Muses' defense of laches. The trial court allowed the business to continue, but enjoined the Muses from displaying signs, keeping refuse in plain view, allowing more than one vehicle at a time in the driveway and adjoining street, and loading/unloading goods at the premises onto vehicles of more than two axles.

The court of appeals did not consider the city's contention that laches cannot bar a city from performing a governmental function, even though the action may have been proprietary in nature. The court did not reach this issue because it found that there was no evidence to support laches in the first place. To establish laches, the Muses had to prove not only an unreasonable delay, but also that they had, in good faith, changed their position to their detriment. There was no evidence of good faith reliance in this case because the Muses had constructive and actual notice of the deed restrictions prior to the remodeling. The court noted that, "[l]aches does not apply where the defendant has acted in open and known hostility to a plaintiff's rights and has not been misled by the plaintiff's apparent acquiescence."

10. ***Bent Nail Dev., Inc. v. Brooks*, 758 SW.2d 692 (Tex. App.—Fort Worth 1988, writ denied).**
Bent Nail purchased property from the Brooks in an area zoned for commercial use, which could not be used for residential purposes. In the negotiations, Bent Nail was offered the property at two different prices, a lower price for conveyance with a residential use only restriction and a much higher price for conveyance without restrictions. Apparently believing it could later have the property rezoned from commercial to residential use, Bent Nail purchased the property at the lower price and with full knowledge that, at the time, it could not do anything with the property because of the residential use only restriction and the commercial only zoning. The Brooks wanted to sell the property with the residential use only restriction so that Bent Nail would not be in competition with them in commercial development in the area. Bent Nail was unsuccessful in its attempts to change the zoning of the property, and brought suit against the Brooks seeking to cancel the deed restrictions restricting the property to residential use. The trial court rendered summary judgment in favor of the Brooks.

The court of appeals found that the purpose of the restrictions in this case was not to maintain the residential character of the property, but was in reality a non-competition agreement. The court further held that although the restriction did not have a time limit, it could nonetheless be enforced for a reasonable time under the circumstances. The question of what a reasonable time is constitutes a fact issue. Accordingly, the case was remanded back to the trial court.

11. ***Young v. City of Houston*, 756 S.W.2d 813 (Tex. App.—Houston [1st Dist.] 1988, writ denied).**
The City of Houston brought suit against the Youngs to enforce private restrictions. The restrictions for the subdivision stated that "no platted lot shall be used except for residential purposes" and further prohibited "noxious or offensive activity." The Youngs operated a golf accessories business on a subdivision lot. The trial court rendered judgment in favor of the city.

On appeal, the Youngs asserted that the city was in violation of the Texas Constitution by using public funds to prosecute violators of private deed restrictions. The court of appeals affirmed the decision of the trial court, however, holding that the Texas Constitution does not invalidate an expenditure that incidentally benefits a private interest, as long as it is made for the direct accomplishment of a public purpose.

12. ***Buzbee v. Castlewood Civic Club*, 737 S.W.2d 366 (Tex. App.—Houston [14th Dist.] 1987, no writ).**

The Buzbees were sued by the association for operating a junkyard in violation of a residence only restriction, as well as a restriction specifically prohibiting junkyards. The trial court granted a permanent injunction ordering the Buzbees to immediately cease all business operations, ruling against their statute of limitations and laches defenses.

On appeal, the Buzbees contended that the four-year statute of limitations barred the association's action on the junkyard restriction because they had been operating a trucking business on the property for several years and had been operating the trucking business in the same manner as they always had. The court of appeals disagreed, finding that there was evidence that there was a change in character of the business from a trucking business to a junkyard, tolling the statute of limitations. With regard to the residence only restriction, however, the court found that the statute of limitations did bar the association's action as to the trucking business on the lots previously purchased, but not as to those lots more recently purchased (less than four years). As to the laches argument, the court held that when the cause of action comes within any of the specific provisions of the statute of limitations, the defense of laches does not apply, unless extraordinary circumstances exist that would justify the application of the defense to bar the action. The court held there were no extraordinary circumstances in this case, even though there was a two-year delay between the date of the first demand letter to the Buzbees and the date the lawsuit was filed. Accordingly, the court allowed the Buzbees to continue operating a trucking business on a portion of the lots due to the statute of limitations defense; however, they were enjoined from operating the junkyard on any of the lots.

13. ***Hicks v. Loveless*, 714 S.W.2d 30 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).**

Hicks and Loveless were both owners of lots within a residential subdivision. Loveless had purchased his lot from a previous owner, Wallace, who had purchased the lot from the original developer, Spence. The Spence-Wallace conveyance took place several days before the restrictions, which restricted the lots to residential use, were filed in the county records. Wallace, however, knew that the restrictions existed at the time of conveyance. Shortly after purchasing the lot, Loveless began to operate a machine shop on the lot. Hicks brought suit to enjoin Loveless from operating the machine shop, contending that the use was in violation of the deed restrictions. Loveless raised the defense of waiver. The trial court rendered judgment denying relief.

The court of appeals reversed the trial court's judgment and granted a permanent junction against Loveless, prohibiting him from pursuing business or commercial endeavors on the lot for the life of the restrictions. With regard to the residential use only restriction, the court held: (1) although the original restrictions were not filed until after the Spence-Wallace conveyance, Wallace had actual knowledge of the restrictions at the time of the conveyance; (2) Wallace's actual knowledge of the restrictions encumbered his title; (3) since Wallace's title was encumbered by the restrictions; and (4) Loveless' activities constituted business or commercial use in violation of the restrictions. Concerning waiver, the court held that the other violations that Loveless pointed to were consistent with residential use and too insignificant for Loveless to carry his burden of proof as to waiver. The court also remanded to the trial court for a determination of reasonable attorney's fees to be awarded to Hicks pursuant to Tex. Prop. Code Ann § 5.006.

14. ***Winn v. Ridgewood Dev. Co.*, 691 S.W.2d 832 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e).**

The developer filed suit against the Winns, owners of three adjoining lots for erecting a two-story, 100 square foot tree house on one of the lots, next to the Winn's residence. The developer alleged that the tree house violated the residential use only restriction. The trial court entered a judgment in favor of the developer based on the jury's finding that the lot was not being used for private residence purposes only. The jury also found, however, that the tree house was pertinent to the residence, suitable for its location and in harmony with its surroundings.

On appeal, the Winns complained that there was a conflict in the jury's findings. The court of appeals agreed, holding that the specific findings controlled over the more general finding. The court reversed the decision of the trial court, holding that the jury's

more specific answers were consistent with a determination that the tree house was a proper residential use of the lot. The court further held that the term "residential purposes" as used in the restrictions required the use of property for living purposes as opposed to business or commercial purposes. Accordingly, since there was not evidence that the lot was being used for business or commercial purposes, the court reasoned that the only logical conclusion was that it was being used for residential purposes.

15. ***Cole v. Cummings*, 691 S.W.2d 11 (Tex. App.—Texarkana 1985. writ ref'd n.r.e.).**

The owners of the other six lots in a seven-lot subdivision sued the owners of the remaining lot seeking to enjoin them from building a street across their lot based on a residential use only restriction. The trial court denied injunctive relief.

In reversing the trial court's decision, the court of appeals disagreed with the argument that the lot owners were justified in wanting to build the street to connect that subdivision to another tract of land they owned which was going to be used for residential lots also. The court noted that in order to obtain injunctive relief for a violation of a residential use only restriction, one need only show a substantial breach of the covenant. Irreparable harm does not have to be shown as it does with other types of covenants.

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

The Mills entered into a commercial childcare business and registered their residence, located on a cul-de-sac, as a "family home" under the Tex. Hum. Res. Code. Mrs. Mills cared for up to six preschool children and reported the income for tax purposes. A group of neighbors living on the same street filed suit against the Mills for violating a residential use only restriction. The trial court determined as a matter of law that the Mills' use of the property was in violation, however, submitted an issue to the jury inquiring whether the restriction had been waived. The jury found that the restriction was waived; however, the trial court rendered judgment in favor of the neighbors notwithstanding the verdict.

On appeal, the Mills contended that the use of their home as a childcare facility was an incidental use of their home. The court of appeals overruled this argument, noting the evidence of increased traffic and the backyard playground facility. With regard to the waiver issue, the court affirmed the trial court's decision because the only evidence of another business in the neighborhood was that of a homeowner who stored and repaired video games from his garage. The court held that this did not constitute waiver in this case because there was no evidence that the neighbors who filed suit against the Mills knew of the video game business.

B. Single Family

1. ***Brents v. Haynes & Boone, L.L.P.*, 53 S.W.3d 911 (Tex. App.—Dallas 2001, pet. denied).**

The Brentses brought a malpractice action against Haynes & Boone, who represented them in a prior suit. The previous suit, which was later found to be groundless, sought to prevent the sale of neighboring residential property to a group home for the disabled. The trial court granted summary judgment in favor of Haynes & Boone and the Brentses appealed. The court of appeals affirmed the lower court and the Brentses petitioned for review. The Supreme Court of Texas vacated and remanded to the court of appeals.

On remand, the court of appeals determined that the Brentses' malpractice cause of action accrued when they received a letter serving as notice of the United States Department of Housing and Urban Development's ("HUD") discrimination investigation. This administrative investigation investigated discriminatory acts of the Brentses with regard to their involvement in the suit to prevent the sale of property to the group home. The court held that the Brentses should have known that they were at risk of economic harm when they received HUD's letter and, thus, their cause of action accrued. Additionally, the court held that the statute of limitations on the Brentses' malpractice cause of action was not tolled during this administrative investigation into the discriminatory acts of the Brentses.

[Editor's Note: While this case does not directly address the issue of what is a "single family", the case has been included to remind the reader of

the potential hazards of attempting to enforce a single family use only restriction against group homes.]

2. ***Tien Tao Ass'n, Inc. v. Kingsbridge Park Cmty. Ass'n, Inc.*, 953 S.W.2d 525 (Tex. App.—Houston [1st Dist.] 1997, no pet.).**

Under the facts of this case, the term "single-family dwelling used for residential purposes" was held to restrict property use to a single family. Refer to Section IV.A.5 of this article for discussion.

3. ***Deep E. Texas Regional Mental Health & Mental Retardation Servs. v. Kinnear*, 877 S.W.2d 550 (Tex. App.—Beaumont 1994, no writ).**

Kinnear brought suit to enjoin Deep East Texas Regional Mental Health and Mental Retardation Services ("DET") from constructing a community home in his subdivision. DET proposed to build an architecturally correct single family detached structure wherein six females with mental impairments would reside and be supervised and carefully regulated by staff members on a 24-hour a day basis. The trial court entered a temporary and permanent injunction prohibiting the construction of the community home. The restriction in question provided:

> All lots shall be known and described as lots for residential purposes only. Only one one-family residence may be erected, altered, placed or permitted to remain on any lot. Said lots shall not be used for business purposes of any kind nor for any commercial manufacturing or apartment house purposes.

The court of appeals reversed and remanded, holding that the restriction only referred to the architectural form of the structure to be placed on the lot, not to the use to which the proposed residence is put. In response to Kinnear's argument that the community home would constitute a nuisance, the court held that it could not enjoin the construction of the community home unless it could be shown that the proposed use or activity will necessarily create a nuisance. Here, the record failed to demonstrate that a nuisance would inevitably be created by the community home. The court also found that the federal Fair Housing Act applied in this case. The court held that this federal law applies to state land use laws and local land use laws and ordinances and requires that the laws "be modified, if necessary, to afford to handicapped persons the same opportunity to housing as those who are not handicapped. This retroactive law applies to vacant, unimproved lots." In reaching its decision, the court cited similar cases from other jurisdictions and quoted the stated purpose of the Fair Housing Act: "This provision is intended to prohibit special restrictive covenants... which have the effect of excluding... congregate living arrangements for persons with handicaps." The court further held that the Fair Housing Act explicitly mandates that discrimination in the sale of a dwelling or a plot upon which a dwelling would be erected, or to otherwise make unavailable or to deny such dwelling or residence to any buyer because of a handicap of a resident is clearly unlawful.

4. ***Silver Spur Addition Homeowners v. Clarksville Seniors Apartments*, 848 S.W.2d 772 (Tex. App.—Texarkana 1993, writ denied).**

The association sought to enjoin the development of a seniors apartment complex on lots 37 through 43 in the subdivision. The applicable restrictions stated that:

> Only ONE (1) family residences may be erected, altered, placed, or permitted to remain on any of the lots in said addition; and said lots in said addition; and said lots shall not be used for any business purposes of any kind, except apartment houses.
>
> All of the lots of the Silver Spur Addition numbered one (1) through six (6), and lots numbered eighty-seven (87) through one hundred twelve (112) shall be restricted to ONE (1) family brick residences... .
>
> With the exception of lots numbered twenty-two (22) through thirty-four (34), the remainder of the lots designated on the plat of the Silver Spur Addition shall be restricted to ONE (1) family dwelling houses... .

The trial court, finding that the restrictions were ambiguous, granted the Apartments' motion for summary judgment, allowing apartments on the proposed lots.

The court of appeals reversed the trial court's decision and held that the restrictions were not ambiguous, and that if read as a whole, provided that apartment complexes were prohibited on lots 37 through 43, the lots owned by the Apartments. The court further held that although the restrictions used the plural term "residences," the term was preceded by the words "ONE" and "family," restricting the lots to single family residences.

5. ***Permian Basin Centers for Mental Health & Mental Retardation v. Alsobrook*, 723 S.W.2d 774 (Tex. App.—El Paso 1987, writ ref'd n.r.e.).**
Permian Basin leased a home in a restricted subdivision for use as a residential family home for six mentally retarded adults. The Alsobrooks, owners of property in the subdivision, filed suit to enjoin the proposed home based on a restriction, which permitted only single family dwellings used for residential purposes. The trial court found that the proposed use of the home would violate the restrictions.

The court of appeals reversed and rendered judgment in favor of Permian Basin, holding that the term "single family dwelling" referred only to the character of the structure of the residence, not the use of it. The court noted that the paragraph which contained this term dealt with the character of structures, not occupancy requirements or use.

C. Trailers/Mobile Homes

1. ***Wilmoth v. Wilcox*, 734 S.W.2d 656 (Tex. 1987).** An action was brought against the Wilcoxes for transporting a manufactured home onto their lot in violation of a restriction which prohibited "house trailers." At issue was whether the term "house trailer" was intended to mean only house trailers which were being built at the time of the drafting of the restriction, or whether it was intended to include later developments in mobile homes (i.e. manufactured homes).

The Supreme Court of Texas held that in interpreting restrictive covenants, it is the task of the court to determine the intent of the framers. In holding that the words used in the restrictive covenant must be given the meaning which they commonly held as of the date the covenant was written, and not as of some subsequent date, the Court held that the manufactured home was a "house trailer" as the definitions were substantially the same. The Court also relied on the testimony of one of the co-developers of the subdivision that their definition of "house trailer" intended to include manufactured homes like the Wilcoxes.

2. ***Pebble Beach Prop. Owners' Ass'n v. Sherer*, 2 S.W.3d 283 (Tex. App.—San Antonio 1999, pet. denied).**
In June of 1997, Sherer purchased two lots subject to the declaration. The declaration provided that no house trailers of any kind may be moved onto the property and no structure of a temporary character, trailer, motor home, mobile home, etc. shall be used on any lot at any time as a residence, either temporary or permanent. The declaration required the prior written approval of the architectural control committee ("AAC") before a building or structure could be erected. Shortly after she purchased her two lots, Sherer took steps to purchase a double-wide trailer to be placed on her two lots. She was informed that she must secure prior approval for the structure she was going to build. She presented her plans to the association who also served as the ACC. The association denied her plans to place the trailer on her two lots.

The trial court found that: (1) the declaration as filed applied to the lots owned by Sherer; and (2) the declaration prohibited mobile homes and Sherer was bound by it. Out of the 800 lots in Pebble Beach, there were approximately 14 trailers, mobile homes and manufactured homes, many of which sat on two or more lots owned by the same person. In its conclusions of law, the trial court found that: (1) the association had waived the restrictive covenant regarding Sherer's manufactured home by its past actions; (2) the association acted in bad faith in seeking to enforce a restrictive covenant and was equitably estopped from enforcing them as to Sherer; and (3) Sherer's structure or substantially similar structures were not barred by the restrictive covenants. The association's president, who was a counter-defendant, was entitled to $2,000.00 in attorney's fees pursuant to Tex. Prop. Code Ann. § 5.006.

The court of appeals found that as a matter of law, the manufactured home was prohibited by the restrictive covenants and that the association had

not waived the restriction prohibiting mobile homes. The court summarized Texas case law regarding waiver and cited the percentage of violations in many Texas cases and found that here, mobile homes existed on only 1.75% of the lots in Pebble Beach, which was within the range where courts have found that no waiver existed. On the issue of whether the association was equitably estopped from enforcing the restrictive covenant because it had allegedly acted in bad faith regarding enforcement, the court remanded the case for a new trial on any of the estoppel factors, except waiver. On a motion for rehearing filed by Sherer, the court granted the motion solely on the issue of waiver. Ultimately, the court remanded the case to the trial court to determine the issue of both waiver and estoppel. On remand, the trial court was instructed to consider the number, nature and severity of any then-existing violations, any prior acts of enforcement of the restrictions and whether it was still possible to realize to a substantial degree the benefits intended through the covenant, when the trial court made its determination of whether a waiver existed. The court reversed the award of attorney's fees to the president of the association.

3. ***Cox v. Melson-Fulsom*, 956 S.W.2d 791 (Tex. App.—Austin 1997, no pet.).**

Cox and Melson-Fulsom owned adjoining lake lot properties, that were burdened with restrictions prohibiting "trailer houses" as well as "old houses moved in." The restrictions also provided for a homeowners' association and a maintenance assessment; however, these particular restrictions were not in force as there was no association to either collect assessments or enforce restrictions. Cox moved a trailer onto her lot and left it there continuously. Cox testified that she stayed in the trailer overnight on several occasions and there was no evidence to suggest that a permanent residence was being built on the lot. There were other trailers in the subdivision; however, one was being used temporarily during the construction of a permanent residence on the lot and the remaining trailers were stored on a lot with a permanent residence. Fulsome sued Cox in order to enforce the restrictive covenant and require her to remove the trailer from the lot.

The trial court granted a permanent injunction against Cox, finding that:

> (1) Cox's trailer was a "trailer house" within the meaning of a deed restriction which prohibits "trailer houses"; (2) Cox violated the deed restrictions by improperly using her trailer on her property; (3) Fulsom would be irreparably harmed if Cox was not required to remove her trailer from her property; and (4) the deed restrictions have not been waived or abandoned.

The court of appeals affirmed the trial court's decision, holding that the restriction was not waived as the other lots which had trailers on them either were under construction of a permanent residence or already had permanent residences on them. Further, the court held that Cox failed to carry her burden of proving that Fulsom had "voluntarily and intentionally relinquished her right to enforce the restrictive covenants." The court also noted that "the failure of a homeowners' association, both organizationally and financially, does not prohibit an individual from enforcing the restrictive covenants when there is no evidence in the record that the failure of the homeowners' association materially affected the individual homeowner."

4. ***Dempsey v. Apache Shores Prop. Owners Ass'n, Inc.*, 737 S.W.2d 589 (Tex. App.—Austin 1987, no writ).**

The association filed suit against Dempsey, a retailer of "mobile, manufactured and modular homes," and the owner of 563 lots in the subdivision, seeking to prohibit him from placing mobile homes in the subdivision on any lots except those where mobile homes were expressly permitted by the restrictions governing the subdivision. The earnest money contracts between Dempsey and the original developer provided that the lots purchased were to be used for mobile or modular homes. Dempsey's representatives attended a meeting of the association prior to placing the homes and no other property owners objected at the time. The property owners later testified that they assumed Dempsey planned to place the mobile homes on only those lots where permitted by the restrictions. The property owners began to complain, however, when Dempsey began moving double-wide trailers onto lots in designated non-mobile home sections. The trial court found in favor of the association and enjoined Dempsey from

placing the homes on lots where same was prohibited by the restrictions.

On appeal, Dempsey argued that his "double-wide manufactured homes" were not "mobile" homes within the meaning of the restrictive covenants. He also argued that the restriction was ambiguous because of the changed meaning of the term "mobile home" since the drafting of the restriction and that any ambiguity should be resolved in favor of the unrestricted use of real property. The court of appeals disagreed, holding that the term's intent was to include all types of mobile or manufactured homes.

5. ***Gigowski v. Russell*, 718 S.W.2d 16 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).**

The Gigowskis placed a double-wide mobile home on their lot in the Harbour Point subdivision. Russell and the Harbour Point Owners Association brought suit seeking the removal of the mobile home because of a subdivision restriction prohibiting mobile homes. The trial court granted the permanent injunction and ordered the removal of the mobile home.

On appeal, the Gigowskis argued that the trial court applied an incorrect definition of "mobile home." The Gigowskis urged a distinction between "manufactured home" and "mobile home", and, that since their home was a "manufactured home" and not a "mobile home," the restriction was unenforceable against them. Specifically, the Gigowskis argued that in 1967 when the restriction was implemented, mobile homes were much different than at the time they purchased their home. Therefore, manufactured homes of the type that the Gigowskis owned were not contemplated by the 1967 restriction and, thus, their home was not barred by the restriction. The court of appeals agreed that the term "mobile home" should be construed by the plain meaning as of the time it was written. When the court, however, applied the meaning of "mobile home" as contemplated by Texas' Uniform Standards Code for Mobile Homes of 1969, the court found that the Gigowskis' home fairly met that definition and held in favor of Russell and the association. In balancing the equities in this case as required, the court found the permanent injunction was proper.

D. Roofs

1. ***Pilarcik v. Emmons*, 966 S.W.2d 474 (Tex. 1998).**

The Pilarciks owned a home in the Waterwood Estates subdivision in Arlington, Texas. One of the deed restrictions applicable to the subdivision expressly prohibited the use of composition-type roof shingles. The Pilarciks' roof was damaged by a hail storm in the spring of 1992. The damage was severe enough that the Pilarciks had to replace the entire roof. After determining that their home could not structurally support other non-wood shingle alternatives, the Pilarciks decided to install composition-type shingles. The Pilarciks sent letters to all five members of the dormant architectural control committee ("ACC") listed in the amended restrictions requesting a waiver from the restriction prohibiting composition roofs. Among other things, the restrictions explicitly: (1) gave the ACC the right to waive any restriction which pertained to the type of roof or quality of masonry as long as the "appraised value of the proposed house is not less than $50,000.00", and (2) provided that if the ACC failed to give written disapproval of a waiver request within thirty days of such request, then the request was deemed to be approved. The Pilarciks received no response from any of the ACC members and commenced the installation of a composition roof. When the roof was approximately 98% complete, a group of homeowners, including the Emmonses, sued the Pilarciks and received a temporary restraining order against the Pilarciks. The Pilarciks sent a second set of letters to the ACC members which were all returned as undeliverable. Finally, the Pilarciks contacted one of the ACC members, Frank Richards, by telephone. Thereafter, Richards and Al Latimer, another one of the ACC members listed in the restrictions, gave written approval of the composition roof. All other members of the ACC listed in the restrictions had resigned their positions.

Both parties moved for summary judgment. The trial court denied the Pilarciks' motion and granted the Emmonses' motion. The court further ordered the Pilarciks to remove their roof. The court concluded that the phrase "proposed house" in the restrictions limited the ACC's authority to waive the roof-type restriction only with regard to houses not yet constructed. Because the Pilarcik's house was

already constructed, the ACC did not have the authority to waive the restriction.

The court of appeals affirmed the trial court. The court, relying on general rules of contract construction, reasoned that the specific language prohibiting composition roofs controlled over the general language allowing the ACC to waive the restriction.

The Supreme Court of Texas reversed the court of appeals and rendered judgment for the Pilarciks. The Emmonses argued that allowing the ACC to waive the prohibition against composition roofs rendered the provision prohibiting such roofs meaningless. The Court dismissed this contention because the waiver provision did not empower the ACC to waive the shingle restriction altogether, it merely allowed the ACC to waive the restriction in specific instances. The Court noted that, in contrast, the Emmonses' construction of the restrictions would render the provision authorizing the ACC to waive the restriction meaningless. The Court then rejected the court of appeal's reasoning. The Court said that the rule of construction relied upon by the court of appeals was not applicable because both provisions were specific and did not conflict with each other. Next, the Court found the Emmonses' argument, that the phrase "proposed house" limited the ACC's authority to houses not yet constructed, to be untenable. One of the primary purposes of having an ACC is to govern alterations to existing houses, as clearly set forth in the restrictions. Thus, according to the Court, the Emmonses' argument "misconstrues the covenants and improperly constrains the ACC's power." Finally, the Court considered the effectiveness of the ACC's waiver. The Court determined that because the Pilarciks obtained written consent from the only two remaining members of the ACC, and that because such waiver comported with the procedure outlined in the restrictions, the ACC's waiver was effective. The Court specifically stated that the fact that the ACC gave its approval after construction had started was immaterial.

2. ***Hoye v. Shepherds Glen Land Co., Inc.*, 753 S.W.2d 226 (Tex. App.—Dallas 1988, writ denied).**

The association sued the Hoyes for installing a composition roof on their house and obtained an injunction ordering them to replace same. The applicable restriction stated, "[a]ll roofs shall be wood shingle, slate or other permanent type."

On appeal, the Hoyes complained that the restrictive covenant was void as against public policy based on Tex. Prop. Code Ann. § 5.025, which provides:

> 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.

The court of appeals disagreed, holding that, even though wood shingles could not be required according to § 5.025, the restriction was still valid as requiring "slate or other permanent type" roofing materials. The court further upheld the trial court's finding that composition roofing material was not a "permanent type."

E. Architectural Control Committees

1. ***Pilarcik v. Emmons*, 966 S.W.2d 474 (Tex. 1998).**

ACC could waive restriction regarding prohibition against composition type roofs. Refer to Section IV.D.1 of this article for discussion.

2. ***Marcus v. Whispering Springs Homeowners Ass'n, Inc.*, 153 S.W.3d 702 (Tex. App.—Dallas 2005, no pet.).**

At the conception of the Whispering Springs neighborhood, a declaration was executed that, among other things, created: (1) a homeowners' association; (2) an architectural review committee ("ARC"); (3) a variety of covenants and restrictions, some of which specified requirements for any improvement to be built on a neighborhood lot; and (4) a requirement that a lot owner begin construction of a dwelling no later than six months after the deed to the lot was conveyed to him and recorded. The ARC was composed of three members appointed by the developer, who retained the right to appoint and remove a majority of the members until all lots in the development were sold and a single family building on each lot had been approved by the ARC. The ARC reviewed and approved or disapproved all submitted plans for improvements, alterations, or additions. The

committee's decisions were based solely on aesthetic considerations. Decisions had to be given to an applicant within sixty days, and if written disapproval or a request for more information was not sent to the applicant within sixty days, the plans were deemed approved. The Marcuses purchased a lot in Whispering Springs in December 1998 and submitted plans to the ARC in July 1999, but were informed over the phone that the plans were unacceptable. In June 2002, the Marcuses submitted new plans to the ARC and the ARC requested more information. That August, the ARC disapproved of the plans in writing, in part because the design included a violation of the requirements for garages set forth in the declaration. In October 2002, the Marcuses submitted another set of plans to the ARC. Although the association and the Marcuses communicated with each other after the plans were submitted, the ARC did not formally reject the plans until February 2003. The Marcuses did not receive written denial within sixty days after submission, so they began preparations to build. They submitted plans to the city and obtained a building permit. A construction fence was then erected around the lot and the building permit was posted. This alerted the association of the Marcuses intent to begin construction, and they filed suit and requested a temporary injunction.

The trial court granted a temporary injunction until there was a final hearing on the cause and ordered the Marcuses to refrain from constructing any improvements without obtaining approval from the ARC. The trial court based this decision on their finding that the plans upon which the Marcuses had received a building permit were never approved by the ARC and were in fact different than any of the plans that had been submitted to the ARC. The trial court further held, however, that the association's request for an injunction on the basis that the Marcuses did not begin construction within six months of buying the property was denied. The Marcuses brought an interlocutory appeal challenging the injunction.

The court of appeals affirmed the trial court's order. The court noted that when an injunction is sought to enforce a restrictive covenant, the movant need only show that the defendant intends to do an act that would breach the covenant. The Marcuses argued that the trial court erred in granting the injunction because the ARC wrongfully refused to approve their submitted plans. Specifically, they claimed the refusals were arbitrary, capricious, untimely, unauthorized and malicious, and that they had a legal right to build a house based on plans submitted to, and wrongfully refused, by the ARC. The association argued, and the trial court found, however, that the plans upon which the Marcuses received a permit were never submitted to the ARC. The court held that, while there was conflicting evidence on the issue of whether the plans were materially the same or different than those submitted to the ARC, there was enough evidence to support the trial court's finding. Thus, the Marcuses' arguments that the ARC acted improperly were not sufficient to overturn the temporary injunction. The Marcuses argued that the injunction was improper because the restrictive covenants relied on by the association were unenforceable due to the fact that they were vague, ambiguous, and they unreasonably restrict the use and enjoyment of the land. Specifically, they contended that the ARC's ability to disapprove plans solely on the basis of aesthetic considerations was overly broad and granted the ARC power to arbitrarily deny them the right to build a home on their property. Applying rules that govern basic contract construction, the court found that, while the language in the approval covenant contained in the declaration was broad, the declaration also contained specific limitations on the design of homes in the neighborhood, and the ARC referenced these clear and unambiguous restrictions when it communicated its disapproval to the Marcuses. Therefore, the temporary injunction to prevent the construction of a home with features clearly in violation of the restrictions was proper. The Marcuses challenged the association's standing to bring the suit because they alleged that the ARC was not properly impaneled. The court recognized that whether or not the ARC was properly impaneled might have an effect on the committee's power to approve or disapprove plans. However, this did not affect the association's standing to enforce the provisions of the declaration relating to the design of homes in the neighborhood. The association's authority to enforce the covenants and restrictions could not only be found expressly in the declaration itself, but also in Tex. Prop. Code Ann. § 202.004, which provides that "[a] property

owner's association… 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." Thus, the court held that the association had standing to bring the suit.

3. ***Anderson v. New Prop. Owners' Ass'n of Newport, Inc.*, 122 S.W.3d 378 (Tex. App.—Texarkana 2003, pet. denied).**

Purcell Co. began development of Newport Subdivision and filed deed restrictions in 1979. The restrictions for Section Eight created a property owners' association ("Section Eight POA") and the Architectural Approval Control Committee (the "AC"), which was given the right to disapprove any plans for construction or improvements in Section Eight. The AC had broad discretion and its decision was deemed final. Article III, creating the AC, did not speak to its dissolution or when the authority given to the AC would transfer to another entity. The restrictions for Section Eight also provided an amendment procedure. In 1990, Anderson purchased two adjoining lots in Section Eight. In 1991, Anderson applied to the Section Eight POA for permission to build a U-shaped driveway. The AC approved, but Anderson postponed construction. In 1991, Purcell Co. sold its undeveloped lots to a party who then sold the lots to Newport Partners, Inc. ("Newport Partners"). In 1997, Newport Partners declared bankruptcy. The New Property Owners' Association of Newport ("NPOAN"), an organization created in 1996 to replace the Section Eight POA, had been involved in litigation with Newport Partners. NPOAN's claims were settled in the bankruptcy proceedings when, in 1998, a trial court ordered the sale of the remaining undeveloped property to Rampart Properties Corp. ("Rampart"). In this sale, Rampart purchased the property and all rights associated with it. To resolve NPOAN's claims, Rampart and NPOAN executed an agreement in which Rampart assigned NPOAN certain rights with respect to the property ("the 1999 Assignment"). In 2000, Anderson filed a second application for approval with NPOAN, but it was denied. Anderson claimed she did not received notice of the denial and, therefore, acted pursuant to the restrictions, which deemed the plans approved if the AC did not act within thirty days. Anderson began construction in March 2001. She was directed by NPOAN's attorney to cease construction because she lacked approval from the Architectural Control Committee of NPOAN. Anderson submitted a second request that NPOAN denied without explanation. Despite the denial, Anderson resumed construction and NPOAN filed suit, seeking a temporary restraining order and injunction to stop construction. In October 2001, in accordance with the restrictions, an amendment applicable to Section Eight was executed ("the Amendment") that gave NPOAN authority to manage the section and enforce deed restrictions. NPOAN filed suit as a Texas nonprofit corporation composed of persons who reside and own homes in the Newport Subdivision. Anderson entered a verified denial challenging NPOAN's standing and capacity. The trial court's judgment ordered Anderson to remove the driveway, restore the property, and awarded NPOAN attorneys' fees.

The court of appeals reversed the judgment, set aside the injunction, and rendered judgment for Anderson. Anderson challenged the trial court's conclusions of law that NPOAN had the authority to enforce deed restrictions in Section Eight. Anderson argued that NPOAN lacked standing to sue to enjoin her from constructing the driveway. An association has standing to sue when it satisfies a three-pronged test: (1) the members must otherwise have standing to sue in their own right; (2) the interests it seeks to protect must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested may require the participation of individual members in the lawsuit. The court found that NPOAN satisfied all three prongs. The court then set out to determine whether NPOAN sued Anderson in the proper capacity by examining the possible sources of the authority NPOAN exercised: (1) the restrictions applicable to Section Eight; (2) the 1999 Assignment; and (3) the Tex. Prop. Code. As to the restrictions, Article II provided a list of entities that had authority to enforce the restrictive covenants, but NPOAN was not listed among them. The restrictions also provided an amendment provision, but the Amendment was not executed until after the suit was filed. Thus, neither provision of the restrictions gave NPOAN authority to enforce the restrictions at the time the suit was filed. Next, the

court looked to the 1999 Assignment and held that its language did not sufficiently support the conclusion that Rampart assigned NPOAN the right to sue in its own capacity to enforce the restrictions. NPOAN contended that Tex. Prop. Code Ann. § 202.004(b) conferred on it the capacity to enforce the restrictions. That section provides: "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." Section Eight did not designate NPOAN as the property owners' association until after the suit was filed. However, the court held that under § 202.004(b), NPOAN did not have to be the property owners' association for Section Eight in order to bring a cause of action on behalf of other property owners. In this vein, NPOAN argued that § 202.004 provides no procedure to designate a representative and, therefore, oral designation sufficed to designate it as the representative. The court concluded that the property owners designated NPOAN as a representative association under § 202.004(b). Next the court assessed the action NPOAN took with respect to the driveway plans. By rejecting Anderson's plans, NPOAN exercised architectural control authority, which the Declarations conferred on the AC. Tex. Prop. Code Ann. § 202.004 provides: "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." The court found that the 1999 Assignment did not convey to NPOAN the right to reject plans in Section Eight because it did not establish a clear intent on the part of Rampart to transfer NPOAN the rights of an architectural control committee. Tex. Prop. Code Ann. § 204.011(b) provides for automatic vesting of an architectural control committee's authority to approve or deny applications for construction or modification of structures or improvements in a property owners' association on the occurrence of specified events. An architectural control committee's authority, given to it by the original restrictions, will vest in the property owners' association when: (1) the term of the architectural control committee authority expires as prescribed by the restrictions; (2) a residence on the last available building site is completed and sold; (3) the person or entity designated as the architectural control committee in the restrictions assigns, in writing, authority to the association; or (4) an assignee of the original holder abandons its authority for more than one year. The court held that the pertinent provision was subparagraph four, regarding the abandonment of the original AC for over one year, but did not find that was the case. Accordingly, the court held that rejecting Anderson's driveway plans without authority do so was an arbitrary and capricious exercise of discretionary authority. Having concluded that NPOAN had standing to maintain the suit and capacity to sue on behalf of Rampart but acted without authority as an architectural control committee in Section Eight, the court addressed a further consideration. The original restrictions made it a violation of the restrictions to make certain improvements without approval of the original AC. NPOAN argued that, since it could sue to enforce deed restrictions, it could enforce this restriction against Anderson and require her to remove the unapproved driveway. The court rejected this argument because the record did not show that Anderson constructed the driveway contrary to the decision of a valid, active architectural control committee authorized to act in Section Eight. The court held Anderson was not entitled to attorneys' fees in the matter because under Tex. Prop. Code Ann. § 5.006(a) only a party who successfully prosecutes a claim alleging breach of a restrictive covenant is entitled to recover attorney's fees, and Anderson did not assert such a claim.

4. ***Ball v. Rao*, 48 S.W.3d 332 (Tex. App.—Fort Worth 2001, pet. denied).**

Ball brought suit against neighbor, Rao, to stop construction of a fence between the parties' yards. According to Ball, the fence allegedly violated deed restrictions pertaining to fence height and Rao did not get architectural control committee ("ACC") approval for changes to retaining wall and grade of property, both of which were part of the fence construction. The trial court granted a temporary injunction in favor of Ball, however, the court later

granted summary judgment in favor of Rao. Additionally, the court sanctioned the Balls and their trial counsel for violations of the Tex. R. Civ. P. and Tex. Civ. Prac. & Rem. Code. Ball was sanctioned by the court for bringing baseless charges with no evidentiary support. Ball's trial attorney was sanctioned for violating the court's in limine orders. Both Ball and their trial counsel appealed.

The court of appeals reversed the trial court's granting of summary judgment in favor of Rao. Going even further, the court granted Ball's motion for summary judgment noting that there were no remaining issues of material fact surrounding the motion. The court found the evidence uncontroverted that Rao did not get ACC approval for changes in his retaining wall or grade of the property next to the retaining wall. Additionally, Rao himself conceded that although he had approval to build a fence no more than eight feet in height, the fence, as erected, was in excess of eight feet in places. Furthermore, he conceded the retaining wall alterations exceeded the deed restriction maximums as well. In discussing another point of error, the court reversed the trial court's granting of sanctions against Ball because, contrary to the lower court's judgment, their suit indeed had the support of meritorious evidence. The court, however, affirmed the lower court with regard to the sanctions against Ball's trial attorney. The case was remanded to the trial court for consideration of Ball's request for attorney's fees.

5. ***Village of Pheasant Run Homeowners Ass'n, Inc. v. Kastor*, 47 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).**

Village of Pheasant Run Homeowners Association brought suit against homeowner, Kastor, after he painted part of his house in colors that purportedly violated the deed restrictions. The trial court granted Kastor's motion for summary judgment and denied the association's motion for partial summary judgment. The association appealed citing two points of error.

In its first point of error, the association asserted that the ACC had the power to approve color changes of *existing* structures within the subdivision. After interpreting the collective language and intent of the deed restrictions, the court of appeals agreed with the association and noted that the ACC had the power to "govern alterations to houses, not just new construction." The association's second point of error contended that the deed restrictions empowered it to adopt architectural guidelines that interpret the provisions of the deed restrictions. Again, the court agreed. The court analyzed the pertinent deed restriction language and acknowledged the existence of the ACC and its ability to establish independent standards to effectuate the intent of the restrictions. For these reasons, the court reversed and remanded to the trial court for further proceedings.

6. ***Bank United v. Greenway Improvement Ass'n*, 6 S.W.3d 705 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).**

Bank United was the principal tenant of the Phoenix Tower located on the Southwest Freeway in Houston. Its lease agreement with the owner of the building provided that it may install signs at the top of the building. However, deed restrictions applicable to the building required Bank United to submit its plans for any proposed signs to the architectural control committee ("ACC") of the Greenway Improvement Association. The restrictions provided that no improvement could be erected, placed or altered on any building site until the construction plans and specifications of the proposed improvements, including, among other things, signs, were approved in writing by the ACC. The restrictions further provided that if the ACC failed to approve or disapprove of the plans and specifications within sixty days after submission, they were deemed approved. The restrictions further provided that no signs or feature lighting of any kind could be displayed to the public view except those signs and feature lighting approved in writing by the ACC. As required by the restrictions, Bank United submitted plans and renderings for the sign to the ACC for its approval on February 3. The association issued no response for seventy-eight days, at which time it admitted it had not yet considered the request. The association rejected Bank United's request one hundred days after the request was submitted. After the rejection, Bank United and the building owner filed for a declaratory judgment seeking to determine their rights under the lease and the deed restrictions. Both sides filed a motion for summary judgment.

The association argued that the specific language prohibiting any signs or feature lighting unless approved in writing by the ACC should control. Bank United argued that both provisions must be read together, and when the ACC failed to act within sixty days, the sign is deemed approved.

The trial court granted a summary judgment in favor of the association, finding that the specific language prohibited signs or feature lighting unless approved in writing by the ACC.

The court of appeals reversed and remanded the case. The court found that both sections must be read together. Therefore, once the request for permission for the sign was submitted to the association, the ACC had to act within the sixty days or the request was approved. The case was remanded to the trial court for entry of a judgment in favor of Bank United and for consideration of reasonable and necessary attorney's fees pursuant to Tex. Prop. Code Ann. § 5.006.

7. ***Beere v. Duren*, 985 S.W.2d 243 (Tex. App.—Beaumont 1999, pet. denied).**

The Beeres and the Durens were next door neighbors. Both of their lots abutted a golf course. The deed restrictions for the subdivision recognized the aesthetic value of lots which abut the golf course. The restrictions only permitted fences made of ornamental iron or other decorative materials that would not unreasonably obstruct the view of the golf course by adjacent property owners. The restrictions also prohibited the building of any structure, out building, opaque fence or wall within the twenty-foot rear set back of lots which abutted the golf course, in order to "protect views and maintain the character of the community". The Durens built a fence and timber wall on their property that obstructed the Beeres' view of the golf course. The Durens, who constructed the six-foot wood fence, alleged on appeal that they had obtained a variance from the architectural control committee ("ACC"), permitting them to build the fence and timber wall. The developer of the subdivision, however, testified at trial that a variance was not justified under the restrictions. He said the only point of the fence built by the Durens was to obstruct the view between the two houses, "so that the Durens would not have to look at the Beeres." The case was tried to a jury and the jury found that the Durens had constructed improvements on their property in violation of the deed restrictions. The jury also found that the Beeres were not entitled to reasonable and necessary attorneys' fees, in violation of Tex. Prop. Code Ann. § 5.006.

Notwithstanding the jury's findings, the trial court entered a take nothing judgment against the Beeres and in favor of the Durens. The Beeres appealed because the court disregarded the jury's findings and failed to enter a judgment enforcing the deed restrictions.

The court of appeals reversed the trial court and found that the trial court had abused its discretion by not issuing the injunction prohibiting the fence and timber wall. The court remanded the case to the trial court for determination of the attorney's fees that should be recovered by the Beeres. On the issue of the variance alleged by the Durens, the court said that it was the Duren's burden to request that a special issue be submitted to the jury on that point. Because no such issue was requested nor submitted to the jury, the court said that a defensive "finding" could play no part in the trial court's ultimate refusal to issue the injunctive relief requested. Therefore, the court did not consider any defensive issues that should have been requested and/or presented to the jury, including that of a variance.

8. ***Tien Tao Ass'n, Inc. v. Kingsbridge Park Cmty. Ass'n, Inc.*, 953 S.W.2d 525 (Tex. App.—Houston [1st Dist.] 1997, no pet.).**

Prior application to ACC indicated actual notice of requirements for subsequent approval. The restrictions made it clear that: (1) a committee existed; and (2) the committee may establish standards independent from those expressed in the restrictions to articulate the intent of the restrictions. Refer to Section IV.A.5 of this article for discussion.

9. ***Gonzalez v. Atascocita N. Cmty. Improvement Ass'n*, 902 S.W.2d 591 (Tex. App.—Houston [1st Dist.] 1995, no writ).**

The association sued Gonzalez for painting her home with colors that allegedly violated the restrictions.

The trial court granted summary judgment in favor of the association, requiring Gonzalez to repaint her home with approved colors, as well as pay the association's attorney's fees and costs.

On appeal, Gonzalez challenged the authority of the association, specifically the architectural control committee ("ACC"), to enforce the restrictions and challenged whether the association implicitly approved her paint color selection. The portion of the restrictions which created the ACC specified a term of ten years that the ACC would be in existence. Gonzalez's alleged violation occurred after the termination date. There was a provision in the restrictions allowing the association to take over power of the ACC with a 2/3 vote; however, there was no evidence presented that this was done. This, the court of appeals held, precluded summary judgment. The court also held that Gonzalez could bring this argument on appeal even though she did not raise it in her response to the association's motion for summary judgment. To hold otherwise, the court reasoned, would wrongly place the burden of proof the association had on Gonzalez.

10. ***Gettysburg Homeowners Ass'n, Inc. v. Olson*, 768 S.W. 2d 369 (Tex. App.—Houston [1st Dist.] 1989, no writ).**

The architectural control committee ("ACC") refused to approve Pulte's plans to construct several homes in the subdivision based on the fact that all of the proposed homes had the same basic floor plan and would in effect be "tract houses." Pulte began construction anyway and the association filed suit to enjoin the construction, asserting that the purpose of the ACC was to preserve the "architectural integrity" of the subdivision and that it had the power to only approve construction of custom homes. The trial court denied the injunctive relief.

The court of appeals affirmed, holding that to warrant issuance of a temporary injunction, an applicant need only show a probable right to recover at trial and a probable interim injury should the court fail to grant the temporary relief. The court noted the record on its application for temporary injunction "supports several legal theories on which the trial court could have concluded that the association had not demonstrated probable success on the merits." Further, offering only "speculative testimony of future loss of market value, the association failed to demonstrate interim injury should the temporary injunction fail to issue."

11. ***Whiteco Metrocom, Inc. v. Indus. Props. Corp.*, 711 S.W.2d 81 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).**

Industrial Properties owned real property in the Trinity Industrial District upon which Industrial placed a restrictive covenant which prohibited the construction of any structure or improvement without the approval of Industrial or its successors. The intent of the restriction was to implement a general development plan throughout the district. Industrial conveyed a portion of this property, subject to the restriction, to a joint venture company. Whiteco then leased a portion of the property owned by the joint venture company for the purpose of erecting a billboard. Whiteco began erecting the billboard without the approval of Industrial. Industrial brought suit to permanently enjoin the billboard construction. The trial court granted the permanent injunction and ordered Whiteco to remove the billboard.

On appeal, Whiteco argued that an approval provision, such as the one in this case, was only valid to enforce a specific restriction found elsewhere in the deed or restrictions. Since no restriction specifically prohibited billboards, Whiteco reasoned that Industrial could not prohibit the construction of a billboard. The court of appeals held that, under the test announced in *Davis v. Huey,* 620 S.W.2d 561 (Tex. 1981), Industrial was entitled to the relief granted by the trial court because: (1) Industrial had demonstrated the existence of the general development plan because the restriction was in every deed and was enforced against and for the benefit of all the purchasers within the district; and (2) the joint venture company/Whiteco had notice of the restriction.

12. ***Giles v. Cardenas*, 697 S.W.2d 422 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).**

The Giles built a fence on their property, which extended twenty feet in front of the building set back line. At their neighbors' (the Cardenases') request, the builder sent them notice that the fence was in violation of the restrictions and that plans and specifications for building a fence must be submitted

to their architectural control department for approval. The Giles then wrote to the builder (after the fence was built) requesting approval, which was denied by the builder's director of architecture and design. The Cardenases filed suit against the Giles, seeking to enforce the building setback restriction with respect to the fence. The trial court rendered judgment against the Giles, ordering them to remove a portion of the fence which extended beyond the setback line and permanently enjoining them from erecting any structures or fences beyond that line.

The court of appeals affirmed the trial court's decision. The Giles' main argument on appeal was that, during the original construction of the home, the builder had put in fence posts on their property which were also in violation of the setback restriction. The court did not consider this because the fence posts were immediately removed after the Cardenases brought the matter to the builder's attention. Further, there was no evidence that the fence in question was part of the original construction by the builder. In fact, the fence in question was a new construction put in by the Giles. The court also rejected the Giles' argument that it would be inequitable to require them to remove the fence because the evidence clearly established that the fence was a material violation of the restrictions and would pose a safety hazard by obstructing visibility around the corner.

F. Satellite Dishes

1. ***River Oaks Place Council of Co-Owners v. Daly*, 172 S.W.3d 314 (Tex. App. – Corpus Christi 2005, no pet.).**

The controversy underlying this appeal is whether Daly could lawfully equip his condominium unit with a satellite dish. The unit is located in River Oaks Place, a complex comprised of 123 condominium units, and in a structure that houses six units under a single roof. All condominiums in River Oaks Place are subject to the Declaration of Covenants, Conditions, and Restrictions of River Oaks Place (the "Declaration"), administered by the River Oaks Place Council of Co-Owners (the "Association"). The Declaration specifically prohibits condominium owners from installing television-receiving antennas on "Common Elements" of the structure, which include, among other things, the roofs of the units. After Daly installed a satellite dish on the roof of his unit and refused to remove it, the Association sued him for breach of contract and declaratory and injunctive relief. Daly counterclaimed for breach of contract and declaratory relief, contending the he could install the satellite dish on his roof, chimney, patio, or on a mast on his patio. The trial court rendered a judgment from a jury's verdict against Daly, issued a permanent injunction against Daly, and ordered him to pay attorneys' fees to the Association. After two motions for rehearing and two substituted opinions, the trial court entered a final judgment on remand, finding that Daly was the owner of the property, he had exclusive use or control of the patio adjacent to his unit but not the airspace above the patio area, and the Association's request for detailed specifications for the proposed satellite dish on a mast on the patio was necessary to accomplish a clearly-defined safety objective. No attorneys' fees were awarded, and both sides appealed.

The Association contended that the trial court erred by (1) failing to take judicial notice of 47 C.F.R. Section 1.4000 and the FCC fact sheet dated May 2001, (2) disregarding the jury's findings regarding the frivolity of Daly's claim and the amount of reasonable and necessary attorneys' fees, and by (3) not awarding attorneys' fees to the Association. 47 C.F.R. Section 1.4000 is a Federal Communications Commission regulation prohibiting restrictions on use of television satellite dishes in areas under the exclusive use and control of the homeowner. Although the court of appeals noted that the trial court erred by failing to take judicial notice of the regulation, it pointed out that Rule 202 of the Texas Rules of Evidence allows judicial notice to be taken at any stage of the proceedings, judicial notice had been taken during the first appeal, and the court would now take such notice, so such failure by the trial court did not lead to rendition of an improper judgment. Next, the court looked to whether the trial court erred by disregarding the jury's findings. It pointed out that a trial court may disregard a jury's answer to a question in the charge only when the answer has no support in evidence or the question is immaterial. As to whether Daly's claim was frivolous, the court found that the Association wholly failed to identify any evidence regarding Daly's bad faith, and

overruled this issue. Subsequently, the amount of attorneys' fees was immaterial, because a jury question is immaterial when it was properly submitted but has been rendered immaterial by other findings. Because Daly's claim was not found to be frivolous, the Association could not be awarded attorneys' fees.

Next the court turned to Daly's appeal. Daly contended that the trial court abused its discretion by (1) submitting jury question one regarding whether Daly had exclusive use or control of the air space above his patio, (2) submitting jury question two regarding whether the Association's written request for detailed specifications for a proposed satellite dish on a mast was necessary to accomplish a clearly-defined safety objective, and by (3) refusing to award attorneys' fees to Daly. Daly argued that question one fell outside the mandate of the First Court of Appeals in its order to remand. The court pointed out that question one did not exceed the mandate of the court of appeals, as it was necessary to determine whether Daly could be prevented from placing a satellite dish on a mast on his patio. Daly did not have exclusive use or control of the air space above the patio, so 47 C.F.R. Section 1.4000 would not prevent the Association from prohibiting Daly's installation of a satellite on a mast on his patio, and the trial court did not err in submitting question one. As to the trial court's submission of question two, the court pointed out that because the Association prevailed on question one, the submission of question two did not affect the judgment, and Daly lost his patio-mast claim based on the jury's answer to question one. Lastly, as to Daly's argument that the trial court erred in refusing to award him attorneys' fees, the court stated that the Declaratory Judgment Act does not require an award of attorneys' fees to the prevailing party but provides that the court may award attorneys' fees. In addition, Daly's contention that he was entitled to attorneys' fees under the Texas Condominium Act was overruled, because Daly was not a prevailing party under the Condominium Act. He was not seeking to enforce the Declaration, so the Condominium Act did not apply, and the trial court did not err by refusing to award attorneys' fees to Daly.

2. ***DeNina v. Bammel Forest Civic Club, Inc.*, 712 S.W.2d 195 (Tex. App.—Houston [14th Dist.] 1986, no writ).**

The association and the Morrises (property owners in the subdivision) obtained a temporary injunction against the DeNinas, enjoining them from maintaining a satellite dish on their lot. On appeal, the DeNinas argued, among other things, that the temporary injunction was improper because the trial court made no finding of irreparable harm. The court of appeals disagreed, holding that proof of actual damages or irreparable injury is not necessary when a substantial breach of the restrictions is shown. The court further held the satellite dish was an improvement to the property, the location and installation of which without prior architectural control committee approval constituted a substantial violation of the restrictions.

G. Adults Only

1. ***Covered Bridge Condo. Ass'n, Inc. v. Chambliss*, 705 S.W.2d 211 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).**

The association filed suit seeking injunctive relief against a condominium owner for violation of a covenant restricting unit occupancy to those sixteen years of age or older. The trial court declared the covenant unreasonable, unconstitutional and unenforceable.

In its opinion, the court of appeals stated that age restriction covenants are not unconstitutional unless unreasonable or arbitrarily applied. The court further held that age restrictions "are a reasonable means of providing housing which meets the differing needs and desires of varying age groups." The court rejected the owner's argument that the association had to show a compelling state interest for a covenant which restricts occupancy by age to be constitutional by holding that the restriction was created by a private contract, not by a governmental ordinance or law. As the owner signed her deed containing the notice of the age restriction, the court held that she had to "accept the obligations of this agreement as well as its benefits." The court further found no evidence that the particular covenant was applied in a discriminatory or arbitrary way.

[Editor's Note: The Federal Fair Housing Act, 42 U.S.C.A. § 3604, has preempted state law in this

area by prohibiting housing discrimination based on "familial status."]

2. ***Preston Tower Condo. Ass'n v. S.B. Realty, Inc.*, 685 S.W.2d 98 (Tex. App.—Dallas 1985, no writ).**

The by-laws for Preston Tower prohibited the permanent residency of any person under age sixteen in any unit in the complex. The two stated exceptions to the rule were: (1) if the person under age sixteen was a resident of the project before the declaration was filed; and (2) if the child was born to owners who had been owners in excess of seven months. The association could also make exceptions for extenuating circumstances. S.B. Realty, owner of a condominium unit, leased the unit to a family with a daughter under sixteen years of age. The family was not notified of the age restriction because it was excised from the lease form. When the association learned of the lease with the excised restriction, it notified S.B. Realty and the tenants that the lease was unacceptable. S.B. Realty's request for an exception was denied by the association, which later filed suit seeking an injunction. The trial court granted summary judgment in favor of the tenants, finding that the age restriction was unconstitutional.

The court of appeals reversed, disagreeing with the tenants' contention that the two exceptions to the age restriction made it inherently unreasonable and able to be applied only in a discriminatory and arbitrary fashion. Further, the court held that the tenants were put on notice by a clause in their lease which stated that they were obligated to comply with "all terms, conditions, agreements, covenants, and provisions of the Condominium Declaration, its By-laws and its Rules and Regulations." Therefore, they had a duty to inquire about the provisions of the declaration.

H. Subdivision of Lots

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

The association filed a declaratory judgment action against homeowners seeking construction of its restrictions and the homeowners counterclaimed. The homeowners sought permission to subdivide their lot to allow an additional home to be built on the subdivided portion of the lot. The homeowners contended that the restrictions did not specifically prohibit such a division. The association countered that it was the drafter's intent to limit each platted lot to one single family residence.

The court of appeals held that since there was no express prohibition in the restrictions against more than one residence per lot, the homeowners should be allowed to place an additional home on the subdivided portion of their lot, as long as building setback requirements could be met. Although one of the original developers testified that the framer's intent was to have only one home per lot, the court held that this testimony was of no probative value because the restrictions were not found to be ambiguous.

2. ***Hubbard v. Dalbosco*, 888 S.W.2d 224 (Tex. App.—Houston [1st Dist.] 1994, writ denied).**

Dalbosco, a real estate developer, owned two improved lots (Lots 1 and 2) in a subdivision. His daughter and son-in-law lived on Lot 1. He deeded Lot 2 to a bank in lieu of foreclosure. Dalbosco then conceived a plan to purchase Lot 2 back from the bank, tear down the house on it, and carve three lots out of Lot 2 and a portion of Lot 1. He then planned to sell the newly subdivided lots to a homebuilder. This would make the resulting three lots over one-half acre each, which was the minimum size according to the restrictions in effect at the time. Knowing that the restrictions were about to expire, Dalbosco himself called a homeowners' meeting to obtain signatures on an agreement that he prepared, which would extend the restrictions for another ten years. The homeowners were vehemently opposed to this plan and instead voted to amend the restrictions to prohibit building on half-acre lots. The homeowners appointed a committee to prepare the new restrictions, however, Dalbosco proceeded with his plan, and attempted to sell Lot 2 to prospective homebuilders. One of these homebuilders (whose contract placed a "free look" provision that entitled him to walk away from his option to buy Lot 2 without losing his earnest money) talked with some of the homeowners (specifically with two who were on the committee) and learned of the neighbors' opposition. Accordingly, the homebuilder walked away from his contract and Dalbosco filed suit against the

homeowners that spoke to the homebuilder for tortious interference with that contract. At trial, the jury found that the two committee members had individually, and not as representatives of the association, tortiously interfered with Dalbosco's contract.

The court of appeals reversed, stating that the two committee members had the privilege of telling the homebuilder that they would not allow the subdividing of Lot 2. A party is privileged to interfere with another's contract when either: (1) the interference is done in a bona fide exercise of the interfering party's rights; or (2) the interfering party has an equal or superior interest in the subject matter to that of the other party. The court concluded by stating that restrictions cannot prevent individual homeowners from stating their personal points of view about their neighborhood.

3. ***Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78 (Tex. App.—Houston [1st Dist.] 1994, writ denied).**

A declaratory judgment action was brought by a group of property owners to determine: (1) whether the lots could be subdivided to build single family residences on the subdivided portions without the consent of the other lot owners; (2) when the owners could amend the restrictions; and (3) how the votes of the owners of the subdivided portions of the lots were to be calculated. The trial court held: (1) the lots could be subdivided to construct single family residences on the subdivided portions of such lots without joinder of the owners of the other lots in the subdivision; (2) a majority of lot owners could amend or terminate the restrictions upon filing within one year of a date certain; and (3) the subdivided portions of lots together have only one vote. The applicable portion of the restrictions provided that the lots "shall be used only for single or multi-family residences, or condominiums... ." and that the lots "may be subdivided to provide building sites for multi-family residences or for condominiums, without the joinder of the owners of other lots... ."

The court of appeals, citing *Wilmoth v. Wilcox*, 734 S.W.2d 656 (Tex. 1987), held that since the restrictions contained no express prohibition against subdividing to construct single family residences, it would not create an implied prohibition restricting the free use of land. With regard to the voting issue, the applicable restriction stated that, "[t]he owners of subdivided portions of lots shall together have but one vote per portion as if each subdivided portion were one lot." The court held that this language gave one vote to the owner of a single family dwelling on a portion of a subdivided lot, and at the same time, prevented multiple owners of multi-family residences located on one portion of a subdivided lot from having more than one vote for their portion. The dissent pointed out that the rules the majority relied on were overruled by Tex. Prop. Code Ann. § 202.003(a), which provides that restrictive covenants should be liberally construed to give effect to their purposes and intent. The dissent stated that, in light of § 202.003(a), "covenants restricting the free use of land are no longer disfavored; no longer are we to resolve doubts in favor of the free and unrestricted use of the premises; and no longer must we construe the covenants strictly against the party seeking to enforce it."

4. ***J.P. Building Enter., Inc. v. Timberwood Dev. Co.*, 718 S.W. 2d 841 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e).**

Timberwood, a developer, sold two tracts of land which were later resold to J.P. Building Enterprises. Attached to the deed were restrictions, including a residential use only restriction which required no buildings other than single family residences. Upon learning of J.P. Building's intent to subdivide the tracts, Timberwood filed suit seeking a declaration that the subdivision of the tracts would violate the restrictions. The trial court found that the restrictions did preclude the subdivision of the tracts.

The court of appeals noted, "in construing a restrictive covenant, we are interested in ascertaining the objective, not the subjective, intent of the parties as reflected by the actual words of the restrictive covenant being construed." The court agreed with the trial court that the restrictions in this case were not ambiguous. The court disagreed, however, with a finding of the trial court which stated, "[i]t was the intention of the developer to restrict each described lot to a single-family residence on each described tract." The court noted that there was no need to make a determination as to the developer's intent because the restriction was not ambiguous and the intentions were clearly set forth in the restrictions. The court reversed the trial court's decision

precluding the subdivision of the tracts and remanded on the issue of damages.

I. Rules and Regulations

1. ***Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n,* 775 S.W.3d 487 (Tex. App.—Texarkana 2002, pet. denied).**

In the suit (Musgrave III), the owner of common areas within a subdivision, Pinebrook Properties Ltd., filed suit against Brookhaven Lake Property Owners Association, as well as various lot owners, seeking injunctive relief, declaratory judgment, monetary damages for trespass, and attorney's fees. The trial court consolidated all counterclaims from a prior suit with this one. Pinebrook Management LLC was the general partner of Pinebrook Properties. Pinebrook Properties filed suit to enjoin the association from working on the roadways and the lake and then billing Pinebrook Properties. The lot owners counterclaimed for injunctive relief, declaratory judgment, and monetary relief against Pinebrook Properties, Pinebrook Management, and Musgrave. Additionally, the lot owners claimed that Pinebrook Properties and Pinebrook Management were alter egos of Musgrave. The trial court rendered judgment in favor of the association finding that Pinebrook's claims were barred by res judicata and collateral estoppel. In its finding of facts and conclusions of law, the trial court found that: (1) Pinebrook Properties and Pinebrook Management were indeed alter egos of Musgrave and that Musgrave has no control over the lake and recreational areas located within the subdivision; (2) all existing roadways were impliedly dedicated as public roads; (3) Pinebrook was liable for debts incurred by the association for maintenance of the lake, dam, recreational areas, and roadways, as well as responsible for maintenance of these areas in the future; (4) the association had authority to make and enforce rules pertaining to the property owner's exclusive right to use and enjoy the lake, dam, recreational areas, and roadways; and (5) monetary damages and attorney's fees. Pinebrook appealed.

The court of appeals affirmed the trial court's determination that Pinebrook's claims were barred by res judicata. In addressing Pinebrook's second point of error, the court reversed the trial court's judgment and found that Pinebrook Properties and Pinebrook Management were not alter egos of Musgrave and that the Owners take nothing against him. Next, the court affirmed the trial court and found that the association did have the authority to file counterclaims and recover as a property owners association since it was a lot owner in its own right. The court also confirmed that Pinebrook had the authority to promulgate rules and regulations regarding the property it owned (even though owners had the exclusive right to use the property) due to the fact that such a right was reserved in the recorded restrictions, provided that the rules and regulations were to insure the safety, sanitation, and pleasure of the greatest number of lot owners (as provided in the restrictions). In its fifth point of error, the court agreed with Pinebrook that the trial court erred with respect to its finding regarding implied dedication of the roadways. Because the court disagreed with the trial court's alter ego determination, the court reversed and remanded the award of monetary damages due the association by Musgrave. Finally, the court found that the trial court erred in granting several of the injunctions. Specifically, the court found that Pinebrook had the right to regulate the property.

2. ***Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. P'ship,* 985 S.W.2d 667 (Tex. App.—Corpus Christi 1999, pet. denied).**

The board of directors of the association enacted a policy regulating the renting of units outside the association's rental pool and levying fees on units rented outside the association's rental pool. The fees were intended to cover the additional expenses caused by renters who were not in the rental pool. Thereafter, the declaration was amended in order to prohibit an owner from using an outside leasing agent. An owner could rent his units either personally or through the rental pool, but not with an outside managing agent. The Cantus sued the association for damages and a declaratory judgment to declare the rental fees and the prohibition against outside leasing agents to be invalid. The suit also claimed that the association, by enacting the restrictions and enforcing them, had tortiously interfered with the management contract between the Cantus and their management company. The association, on the other hand, filed a counterclaim

to recover unpaid assessments, accrued interest, attorney's fees and expenses.

The court of appeals reversed the decision of the trial court and rendered judgment in favor of the association. The court noted that when reviewing an action of a board of directors of a condominium association courts apply a "reasonableness" standard "recognizing that they may not enforce arbitrary, capricious, or discriminatory rules." The court considered the Cantus' argument that they had an absolute right to lease their units to whomever they desired and to choose an independent manager to manage and run their units. But in reviewing the declaration, the court found that the right of an owner to lease or rent his apartment was also "subject to all provisions and restrictions applicable to the project". Therefore, the right to lease was not actually absolute. Therefore, the court held that the trial court erred when finding that the absolute right to lease included the right to choose an independent manager to manage units. The court also found that the declaration and by-laws gave the board of directors the authority to levy fees against condominium owners who rented their units outside of the co-owners' rental pool, and to prohibit use of outside leasing agents. The court found that the rental fees were not arbitrary, capricious or discriminatory. The declaration and by-laws provided the association and its board of directors with the legal right to interfere with a unit owner's contracts with renters and its outside leasing agents. The association was entitled to recover the undisputed amount of unpaid assessments and attorney's fees owed by the Cantus. The court found there was no tortious interference with the Cantus' existing leasing contracts or with its contract with the management company, because the association was justified under Texas law in interfering with those contracts. The court ultimately rendered judgment in favor of the association against the Cantus for unpaid assessments in attorney's fees and litigation expenses.

3. ***Dickerson v. Debarbieris*, 964 S.W.2d 680 (Tex. App.—Houston [14th Dist.] 1998, no pet.).**

The condominium association proposed installing a remote control access gate for parking. The cost of the system was to be financed by a special assessment; however, the special assessment was to be financed by an increase in the regular monthly assessment over one year rather than a single special assessment. The access gate was approved by the required number of owners; however, one owner, Ms. Dickerson, who voted against the gates and voiced her disapproval at the meetings, elected to refuse to pay the increased amount and only paid her regular monthly assessment. As a result, the association began to assess late charges on her account and ultimately refused to accept any more partial payments from her. The condominium declaration stated that the association's lien for assessments could be foreclosed "in the same manner as foreclosure of a mortgage or deed of trust on real property"; however, it did not name a trustee or set forth nonjudicial foreclosure procedures. Rather than amending the condominium declaration, which required 75% owner approval, the association elected to and did amend its by-laws to provide that the association had the power to appoint a trustee to foreclose the association's lien in accordance with Tex. Prop. Code Ann. § 51.002. Only a simple majority of the owners was required to approve an amendment to the by-laws. The association then proceeded to non-judicially foreclose on Dickerson's unit, which was sold to a third party at the sale. Dickerson then filed a petition seeking a temporary restraining order and injunction against the association, the association's managing agent and the third party purchaser. After the temporary restraining order was granted, the association rescinded the sale and filed a counterclaim for unpaid assessments and for a declaratory judgment that the by-law amendment was properly adopted. The trial court entered judgment in favor of the association.

The court of appeals held that, although the condominium declaration did not contain the words "power of sale," or set forth the procedures for conducting a sale, there is no authority requiring the necessary power of sale language be set forth in the condominium declaration rather than in the by-laws. The court also held that the special assessment for the gate system was proper as Dickerson failed to prove that the gate system interfered with her ownership rights. It was noted, however, that Dickerson failed to plead or otherwise raise at trial the argument that the gate system altered a limited common element without the consent of all the affected owners in violation of Tex. Prop. Code Ann.

§ 81.104(e) and § 81.002(8). As such, the court did not consider this argument. In the other major issue discussed in this case, the board passed parking regulations that were violated by Dickerson and resulted in one of her cars being towed. The association placed a concrete block in part of Dickerson's space and designated it a bike storage area. Dickerson contended the association did not have the authority to designate a part of the parking space for bike storage. The court held that Dickerson failed to prove that the block interfered with her ability to park one car in her space as allowed by to the regulation. The court also upheld the $12,000 in damages awarded by the trial court based upon Tex. Prop. Code Ann. § 202.004(c) and $32,893.50 in attorney's fees awarded by the trial court, although Dickerson argued they were excessive.

J. Nuisance

1. ***Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212 (Tex. App.—Houston [14th Dist.] 1989, writ denied).**

Freedman had operated a shopping center in the subdivision for thirty years. The shopping center was separated from the remainder of the subdivision by a ten-foot wall. The previous restrictions provided that Freedman's lot, as well as others along the periphery of the subdivision near the shopping center, could be used for retail and business purposes. Freedman purchased an additional lot on the other side of the ten-foot wall, intending to use the lot as a parking lot for the shopping center. Two days after Freedman began tearing down the house to create the parking lot, the association filed amended deed restrictions which converted the lot in question to residential use only. The association then sued Freedman attempting to enforce the amended restrictions, which the trial court disallowed as a matter of law. The jury found that the intended use of the lot would not violate the original restrictions, but would constitute a nuisance to the neighborhood. Subsequent to the jury verdict, the trial court conducted a hearing to allow Freedman to present evidence to balance the equities wherein the trial court rendered judgment for the association, permanently enjoining Freedman from building the proposed parking lot.

On appeal, Freedman complained that the association did not have standing to file a nuisance claim, and that the issue of nuisance was not ripe for litigation. The court held that the association did have standing to sue on a nuisance claim because it was encumbered with the duty to ensure the safety and maintenance of the subdivision on behalf of the residents. As such, the association had a vested interest in the land or the lawful enjoyment thereof. The court reiterated the general rule that:

> ...an injunction will be granted only to restrain an existing nuisance and not to restrain an intended act on the grounds that it may become a nuisance. However, a court of equity is empowered to interfere by injunction to prevent a threatened injury where an act or structure will be a nuisance per se, or will be a nuisance for which there is no adequate remedy at law, or where a nuisance is imminent.

The court held that although a parking lot is not a nuisance per se, the parking lot did not have to be in existence for the association to bring this claim. Further, the evidence was sufficient to support the jury's finding that the parking lot was a threatened nuisance.

2. ***Guajardo v. Neece*, 758 S.W.2d 696 (Tex. App.—Fort Worth 1988, no writ).**

Neece filed suit against Guajardo seeking an injunction that Guajardo be stopped from constructing and operating a breeding and boarding dog kennel on his property within the subdivision based upon a nuisance restriction. The trial court found that the operation of the proposed facility would violate the restriction.

On appeal, Guajardo contended that the temporary injunction granted by the trial court violated the public policy of the State "to foster the care, health and maintenance of domesticated animals," and operated an extreme and unreasonable restriction of the use of his property. The court of appeals disagreed, holding that the kennel would constitute an offensive trade in a residential community. The court further held that, "[a]ny policy considerations in favor of the care of animals operating in this case do not outweigh the rights of property owners to enforce valid restrictive covenants."

K. Convenience Stores

1. ***WLR, Inc. v. Borders*, 690 S.W.2d 663 (Tex. App.—Waco 1985, writ ref'd n.r.e.).**

Borders purchased a grocery market from Peel. The documents accompanying the sale provided that Peel would not operate a grocery business in the county for two years and that Peel would not sell the vacant lot across from the store for the purpose of operating another grocery store for as long as Borders owned and operated the market. Peel leased the vacant lot to Ray, who began construction of a convenience store. Ray was aware at all times of the restriction against operating a grocery store. When construction was completed, Peel conveyed the lot to WLR, Inc. c/o Ray. The deed also recited the restriction in question. WLR brought suit contending that operation of a convenience store did not constitute operation of a grocery store and seeking a declaration that the term "grocery store" was vague and rendered the restriction unenforceable. Borders countered with an action seeking to enjoin WLR and Ray. The trial court ruled in favor of Borders and specified a list of items that WLR was prohibited from selling at the location in question.

The court of appeals found that grocery items were in fact being sold at the convenience store. The court held that the language of the restriction was clear enough to manifest an intent that such items not be sold from the location across from the Borders market, that WLR's distinction between "convenience store" and "grocery store" was immaterial, that the sale of grocery items from WLR's location violated the restriction so that injunction was proper.

L. Sexually Oriented Businesses

1. ***Highlands Mgmt. Co. v. First Interstate Bank of Texas*, 956 S.W.2d 749 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).**

In 1995, First Interstate conveyed, by special warranty deed, a tract of commercial land to Highlands. One of the restrictions contained in the special warranty deed prohibited the location and operation of a sexually oriented business on the property. According to First Interstate, Highlands indicated that they intended to use the tract to operate a barbecue restaurant. Highlands, however, decided to lease the property to the adjacent landowner. That landowner operated gentlemen's cabaret and intended to use the property as a parking lot for the cabaret. Upon learning of Highland's intent, First Interstate filed suit to enforce the restriction against use of the property for a sexually oriented business. First Interstate obtained a temporary restraining order and filed a motion for summary judgment to permanently enjoin Highlands from leasing the property to the cabaret. The trial court granted summary judgment in favor of First Interstate.

The court of appeals affirmed the trial court. Highlands argued that the restriction did not prohibit the intended use because there would be no sexually oriented business located and operated on the property. Relying on the rules for construing a restrictive covenant set forth in *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987), the court stated that because the restriction was not ambiguous, the court's objective was to discover the objective intent (the intent expressed in writing) of the restriction's framers. The court also noted that it was required to liberally construe the restrictions language in order to give effect to its purpose and intent as required by Tex. Prop. Code Ann. § 202.003(a), which was added to the Texas Property Code in 1987 and applied to all restrictive covenants. Further the court noted it had previously stated in *Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 63 S.W.2d 474, 477 (Tex. App.—Houston [14th Dist.] 1988, writ denied), "the covenant should not be hedged about with strict construction, but given a liberal construction to carry out its evident purpose." The court determined that the intent of the restriction was to prohibit the operation of a sexually oriented business on the property. According to the court, a parking lot was an integral part of the business. In fact, the cabaret was required by city ordinance to provide a sufficient amount of parking. Thus, held the court, using the tract as a parking lot for the cabaret would violate the restriction.

M. Fences

1. ***Ball v. Rao*, 48 S.W.3d 332 (Tex. App.—Fort Worth 2001, pet. denied).**

A fence was constructed in violation of restrictions that prohibited fences higher than eight feet and fences without architectural approval. Refer to Section IV.E.4 of this article for discussion.

2. ***Beere v. Duren*, 985 S.W.2d 243 (Tex. App.—Beaumont 1999, pet. denied).**
A six-foot wooden fence violated a restriction prohibiting any fences except wrought iron or other decorative material that did not obstruct the view of the golf course from adjacent lots. Refer to Section IV.E.7 of this article for discussion.

N. Alcohol Sales

1. ***Ehler v. B.T. Suppenas Ltd.*, 74 S.W.3d 515 (Tex. App.—Amarillo 2002, pet. denied).**
The issue in this case concerned the enforceability of deed restrictions prohibiting alcohol sales on land adjacent to a parcel of land where off-premises alcohol sales were permitted. In order to induce the sale of a small portion of a large tract of land to Suppenas, the seller divided the property into dominant and servient estates. Suppenas purchased all the dominant estate consisting of 18.9 acres for $1,500,000. To formally execute this division into a dominant and servient estate, the seller filed a declaration that defined Suppenas' 18.9 acres as the sole dominant estate and expressly stated:

> [n]o part, parcel, or lot of the real property described herein as the Servient Estate shall ever be used for the purpose of off premises sale of alcoholic beverages.

Furthermore, the declaration provided that the restrictions were imposed "for the purpose of protecting the value and the desirability of the Dominant Estate." Later, a portion of the servient estate was sold to James and Shirley Stuart, who were not parties to this suit. The remaining 218 acres of the servient estate was sold to Ehler in 1997 for $1,200 per acre. Ehler felt the price was slightly more than market value for property used as farm land (the land's primary purpose until then); however, he thought there was a good chance of removing the restriction against alcohol sales on the servient estate, thereby significantly increasing the value of his property. In 1998, Ehler brought suit against Suppenas requesting the trial court to declare the restriction prohibiting alcohol sales on the servient estate amounted to a covenant not to compete and was an unreasonable restraint on trade. The trial court rendered judgment against Ehler and made findings of fact and conclusions of law in support its judgment. On appeal, Ehler challenged the legal and factual sufficiency of the trial court's findings of fact and conclusions of law.

The court of appeals overruled Ehler's points of error and affirmed the trial court's judgment. Specifically, the court found that the trial court's findings of fact were legally and factually supported by the evidence in the record. More importantly, while reviewing the trial court's conclusions of law, the court discussed the applicability of Tex. Bus. & Com. Code Ann. § 15.50. § 15.50 provides criteria for enforceability of non-competition agreements almost exclusively within the realm of employment contracts. The court affirmed the trial court's finding that Ehler had no contractual relationship with Suppenas. Moreover, the court stated that § 15.50 does not govern the rights and liabilities of property owners and was inapplicable to this case as a matter of law. The court also affirmed the trial court's finding that the restriction was not an unlawful attempt to monopolize trade. In so doing, the court found that 218 acres was such a small section of an entire county precinct which allows alcohol sales as to preclude a finding that the restriction was an impermissible restraint on trade.

O. Water Wells

1. ***Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.).**
Lot owners within a residential subdivision sued the developer for a declaratory judgment that the restrictive covenants applicable to their lots did not prohibit the drilling of water wells. Subsequent to the dispute between the developer and the lot owners over the water wells, but prior to litigation, the developer unilaterally executed amended restrictive covenants expressly prohibiting the drilling of water wells. The trial court granted a summary judgment in favor of the lot owners. The developer appealed the judgment of the trial court arguing that the amended covenants were valid, or,

alternatively, the original covenants prohibited the water wells at the center of this controversy.

The court of appeals affirmed the trial court's judgment in part and reversed and remanded in part. The original restrictive covenant in question prohibited the drilling for minerals. One issue on appeal was whether water could be defined as a "mineral" and, thus, the original covenant would encompass a prohibition against the drilling for water on any lot. The court held that although water was "technically" a mineral, the natural and ordinary meaning of mineral excluded water. Another issue on appeal was the validity and enforceability of the developer's unilateral amendment to the restrictive covenants expressly prohibiting the drilling of water wells. On this issue the court held that the original restrictive covenants clearly reserved the right and method for unilateral amendment by the developer.

P. Industrial Use

1. ***Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657 (Tex. App.—Austin 2005, no pet.).**

The court of appeals explained that when a covenant restricts the use of property to industrial purposes, additional uses may be permitted if they are reasonably incidental to prescribe uses and of such nominal or inconsequential breach of the covenants as to be in substantial harmony with the purpose of the parties in the making of the covenants. Here, use of the property for church purposes was a distinct and substantial breach of the restrictive covenants, although church services only constructed 17% of the time the property was used for activities; purchaser was organized primarily for religious purposes, all other activity on the property was conducted for the purposes of supporting purchaser's religious mission, and church services formed the fundamental core of the property's use. Refer to Section II.C.1 of this article for discussion.

2. ***Dynamic Publ'g & Distrib. L.L.C. v. Unitec Indus. Center Prop. Owners Ass'n, Inc.*, 167 S.W.3d 341 (Tex. App.—San Antonio 2005, no pet.).**

Royal was the developer and one of the property owners in the Unitec Industrial Center. The center was outside of the Laredo City limits when it was developed. Royal and the city entered into a contract, whereby the city agreed to supply water to the center and Royal agreed that the center would be used only for industrial purposes as defined by Laredo City Ordinance and any future amendments to the ordinance. The contract also required Royal to include restrictive covenants in deeds conveying the property within the center, which were filed in the county real property records. Included in the covenants was a use restriction, which provided that: (1) the lots could only be used for industrial purposes as defined in the covenants; (2) the land was subject to the terms and conditions of the ordinance; (3) in the event of conflict between the contract with the city and the ordinance, the ordinance controlled; and (4) "industrial purposes" as used in the covenants had the same meaning as "industrial purposes" in the ordinance. The ordinance defined "industrial purposes" as:

> [A]ny and all use or uses of land, first allowed in those Districts which are M1, and M2, under the Zoning Ordinance of the City of Laredo, and for clarification, those uses which are so allowed within the meaning of the phrase 'industrial purposes' are specified herein…

The Ordinance then listed twenty-five specific uses that qualified as industrial purposes, all of which were consistent with the stated purpose of M2 districts. The stated purpose of the M2 zoning district was found in the Laredo Land Dev. Code, which provides that:

> The purpose of the M2 Heavy Manufacturing District is to provide areas for manufacturing, processing, assembling, storing, testing and industrial uses which are extensive in character, and require large sites, open storage and service areas, extensive services and facilities, ready access to regional transportation; and which may be incompatible with less intensive uses by reason of traffic, noise, vibration, dust, glare, or emissions.

The Laredo Land Dev. Code also provides that any property owner who wants to establish a use on land that is not zoned for that use can apply for a special use permit. The city annexed the center in

1997 and 1998, and it was zoned M2. Dynamic obtained a special use permit from the city, allowing it to operate an adult book store featuring live nude dancing on its center premises. Royal and the Unitec Property Owners Association sued for declaratory relief, specifically: (1) that Dynamic's operation of an adult bookstore was prohibited by the restrictive covenants; (2) that the restrictions remained in force despite annexation; and (3) that the restrictions limited the use of the property to industrial purposes. They also sought a permanent injunction to prevent Dynamic from operating an adult entertainment business within the center for the duration of the restrictive covenants.

Royal and the association twice moved for summary judgment. The trial court granted the second motion, holding that: (1) the covenants survived annexation and limited the use of the center property to "industrial purposes" only as set forth in the ordinance and its amendments; and (2) an adult entertainment business such as the one Dynamic planned to operate was not permitted on the center's property. A permanent injunction was issued and attorney's fees were awarded. Dynamic appealed.

The court of appeals affirmed the trial court's grant of summary judgment. At the onset, the court noted that the rules of contract construction and interpretation require that, in order for a court to construe a contract as a matter of law, it must be unambiguous. Dynamic argued that Royal and the association did not establish as a matter of law that its use of the property was not an "industrial purpose." Royal and the association asserted that "industrial purposes" had only one meaning, and that meaning was clarified by the twenty-five specific uses listed in the ordinance. Dynamic countered that the definition had two parts: (1) "any and all use or uses of land allowed in those Districts which are M1, and M2…" and (2) those twenty-five specific purposes listed. Dynamic argued that the word "allowed" in the first part included those uses that required a special permit as well as those that did not. Dynamic further argued that the second part merely contained examples of possible permitted uses that were provided for guidance and to minimize confusion. The court found that the term "industrial purposes" as defined in the ordinance was not ambiguous. The court noted that each time the ordinance was amended, the amended ordinance included an opening paragraph indicating the addition of a new industrial purpose to the list along with an explanation discussing the reason for expanding the definition of "industrial purposes." The court felt that, when the original ordinance and all amendments were read together in their entirety, it was clear that the listed purposes were more than mere examples. The listed purposes were meant to define the term "industrial purposes" and limit the use of any development to only those listed purposes. Because the term was not ambiguous and the restrictive covenant limited its definition of "industrial purpose" to that term as defined in the ordinance, the court held that the trial court did not err in granting summary judgment.

Q. Religious Freedom

1. ***Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657 (Tex. App.—Austin 2005, no pet.).**

Enforcement of a restrictive covenant which only permitted commercial/light industrial uses on property did not violate purchaser's state constitutional right to religious freedom and expression by prohibiting religious services and meetings, as restriction applied equally to the religious activities of all denominations and faiths. Refer to Section II.C.1 of this article for further discussion.

V. ASSESSMENTS

A. Judicial Foreclosure

1. ***Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004).**

Northglen Association was the homeowners association for six subdivisions or sections and each section is governed by deed restrictions. The restrictions for each section provided that all homeowners in those subdivisions were members of the association, and subjected all homeowners to an annual assessment that was deposited into a maintenance fund for maintaining common areas. In 1994 the association's board of directors

amended the deed restrictions to expand the board and to assess late fees on unpaid assessments. Geneva Brooks and other owners organized a committee and sought to remove certain members of the board. The association responded by filing a lawsuit seeking an injunction and declaratory relief. The association sought to obtain a judgment declaring that its actions in electing the board and assessing late fees were valid exercises of its authority. Brooks counterclaimed for a declaratory judgment that the association had no authority to raise assessments or charge late fees without a vote of the property owners. The association non-suited its claims, and the case proceeded on Brooks' declaratory judgment action. The property owners challenged the attempt by the association to increase and accumulate annual assessments and impose late fees. The deed restrictions did not mention late fees specifically. The deed restrictions for Sections One, Two and Three provided, in pertinent part:

> an annual maintenance charge and assessment not to exceed $10 per month or $120 per annum, for the purpose of creating ... the 'maintenance fund'...." The restrictions further provide that "[t]he rate at which each Lot will be assessed will be determined annually" by Northglen, and that "[s]aid rate and when same is payable may be adjusted from year to year by [Northglen] as the needs of the Subdivision may in the judgment of [Northglen] require.

The deed restrictions for Sections Four and Five specifically provided the annual assessment could be increased up to 10% over the prior year without a vote of the membership. The Association relied on Tex. Prop. Code Ann. § 204.010(a)(16) to accumulate the allowed increases contending that it could assess a $430 single year increase raising the assessment from $120 to $550.

The trial court granted summary judgment for the association, declaring that, without a vote of the homeowners, the association had the authority to raise the assessment for Sections One, Two, and Three, and raise the assessment for Sections Four, Five, and Six by 10% each year or accumulate and assess the increase after a number of years, and to charge a late fee. The trial court did not award attorneys fees.

The court of appeals affirmed the trial court's judgment in part and reversed in part. It reversed as to Sections One, Two, and Three, holding that the deed restrictions did not permit annual assessments exceeding $120.00. As to Sections Four, Five, and Six, the court held that because the deed restrictions contained no language expressly forbidding accumulation, the association could accumulate previous assessments. The court also held that the association had the right to assess a $35.00 late fee in addition to the interest charge permitted by the deed restrictions. Because the owners did not have prior notice of the late fee, the court held that the association could not foreclose on any homesteads to collect those fees. The court affirmed the trial court's denial of attorney's fees.

For the first time on appeal to the Supreme Court of Texas, Northglen raised the issue that the trial court lacked subject matter jurisdiction because Brooks did not join all Northglen property owners as parties. Northglen argued that it should be allowed to raise this argument for the first time on appeal based on the doctrine of fundamental error. The Court disagreed and held that Northglen's failure to raise the absence of non-joined parties at the trial level waived the right to raise the argument on appeal. The Court affirmed the portion of the court of appeals decision regarding increasing the assessments under the deed restrictions for Sections One, Two and Three, concluding that the association could not increase assessments beyond the $120 limitation set forth in the deed restrictions. The Court held that the association could not accumulate unassessed fee increases because the language in the deed restrictions prevailed over the language of Chapter 204 of the Tex. Prop. Code, the deed restrictions limited the allowed increase to a set amount and did not provide for accumulation. § 204.010 provides the powers enumerated therein are available to be exercised by an association acting through its board, unless otherwise provided by restrictions, articles of incorporation or by-laws, which the Court held was the case here. The Court affirmed the court of appeal's judgment that the association had the authority to assess late charges for unpaid fees, because there was nothing in the deed restrictions that otherwise provided, as with the accumulation issue. The Court specifically held

that the association could charge the late fee in reliance on Tex. Prop. Code Ann. § 204.010(10) and that such charge was constitutional. The Court also held that the association could not foreclose on the property if late charges were not paid. The Court agreed with the court of appeals, finding that because the deed restrictions did not provide any notice of a late fee, foreclosure was not an appropriate remedy for failure to pay the late charge. The Court also affirmed the lower court's judgment denying attorneys' fees.

2. ***Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987).**

Inwood North brought suit against the Harrises to recover delinquent maintenance assessments and for foreclosure of the lien granted to the property owners association by the restrictions encumbering the property. Prior to the Harrises purchasing their home, the restrictions had been filed of record. The restrictions provided that the assessments, plus interest and costs of collection, were designated to be "a charge on the land and shall be secured by a continuing Vendor's Lien upon the Lot against which such assessment is made."

The trial court awarded Inwood North a judgment for the delinquent assessments and related costs. The trial court refused, however, to grant Inwood North the right to foreclose on the Harrises' homestead to collect on the judgment. The court of appeals affirmed the decision of the trial court, holding that no proper vendor's lien was created by the restrictions. The court further held that the homestead laws contained in the Texas Constitution precluded foreclosure.

In a landmark decision for property owners associations, the Supreme Court of Texas overturned the decision of the court of appeals. The Court recognized that the restrictions did not create a true vendor's lien, as the assessment charges were not a part of the purchase price of the property and there was no deed of trust acknowledging the prior lien. Nonetheless, the Court held that the association's lien was a contractual lien that could be foreclosed upon. Regarding the Texas homestead law, the Court noted that while foreclosure for nonpayment of maintenance assessments is not one of the exceptions listed in Article XVI, § 50 of the Texas Constitution, this was not the issue. The issue was *when* the lien attached to the property. If the lien attached "simultaneously to or after the homeowners took title, there is authority which would deem the homestead right superior. ...On the other hand, if the lien attached prior to the claimed homestead right and the lien is an obligation that would run with the land, there would be a right to foreclose." As such, the Harrises' property was subject to Inwood North's lien since the lien was in existence prior to their purchasing the property. The court went on to recognize the concept of property owners associations and mandatory membership as an inherent property interest. The Court further held the "right to require that all property owners pay assessment fees is an inherent property right. That no owner has to pay more than a pro rata share is an essential characteristic of the property interest. ...The remedy of foreclosure is an inherent characteristic of the property right." The Court did note in dicta that it recognized the harshness of the remedy of foreclosure, especially when delinquent assessments are such a small sum compared to the value of a homestead; however, the Court was "bound to enforce the agreements into which the homeowners entered concerning the payment of assessments."

3. ***Cottonwood Valley Home Owners Ass'n v. Hudson*, 755 S.W.3d 601 (Tex. App.—Eastland 2002, no pet.).**

In accordance with its restrictive covenants, Cottonwood Valley brought suit against Hudson for nonpayment of homeowners' assessments as well as interest charges and costs advanced by the law firm attempting to collect the debt. Hudson failed to appear and did not answer the association's petition; therefore, the trial court granted a default judgment in favor of the association. The judgment, however, did not provide for the foreclosure of the association's lien. The association filed a motion to modify the judgment, asking the trial court to grant foreclosure on the assessment lien against Hudson's property. The court overruled the motion to modify on the grounds that it was not timely filed. The association appealed.

The court of appeals held that the association was entitled to foreclosure of homeowner's property and that the association's motion to modify was timely filed. Furthermore, the court found that the trial

court abused its discretion when it did not grant the foreclosure of the association's lien. Relying on *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 636 (Tex. 1987), the court stated that the remedy of foreclosure in an inherent characteristic of the property interest when someone purchases a lot in a subdivision with deed restrictions that carry the obligation to pay association fees for maintenance and ownership of common facilities and service. Again relying on *Inwood*, the court noted that "while the remedy of foreclosure may seem harsh especially when a small sum is due, the court is bound to enforce the agreements the homeowners enter into concerning the payment of assessments."

4. ***Northwest Park Homeowners Ass'n, Inc. v. Brundrett*, 970 S.W.2d 700 (Tex. App.—Amarillo 1998, pet. denied).**

The restrictions for Northwest Park were filed of record in 1984. Among other provisions, the restrictions provided that the homeowners association was authorized to charge and collect, from each lot owner, annual assessments. Brundrett purchased a lot in Northwest Park in 1991, subject to the restrictions, but never paid any assessments. In 1994, the association sued Brundrett seeking to recover unpaid assessments and to judicially foreclose the lien on Brundrett's property. The association was not chartered as a non-profit corporation until 1995.

The association couched its pleadings in the form of an action on a sworn account under Tex. R. Civ. P. 185. The trial court, sitting without a jury, ordered that the association take nothing on its claims. On the association's request, the trial court entered findings of fact and conclusions of law.

The court of appeals affirmed the trial court's judgment. The court considered whether the association's claim, as plead, constituted a claim for a liquidated money demand based upon a written contract and, thus, was entitled to the procedural benefit of Rule 185. The court noted that, on this point, the case might one of first impression. The court held that Rule 185 was inapplicable because: (1) the declaration did not provide a formula for determining the assessment amount; (2) the assessment amount could only be determined by action of the association's board; and (3) the association's pleadings did not contain a verified allegation that the assessment amount had been properly determined according to the procedure set out in the declaration. The court then refused to reverse the trial court because the association, instead of specifically challenging the legal and factual sufficiency of the trial court's findings, challenged the judgment as a whole.

5. ***Riner v. Briargrove Park Prop. Owners, Inc.*, 976 S.W.2d 680 (Tex. App.—Houston [1st Dist.] 1997, no writ).**

In a suit to quiet title to a lot in the Briargrove Park subdivision, the association was joined as a defendant because it claimed a lien on the property for unpaid maintenance assessments. The association counterclaimed for the unpaid assessments and to foreclose its lien. The title was awarded to Riner, who filed a cross-claim against the association after they rejected his settlement offer to pay only the delinquent assessments and no attorney's fees or costs.

The trial court rendered judgment in favor of the association for only the amount of the past due assessments and interest. The trial court held that Riner had not personally breached the assessment covenant and rendered judgment in rem rather than rendering a personal judgment against Riner. An order of sale was issued; however, Riner paid the entire amount of the judgment in order to avoid the sale. The court of appeals then reversed the trial court's decision in part and remanded the case back to the trial court solely on the issue of attorney's fees and court costs which should be awarded to the association.

On remand, the trial court entered a second judgment in favor of the association awarding total attorney's fees of $10,000. The second judgment did not mention the amount of past due assessments and interest which had already been paid by Riner and also did not mention a lien on the property. Further, the trial court ordered that the second judgment replaced "in all aspects" the first judgment. The association did not timely file a motion for new trial and the court's plenary jurisdiction was lost. Nonetheless, the trial court then changed it's second judgment, awarding the association a lien on Riner's property, judgment for unpaid maintenance

assessments, attorney's fees of $10,000 plus post-judgment interest (the third judgment). By making this change, the trial court was attempting to combine the two judgments using a judgment "nunc pro tunc."

In the second appeal, the court of appeals ruled that the changes made were "both substantive and material and could not properly be accomplished by a judgment nunc pro tunc." Accordingly, the third judgment was held void and the second judgment was held valid, which resulted in the association having a personal judgment against Riner for $10,000 in attorney's fees; however, no lien existed with which to secure this amount.

6. ***Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543 (Tex. App.—Houston [1st Dist.] 1994, no writ).**

The association sued Cox, a homeowner, and obtained an injunction prohibiting Cox from parking inoperable cars on his lot, which was also his homestead property. The association also obtained a judgment for attorney's fees. After the lawsuit was filed, the restrictive covenants were legally amended to provide that attorney's fees awards obtained as a result of violations of the restrictions were secured by a lien in favor of the association as "special assessments." Prior to this amendment and to Cox's homestead declaration, a lien already existed in the restrictions for maintenance assessments. After the judgment became final, the association tried to foreclose on Cox's property based on the award of attorney's fees relying on the amended restrictions which provided a lien against Cox's property for the attorney's fees. Cox contended that this violated his right to be protected from the forced foreclosure of his homestead property pursuant to the Texas Constitution.

The court of appeals considered but did not decide the issue of whether the amendment was a creation of a new lien, or a modification of the maintenance lien. If the amendment was found to be a new lien, made subsequent to the homestead declaration, then it would not be enforceable because it did not preexist the homestead right. The court instead based its decision on the fact that the association originally plead for attorney's fees at trial based on Tex. Prop. Code Ann. § 5.006, not on the amended restrictions. As such, the association could not foreclose as a remedy for the judgment.

7. ***Wohler v. La Buena Vida in W. Hills, Inc.*, 855 S.W.2d 891 (Tex. App.—Fort Worth 1993, no writ).**

A homeowners association, La Buena Vida, filed suit against Frances Wohler for nonpayment of delinquent assessments and to foreclose its lien against her property. Wohler did not appear in the suit and the Association obtained a default judgment against her. On appeal, Wohler contended that the judgment was void because the service of citation was defective. Further, Wohler contended that the judgment was not effective against the Frances C. Wohler Trust (the owner named in the deed to the property) as the Trust was no properly served. Lastly, Wohler argued that the judgment could not stand because the beneficiaries of the Trust were necessary parties and should have been given notice.

The court of appeals overruled all of Wohler's points of error, holding that service was proper and that the beneficiaries were not necessary parties in this case because: (1) their interests were not adverse to those of the trustee; and (2) La Buena Vida's lien encumbered the property long before it became trust property.

B. Nonjudicial Foreclosure

1. ***Aghili v. Banks*, 63 S.W.3d 812 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).**

Owners of condominium units brought suit against condominium owners' association, management company, buyer, and attorney who conducted foreclosure sale, seeking to set aside the non-judicial foreclosure sale of their units. The trial court entered summary judgment against the unit owners. Owners appealed.

The court of appeals affirmed in part and reversed and remanded in part. The court affirmed the trial court's decision to deny Aghili's motion for partial summary judgment because the owners' association was not required to file a notice of lien before it conducted a non-judicial foreclosure. The court stated that recordation of the condominium's declaration provided record notice and perfection of the secured continuing lien for assessments. The court further stated that "[n]o further recordation is necessary unless so specified by the condominium

declaration." Next, Aghili objected to appellees' summary judgment evidence and the court agreed. Specifically, the attorney representing appellees, Banks, was also a witness by affidavit in the motion for summary judgment. The court found that when an attorney who represents a party is also an affiant in support of a motion for summary judgment, the attorney is considered a witness. Although the court stated that the issue of excluding the affidavit of an attorney because of his dual role as witness and advocate was a matter of first impression for the court, it went on the rule that the trial court abused its discretion by overruling Aghili's objection to Bank's affidavit. Because Bank's affidavit was the central evidence in the motion for summary judgment, and, therefore, the evidential burden was not met, there remained fact issues which were remanded to the trial court for further proceedings.

2. ***Dickerson v. Debarbieris*, 964 S.W.2d 680 (Tex. App.—Houston [14th Dist.] 1998, no pet.).**
The court of appeals upheld amending by-laws to include "power of sale" language and procedure to conduct a non-judicial sale, where absent in restrictions. Refer to Section IV.I.3 of this article for discussion.

3. ***Onwuteaka v. Cohen*, 846 S.W.2d 889 (Tex. App.—Houston [1st Dist.] 1993, writ denied).**
Onwuteaka, an attorney and CPA, filed a wrongful foreclosure suit against Hearthwood II, who foreclosed on his rental condominium unit for failure to pay assessments. All of the demand letters/notices of foreclosure sent by Hearthwood's attorney were returned undelivered. In his complaint, Onwuteaka claimed that he was not properly notified of the sale as required by statute.

The court of appeals held that Hearthwood did provide timely, proper notice under Tex. Prop. Code Ann. § 51.002(e), which provides: "Service of a notice [of trustee sale] by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address as shown by the records of the holder of the debt." Onwuteaka failed to establish that Hearthwood had in its records his most recent address and failed to send notice to that address. The court also noted that in computing the 21-day notice requirement of Tex. Prop. Code Ann. § 51.002(b), the first day is excluded and the last day is included.

4. ***Johnson v. First S. Props., Inc.*, 687 S.W.2d 399 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).**
The association non-judicially foreclosed on a condominium for nonpayment of assessments pursuant to the terms contained in its condominium declaration. The owner then sued the association alleging wrongful foreclosure. The owner contended that the provision in the condominium declaration providing for non-judicial foreclosure was invalid because this remedy was not set forth in the Condominium Act effective at the time of his purchase.

The court of appeals held that the remedies found in the Condominium Act were not exclusive, and that co-owners could establish additional remedies, including non-judicial foreclosure. Additionally, the owner in this case complained that the trustee who conducted the sale was not properly appointed according to the terms and conditions of the condominium declaration. The court held that the trustee who conducted the sale swore in the trustee's deed that he had been designated as trustee by the association's board of directors. This recital, the court held, gave rise to a rebuttable presumption of the validity of the sale. As the owner in this case failed to bring forth adequate evidence to rebut this presumption, the sale was held to be valid.

C. Late Fees and Interest

1. ***Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004).**
The Supreme Court of Texas affirmed the court of appeal's judgment that the association had the authority to assess late charges for unpaid fees, based on Tex. Prop. Code Ann. § 204.010(10) and that such late charges were constitutional. However, the association could not foreclose on property if late charges were not paid. Refer to Section V.A.1 of this article for discussion.

2. ***McGuire v. Post Oak Lane Townhome Owners Ass'n Phase II*, 794 S.W.2d 66 (Tex. App.—Houston [1st Dist.] 1990, writ ref'd n.r.e.).**

A homeowner, McGuire, brought suit pro se against his townhome association, alleging that the association's penalty for late payment of assessments was arbitrary, capricious, and invalid. The association counterclaimed asking for damages and its attorney's fees and costs.

The trial court granted judgment in favor of the association, stating that McGuire presented no evidence. The trial court awarded the association its attorney's fees, plus interests and costs of court. The court of appeals affirmed the judgment of the trial court, stating that McGuire: "(1) presented no evidence to the trial court when his case was called for trial; (2) did not request findings of fact and conclusions of law; (3) did not file a statement of facts with our court; (4) appealed a proposition of law that was well established against him; (5) did not appeal with proper points of error; and (6) did not appeal with sufficient arguments or citations of authority."

3. ***Lee v. Braeburn Valley W. Civic Ass'n*, 794 S.W.2d 44 (Tex. App.—Eastland 1990, writ denied).**
Braeburn sued Lee to collect maintenance assessments and late charges. Lee contended that the 10% per annum interest rate charged by Braeburn on delinquent assessments was usurious and violated the Texas Constitution as he never entered into a contractual agreement to pay higher than the statutory 6% per annum. Lee purchased his lot pursuant to the restrictions, which restrictions provided that the rate of interest on late assessments would be 10% per annum.

After summary judgment was granted by the trial court in favor of the association, Lee appealed contending only that the trial court erred in denying his motion for new trial. The court of appeals overruled Lee's point of error and affirmed the judgment of the trial court. The Supreme Court of Texas reversed and remanded because the court of appeals failed to respond to Lee's challenges to the merits of the summary judgment in his motion for rehearing.

On remand, the court of appeals (in a decision with the exact same result as the summary judgment granted by the trial court) held that the interest rate was not in violation of the Texas Constitution as the restrictions for Braeburn Valley West provided for the interest rate and that Lee purchased the lot pursuant to the restrictions.

4. ***Tygrett v. University Gardens Homeowners' Ass'n*, 687 S.W.2d 481 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).**
The condominium association sued one of the owners to collect late fees resulting from overdue maintenance assessments on a condominium. The owner counterclaimed that, despite the fact that late fees were authorized by the restrictions, they nonetheless amounted to unlawful usurious interest.

The court of appeals noted that, in order for the usury laws to apply, there must be an overcharge by a lender for the use, forbearance or detention of the lender's money. The court held that the usury laws did not apply in this case as there was no lending transaction and further, that the late fees did not fall into any of the statutory definitions of interest.

D. Increasing Maintenance Fees

1. ***Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004).**
The Supreme Court of Texas affirmed a portion of the court of appeals' decision regarding increasing the assessments under the deed restrictions for certain sections of the subdivision, concluding that the association could not increase the assessments beyond the $120.00 limitation set forth in the deed restrictions. Chapter 204 of the Tex. Prop. Code allows for the accumulation of allowed increases of maintenance fees. However, the association could not accumulate unassessed fee increases because the deed restrictions did not so provide. Refer to Section V.A.1 of this article for a more complete discussion.

2. ***Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552 (Tex. App. – Houston [1 Dist.] 2005, pet. denied).**
The Wilchester Club ("the Club") was an independent, non-profit corporation that owned and maintained swimming and tennis facilities at two locations adjacent to the Wilchester and Wilchester West subdivisions. In August 1999, an ad hoc committee studied and prepared recommendations concerning the financial future of the Club and its relationship with the subdivisions. At that time, Club membership was voluntary; members paid fees and dues in order to use the facilities.

Materials were circulated to the homeowners of both subdivisions that explained the committee's conclusion that the Club was not financially viable. The committee recommended that to remedy the situation, the two homeowners associations ("HOAs") vote either to merge with the Club or to increase the homeowners' annual assessments and to designate such funds for the use of the Club.

In March 2000, a majority of Wilchester homeowners voted by petition to amend their deed restrictions to provide that: (1) each homeowner would become a voting member of the Club; and (2) would pay $160 increase in their annual homeowners' assessment, with such increase to be paid by the Wilchester HOA to the Club. That same month, the Wilchester West HOA Board circulated a letter proposing a similar amendment to the deed restrictions for Wilchester West homeowners. Petitions were also circulated, and a majority of Wilchester West homeowners voted in favor of amending the deed restrictions as proposed. In April 2000, the Club and the HOAs executed an agreement that extended Club membership to homeowners of both subdivisions in exchange for $160 increase in the homeowners' annual assessments, to be paid by the HOAs to the Club.

In October 2001, the WWCH sued the Club and the HOAs, alleging that: (1) the Wilchester West HOA failed to comply with applicable deed restrictions and law when circulating petitions for the amendment; and (2) the agreement executed between the HOAs and the Club violated deed restrictions of the Wilchester West subdivision. They sought declaratory relief on a number of issues and attorney's fees. WWCH subsequently filed a motion for summary judgment. The Club and the HOAs also filed a joint motion for summary judgment.

The trial court denied WWCH's summary judgment motion and granted the joint summary judgment motion filed by the Club and the HOAs. The joint motion argued that the Wilchester West HOA (1) had the authority under the deed restrictions to amend the restrictions by agreement of a majority of homeowners; (2) as a non-profit organization they had authority to enter into a contract with an outside party; and (3) made sufficient disclosures to Wilchester West homeowners to inform them of the purpose and effect of the amendment to the deed restrictions. Additionally, the HOAs and the Club argued that WWCH had failed to join all affected homeowners as parties to the suit. WWCH appealed.

In its original opinion, the court of appeals "held that all other homeowners in the subdivisions whose property rights and interest were directly at stake were 'indispensable parties,' and WWCH's failure to join these parties deprived the trial court of subject matter jurisdiction over WWCH's declaratory judgment action. This holding was based on section 37.006 of the DJA, which provides that '[w]hen declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties.' TEX. CIV. PRAC. & REM. CODE ANN. § 37.006 (Vernon 1997)."

WWCH argued in its motion for rehearing that *Simpson v. Afton Oaks Civic Club*, 145 S.W.3d 169 (Tex. 2004) and *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004) gave the trial court subject matter jurisdiction over the dispute without joinder of all affected homeowners, and so the court of appeals should adjudicate the dispute on the merits. The court agreed. It conceded that Rule 39 of the Texas Rules of Civil Procedure, which governs joinder of persons under the DJA, mandates joinder of all persons whose interests would be affected by the judgment. However, under the jurisdictional analysis provided by *Brooks*, the court pointed out that the trial court had subject matter jurisdiction over the dispute. Citing *Brooks*, it stated that, although it recognized that the Club and the homeowners' associations may be subject to the possibility of inconsistent judgments since not all of the homeowners in the subdivision had been joined, that possibility was caused by the homeowners' "own inaction." In light of *Brooks* and *Simpson*, it rejected the argument that a court does not have jurisdiction to hear this type of case unless all property owners are joined, and stated that instead, under *Brooks*, the Club and the homeowners' associations should have sought abatement or joinder to protect their interests, and if the trial court denied such relief, then they should have sought review of the trial court's denial of their efforts to seek such relief.

Additionally, the court addressed the Club's and the homeowners' associations' argument in their response to WWCH's motion for rehearing that WWCH is not an owner of property in Wilchester or Wilchester West and that WWCH did not present any evidence of its authority to represent owners in these subdivisions. It interpreted this argument as a challenge to WWCH's organizational or associational standing and applied the Supreme Court's three-pronged test for the determination of whether an organization has standing to bring suit. Because (1) WWCH's members had standing to sue on their own behalf, (2) the interests the organization sought to protect were germane to the organization's purpose, and (3) neither the claim nor the relief requested required the participation of individual members of WWCH, the court found that WWCH had standing to bring this action and that it may adjudicate the dispute on the merits.

Finally, WWCH contended that the trial court erred in granting the Club's and the homeowners' associations' joint motion for summary judgment and in denying its own summary judgment motion because (1) in the absence of the amendments to the homeowners' deed restrictions, the homeowners' associations did not have authority to enter into the Use Agreement with the Club, (2) the amendments to the deed restriction were not effective because they failed for lack of notice and because the petition circulated by the homeowners' associations seeking approval of the amendments contained material non-disclosures that rendered the amendments invalid, and (3) the associations did not have the authority to enter into the Use Agreement with the Club.

First the court considered whether the amendments to the deed restrictions were valid. It set forth the three conditions that must be met in order for deed restrictions to be amended. First, the instrument creating the original restrictions must establish both the right to amend and the method of amendment. Second, the right to amend implies only those changes contemplating a correction, improvement, or reformation of the agreement rather than its complete destruction. Third, the amendment must not be illegal or against public policy. The court also pointed out that the Texas Property Code allows the extension, addition to or modification of restrictions proposed by a property owners' association to be adopted by a number of methods, including "a method permitted by the existing restrictions." TEX. PROP. CODE ANN. § 204.008(4) (Vernon Supp. 2004-2005). Because Wilchester West's restrictions stated that the restrictions could be amended by an instrument executed by a majority of the lots within the subdivision agreeing to change the restrictions, the court held that the amendments to the restrictions were valid.

In considering whether the amendments to the deed restriction were not effective because they failed for lack of notice and because the petition circulated by the homeowners' associations seeking approval of the amendments contained material non-disclosures that rendered the amendments invalid, the court looked to the restrictions, and pointed out that "[b]ecause the restrictions do not contain any specific notice requirement of a proposed amendment to the restrictions, WWCH's notice argument fail[ed]." It also found that the petition circulated by the homeowners' association seeking approval of the amendments did not contain material non-disclosures, and indeed expressly set forth the proposed amendments to the restrictions.

Next, the court considered whether the substance of the amended restrictions and the actions taken by the homeowners' association pursuant to those amendments were lawful. It pointed out that deed restrictions governing residential property are generally enforceable when their language is clear, they are confined to a lawful purpose, and they are written within reasonable bounds. Also, under the Texas Property Code, an exercise of discretionary authority by a property owners' association concerning a restrictive covenant is presumed reasonable unless the court determines that such exercise was arbitrary, capricious or discriminatory. In this case, the court found that the amendments authorizing the increase in the homeowners' annual maintenance charge, along with the actions taken pursuant to those amendments by the association, were not illegal or against public policy.

3. ***Pine Trail Shores Owners' Ass'n, Inc. v. Aiken*, 160 S.W.3d 139 (Tex. App.—Tyler 2005, no pet).**

In 1971 and 1972, Eastern Resorts Property, Inc. established Pine Trail Shores subdivision and filed restrictions in the county real property records, which included a provision establishing assessments for lot owners: an owner of one lot was assessed $1.50 per month, owners of multiple lots were assessed $1.00 per month per lot, but no owner of multiple lots was to be assessed more than $4.00 per month. In 1994, Eastern Resorts assigned its rights to the Pine Trail Shores Owners' Association. In 1992, the association raised the assessments to $33.00 for the owner of one lot, $42.00 for the owner of two lots, $57.00 for the owner of three lots, and $72.00 for the owners of four or more lots. In 1996, the association raised the assessments to $40.00 for one lot and $15.00 for each additional lot. In May 2001, the Association filed suit against 156 lot owners seeking to collect a total of $70,278.00. Eventually, in October 2003, the association went to trial against 46 lot owners seeking a total of $25,564.40. After a bench trial, the trial court entered a take nothing judgment. The association appealed.

The court of appeals affirmed. The association argued that the trial court erred by failing to render judgment on its suit on sworn account because none of the defendants filed an answer that was sufficient to deny the validity of the account. The court disagreed. The association did not establish a prima facie case on sworn account because they failed to follow the provisions outlined in Tex. R. Civ. P. 185 to establish a liquidated claim. Their petition included a chart listing the total amount of unpaid assessments that they alleged were due, but the petition did not include an explanation of how the assessments were calculated, did not state the beginning date for the calculation of each assessment, and did not identify any assessments that were based on partial months of ownership. Because the trial court could not accurately calculate, from the facts alleged in the petition, the damages against each of the lots owners in the suit on sworn account, the association had to prove its case at common law. In this regard, the association failed to prove its claim under Tex. R. Civ. P. 243 because it did not show when each assessment began to accrue and for how long it accrued. The association's record custodian testified that the figures presented were true and correct, but failed to explain how the assessments were calculated. The association argued that the trial court erred in concluding that it lacked authority to increase the assessments, but the court disagreed. The original by-laws of the association had not been provided to the trial court, therefore there was no evidence in the record to establish the association's authority to raise the assessments above what was imposed in the 1971 and 1972 restrictions.

4. ***Jakab v. Gran Villa Townhouses Homeowners Ass'n, Inc.*, 149 S.W.3d 863 (Tex. App.—Dallas 2004, no pet.).**

Jakab owned five units at Gran Villa Townhouses from January 1991 through July 2001 and one unit from May 1995 through July 2001. The restrictions provided that: (1) the association had the right to assess each lot owner up to $50/month; and (2) the annual assessment may be increased effective January 1 of each year without a vote of the membership in conformance with the rise, if any, of the Consumer Price Index for the preceding month of July. In 1990, the association voted to increase its dues to $75/month. The association filed suit against Jakab for unpaid dues and late fees on six units. Jakab counterclaimed and sought recovery of dues, arguing that the increase in dues was in violation of the Declaration.

The trial court interpreted the restrictions to mean that the association could not assess dues over $50/month. The court held that the difference between the amount actually paid by Jakab and the $50 lawfully authorized by the association was an overpayment for which Jakab should be reimbursed. The court also found that Jakab made some payments late and failed to make some payments at all. The trial court made two calculations—one for Jakab's missed payments and late fees, and one for his overpayments—and rendered judgment accordingly. The court also awarded attorney's fees to the association. Jakab appealed.

The court of appeals vacated the award of attorney's fees, reformed the judgment to reflect an award of $9,125 in favor of Jakab, and affirmed the judgment as reformed. Jakab argued that all

assessments against him were unauthorized and illegal after January 1, 1991, because they were excessive, the purposes for which they were made were not authorized by the restrictions, and the increase was not made on an annual basis considering the needs of the association for the upcoming year. Applying rules of contract interpretation, the court found that it was within the realm of reasonable disagreement that only $25 of the $75 monthly dues was not authorized by the restrictions and thus held that the trial court did not abuse its discretion in making that determination. The court further held that the evidence was both legally and factually sufficient to support the finding that Jakab missed assessment payments of $1,875 and late fees of $375 from 1999 though 2002 and the finding that Jakab paid $11,375 more than he was obligated to pay from the time the assessments were increased in 1990. Jakab also argued that the award of attorney's fees to the association was improper because the association was not the prevailing party. The court noted that the main issue in determining the prevailing party was the interpretation of the restrictions and how that interpretation affects the financial positions of the parties. The trial court found in favor of Jakab on that issue and Jakab was vindicated. Jakab's debts to the association were satisfied by his overpayments, which were created by the illegal assessments long before association brought suit. The court held that a party cannot be a prevailing party if it has already been fully compensated for any losses incurred prior to the commencement of litigation, therefore the association is not the prevailing party and not entitled to attorney's fees.

5. ***American Golf Corp. v. Colburn*, 65 S.W.3d 277 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).**

As a benefit of being residents of Walden on Lake Houston Subdivision, the Colburns were given membership in a country club. The Declaration of Covenants, Conditions and Restrictions for the subdivision authorized the country club to impose and collect "athletic and social membership dues." The Colburns sought a declaratory judgment against the country club operator, American Golf, seeking to restrain the club from charging a quarterly "minimum spending fee." American Golf counterclaimed seeking a declaratory judgment that the spending fee was valid and for collection of unpaid fees owed by Colburns. The trial court rendered judgment for the Colburns finding that the minimum spending fee was in fact unauthorized and denied requests by both parties for attorney's fees. American Golf appealed.

The court of appeals affirmed the trial court on several points of error. First, the court agreed with the trial court that American Golf could only levy dues and the minimum spending fees were not dues as defined in the restrictions. Next, the court agreed with the trial court that American Golf had the contractual right to levy a minimum spending fee if the club members availed themselves of club services, but the fee could not be levied as mandatory dues. Finally, the court held that since the Colburns were the prevailing party, they were entitled to recover attorney's fees. Since the Colburns did not, however, appeal the denial of attorney's fees, they waived recovery.

6. ***Ostrowski v. Ivanhoe Prop. Owners Improvement Ass'n, Inc.*, 38 S.W.3d 248 (Tex. App.—Texarkana 2001, pet. denied).**

Subdivision lot owners sued Ivanhoe seeking a declaratory judgment that the association's method of raising property assessments violated restrictive covenants and the maintenance fund agreement ("MFA") and for reimbursement of past paid fees. The association sought the recovery of past due assessments. In raising maintenance fees over the years, the association relied on a majority vote of a quorum of the members present at duly called association meetings. Section 5 of the MFA, the language central to this suit, states in pertinent part:

> Such annual charges or dues may be adjudged [sic] from year to year by said association as the need to the property may, in its judgment, require but in no event shall such charge be raised unless approved by a majority of the lot owners.

The trial court granted partial summary judgment in favor of Ivanhoe when it affirmed the association's method of raising maintenance fees by a majority of the quorum at a meeting of the members. Both Ivanhoe and the lot owners appealed.

The court of appeals reversed the summary judgment granted in favor of the association and held that a majority vote of a quorum present at duly called association meetings violated the method prescribed in the MFA. Specifically, the court stated that the MFA contemplated one vote by all lot owners within all the subdivisions of the association that would be binding on all subdivisions, not subdivision by subdivision. Additionally, any amendment to the maintenance charge required approval of a majority of all lot owners, not just a majority of the quorum present for association meetings. The association's claim for past due maintenance fees and the lot owners' claim for reimbursement of past paid maintenance fees was severed and remanded to the trial court for trial.

7. ***Samms v. Autumn Run Cmty. Improvement Ass'n, Inc.*, 23 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).**

The Autumn Run restrictions provided that the annual maintenance charge could not exceed $12.00 per month or $144.00 per annum. Later in that paragraph, the restrictions provided that the rate, and when the assessment is payable, may be adjusted from year-to-year by the board of directors as the needs of the subdivision may, in the judgment of the directors, require. In 1983, Samms and Buck purchased separate lots. In 1987, the annual assessment per lot was $192.00. In 1998, the assessment had increased to $260.00, yet the restrictions had not been amended. Samms and Buck filed a declaratory judgment action to determine the maximum annual maintenance assessment that could be charged by the association. The parties filed cross motions for summary judgment. The trial court granted summary judgment in favor of the association.

The court of appeals reversed the trial court's judgment, which granted the association's summary judgment because it was based on ratification. The court discussed the assessment language which limited the amount of the assessment to $144.00 per annum, but later provided that the rate and when the assessment was payable could be adjusted from year-to-year by the board of directors as the needs of the subdivision require. The court stated that restrictive covenants were to be liberally construed, giving effect to the intent and purposes of the restrictions. The court discussed the difference between the method for modifying assessment charges annually and the method for amending the restrictions generally. The court found that the assessment language gave the association the right to change the annual assessments every year as it saw fit. The general amendment provision covered amendments to articles that did not specify an amendment procedure within the article itself. Samms and Buck claimed that without amending the entirety of the restrictions, the assessment level could not go above $144.00 annually. The court disagreed. However, the trial court's summary judgment was based on ratification by the owners of the assessment. 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. The court found that the association acted within the bounds of the deed restrictions, and therefore Samms and Buck were never in a position to repudiate the association's actions; therefore, the association was never in a position to ratify. Ratification was an improper basis for summary judgment. The court remanded the case to the trial court on the plaintiff's intimidation and harassment claim, which was not presented in the summary judgment pleadings.

[Editor's Note: The restrictive covenant in the *Samms* case was virtually identical to the restrictive covenant construed by the Supreme Court of Texas in *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004). In *Brooks*, the Supreme Court held that the monetary cap was an absolute cap and the remaining language regarding the board's discretion to adjust the assessment only allowed the board to increase the assessment up to the amount of the monetary cap.]

E. Special Assessments

1. ***Bankler v. Vale*, 75 S.W.3d 29(Tex. App.—San Antonio 2001, pet. denied).**

Condominium board passed a special assessment in order to build a reserve account and to fund emergency improvements to the townhomes. Condominium owners brought suit against the

board requesting a temporary restraining order and injunctive relief on grounds that board failed to comply with the restrictions. The pertinent restrictions limited the imposition of a special assessment to cover only unforeseen emergency expenses. Moreover, special assessments were limited even further to such emergency expenses where insurance proceeds were insufficient to pay all of the costs of repair. The trial court granted the temporary injunction, suspending special assessments pending a trial on the merits. The board appealed.

Among several points of appeal, the board argued that the trial court abused its discretion because the board reasonably acted within its authority. The court of appeals affirmed the judgment rendered in the lower court and held that the purposes for which the board levied the special assessment were not "emergencies" as required by the restrictions. In so stating, the court found that the special assessments were not imposed to pay for damage caused by unforeseen emergency expenses. In fact, the proposed projects were not set to be complete for at least three years. The court noted that an emergency would require more immediate action. Additionally, the court found that funding a reserve account couldn't be deemed an emergency. In another point of error, the board claimed that the Vales failed to prove they suffered "irrevocable harm." The court specifically stated:

> Demonstrable intent to breach a restrictive covenant will support an injunction without any showing of irreparable injury or imminent harm.

The board also argued that the injunction was improper because the Vales had an adequate remedy at law, i.e., a suit for damages. The court did not accept the board's argument. In denying this point of error, the court reasoned that if the injunction were dissolved and the board was allowed to spend the special assessments on the proposed projects, "there is no way that this amount can be raised to be repaid from any source other than the townhome owners."

2. ***Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d 524 (Tex. App.—San Antonio 2000, pet. denied).**

The Hodases were owners in the Scenic Oaks subdivision. In 1987, a special meeting was held to discuss assessments for a 24-hour security guard and new secured entrance gate. In the meeting, the special assessment was approved and charges for the assessment were levied. The Hodases made payments on the security assessments through May of 1989. In August of 1990, another special membership meeting was held to approve a road and drainage assessment. The members voted to approve the assessment. A payment plan was permitted consisting of a one-time $50.00 payment and then a $10.00 monthly payment for approximately 5½ years. In their lawsuit, the Hodases alleged that both the security guard assessment (which they voted in favor of) and the road and drainage assessment were special assessments governed by Section H of the restrictive covenants. Section H provided that upon the approval of 2/3rds of the votes in the association, special assessments could be levied for capital improvements in any given year (applicable to that year only). The Hodases claimed the security guard assessment was invalid because it was not intended to be and was not used for capital improvement. The Hodases contended that the road and drainage assessment was invalid because it was to be paid over a period exceeding one year and special assessments for capital improvements had to be collected in the year in which they are assessed. The association took the position that the security guard assessment was an annual, rather than a special assessment. The association alleged that the road and drainage assessment met the requirements of a special assessment, namely, that the total liability was "imposed" in the year in which the special assessment is determined. The association alleged that the special assessment section did not require the complete collection of the special assessment in the year that it was imposed. The trial court held all assessments levied against the Hodases were valid.

The court of appeals affirmed the trial court's judgment. The court refused to hold that the security assessment was a "special assessment" based solely on the fact that the association termed it a "special assessment" in the meeting notification and minutes. The court found that the wording of the deed restriction itself controlled, rather than the

title. The court also looked to other provisions of the restrictions, such as those that provided that the association shall make assessments and collect fees for maintenance of private roads, common areas as well as the cost of security services and facilities. The Hodases also claimed that the accounting for the security guard assessment did not mirror an annual accounting. The court said that a monthly charge of an annual assessment was permitted by the restrictions. With respect to the road assessment, the restriction provided that the association "may levy, in any assessment year, a special assessment applicable to that year only." Relying on the rules of construction *Wilmoth* and *Pilarcik* cases the court held that the term "applicable to that year only" to mean that the special assessment is effective only for the year in which it is assessed. The court noted that property owners were given the option to pay the entire amount of the assessment at once or to follow the payment plan adopted by the association. Several property owners opted to pay the entire amount up front.

3. ***Richardson Lifestyle Ass'n v. Houston*, 853 S.W.2d 796 (Tex. App.—Dallas 1993, writ denied).**

A city building inspector found the roof of the condominium project to be in violation of the housing code. The board of directors then obtained contractor bids to replace the roof and chose a contractor. The board then levied an assessment on the condominium owners for the roof replacement. A group of unit owners filed suit after the roof replacement had begun, contending that the roof replacement was a capital improvement and, as such, required approval of 75% of the owners and 75% of all first lien mortgage holders. The trial court agreed and found that the roof replacement was a capital improvement and that the assessments arising from the roof replacement were void.

On appeal, the association claimed that the work done was a replacement. As such, the association argued, no approval was necessary because the condominium by-laws provided that the cost of replacement of the common elements could be assessed back to the owners at the sole discretion of the association's board of directors. The court of appeals agreed and reversed the trial court's decision, holding that it was immaterial whether the roof replacement was also a "capital improvement" because it was a replacement under the terms of the condominium's by-laws.

4. ***San Antonio Villa Del Sol Homeowners Ass'n v. Miller*, 761 S.W.2d 460 (Tex. App.—San Antonio, 1988, no writ).**

An inspection of the condominium complex's gas lines revealed that all of the lines in the complex needed to be replaced. The association's board of directors voted to accept a bid for this work and to specially assess the members for the repairs. Miller claimed the board's action was illegal and refused to pay his special assessment and also refused to pay his monthly maintenance assessments. The association provided garbage collection, grounds upkeep, gas, water, and security to its members as common expenses. The board notified Miller that it would disconnect his gas and water unless his maintenance assessments were paid. Miller again refused to pay and the gas and water were disconnected. Miller then filed suit against the association, its board of directors and the property manager, alleging harassment. The association filed a counterclaim against Miller for the monthly and special assessments. Among other things, the trial court held that: (1) the special assessment was not valid because the replacement of the gas lines was not a capital improvement "necessary in the Board's reasonable judgment to preserve or maintain the integrity of the common elements" under the terms of the condominium declaration and, as such, required a vote of the membership; (2) the association lacked authority to terminate Miller's utilities; and 3) Miller was responsible for the past-due assessments, to be offset by his moving expenses.

In holding that the association did act within the scope of its authority in levying the special assessment, the court of appeals reversed and remanded, stating that:

> The reasonableness standard in this case must be measured in the context of the uniqueness of condominium living. ... Each condominium owner relinquishes some degree of freedom of choice... . The association is vested with considerable discretion to determine the necessary expenses of the operation of the

> condominium project and to assess the owners' pro rata share of such common expenses.

Regarding the utilities, the court held that Miller, by not paying his monthly maintenance assessments, was in violation of the terms of the condominium declaration. The court stated: "Clearly, a condominium dweller who does not pay his share of the maintenance fee, admits that the other owners are in essence paying his way... . The Association took appropriate action to abate this condition." Further, the trial court denied the association any prejudgment interest on unpaid monthly maintenance assessments, apparently finding that Miller acted in good faith in withholding his monthly assessments because he was disputing an allegedly illegal special assessment levied for the replacement of a gas line. The court reversed and held that the trial court did not have discretion to increase or reduce prejudgment interest as the restrictions provided for same and Miller admitted that he had not paid the monthly assessments at trial.

F. Disconnecting Utilities

1. ***San Antonio Villa Del Sol Homeowners Ass'n v. Miller*, 761 S.W.2d 460 (Tex. App.—San Antonio, 1988, no writ).**

Disconnecting utilities due to failure to pay assessments was upheld. Refer to Section V.E.4 of this article for discussion.

G. Use of Maintenance Assessments

1. ***Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474 (Tex. App.—Houston [14th Dist.] 1988, writ denied).**

The association sought to use its maintenance fund to purchase a recreational facility for the subdivision by increasing the annual assessments, subject to approval by the requisite number of lot owners. In the section regarding the purposes of the maintenance fund, the restrictions listed several purposes, which were followed by a general phrase stating that the association could do anything necessary or desirable or which would be a general benefit to the owners and occupants of the subdivision. One of the lot owners, Goodwin, filed suit to prevent the purchase of the recreational facility, arguing that the restrictions did not intend for the maintenance fund to be used to acquire real property. The applicable portion of the restrictions regarding the general purpose of the maintenance fund provided specific items for which the maintenance fund could be used, and the list did not include the purchase of real property. The trial court agreed with Goodwin and held that the restrictions were not ambiguous, thus excluding the developer's testimony as to the intent expressed in the restrictive covenants.

Citing Tex. Prop. Code Ann. § 202.003, which provides for the liberal construction of restrictive covenants to give effect to their purposes and intent, the court of appeals found that the language contained in the general phrase was unambiguous and permitted the use of the maintenance fund to purchase real property provided such purchase would be of benefit to the owners and occupants of the subdivision. The court stated: "The covenant should not be hedged about with strict construction, but given a liberal construction to carry out its evident purpose. ...we must look to the entire document and the necessary references within the document's language to discern its purposes and intent."

H. Inverse Condemnation

1. ***Harris County Flood Control Dist. v. Glenbrook Patiohome Owner's Ass'n*, 933 S.W.2d 570 (Tex. App.—Houston [1st Dist.] 1996, writ denied).**

The restrictions for Glenbrook Patiohomes provided for the payment of annual and special assessments, along with interest, attorney's fees and costs. Harris County Flood Control District purchased twenty patiohomes from their individual owners for the purpose of widening and straightening a bayou. The patiohomes were destroyed by the district. The district did not exercise its power of eminent domain to acquire any of these properties; however, the district refused to pay any assessments that accrued against its patiohomes after the date it purchased them.

The court of appeals held that the restrictive covenants ran with the land. Accordingly, the right to assessments was a property right owned by the remaining individual patiohome owners and by Glenbrook as the owner of the common area. This property right was extinguished, however, when the district purchased the patiohomes and refused to pay the assessments. As such, Glenbrook was entitled to

past-due assessments and compensation for the diminution of value to its assessment base by inverse condemnation.

I. Developer Liability for Assessments

1. ***Alma Invs., Inc. v. Bahia Mar Co-Owners Ass'n*, 999 S.W.2d 820 (Tex. App.—Corpus Christi 1999, pet. denied).**

The association requested a declaratory judgment to interpret certain rights and obligations within the recorded maintenance agreement. There was a provision in the agreement which allowed the developer, its successors or assigns, to suspend, reduce, waive or exempt any tract, residential unit, commercial unit and project owner or tenant from the payment of maintenance charges, in the developer's sole judgment. The developer could also reinstate any waived, reduced or suspended maintenance charge at any time. All decisions by the developer with respect to waiving, reducing, suspending or exempting the maintenance charges were binding and conclusive upon all persons and parties in interest. Alma alleged that the suit was barred by the four-year statute of limitations, waiver, estoppel and laches because the association became the owner of a leasehold interest in a condominium unit in 1987, but did not file suit until 1994. Alma argued that during that seven year period, the association has acquiesced in the exemption of Alma's condominium units from the payment of any assessments. The trial court found that the section of the agreement which authorized the exemption of units from the maintenance charge was void, unenforceable and against public policy. Alma appealed the decision.

The court of appeals affirmed the decision of the trial court. The court cited several Supreme Court of Texas cases which applied the public policy doctrine as found in the Restatement (Second) of Contracts. In its decision, the court looked closely at § 81.204 of the Texas Condominium Act, entitled "Maintenance of Condominium", which describes expenses that a condominium unit owner is responsible for on a pro rata basis. The court also reviewed the statutory definition in the Texas Condominium Act of general common elements. An Exhibit "C" was attached to the agreement, which described the common facilities of the association. The court found that most of those common facilities fell under particular provisions of the Texas Condominium Act which required an apartment owner to pay their pro rata share of the expenses associated with those common facilities. The court found a strong legislative intent, as established by the specific wording of the statute, that all apartment owners pay their pro rata share of the maintenance expenses of the association. Therefore, the court held the exemption provisions were against public policy and therefore void. Alma had asked the trial court to make findings of fact and conclusions of law. The trial court filed its findings of fact and conclusions of the law but did not make any findings or conclusions on Alma's affirmative defenses of limitations, waiver and estoppel, or laches. Alma did not file a request for specified additional or amended findings of fact and conclusions of law. Therefore, the appellate court held that Alma waived the affirmative defenses of limitations, waiver, estoppel and laches.

2. ***Fairway Villas Venture v. Fairway Villas Condo. Ass'n*, 815 S.W.2d 912 (Tex. App.—Austin 1991, no writ).**

At the time of the developer's filing of the condominium declaration, none of the buildings had been erected; however, the declaration indicated that the regime would contain nine buildings, each building containing one apartment. Under Tex. Prop. Code Ann. § 81, the association, consisting of the owners of the five buildings/apartments that were in existence at the time, assessed the developer for a pro-rata share of the expenses relating to the remaining four building sites which had not been sold by the developer and which did not yet contain improvements. The developer then brought suit for a declaratory judgment that he was not liable for assessments for his remaining building sites. The developer contended that he was not an "apartment owner" under the Tex. Prop. Code as no buildings had been erected on any of his four building sites.

The court of appeals found that the developer was liable for the assessments. Noting that the legislature failed to define the term "apartment owner," the court held that the term encompassed both existing and proposed apartments. In its reasoning, the court stated that the building sites "can only be 'apartments' for no other part if the regime, including land, is

subject to exclusive ownership." In other words, the developer had to be an "apartment owner" if he had any exclusive ownership interest at all because no other part of the condominium regime could be owned exclusively, even the land on which the buildings were to be located.

3. ***Richard Gill Co. v. Jackson's Landing Owners' Ass'n*, 758 S.W.2d 921 (Tex. App.—Corpus Christi 1988, writ denied).**

The association sued the developer and partial owner of a condominium project for failure to pay assessments and for negligent failure to keep the books of the project in good order during the period of development. The trial court awarded judgment in favor of the association for unpaid assessments, late fees, interest, actual damages for failure to keep the books in good order, and attorney's fees.

The court of appeals affirmed the trial court's decision as to the assessments. As the condominium declaration provided that, "[e]ach apartment owner shall be liable for a proportionate share of the common expenses..." the court held that the developer was responsible for paying assessments. Regarding the keeping of the books and records, the court held that there was sufficient evidence to show that the condition in which the developer left the books proximately caused the association to pay substantial accounting fees to have those books reconstructed, a cost the association would not have had to pay otherwise. Finally, the court held that there was a fiduciary relationship between the developer and the owners. As such, the four-year statute of limitations was not strictly applicable and the developer would be held liable for assessments discovered after the applicable statute of limitations had run.

J. Association's Duty to Repair Common Areas Independent From Owners' Obligation to Pay Assessments

1. ***Pooser v. Lovett Square Townhomes Owners' Ass'n*, 702 S.W.2d 226 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).**

Owners of two townhomes brought suit against the owners' association to enjoin the collection of past-due maintenance assessments until certain claimed offsets against said assessments had been satisfied. The offsets sought were for expenditures made by the owners to repair leaking roofs and resulting damage. The owners claimed that the association breached its duty to keep their roofs in good condition, resulting in the leaks. The association counterclaimed for the past-due assessments and related charges. The association argued that the leaks were caused by defective design and construction of the roofs. The association was at the time pursuing the developer to correct the defective work.

The court of appeals held that the association acted reasonably in taking measures to resolve the roof problem. The court also noted that the reasonableness of the association's actions must be "measured in the context of the uniqueness of condominium living" (i.e., relinquishing certain ownership rights). In response to the owners' argument that the conduct of the association violated the restrictive covenant requiring the association to keep the common elements in good repair, the court found that the association did all it could in light of the fact that the roof was defectively constructed. Regarding the owners' contention that their assessments should be offset, the court held: "Neither the condominium declaration nor the Condominium Act mandates that the duty to pay assessments is contingent upon the obligation to repair common elements. Rather, payment in this case makes maintenance and repair more plausible."

VI. ENFORCEMENT OF RESTRICTIONS

A. Authority to Enforce

1. ***Anderson v. New Prop. Owners' Ass'n of Newport, Inc.*, 122 S.W.3d 378 (Tex. App.—Texarkana 2003, pet. denied).**

An association has standing to sue when it satisfies a three-pronged test: (1) the members must otherwise have standing to sue in their own right; (2) the interests it seeks to protect must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested may require the participation of individual members in the lawsuit. In *Anderson*, the court of appeals found that these three prongs were met and therefore, the association had standing to bring suit to enforce the restrictions. The court also looked to the restrictions and an assignment to determine if the governing documents provided the association with the

authority to enforce the restrictive covenants. The court found that the documents did not give the association the authority to enforce the restrictions. However, the court found that Tex. Prop. Code Ann. § 202.004(b) gave the association the authority to enforce the restrictions because the property owners designated the association as a "representative association" under that section. Refer to Section IV.E.3 of this article for discussion.

2. ***Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 226 (Tex. App.—Texarkana 2002, pet. denied).**
In a suit to recover damages, the association did have the capacity to sue the successor to the developer, since it owned a lot in the subdivision. Refer to Section IV.I.1 of this article for discussion.

3. ***Cox v. Melson-Fulsom*, 956 S.W.2d 791 (Tex. App.—Austin 1997, no pet.).**
Failure of association to enforce the restrictions did not preclude individual owner from enforcing restrictions. Refer to Section IV.C.3 of this article for discussion.

4. ***Wayne Harwell Props. v. Pan American Logistics Center, Inc.*, 945 S.W.2d 216 (Tex. App.—San Antonio 1997, no writ).**
Pan American sought a declaratory judgment that agreements between themselves and Harwell burdening a piece of land were personal covenants unenforceable against a third party purchaser. Pan American and Harwell signed development agreements containing the covenants on about 600 acres. Pan American was to contribute the land and Harwell was to contribute the development expertise.

The court of appeals noted that for a party to enforce an agreement burdening land against a successor to the party with whom he covenanted, the agreement must run with the land. Covenants may be real or equitable and for them to bind successors, the covenant must be made between parties who are in privity of estate at the time the covenant is made. The privity must be contained in the grant of the land or in a grant of some property interest in the land. If no privity of estate existed between the original parties, it must be shown that the restriction was imposed for the benefit of adjacent land; otherwise, the covenant will be construed as a personal covenant with the grantor. To show privity between the parties, the court noted that the interest transferred must convey the land involved.

5. ***Forest Cove Prop. Owners Ass'n, Inc. v. Lightbody*, 731 S.W.2d 170 (Tex. App.—Houston [1st Dist.] 1987, no writ).**
The association sued the Lightbodys for violating restrictions. The Lightbodys asserted that the association lacked the authority to enforce the restrictions and the trial court agreed and rendered summary judgment in favor of the Lightbodys.

In reversing the trial court's summary judgment and remanding the case back to trial, the court of appeals held that it was the Lightbodys' burden to conclusively establish that, as a matter of law, the association had no justiciable interest that would support its action to enforce the restrictions. The Lightbodys' motion for summary judgment simply stated that the association did not have the authority to bring the action, and that an owners' "committee" had the authority to enforce the restrictions. This, the court held, did not conclusively negate the allegations of the association that they acquired the authority through merger or assignment.

B. Construction/Interpretation of Restrictive Covenants

1. ***Wilmoth v. Wilcox*, 734 S.W.2d 656 (Tex. 1987).**
Words used in restrictive covenants must be given the meaning which they commonly held as of the date the covenant was written. Refer to Section IV.C.1 of this article for discussion.

2. ***Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Assoc., Inc.*, 178 S.W.3d 384 (Tex. App. – Fort Worth 2005, pet. denied).**
Appellants Raman Chandler Properties, L.C., Villas at Caldwell Creek, Ltd., and Caldwell's Creek, Ltd. appealed from a declaratory judgment that the trial court granted in favor of appellee Caldwell's Creek Homeowners Association, Inc. in connection with an access easement located in the Caldwell's Creek Addition. The Developer developed the Addition from 57.9 acres in Tarrant County. After various

amendments to the plats, the common areas in the Addition consisted of all private open spaces and Lots 39, 40A, and 41A, Block 2 and the median at Caldwell Creek Drive. In October 1999 the Association was formally incorporated as Caldwell Creek Homeowners Association, Inc. Two months later, in December 1999, the Developer executed an easement agreement granting access to the Addition's common areas in favor of the Villas, an adjacent development. Under the easement's terms, the Association was responsible for the maintenance of the common areas, while the Villas had only to pay for and maintain a new iron and brick fence on the border between the two additions. As a result of the easement agreement, lot owners in the Villas gained virtually free and uninterrupted pedestrian access from the Villas to John McCain Road over the Addition's common areas as well as full access and use of the Addition's common areas, despite the fact that the Villas already had access to John McCain Road over and through its own development. In January 2000, the Developer deeded the lots in the common areas of the Addition to the newly formed Association, but the conveyance was specifically subject to the just-granted access easement in favor of the Villas. At the same time, the Developer assigned all of its rights, powers, and authority in the Addition to the Association. The Association rejected the deed, claiming that the property had already been conveyed to it by operation of law when the Association was formed. It claimed it was not subject to the Developer's newly created Easement Agreement with The Villas and demanded its removal. The Developer refused, and the Association filed this suit. The trial court rendered judgment for the Association.

On appeal, the Developer argued that the trial court erred by (1) determining that the common areas were for the sole and exclusive use of the homeowners in the Addition, (2) basing its judgment on estoppel in pais, (3) concluding that the Developer was barred from granting an easement affecting the common areas of the Addition, (4) finding that the December 17, 1999 Easement Agreement was null and void, and (5) in awarding the Association its attorneys' fees.

First, the court of appeals addressed the issue of when and if a developer loses its right to make adjustments to a dedicated plat of a subdivision and what rights, if any, inure to the benefit of the homeowners who purchase lots within a subdivision during the start-up phase of the development, before the deed restrictions allow for or establish the actual homeowners' association that will ultimately hold the obligations and duties previously held by the developer. The court pointed out that it reviews a trial court's interpretation of restrictive covenants de novo, and applies general rules of contract construction when construing restrictive covenants. If a covenant has a definite or certain meaning, it is unambiguous as a matter of law. Further, a restrictive covenant should be liberally construed to give effect to its purpose and intent, but doubts should be resolved in favor of the free and unrestricted use of the premises, and any ambiguity must be strictly construed against the party seeking to enforce the restriction. The court pointed out that a subdivision developer is generally free to amend restrictions in covenants for the subdivision prior to the sale of lots in the subdivision. However, the sale of subdivision lots usually triggers amendment mechanisms set forth in the dedication. When the power to amend the land use restriction is reserved to the developer, the amendment of a restrictive covenant must be in the precise manner authorized by the dedicating agreement. Generally, landowners have the unilateral or ex parte right to impose any restrictions they choose, to alter or cancel restrictions, or to abrogate them in their entirety, so long as no lots have been sold. While in some restrictions the power to amend covenants and restrictions may be reserved to the developer, any amendments must be in the exact manner provided in the dedication. The court looked to the restrictions to determine who had the right to amend the restrictions and the method for amending them; whether the amendment corrected, improved, or reformed the restrictions rather than destroying them; and whether the amendment was illegal or against public policy.

According to the language in the restrictions, each lot owner gave the Developer a power of attorney to perform any act on behalf of other owners for a three-year period ending on the earlier of the third anniversary of the filing of the plat dedication or when the developer no longer owned lots within the subdivision. The restrictions also provided that the

Developer could make amendments to the plat, covenants, and restrictions during this same three-year period, but after the three-year period expired, approval of seventy percent of the lot owners was required before any amendment could be effective. Because the court determined from the record that the original dedication and recording of the plat for the Addition occurred on May 9, 1994, it concluded that the three-year period during which the Developer could amend the plat or the dedication and restrictions without seventy percent of the lot owners' approval had expired on May 9, 1997. Thus, by the time the Developer attempted to convey any interest in the Addition to the Villas it had already lost the right to amend the restrictions without at least seventy percent of the homeowners' approval. The court pointed out that the primary issue was whether the Developer, in 1999, retained the right to unilaterally amend the plat or create and burden the common areas for the benefit of a different association by granting it an easement, a question the court answered in the negative, pointing out that only if the Developer followed the specific procedure for amending the restrictions or the plat as set forth in the covenants could it have had the right to create such an easement for the benefit of some entity or owner other than the Association and its lot owners. Once an association shows that a plan or scheme exists for the benefit of all lot owners, it has shown a right to enforcement of such covenants and restrictions. Thus, the court agreed with the trial court that the lots were dedicated as open space common areas to be maintained for the benefit of the Association and lot owners and at the expense of the Association.

Next the court turned to the question of whether the trial court erred in rendering judgment based upon the theory of estoppel in pais because there were no pleadings to support this theory in the Association's live pleading at the time of trial. The first time the issue of estoppel in pais was specifically asserted was in the Association's written final argument filed with the trial court. However, the Association also filed a supplemental petition a few weeks after trial that specifically set forth its estoppel in pais theory, which, the Developer contended, should be struck because the Association failed to seek leave to file its supplemental answer post-trial as required by Rule 63. The court pointed out that Rule 63 did not apply, noting that Rule 67 applies to amendments to conform pleadings to issues tried by consent. Although Rule 67 requires leave to file, as well, the Developer made no objection to the trial amendment, so the issue was not preserved for review on appeal. The court stated that when it is clear that the parties tried a theory by consent it would not disregard it on appeal. Further, the court found that there was more than a scintilla of evidence to support the estoppel in pais theory, and the evidence was not so weak or the evidence to the contrary so overwhelming that the answer should be set aside.

Lastly, the court looked to the award of attorneys' fees to the Association under Chapters 37 and 38 of the Civil Practice and Remedies Code. The court found that the Association sought a declaration of its rights under a deed, and that the Association's efforts to void the deed signed by appellants or to determine the Association's authority as the proper association in light of the Developer's actions required a declaration of the Association's rights or authority, in spite of the Developer's contention that the Association was not entitled to attorneys' fees because it had not sought true declaratory relief under Chapter 37 of the Code. Because the court determined that the award of attorneys' fees was proper under Chapter 37, and the final judgment awarded attorneys' fees under both chapters, it declined to determine whether the award was appropriate under Chapter 38 as well.

3. ***Hubert v. Davis*, 170 S.W.3d 706 (Tex. App. – Tyler 2005, no pet.).**

On May 23, 1967, Cecil Bauguss filed a document which created a residential community adjacent to Cedar Creek Lake, in Henderson County, Texas. The document contained the following provisions, at issue in this case:

> I[,] Cecil Bauguss[,]…do hereby impress all of the property in such subdivision with the following restriction[s], except Lot No. 9.
>
> 13. There is hereby granted unto all owners of lots in said subdivision the free use, liberty and privilege of passage in and along, over and across all of Lot No. 9 Block No.1 of said Subdivision with free ingress and

> egress to said owners with boats, boat trailers and other vehicles, and travel by foot, and the right to temporarily park thereon boats, boat trailers, and other vehicles incident to the use of such property as a boat landing.
>
> 14. These restrictions and covenants are hereby declared to be covenants running with the land and shall be fully binding upon all persons acquiring property in said subdivision whether by descent, devise, purchase or otherwise, and any person by the acceptance of title to any lot of this subdivision shall thereby agree and covenant to abide by and fully perform the foregoing restrictions and covenants. These covenants are to run with the land and shall be binding for a period of 25 years from the date hereof; at the end of such period, said restrictions and covenants shall automatically be extended for a successive period of 10 years unless by a vote of three-fourths majority of the then owners of the lots in said subdivision (each lot having one vote), taken prior to the expiration of said 25-year period and filed of record in said County, it is agreed to amend or release the same.

Hubert acquired Lot 9 on January 28, 2003 from Robert and Melba Garner. One of Hubert's predecessors in interest had erected a fence in order to prevent others from entering onto Lot 9. However, Davis and others breached the fence and entered upon Lot 9, without gaining the consent from Hubert or the Garners to use Lot 9 for any purpose, and used the boat ramp located on Lot 9. Hubert then brought this lawsuit, seeking a declaratory judgment that he was the sole and exclusive owner of Lot 9, unencumbered by the expired restrictions. In response, Davis counterclaimed seeking a declaratory judgment recognizing an easement burdening Lot 9. The trial court granted Davis's motion for summary judgment, finding that Lot 9 is burdened with the easement created by Paragraph 13 of the restrictive covenants and that the easement is not subject to expiration through the same time limits set for the restrictions.

At issue before this court was whether paragraph 13 unambiguously created an easement as a matter of law as opposed to a restriction or covenant, which, by the terms of the document, was subject to expiration. Courts of appeals review the trial court's interpretation of restrictive covenants and easements de novo. The rules of contract construction govern the interpretation of restrictive covenants and easements. Whether restrictive covenants or easements are ambiguous is a question of law. Courts must examine the covenants and easements as a whole in light of the circumstances present when the parties entered the agreement. Like a contract, covenants and easements are unambiguous as a matter of law if they can be given a definite or certain legal meaning. If the covenants or easements are susceptible to more than one reasonable interpretation, they are ambiguous. The court of appeals held that the language in Paragraph 13 might be reasonably interpreted as creating an easement. Moreover, the court held that the time restrictions in Paragraph 14 could be reasonably found by the trial court to apply only to the restrictions and covenants contained in the document. Because Paragraph 13 granted an easement, and the language in Paragraph 14 applies only to restrictions and covenants, the court held that the time restrictions in Paragraph 14 are inapplicable to the easement granted by Paragraph 13.

4. ***Marcus v. Whispering Springs Homeowners Ass'n, Inc.*, 153 S.W.3d 702 (Tex. App. —Dallas 2005, no pet.).**

Restrictive covenants are interpreted according to the rules that govern contract construction. Covenants are unambiguous as a matter of law if they can be given a definite or certain legal meaning. Both statute and declaration of covenants granted the association authority to enforce covenants, and thus association had standing to bring action for temporary injunction to prevent lot owners from building house on lot; Tex. Prop. Code Ann. § 202.004 provided that association could "initiate" an action "affecting the enforcement of a restrictive covenant," and declaration of covenants stated that any breach "may be enjoined, abated, or remedied by appropriate legal proceeding instituted by" the association. Refer to Section IV.E.2 of this article for discussion.

5. ***Buckner v. Lakes of Somerset Homeowners Ass'n, Inc.*, 133 S.W.3d 294 (Tex. App.—Fort Worth 2004, pet. denied).**

The Lakes of Somerset Addition subdivision was subject to restrictions that required changes to the exterior of existing structures to be approved by an architectural control committee ("ACC"). Article VI of the deed restrictions provided in part:

> [N]or shall any exterior addition to or change or alteration therein be made until the details... have been submitted to and approved in writing ... by [the ACC].... In the event the [ACC] fails to approve or disapprove any such detail, design, plan, specification or location within thirty (30) days after submission to it, or in any event if no suit to enjoin has been commenced prior to the completion thereof, approval will not be required and this Article will be deemed to have been fully complied with.

The Buckners, homeowners in the subdivision, submitted sample roofing materials to Rosen, chairman of the ACC, and requested immediate approval so they could begin reroofing the next day. The Buckners called the next day to ask if the materials were approved, and Rosen informed them that a decision could not be made by the Buckners' 24-hour deadline, but that the ACC would meet as soon as possible. The Buckners began replacing the roof without approval. A week after the plans were submitted, the ACC met and denied the request. The Buckners appealed to the association's board of directors. The board met, voted to deny the appeal, and advised the Buckners of their decision. Instead of removing the roofing materials and submitting alternatives for approval, the Buckners continued to complete the roof. Rosen called the Buckners and asked them to stop work, but Richard Buckner told Rosen he "did not agree with the Board's decision" and that "the Board was wrong." Work on the roof continued. The association filed suit against the Buckners alleging that the new roof violated deed restrictions and requested damages and injunctive relief. The Buckners answered, alleging as affirmative defenses that: (1) the ACC unreasonably withheld its approval because it had previously approved the use of the same or substantially the same material on two other homes in the addition; (2) the ACC's disapproval was arbitrary, capricious, and racially motivated; and (3) the association did not file suit to enjoin the use of the disapproved materials before installation was completed as required by the deed restrictions.

The association moved for partial summary judgment, alleging that it was entitled to judgment as a matter of law because the uncontroverted summary judgment evidence showed that the Buckners knowingly replaced their roof with unapproved materials and that they could not prove any of their defenses. The association's partial summary judgment motion was granted. The association filed a second partial summary judgment motion, asking that the trial court award it damages, attorney's fees, and injunctive relief because it had prevailed on the liability issues. The trial court entered final judgment granting the association a permanent injunction and awarding attorney's fees, but no damages. The Buckners appealed.

The court of appeals reversed and remanded. The Buckners argued that the trial court erred in granting partial summary judgment on the liability issues because the deed restrictions provide that approval of the roofing material was unnecessary if the association did not sue to enjoin replacement of the roof before its completion, and the court agreed. Applying rules of contract construction, the court held that the use of the word "any" in the applicable deed restriction showed an intent to describe all other scenarios other than those in which the ACC gives explicit approval or fails to disapprove submitted plans within 30 days—when the homeowner has not complied with the restrictions by requesting approval or when the ACC has denied approval and the homeowner continues making alterations in accordance with the disapproved plans. The association argued that the phrase "in any event" should be read to mean that it was required to file suit to enjoin the Buckners' activities only if the ACC failed to approve or disapprove of the materials within 30 days after requested approval. The court rejected this argument, explaining that such an interpretation would render the "in any event" language

meaningless—if the ACC did not approve or disapprove of the submitted plans within 30 days, the plans were deemed approved in accordance with Article VI, so a subsequent suit to enjoin activities completed in accordance with such plans would be pointless. The association judicially admitted in its original petition that the Buckners had completed replacing the roof before it filed suit, thus their own pleadings showed they were not entitled to summary judgment. Resolution of this issue disposed of the remainder of the appeal.

6. ***Youssefzadeh v. Brown*, 131 S.W.3d 641 (Tex. App.—Fort Worth 2004, no pet.).**

In April 1954, an instrument entitled "Dedication of Southland Terrace…" (the "1954 Dedication") was filed with the county clerk. Paragraph 1 of the 1954 Dedication stated in part that all lots in were residential lots, with the exception of Block 24, which was reserved for commercial development.

Paragraph 9 of the instrument stated in part:

> These covenants are to run with the land and shall be binding on all the parties and all persons claiming under them until March, 1984, at which time said covenants shall be automatically extended for a successive period of ten years unless by a vote of the majority of the then owners of the lots it is agreed to change the said covenants in whole or in part.

No other language in the 1954 Dedication provided any other method for changing the covenants, and no reservation of a right to amend was withheld by the dedicators. In May 1961, after a number of lots in the addition had been sold, a document entitled "Amendment to the Dedication of Block 24, Southland Terrace…" (the "1961 Amendment") was filed by the owners of Block 24. Paragraph 2 of the 1961 Amendment stated:

> The east part of said Block 24, being all of said Block 24 except the west 151.4 feet thereof, shall never be used for a purpose less restrictive than that permitted by the Zoning Ordinances of the City of Fort Worth in effect on May 12, 1961, for property zoned "A-one family residential," nor shall the present zoning of said east part of Block 24 which is "A-one family residential" ever be changed or modified so as to permit the auxiliary use of such property as a parking area for passenger automobiles for use by customers of business establishments located on the west part of said Block 24.

Paragraph 3 of the 1961 Amendment stated:

> This amendment ... imposes additional restrictions on Block 24 thereof not in conflict with the provisions of the original dedication thereof and in all other respects than that mentioned herein, the provisions of said original dedication shall apply and control.

The owner of Block 24 thereby attempted to change the characterization of Block 24 from commercial use to part commercial and part residential use. While the change of use applied only to Block 24, the 1961 Amendment's stated purpose was "to carry out a general plan for the protection, use and benefit of each and every purchaser of a lot or lots in said Southland Terrace…" Fat Cat's Liquor Store opened in November 2001 on Block 24. Several subdivision lot owners (collectively, "Brown") filed suit, seeking to establish that the restrictive covenants in the 1961 Amendment governed the liquor store property and prohibited such use. The defendants, the present and former property owners and the liquor store owner/operators (collectively, "Lieu"), sought to establish the right to such use. Both parties filed cross-motions for summary judgment.

The trial court: (1) granted Brown's motion for summary judgment, thus enjoining the operation of the liquor store, assessing civil damages pursuant to the Tex. Prop. Code, and awarding attorneys' fees; (2) denied Lieu's motion for summary judgment; and (3) entered a final judgment in accordance with its rulings on the motions. Lieu appealed.

The court of appeals reversed and rendered judgment that Brown take nothing. The court further rendered judgment for Lieu that the 1954 Dedication set forth the restrictive covenants

applicable to Block 24. Lieu argued that the trial court erred by granting Brown's motion for summary judgment, thereby validating the 1961 Amendment, and by denying Lieu's summary judgment motion in which Lieu sought to have the amendment declared void. To resolve both issues, the court set out to determine whether in 1961, the owners of Block 24 could place additional restrictions on its use without following the procedures outlined in the 1954 Dedication. A subdivision developer is generally free to amend restrictions for the subdivision prior to the sale of lots in the subdivision, but the sale of lots triggers any amendment mechanism provided in the dedication. When the power to amend is reserved in the developer, the amendment of a restrictive covenant must be in the precise manner authorized in the declaration. This "precise manner" requirement logically extends to when the power to amend lies other than with the developer. Here, the 1954 Dedication provided no mechanism whereby an owner of property in the subdivision could unilaterally amend the restrictions on the use of the property. The 1954 Dedication provided that the covenants were to continue in place from 1954 until 1984, after which time a majority of the property owners could amend. Applying rules of contract construction, the court found that: (1) the 1954 Dedication was unambiguous; (2) the 1961 Amendment was not executed in the precise manner called for in the 1954 dedication; and (3) thus the 1961 Amendment was void and had no effect. Brown argued that: (1) the amended restrictions were limited to Block 24; (2) no attempt was made to modify or change the restrictions to the subdivision as a whole; and (3) the restrictions provided in the 1961 Amendment actually enhance other lots by creating a residential lot between the commercial portion of Block 24 and the residential lots of the neighborhood. The court rejected this argument, noting that following such reasoning would allow every lot owner to place restrictions on his lot, thus sending a uniformly planned subdivision into disarray. The court noted that resolution of this issue disposed of all other issues on appeal.

7. ***TX Far West, Ltd. v. Texas Invs. Mgmt., Inc.*, 127 S.W.3d 295 (Tex. App.—Austin 2004, no pet.).**

In the early 1980s, Texas Investments Management, Inc. ("TMI") proposed plans to develop a 35.49 acre tract ("the Tract") of land for commercial purposes. While city approval of the plans was pending, Prudential Health Care Plan, Inc. ("Prudential") purchased five acres of the Tract. Restrictions were attached to Prudential's deed, and provided that they were covenants running with the five-acre tract. The purpose of the restrictions, as stated within, was to establish a high quality mixed-use office and commercial complex composed of a coordinated series of buildings, roadways, landscaping, pedestrian malls and parking facilities. The restrictions included a provision for an annual maintenance fee ("the Fee") to be paid by Prudential and subsequent owners to TMI. The restrictions stated that the purpose of the fee was: "to provide for the orderly development, operation and maintenance of streets, sidewalks, pedestrian malls and other quasi-public facilities on [the Tract], as well as to provide for the operation and maintenance of a proposed jogging trail, necessary security services, insurance, traffic control and architectural review and enforcement for [the Tract]." Prudential continuously paid the Fee until it sold the property, as did the subsequent purchaser until TX Far West ("TXFW") bought the property in July 2001. TXFW sued for declaratory relief among other reasons because it contended that The Fee covenant did not run with the land. TMI counterclaimed for breach of contract and declaratory relief. Both parties moved for summary judgment.

The trial court denied TXFW's summary-judgment motion, granted TMI's summary judgment motion. TXFW appealed.

The court of appeals reversed and remanded. TMI argued that the language of the restrictions clearly showed that the covenant ran with the land and bound TXFW, therefore, summary judgment was appropriate. The court looked at the language of the restrictions to determine their meaning and whether the covenant ran with the land. TXFW and TMI presented different interpretations of the restrictions, both of which the court found reasonable. The court held that the ambiguous language of the restrictive covenant could not

establish whether the original parties intended it to run with the land when the Tract was not fully developed and was thus was insufficient to support summary judgment. TMI argued that the intent of the parties and the consistent interpretation and performance of the restrictions in previous years supported summary judgment. Specifically, TMI argued that it and Prudential intended the Fee to be a financing arrangement, but the court's review of the record revealed several conflicts with this assertion: (1) an affidavit from a former Prudential officer whose recollection of the negotiations differed from TMI's; (2) the closing agreement between TMI and Prudential discussed completion of a jogging trail; and (3) a letter from TMI's president to Prudential, responding to an inquiry of how the Fee was spent. Because issues of material fact existed as to the original parties' intent and the purpose of the restrictions, the court held that TMI failed to prove as a matter of law that the covenant ran with the land and was enforceable against TXFW. TMI argued that the previous owners' acquiescence to the alleged violations of the restrictions constituted a waiver of TXFW's right to enforce the restrictions. The court disagreed because the restrictions expressly stated that "failure by Grantor or Grantee, their successors or assigns, to enforce any covenant, condition or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter."

8. ***Lee v. Perez*, 120 S.W.3d 463 (Tex. App.—Houston [14th Dist.] 2003, no pet.).**

The court of appeals in accordance with Tex. Prop. Code Ann. § 202.003(a), which requires courts to construe restrictive covenants liberally and give full effect to their purpose and intent, found that the deed restriction, which stated that the lots "shall be known and described as residential lots," did not merely limit the buildings that could be constructed on the lots; thus, the restriction prohibited use of the lots for a used car business. Refer to Section IV.A.3 of this article for discussion.

9. ***Air Park-Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900 (Tex. App.—Dallas 2003, no pet.).**

Air Park-Dallas began in 1969 when M.J. and H. Noell decided to create a residential airpark on their property in Collin County "for people who like to fly airplanes." The restrictive covenants that burdened each individual lot provided in part that: (1) no structure could be commenced, erected or maintained on any of the lots or tracts unless approved by the zoning committee composed of M.J. Noell, D.W. Noell and three members to be elected from the lot owners by a majority vote of same every two years; (2) no lot could be resold until the sales contract was first offered to the zoning committee with a right of purchase for the same price as offered on the contract; (3) the zoning committee acted as a governing body with legal authority to make those rulings necessary or call for an election to protect the best interests of the community until an incorporated government could be established; and (4) the restrictive covenants ran with the land and were binding on all parties and all persons claiming under them until revoked or modified in whole or in part by a 3/4ths majority vote of the then owners of the real property therein, said vote to be on the basis of one vote per lot therein. Pursuant to the restrictive covenants, the zoning committee enacted by-laws to effectuate the intent and purposes of the restrictive covenants. The relevant by-laws provided in part that: (1) if any lot owner violated or failed to comply with any of the restrictive covenants, the zoning committee could suspend that lot owner's right to participate in any elections called by the zoning committee under the provisions of the restrictive covenants; and the zoning committee could take such other actions they deemed necessary to protect the best interests of the community under the authority granted them by the restrictive covenants. In 1983, the Billingsleys purchased ½ of M.J. Noell's interest in the Air Park, including ½ of an undivided interest in all of the common areas. It was undisputed that the Billingsleys purchased their interest solely for investment purposes. There was evidence in the record that Henry Billingsley would have turned much of the subdivision into a commercial area if he could have unilaterally made that decision. However, before the Billingsley sale, several aviators purchased lots in the subdivision. After the Billingsley's initial purchase from M.J. Noell, they formed two Billingsley partnership entities, Crow-Billingsley Airpark, Ltd. and Crow-Billingsley Berkeley, Ltd. (collectively, the "Billingsley Parties"). Since the Billingsley's initial purchase, they had acquired 32 of the 68 residential lots. They also owned 3 business lots by the runway.

The zoning committee brought action against the Billingsley parties, seeking a declaration of rights under the restrictive covenants. The trial court entered a declaratory judgment and both parties appealed.

The court of appeals affirmed in part and reversed in part. The court pointed out that it reviews a trial court's interpretation of a restrictive covenant de novo, and, applying rules of contract construction, determined that the restrictive covenants were not ambiguous. The zoning committee argued that the trial court erred when it declared that Henry and Lucy Billingsley could run as candidates in a zoning committee election despite the fact that the trial court ruled that certain of their lots' right to vote were suspended for noncompliance with the restrictive covenants and ancillary by-laws promulgated by the zoning committee. The court disagreed, holding that under the restrictive covenants and by-laws, an owner's voting disability due to non-compliance with the covenants pertained only to those lots affected by noncompliance. The zoning committee also argued that the trial court erred in failing to declare that the Billingsley Parties, by virtue of having purchased an undivided ½ interest in Air Park-Dallas from M.J. Noell, had stepped into the role of an Air Park-Dallas "developer," and thus, their interests were represented by the remaining permanent zoning committee member D. Noell. The committee's argument went one step further, contending that since the "developers" were represented by a permanent zoning committee member, the Billingsleys were precluded from running for the three remaining membership slots that were reserved for the "lot owners." The court rejected the entire argument. The term developer lots did not appear in the restrictive covenants or the by-laws. Although lot owners were mentioned, they were not mentioned in the context of the argument advanced by the zoning committee. The concept of a distinction between developers and lot owners was notably absent in the covenants and by-laws. Because the court declined to enlarge, extend, or stretch the plain meaning of the covenants and the by-laws, they overruled the construction advanced by the zoning committee. Next, the zoning committee argued that any future sale had to be offered on the same terms of over 15 years ago, to which the Billingsley Parties raised the affirmative defenses of laches and limitations. The court held that laches precluded specific performance and enforcement of the restrictive covenant giving the zoning committee the right of first refusal on the sale of the lots in the subdivision at the contract prices as they existed at the time the lots were sold. The zoning committee also argued that the trial court erred in failing to award civil damages pursuant to Tex. Prop. Code Ann. § 202.004(c), which provides that: "a court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation." The court noted that the statutory language used is permissive in nature and held that the denial of statutory civil damages for violations of the restrictive covenants was in the trial court's discretion. The Billingsley Parties argued that the by-law which purported to enable the zoning committee to suspend the right to participate in a vote in a zoning committee election of any lot deemed to be in violation of the restrictive covenants, was an invalid by-law, as it materially changed the rights and obligations expressly set forth in the restrictive covenants. Relying on the restrictive covenants, the Billingsley Parties further argued that any rule concerning the suspension of voting rights would need to be approved by a 3/4ths majority vote of all lot owners. However, the court pointed out that the restrictive covenants provided that the committee would "act as a governing body with legal authority to make those rulings necessary... to protect the best interests of the community." The court concluded that restrictive covenants authorized the zoning committee to promulgate a by-law suspending voting rights for non-compliance with the restrictive covenants. The court further concluded that the zoning committee did not have to obtain a 3/4ths majority vote because the restrictive covenants themselves were not revoked or modified as provided in restrictive covenants. The by-law was merely a clarification of the restrictive covenants. Next, the Billingsley Parties argued that the trial court erred when it decided that only the residential lots, and not the business lots, had the right to vote in a zoning committee election. Applying rules of contract construction, the court pointed out that a court's review of restrictive covenants is de novo, and concluded that the plain language of the restrictive covenants did not distinguish between

residential lots or business lots when it came to the voting rights at issue, and thus sustained the Billingsley's Parties' motion.

10. ***American Golf Corp. v. Colburn*, 65 S.W.3d 277 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).**
A court's primary task is to determine intent of the framers and if restriction is ambiguous. Determining whether a restriction is ambiguous is a question of law. If deemed to be unambiguous then its construction is also a question of law. Refer to Section V.D.5 of this article for discussion.

11. ***Aghili v. Banks*, 63 S.W.3d 812 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).**
A condominium declaration was held to be a contract between the parties, subject to same general rules of contract interpretation. The primary concern of the court is to determine the true intention of the parties expressed in the instrument. Ambiguity is a matter for the courts to decide. Restrictions must be liberally construed to give effect to their purpose and intent. Refer to Section V.B.1 of this article for discussion.

12. ***Village of Pheasant Run Homeowners Ass'n, Inc. v. Kastor*, 47 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).**
Restrictions will be given their ordinary meaning as of the date written. The objective intent (versus subjective) must be determined by the court. The entire document must be considered so that none of provisions are rendered meaningless. An unambiguous restriction must be liberally construed. Refer to Section IV.E.5 of this article for discussion.

13. ***Ostrowski v. Ivanhoe Prop. Owners Improvement Ass'n, Inc.*, 38 S.W.3d 248 (Tex. App.—Texarkana 2001, pet. denied).**
Restrictions in dedicatory instruments are treated as contracts between parties and are subject to general rules of contract construction. Question of whether restrictive covenant is ambiguous is a question of law for the court, which the court of appeals reviews de novo. Courts must liberally construe restrictive covenants. Refer to Section V.D.6 of this article for discussion.

14. ***Mitchell v. Laflamme*, 60 S.W.3d 123 (Tex. App.—Houston [14th Dist.] 2000, no pet.).**
Several townhome owners filed a lawsuit against the association for failure to comply with the covenants and by-laws, due to failure to maintain their townhomes. The jury awarded the owners damages for the costs of the repairs to the interior of the townhomes, loss of use, and costs of repairs to the exterior and common areas. The jury also awarded the owners attorneys' fees. The trial court entered judgment not withstanding the verdict, which disallowed the attorneys' fees and limited the damages to the homeowners to interior damages and loss of use. The issue on appeal was whether the owners could sue individually for damages to the exterior and common areas.

The court of appeals starting point for its review was the restrictive covenants, in reference to which the court stated restrictions in a dedicatory instrument are treated as contracts between parties. The court then reviewed and rejected the association's argument that failure to maintain the exteriors and common areas constitute an ultra vires act by the association. The court, however, agreed with the association that an owner could not personally recover damages for a wrong done solely to the corporation, even though the owner may have been injured by that wrong. The court did not reach the issue of the owners' right to sue for damages to the exterior of their townhomes because there was no evidence in the record on this element of damages. The court of appeals found that any damages to the common areas were damages suffered by the association and that the declaration gave the owners the right to sue to enforce the declaration, but not the right to sue for damages to the common areas. The court also held that to sue for damages done to the common areas, the owners were required to bring a representative suit on behalf of the corporation. The court reversed the trial court's denial of attorneys' fees to the homeowners. The owners claimed that they were entitled to attorneys' fees under Tex. Prop. Code Ann. § 5.006(a), which makes an award of reasonable attorneys' fees mandatory to a prevailing party who asserted an action based on breach of a restrictive covenant pertaining to real property. The court held that the owners could recover attorneys' fees under the Tex. Prop. Code, even though the owners' petition sought attorneys' fees

under the Declaratory Judgment Act and the Uniform Condominium Act.

15. ***Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d 524 (Tex. App.—San Antonio 2000, pet. denied).**

Relying on the rules of construction *Wilmoth* and *Pilarcik* cases the court of appeals held that the term "applicable to that year only" to mean that the special assessment is effective only for the year in which it is assessed. Refer to Section V.E.2 of this article for discussion.

16. ***Oldfield v. City of Houston*, 15 S.W.3d 219 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**

In 1976, Oldfield's father purchased a lot in the Brookhaven residential subdivision. The subdivision was originally platted in the 1930's and deed restrictions were properly filed in 1936. The restrictions prohibited the use of any property for business purposes except for those tracts that had exposure or frontage on Holmes Road. Since acquiring the property in 1976, Oldfield and his father owned and operated a used machinery business on the property. Over the years, various business-related improvements were made to the property, such as the addition of a large billboard-sized sign and warehouse. Oldfield and his father paid the City for permits to operate signs on the property. Oldfield inherited the property and business in 1992 after his father's death. When the Brookhaven deed restrictions were filed, Oldfield's lot did not have exposure or frontage on Holmes Road. In 1962, however, the South Loop was built. Once the South Loop was built, Oldfield's property had exposure to Holmes Road. In March of 1998, the City of Houston sued Oldfield to permanently enjoin his operation of the used equipment sales business and to prevent him from performing any commercial activity on the premises. Oldfield raised several affirmative defenses, including laches, waiver, abandonment and estoppel. Both the City of Houston and Oldfield filed cross motions for summary judgment. The trial court granted the motion for summary judgment filed by the City of Houston and entered a permanent injunction against Oldfield and the operation of his business.

The court of appeals affirmed in part and reversed and remanded the case in part. This case presented an uncommon issue—how to treat a "latent ambiguity" in a deed restriction. When the restrictions were written, Oldfield's lot had no exposure to Holmes Road. With the construction of the South Loop, however, the property had exposure to Holmes Road. The deed restrictions did not address the effect of an intervening circumstance, such as the construction of a major interstate highway through the subdivision. Accordingly, as applied to Oldfield's property, a latent ambiguity existed with respect to the deed restrictions' prohibition against use for business purposes. The court held a fact issue existed as to whether Oldfield's business violated the deed restriction. It was, therefore, error to grant the motion for summary judgment. The Tex. Loc. Govt. Code states that a municipality "may" sue in any court to enjoin or abate a violation of a restriction contained or incorporated by reference in a plan, plat or other instrument. The provision does not require the enforcement of the deed restrictions, but gives the city the discretion to enforce them. As a result, the court held Oldfield could assert his defenses against the city just as he would if he were suing a private entity. The court then discussed the waiver defense, and found that a genuine issue of material fact existed as to whether the city had waived its enforcement of the deed restrictions. The court cited several "waiver" cases for its authority. Oldfield also argued that because of changed conditions, the summary judgment should not have been granted. Since the changed condition occurred before Oldfield acquired the property, the court held he could not rely on changed conditions. Oldfield also claimed that he was entitled to a summary judgment based upon the affirmative defense of estoppel because he had paid business taxes on the property, had paid commercial rates to the city for utility services and received permits from the city to operate signs. The court held that there was a genuine issue of material fact as to whether the city, by accepting fees over twenty two years, is estopped from enjoining his commercial activity.

[Editor's Note: The portion of the *Oldfield* decision holding that a municipality's enforcement of deed restrictions is a proprietary function has been superceded by statute. Tex. Loc. Govt. Code Ann. § 212.137 was specifically

amended in 2001 to clarify that a municipality's enforcement of deed restrictions is a governmental function.]

17. ***Samms v. Autumn Run Cmty. Improvement Ass'n, Inc.*, 23 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).**
The court of appeals stated that restrictive covenants are to be liberally construed, giving effect to the intent and purposes of the restrictions. Refer to Section V.D.7 of this article for discussion.

18. ***Bank United v. Greenway Improvement Ass'n*, 6 S.W.3d 705 (Tex. App.— Houston [1st Dist.] 1999, pet. denied).**
The court of appeals held that the rule of construction that provides a specific provision rules over a general provision applies only where there is an irrevocable conflict and held that sixty days automatic approval where ACC fails to respond controls even when clause requires ACC written approval. Refer to Section IV.E.6 of this article for discussion.

19. ***Benard v. Humble*, 990 S.W.2d 929 (Tex. App.—Beaumont 1999, pet. denied).**
Legislature, in enacting statute requiring that restrictive covenants be liberally construed in a manner that may occasionally run hard afoul of strict common law requirements. Refer to Section IV.A.4 of this article for discussion.

20. ***Highlands Mgmt. Co. v. First Interstate Bank of Texas*, 956 S.W.2d 749 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).**
Relying on rules of construction in *Wilmoth*, *Candlehills*, and the liberal construction required by Tex. Prop. Code Ann. § 202.003, a restriction prohibiting a sexually oriented business from being operated on a tract, prohibited the tract for being used as a parking lot in conjunction with a sexually oriented business or an adjoining tract. Refer to Section IV.L.1 of this article for discussion.

21. ***Ashcreek Homeowner's Ass'n, Inc. v. Smith*, 902 S.W.2d 586 (Tex. App.—Houston [1st Dist.] 1995, no writ).**
The association sued the Smiths alleging that the absence of a backboard on a basketball goal and a broken fence slat were violations of a nuisance restriction. The trial court found in favor the Smiths. On appeal, the association contended that the trial court abused its discretion by "judicially scorning" Tex. Prop. Code Ann. § 202.003(a), which requires that restrictive covenants be liberally construed to give effect to their purposes and intent. The association argued that this statute reversed the rule that restrictions restricting the free use of property are to be strictly construed.

The court of appeals disagreed, holding that they were unable to make a distinction between liberally construing a restrictive covenant to give effect to its purpose and intent and construing a restrictive covenant either to favor the free and unrestricted use of land or to strictly construe it against the party seeking to enforce it. The court also held that the association did not give the Smiths proper notice pursuant to the restrictions. The court rejected the association's argument that it had no obligation to inform the Smiths of the particular provision of the deed restrictions allegedly being violated in the association's demand letter, as long as it stated the subject of the violation. The court found that such an interpretation would unfairly penalize homeowners attempting to verify their compliance with the deed restrictions.

22. ***Caldwell v. Callender Lake Prop. Owners Improvement Ass'n*, 888 S.W.2d 903 (Tex. App.—Texarkana 1994, writ denied).**
The association increased its annual assessment for the third time in accordance with a vote of the lot owners. Two lot owners then filed suit contending that the election was not held in accordance with the restrictions that set up the maintenance fund agreement under which the fees were collected. The association counterclaimed, requesting a declaratory judgment that the maintenance fund agreement controlled over the restrictions with regard to elections to increase the annual assessment. The lot owners' claim was dismissed by the trial court as a sanction for discovery abuse, and the association obtained a summary judgment on its counterclaim finding that the maintenance fund agreement controlled.

The court of appeals held that, although the restrictions mentioned the initial maintenance fund, the focus of its language was on the time frame for the fund's existence. Accordingly, the more specific language of the maintenance fund agreement

controlled. The court also held that because these lot owners had paid the fees increased by the previous two elections, they had in effect ratified the process of election used by the association. The court noted that ratification (sometimes used interchangeably with waiver) invoke the following 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 on the user's choice of words."

23. ***Club Corp. of America v. Concerned Prop. Owners for April Sound*, 881 S.W.2d 620 (Tex. App.—Beaumont 1994, no writ).**

An unincorporated group of residential lot owners filed suit to decide, among other things, whether the members of the group were entitled to vote for trustees of the association. The association's by-laws stated that no members of the association were entitled to vote so long as building sites in the subdivision remained unsold. The entire issue in this case was whether there were any unsold building sites remaining. Apparently, rather than the developer actually deeding lots to purchasers, the interests in the lots were transferred via an agreement wherein the developer gave the potential purchaser only the surface rights to a lot to be designated by seller at a later date. The agreement expressly stated that it should not be construed as a conveyance or sale of property, rather it should be constructed as a mere agreement to sell the property set out and that the relation created between the seller and the purchaser by agreement should be that of landlord and tenant, until such time as a warranty deed is delivered. Nonetheless, the trial court held that the agreement constituted a conveyance.

The court of appeals reversed and held that the execution of the agreement (without performance under the terms) did not convey equitable title, much less legal title, and consequently under the terms of the by-laws, the lots in question remained unsold.

24. ***Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78 (Tex. App.—Houston [1st Dist.] 1994, writ denied).**

The rules of construction of restrictive covenants requiring the free and unrestricted use of land and strict construction are not in conflict with Tex. Prop. Code Ann. § 202.003(a) requiring liberal construction. Refer to Section IV.H.3 of this article for discussion.

25. ***Roman Catholic Diocese of Galveston-Houston v. First Colony Cmty. Servs. Ass'n, Inc.*, 881 S.W.2d 161 (Tex. App.—Houston [1st Dist.] 1994, writ denied).**

The association sued the Diocese as well as St. Laurence Catholic Church for unpaid maintenance assessments. The Diocese contended at trial that the restrictions governing the property owned by the church did not specifically mention that churches were subject to assessments. Both parties argued that the restrictions were unambiguous. The trial court granted summary judgment in favor of the association, holding that the church property was subject to assessments.

The court of appeals reversed and remanded, holding that the restrictions were ambiguous and did not clearly apply to or exclude the Diocese. As such, summary judgment was not proper.

26. ***Ramsey v. Lewis*, 874 S.W.2d 320 (Tex. App.—El Paso 1994, no writ).**

The Ramseys bought half of a residential duplex from Lewis, the developer. The Ramseys and Lewis also entered into a "Duplex Agreement" which stated that the owners would not perform or allow any act which would tend to depreciate the value of his dwelling unit, the duplex, or any other duplex in the development. At the time of purchase, the Ramseys had an unobstructed view of downtown El Paso. Subsequently, Lewis began construction of a two-story duplex on the lot adjacent to the Ramseys which would, upon completion, block the view from the Ramsey unit. The Ramseys brought suit to enjoin the construction. The trial court denied the application for temporary injunction.

On appeal, the Ramseys argued that the "Duplex Agreement" together with promotional materials distributed by Lewis, which advertised the unit as having "a magnificent view of the downtown skyline", created an implied restriction prohibiting Lewis from doing anything which would obstruct the Ramseys' view. The court of appeals found that the evidence presented by the Ramseys did not prove the existence of an implied restriction enforceable against Lewis. Further, if such a restriction did exist,

it would create an interest in real estate, in the form of a negative easement, which would have to satisfy the statute of fraud's requirement of a writing. The court held that the Ramseys had failed to show the probability of obtaining a permanent injunction and affirmed the trial court's refusal of a temporary injunction.

27. ***New Braunfels Factory Outlet Center v. IHOP Realty Corp.*, 872 S.W.2d 303 (Tex. App.—Austin 1994, no writ).**

IHOP and the New Braunfels Factory Outlet entered into a contract of sale for IHOP to operate a restaurant on part of a six acre tract on the Outlet property. A significant part of the negotiations between IHOP and New Braunfels concerned the degree to which New Braunfels and its successors would be restricted from using the balance of the tract not sold to IHOP as a restaurant. They agreed on the language in the contract that New Braunfels could not for thirty years after the closing permit any portion of the outlet center or property within one mile of boundaries of the property owned by New Braunfels for any kind of family-oriented coffee shop-style restaurant that would be in competition with IHOP. The contract for sale differed, however, with regard to the restriction incorporated into the deed. The restriction in the deed provided coffee shop *or* restaurant. New Braunfels then entered into negotiations with Cracker Barrel to purchase an adjoining tract. IHOP did not consent to the sale contending Cracker Barrel was a direct competitor and therefore prohibited by the restrictive covenant. The trial court rendered judgment in favor of IHOP; however, it declined to reform the wording of the contract, holding: (1) that New Braunfels was estopped from complaining of the wording because it failed to notice the difference in wording in the restrictive covenant before signing it; and (2) both versions of the restrictions prohibited the sale to Cracker Barrel.

The court of appeals reversed and remanded, holding that New Braunfels was not estopped from seeking reformation. The appeal resulted in judgment for IHOP, however. In its opinion, the court reviewed the language in dispute and reformed the "or" language citing mutual mistake. Once the "or" language was taken out, the court then turned to the issue of whether IHOP still could exclude Cracker Barrel based on the language of the restrictive covenant. The court agreed with IHOP looking at the covenant as a whole, holding that the covenant excluded family-oriented coffee shop-style restaurants that directly compete with IHOP.

28. ***Settlers Village Cmty. Improvement Ass'n, Inc. v. Settlers Village 5.6 Ltd.*, 828 S.W.2d 182 (Tex. App.—Houston [14th Dist.] 1992, no writ).**

Settlers Village 5.6 brought suit against the association to recover maintenance fees that were allegedly being overcharged and to remove the liens filed against their property for nonpayment of those fees. The provision of the restrictions that provided for assessments stated that the maximum annual assessment was "$0.015 mills per square foot." (A mill is defined as one-tenth of a cent.) The association interpreted this to mean one and one-half cents per square foot or 15 mills per square foot and assessed fees accordingly. The trial court disagreed and granted judgment in favor of Settlers Village 5.6.

On appeal, the association argued that the term "$0.015 mills" was ambiguous and the court of appeals agreed. The court held that because the term was ambiguous, summary judgment was not proper and the trial court improperly refused to hear parole evidence as to the intent of the parties to the restrictions.

29. ***Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474 (Tex. App.—Houston [14th Dist.] 1988, writ denied).**

Restrictions should be liberally construed. Refer to Section V.G.1 of this article for discussion.

30. ***Dempsey v. Apache Shores Prop. Owners Ass'n, Inc.*, 737 S.W.2d 589 (Tex. App.—Austin 1987, no writ).**

Restrictions were not ambiguous and intent of restrictions was to include "double-wide manufactured homes" within prohibition against "mobile homes." Refer to Section IV.C.4 of this article for discussion.

31. ***J.P. Building Enter., Inc. v. Timberwood Dev. Co.*, 718 S.W. 2d 841 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e).**

Restrictions are to be construed strictly in favor of the grantee. If a restriction is not ambiguous, there is

need to determine the intent of the developer. Refer to Section IV.H.4 of this article for discussion.

32. ***Gigowski v. Russell*, 718 S.W.2d 16 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).**
Meaning of words used in restrictions must be determined as of date restriction is written and not as of some subsequent date. In determining the ordinary meaning of contractual terms at the time a contract was executed, it is proper and frequently necessary for the court to consult other contemporary documents employing the phrase. Refer to Section IV.C.5 of this article for discussion.

33. ***WLR, Inc. v. Borders*, 690 S.W.2d 663 (Tex. App.—Waco 1985, writ ref'd n.r.e.).**
End sought in construing a restriction is to ascertain the intent of the parties by language used in restriction. Refer to Section IV.K.1 of this article for discussion.

[Editor's Note: The appellate court decisions involving strict or liberal construction of restrictions are in hopeless conflict with one another and are ripe for interpretation by the Texas Supreme Court.]

C. Insignificant/Different Prior Violation

1. ***Sharpstown Civic Ass'n, Inc. vs. Pickett*, 679 S.W.2d 956 (Tex. 1984).**
Prior incidental or insignificant violation of restrictions does not constitute waiver. Refer to Section IV.A.2 of this article for discussion.

2. ***Colton v. Silsbee State Bank*, 952 S.W.2d 625 (Tex. App.—Beaumont 1997, no writ).**
After receiving notification from the attorney for Colton, owner of property adjacent to the bank, that Colton objected to the bank's expansion plans, the bank filed an action seeking a declaratory judgment that restrictive covenants entered into between the bank's predecessor in title and Colton's predecessor in title were unenforceable based on waiver, estoppel, laches, and the statute of limitations. The bank also contended that Colton knew about their proposed building extension prior to their going to great expense to implement the expansion. Further, the bank's predecessor in title had also made improvements in violation of the restrictive covenants.

The trial court granted summary judgment in favor of the bank and the court of appeals reversed and remanded. The court held that there were genuine issues of material fact regarding the issue of whether the restrictive covenants were enforceable despite the prior violations. The court stated, "[w]e believe this issue is determined by whether the prior expansion by the bank is significant or insignificant when compared to the proposed or new use." With regard to the statute of limitations issue, the court stated, "...we hold where the prior violation is insignificant or insubstantial when compared to the proposed or new use, the statute of limitations accrues upon the subsequent breach of the covenant, whereas it otherwise accrues from the date of the original violation." In its opinion, the court cites *Sharpstown Civic Ass'n v. Pickett*, 679 S.W.2d 956 (Tex. 1984), wherein the Court stated that "the prior violation which has been carried on without objection, if insignificant or insubstantial when compared to the proposed or new use, will not support a waiver of the new and greater violation."

D. Burden of Proof

1. ***Cox v. Melson-Fulsom*, 956 S.W.2d 791 (Tex. App.—Austin 1997, no pet.).**
Defendant had burden of proving plaintiff intentionally relinquished right to enforce restrictions. Refer to Section IV.C.3 of this article for discussion.

2. ***Mitchell v. Rancho Viejo, Inc.*, 736 S.W.2d 757 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).**
Mitchell represented a class of property owners within the Rancho Viejo subdivision. The owners sought a declaratory judgment setting forth their rights with regard to Rancho Viejo, Inc., which owned much of the land in the subdivision. Rancho Viejo bought the land in question, consisting of golf courses, a convention center, a club house, etc. as well as some unsold lots at a foreclosure sale. The trial court held that the land owned by Rancho Viejo was adjacent to and meandered through the subdivision, but was not part of the subdivision and not subject to any restrictions or covenants of the subdivision.

On appeal, the owners contended that the land owned by Rancho Viejo was subject to certain restrictions, dedications, and covenants. The only documentation that the owners produced with regard to the existence of the restrictions, dedications, or covenants was two plats of different parts of the subdivision which were prepared at different times, and a document entitled "Correction to Amendment to Covenants and Restrictions." The owners argued that certain references within these documents to certain dedications and covenants conferred upon the owners the right to inhibit Rancho Viejo's use, alteration, and improvement of the golf courses and other areas in question. The court of appeals held that the trial court erred in concluding that the land owned by Rancho Viejo was not within the subdivision, but that the owners had failed to produce evidence sufficient to establish that they had any rights to the land in question through any restrictions or covenants.

3. ***Cole v. Cummings*, 691 S.W.2d 11 (Tex. App.—Texarkana 1985. writ ref'd n.r.e.).**
In order to obtain injunctive relief for violation of a residential use only restriction, one need only show a substantial breach of the covenant. Refer to Section IV.A.15 of this article for discussion.

E. Delays

1. ***Rosas v. Bursey*, 724 S.W.2d 402 (Tex. App.—Fort Worth 1986, no writ).**
The Rosas bought a vacant lot in a restricted subdivision at about the same time they bought a house with the plan of moving the house onto the vacant lot. Upon learning of this plan, a group of homeowners gave the Rosas a copy of the deed restrictions, which required submissions of plans for approval of the project, and advised they would seek injunctive relief if necessary. The Rosas did not submit plans prior to beginning the project and the homeowners filed suit against the Rosas. After the Rosas finally submitted plans, the plans were approved conditioned on the Rosas' agreement to complete the external improvements within ninety days. A written settlement agreement was entered into and executed by the Rosas. When the Rosas' house was not completed within the specified time, the homeowners proceeded with seeking a temporary and permanent injunction. The temporary injunction as well as the summary judgment was granted by the trial court in favor of the homeowners.

On appeal, in addition to numerous alleged procedural defects which were overruled by the court of appeals, the Rosas contended that their response to the homeowners' motion for summary judgment raised fact issues as to whether the weather conditions and supply delays prevented the Rosas from completing the work in time and whether the other homeowners were prejudiced against the Rosas. The court denied these arguments, holding that, "even if the delays were caused by weather and supply problems, such problems do not excuse appellants' failure to perform the contract within the ninety-day period." Further, the court held that the other homeowners' alleged prejudice was irrelevant as a motive for enforcement.

F. Injunctions

1. ***Marcus v. Whispering Springs Homeowners Ass'n, Inc.*, 153 S.W.3d 702 (Tex. App. —Dallas 2005, no pet.).**
When a temporary injunction is sought to enforce a restrictive covenant, the movant is not required to show proof of irreparable injury; instead, the movant need show only that the defendant intends to do an act that would breach the covenant. Here, evidence was sufficient to support finding that owners of subdivision lot were attempting to build a home based on plans that they failed to submit to architectural review committee, so as to support temporary injunction prohibiting construction, although there was testimony that plans approved by city were the same in all material ways as plans submitted to committee; in response to a direct question by the court, a committee member testified that the plans were different. Refer to Section IV.E.2 of this article for discussion.

2. ***Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 775 S.W.3d 487 (Tex. App.—Texarkana 2002, pet. denied.).**
Every order granting an injunction and every restraining order shall set forth the reasons for its issuance. A successful applicant for injunctive relief must demonstrate: (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of incomparable injury; and (4) the absence of an adequate remedy at law. In an appeal

from a permanent injunction, the standard of review is whether the trial court committed a clear abuse of discretion. Refer to Section IV.I.1 of this article for discussion.

3. ***Bankler v. Vale*, 75 S.W.3d 29 (Tex. App.—San Antonio 2001, no pet.).**
Trial court did not abuse its discretion in injunction suspending special assessments pending trial. Refer to Section V.E.1 of this article for discussion.

4. ***Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**
The lots in Terramar Beach, Section 6 were subject to deed restrictions which required a 10-foot set-back from the property side lines and stated that no building shall be erected until the architectural control committee ("ACC") had approved the construction plans. The ACC approved Rutherford's plans for homes on Lot 8 and Lot 9, both violated the set-back restriction. The ACC denied approval for the construction plans of a third home on Lot 7 that violated the setback restriction. Rutherford began construction on Lot 7. He received a letter from legal counsel for the association two weeks later reminding him that the lots were subject to the set-back requirements and he needed the approval of the ACC. Rutherford refused to halt construction. Terramar filed suit seeking an injunction to stop the construction and enforce the deed restrictions. Rutherford counterclaimed alleging wrongful injunction and asserting that the affirmative defenses of waiver, laches, estoppel and fraud applied. Rutherford also sought his own injunction to stop the association from interfering with his construction. The trial court granted the association's motion for temporary injunction. The association then moved for a summary judgment as to all of its claims against Rutherford, including his affirmative defenses, his counterclaim and the association's attorneys' fees. The trial court partially granted the motion for summary judgment, permanently enjoining Rutherford from further violations of the deed restrictions, denying Rutherford's counterclaim and rejecting his affirmative defenses. But the trial court denied the association's summary judgment motion for recovery of attorneys' fees. Rutherford appealed the trial court's grant of the summary judgment and the association appealed the trial court's denial of its request for attorneys' fees.

The court of appeals reviewed the standards for granting or denying a permanent or temporary injunction and summary judgment standards. The court decided that the association had proved through its summary judgment evidence that it was entitled to a permanent injunction and that there was no abuse of discretion by the trial court. The appellate court then looked at the affirmative defenses raised by Rutherford which the trial court had denied by granting the summary judgment in favor of the association. Rutherford argued that the association waived its set-back deed restriction as to Lot 7 when it approved his 5-foot set-backs on Lots 8 and 9. He also alleged that the association had waived the set-back restriction because four other homes in Section 6 of the subdivision violated the general deed restrictions. The court noted that the restrictions contain a severability clause, stating that one violation does not invalidate all of the restrictions. The court looked at the number of lots and homes in the subdivision (54) and the number of other violations. Rutherford could only point out one other violation of the side set-back restriction. The court held that one violation is not so great as to lead to an abandonment of the restriction. The court also discussed estoppel and laches. Estoppel can apply when one party changes its position materially based upon the actions of another party. But here, Rutherford presented no evidence that he changed his position regarding the set-back violation on Lot 7 based upon the association's conduct. Rutherford could not prove the two elements of laches, which are an unreasonable delay in asserting a legal or equitable right, and a good faith change of position to the claimant's detriment. Rutherford began construction on Lot 7, without the approval of the association. Legal counsel for the association wrote him a letter less than a month later. Two weeks after that, the association filed suit. Therefore, there was no unreasonable delay. With regard to the attorneys' fees, the court said that the trial court had erred in failing to award attorneys' fees. The case was remanded to the trial court to award the association reasonable attorneys' fees.

5. ***Musgrave v. Brookhaven Lake Property Owners Ass'n*, 990 S.W.2d 386 (Tex. App.—Texarkana 1999, pet. denied).**
The court of appeals found that the injunction prohibiting lodge guests from using the lake and recreational property was warranted, but that a portion of the injunction that prohibited the implementation of a forest management plan lacked the required specificity because it incorporated by reference another document that was not attached, which is prohibited by Tex. R. Civ. P. 683. Refer to Section II.C.4 of this article for discussion.

6. ***Beere v. Duren*, 985 S.W.2d 243 (Tex. App.— Beaumont 1999, pet. denied).**
The court of appeals found that the trial court clearly abused its discretion in failing to grant injunctive relief. Refer to Section IV.E.7 of this article for discussion.

7. ***Munson v. Milton*, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied).**
Movant seeking a temporary injunction to enforce a restrictive covenant is not required to show proof of irreparable harm. Refer to Section IV.A.6 of this article for discussion.

8. ***Kulkarni v. Braeburn Valley W. Civic Ass'n, Inc.*, 880 S.W.2d 277 (Tex. App.--Houston [14th Dist.] 1994, no writ).**
The association sued the Kulkarnis for building a chain link fence around their lot in violation of the deed restrictions. The trial court granted a temporary injunction ordering the Kulkarnis to remove all parts of the fence.

The court of appeals reversed the trial court's decision, holding that the association's deed restrictions expressly allowed fences on corner lots. Accordingly, in the court's opinion, the temporary injunction was too broad in that it prevented the Kulkarnis from having a fence at all.

9. ***Ramsey v. Lewis*, 874 S.W.2d 320 (Tex. App.—El Paso 1994, no writ).**
Trial court abuses its discretion if it grants temporary injunction when evidence fails to provide reasonable basis for concluding that applicants have probable right of recovery. Refer to Section VI.B.26 of this article for discussion.

10. ***Siddiqui v. West Bellfort Property Owners Ass'n*, 819 S.W.2d 657 (Tex. App.—El Paso 1991, no writ).**
The association requested a permanent injunction against the homeowner for erecting an antenna on her property without architectural control committee ("ACC") approval, which approval was required by the restrictions. The homeowner did not file an answer and the trial court awarded a default judgment and permanent injunction against the homeowner.

On appeal, the homeowner's only complaint was that the trial court erred in granting a default judgment without hearing evidence. The court of appeals held that, although an injunction is an extraordinary remedy for which a party must show itself justly entitled, the burden may be satisfied as long as the petition provides the defendant with fair notice of the relief sought against him. The "fair notice" requirement is satisfied as long as the claim is for liquidated damages and is proved by an instrument in writing. The court upheld the permanent injunction in this case as the relief sought could not be classified as unliquidated damages. With regard to the trial court's award of attorney's fees, however, the court held that an evidentiary hearing was necessary because "attorney's fees are by their very nature unliquidated unless the exact amount is fixed by agreement." The default judgment was affirmed, except as to the issue of attorney's fees.

11. ***Gettysburg Homeowners Ass'n, Inc. v. Olson*, 768 S.W. 2d 369 (Tex. App.—Houston [1st Dist.] 1989, no writ).**
To warrant issuance of a temporary injunction, an applicant must show probable right to recovery at trial and a probable interim injury should the court fail to grant the temporary relief. Refer to Section IV.E.10 of this article for discussion.

12. ***Gigowski v. Russell*, 718 S.W.2d 16 (Tex. App.—Tyler 1986, writ ref'd n.r.e.).**
In balancing the equities in this case as required, the court found the permanent injunction was proper. Refer to Section IV.C.5 of this article for discussion.

13. ***DeNina v. Bammel Forest Civic Club, Inc.*, 712 S.W.2d 195 (Tex. App.—Houston [14th Dist.] 1986, no writ).**

For injunctive relief, proof of actual damages or irreparable harm not necessary when a substantial breach of the restrictions is shown. Refer to Section IV.F.2 of this article for discussion.

14. ***Hidden Valley Civic Club v. Brown*, 702 S.W.2d 665 (Tex. App.—Houston [14th Dist.] 1985, no writ).**

The association brought suit against the Browns for parking their recreational vehicle at their home, allegedly in violation of the restrictions. The trial court denied the temporary injunction, finding that the camper was not a building, structure or mobile home and finding that the action was barred by the four year statute of limitations.

The court of appeals affirmed, holding that the denial of the temporary injunction was proper because the legitimate purpose of the temporary injunction is "merely to preserve the existing condition until a final hearing can be had on the merits." The Browns testified that the camper had been parked on their property for six years prior to this lawsuit. Further, the association was not entitled to a temporary injunction because it failed to establish as a matter of law that the camper constituted a violation of the restrictions and because it failed to prove irreparable harm would result.

G. Contempt Actions

1. ***In re Nunu*, 960 S.W.2d 649 (Tex. 1997).**

The association brought suit against Paul Nunu, an owner in the subdivision (who was also an attorney) for violating various restrictions. The trial court granted an injunction against Nunu. After a hearing on the association's motion for contempt, the trial court ordered Nunu to comply with the injunction within sixty days to be purged of contempt. Otherwise, Nunu would be incarcerated. The final amended commitment order also provided that Nunu "shall be released from jail upon reimbursement of all reasonable and necessary expense incurred by the Association in the removal of items from the property as authorized herein."

The Supreme Court of Texas found that the reimbursement of expenses provision in the final commitment order was in violation of the Texas Constitution in that it resulted in Nunu being imprisoned for debt. The court struck only that portion of the order referring to reimbursement and remanded Nunu to sheriff's custody.

2. ***Ex Parte Guetersloh*, 935 S.W.2d 110 (Tex. 1996).**

The association filed suit against the property owner seeking an injunction prohibiting various nuisance activities, including operating a commercial junk yard and fireworks stand, failure to mow and maintain the property, failure to obtain approval for construction, as well as posting derogatory signs directed towards the association's officers and directors. The trial court granted the injunctive relief and the property owner appealed.

During the pendency of the appeal, the association filed a motion for contempt. The court of appeals affirmed the trial court's decision as to all but the signage. The court ordered that the motion carried with the appeal as all of the issues raised by the property owner on appeal were the same as those in his defense to the motion for contempt. The court found contempt and sentenced the property owner to jail as follows: (1) ninety days for the sale/storage of fireworks; (20 thirty days for burning garbage; and (3) 180 days for permitting workers to pour the slab of a four-plex building on the property and continuing with the construction without architectural control committee approval (to be served concurrently).

In a habeas corpus proceeding, the Supreme Court of Texas upheld all of the sentences except the 180-day sentence. The court held that the 180-day sentence was void because the construction actually began shortly prior to the existence of the trial court's injunction. This, the Court said, was wrongfully punishing the property owner for an act that occurred prior to the injunction. The Court noted that if the court of appeals would have listed the correct dates in order and only sentenced the property owner for continuing with the construction after the injunction date, the 180-day sentence would not have been void.

3. ***Ex Parte Alloju*, 907 S.W.2d 486 (Tex. 1995).**

The homeowners association obtained a judgment against Alloju in justice court for unpaid maintenance assessments and related charges. When Alloju refused to answer post-judgment

interrogatories, the association obtained an order compelling him to answer them within ten days and pay additional attorney's fees. When Alloju again refused to comply, the justice court held him in contempt. Alloju was not present for the contempt hearing. Alloju then challenged the jurisdiction of the justice court on appeal. Initially, the court of appeals released Alloju on bond, then later, holding the justice court did have jurisdiction, denied the writ, revoked the bond and ordered Alloju remanded to sheriff's custody.

In a habeas corpus proceeding, the Supreme Court of Texas released Alloju, holding that a person may not be held in contempt if not present at the hearing. The Court held that the court should have instead issued a capias or writ of attachment to bring the alleged contemnor before the court.

H. Class Action Litigation

1. ***Hardy v. Wise*, 92 S.W.3d 650 (Tex. App.—Beaumont 2002, no pet.).**

There were approximately 20 separate sections of Horseshoe Lakes subdivision and approximately 1,550 individual deeds. Each property owner took under a unique chain of title. Only about 300 of the lots had restrictive covenants in the deed records. The association and some property owners brought a putative class action against other property owners to determine the validity of claimed restrictive covenants and to collect assessments considered past due. The trial court certified two classes: Class A ("the plaintiff class") was defined as those lot owners supporting the association's requests set out in its petition; and Class B ("the defendant class") was defined as those lot owners opposing the requests set out in its petition. Attached to the association's petition were lists of those persons in Class A and those in Class B. Class B members were provided with notice of class certification that informed them of their potential liability for the plaintiff's attorney's fees and costs. At trial the association relied on matters not recorded in the deed records, such as letters from the original developer and the doctrine of negative reciprocal easements, in support of its authority to make and collect assessments.

The trial court entered judgment in favor of the association and entered monetary judgments against those listed in Class B, but monetary judgments were also entered against "delinquent" lot owners who were listed in Class A and part of the plaintiff class. While the case was on appeal, the parties reached an agreement and the association asked that the judgment be set aside. The court of appeals vacated the judgment and remanded the case. The trial court held hearings, removed the association as representative of the plaintiff class, appointed new class representatives for the plaintiff class, then entered substantially the same judgment. The association and the named representatives of the defendant class appealed.

The court of appeals found that failure to comply with the requirements for class actions as set forth in Tex. R. Civ. P. 42 resulted in a denial of due process, and thus reversed and remanded. First, the court reasoned that "state of mind" could not be employed to define the classes. Under Rule 42, one of the prerequisites to a class action is a "cognizable" class—an identifiable class susceptible to precise definition. Further, class members must be ascertainable by reference to objective criteria for a class to be sufficiently defined, and "state of mind" is a subjective criterion. The court also noted that it is generally not feasible to identify class members based on each individual's state of mind because it would require inquiry into each member's thoughts, and those thoughts may change. Here, the record demonstrated that the lot owners could not readily be divided into those favoring and those opposed to the association's claims. Second, because there were separate factual issues applicable to each individual member of the classes, the court found that class action treatment was inappropriate. The court recognized that some cases have stated that generally the construction of restrictive covenants is uniquely suited for a class action, but felt that many relevant issues required individual determination, such as notice of and the existence of the covenants and the validity of the assessments. Finally, the court found that due process had been denied to those absent members of the plaintiff class who were cast in judgment after the trial. The court reasoned that: (1) persons are generally not bound by judgments to which they are not a party; (2) assessments for subdivision maintenance dues have been held to be covenants running with the land

enforceable by the remedy of foreclosure; and (3) generally due process requires that parties must be served with process or given proper notice reasonably calculated to give them the opportunity to present defenses and objections.

2. ***Dahl v. Hartman*, 14 S.W.3d 434 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**
Spring Branch Estates II was a deed restricted subdivision platted in 1949 for single family residences. The restrictions expired by their own terms on January 1, 1997, and there were no internal provisions that described how the restrictions would be renewed. Before the restrictions lapsed, members of the community formed a committee to circulate several petitions to allow the deed restrictions to be renewed. The group also desired to form a homeowners association as a non-profit corporation. The committee was successful in organizing the association and the deed restrictions were extended. Dahl was a resident of the subdivision and filed a declaratory judgment action against the new association and the committee, alleging that the committee did not properly follow the Tex. Prop. Code in extending the restrictions or forming the association. He also claimed that portions of Chapter 204 of the Tex. Prop. Code were unconstitutional. The defendants claimed that the 333 real property owners in the subdivision were necessary parties to the suit who had not been served by Dahl. The court abated the case and gave Dahl ninety days within which to serve all affected property owners. Dahl failed to serve the other homeowners and did not comply with the court's order. Because Dahl didn't serve all property owners, the trial court dismissed the case, including his constitutional challenge, but without prejudice.

The court of appeals affirmed the trial court decision. The case was brought under the Texas Uniform Declaratory Judgment Act. Tex. Civ. Prac. & Rem. Code Ann. § 37.006(a) provides that "all persons who have or claim any interest that would be affected by the declaration must be made parties." Because the trial court found that the invalidation of the deed restrictions would affect the property interests of all real property owners in the subdivision, the court did not abuse its discretion in ordering Dahl to make them parties. But Dahl alleged that the Tex. Prop. Code made the association the representative of all property owners in the community, and therefore, service on the association (as a non-profit corporation) effectively constituted service on each member. The association argued that Chapter 204 does not create a mandatory, affirmative duty for the association to represent each real property owner, but gives it the power to represent each owner on a permissive basis. The only mandatory power under Chapter 204 is the power to approve and circulate petitions relating to changing existing deed restrictions. The court noted, however, that Tex. Prop. Code Ann. § 201.010(b) states that all property owners in a community must be made parties in a declaratory judgment action challenging deed restrictions. The court held that all members of the association were necessary parties even though they were "represented" by the association. Dahl pointed out that typically service on a corporation makes individual service on its shareholder unnecessary. The court responded that the interests affected by Dahl's suit were both corporate and personal and, therefore, each individual homeowner had to be served with notice of the suit. Finally, Dahl argued that the trial court abused its discretion by dismissing his challenge to the constitutionality of Chapter 204 of the Tex. Prop. Code. The court responded that the dismissal of his underlying claim made the constitutionality claim non-justiciable. Hostile, adverse parties are necessary to make a claim justiciable.

3. ***Riddick v. Quail Harbor Condo. Ass'n*, 7 S.W.3d 663 (Tex. App.—Houston [14th Dist.] 1999, no pet.).**
Riddick purchased a condominium unit from association in 1987. The slab foundation of the condominium unit shifted and moved, causing cracks in the interior and exterior walls of the unit. In 1988, Riddick complained about the foundation problems and the association hired an engineering firm to investigate. The engineering firm recommended removing trees which were draining the soil of water and installing an automatic soaker system to keep the soil at a constant moisture level. The foundation soaker system continued to be used through 1992. The engineering firm reinspected the condominium unit in September of 1992, and noted that there was an improvement in the problem. Riddick filed a lawsuit against the association. Then, two years after his original suit was filed,

Riddick filed his Second Amended Original Petition asking for a declaratory judgment. His request for a declaratory judgment brought in a whole new claim that the association should pay for the damages to his unit caused by the shifting foundation. The association responded by filing a motion for summary judgment alleging that based on the declaratory judgment action, all of the co-owners in the association should be joined as defendants, since the foundation actually was owned in percentage ownership interests by all of the owners in the association, and their maintenance fees would be used to pay Riddick's damages. Riddick did not attempt to join the co-owners or otherwise comply with the law and the trial court granted a partial summary judgment. A partial summary judgment was also granted as to Riddick's Deceptive Trade Practices Act ("DTPA") claims. In September of 1996, the remaining issues were tried to a jury. The jury entered a take nothing verdict on all of Riddick's causes of action. The association had filed a counterclaim for its attorney's fees under the DTPA, alleging that Riddick's suit was groundless, brought in bad faith and for purposes of harassment. The trial court found that the DTPA claim was groundless and brought in bad faith, and awarded the attorney's fees incurred by the association in defending the DTPA claim of Riddick.

The court of appeals affirmed the trial court decision in part and reversed and rendered in part. The court affirmed the partial summary judgment that Riddick could not bring an action against the association under the DTPA, because Riddick was not a consumer entitled to bring a DTPA action as that term is defined in the DTPA. The court found that Riddick's payment of monthly maintenance fees to the association did not constitute a purchase under the DTPA and, therefore, he could not be a consumer. The court also found that his cause of action was barred by the two-year statute of limitations under the DTPA. That two-year period began to run when he first discovered the cracks in his walls. Further, the court stated that mere breach of contract allegation, without more, is not necessarily a "false, misleading or deceptive act" in violation of the DTPA. The court stated that it is critical to differentiate a "mere breach of contract claim" from a breach that involves something more in the way of a misrepresentation or fraud claim to invoke the DTPA. The court also discussed whether Riddick should have joined in his declaratory judgment action all persons who had any interest in the case, i.e., the other co-owners in the condominium association. The court held that because this was a condominium, all condominium owners had an interest in the suit because their maintenance fees would be used to pay Riddick's damages, all co-owners should have been joined as defendants. The court gave a rather detailed explanation of its decision on the declaratory judgment action and differentiated its decision from other Texas cases. Finally, the court reviewed the award of attorney's fees in favor of the association, based upon the bad faith and groundless nature of Riddick's suit. The court reviewed other Texas cases determining whether a DTPA action was groundless or in bad faith. Here, the court found that, because no case existed explicitly holding that the payment of maintenance fees by a homeowner to an association was sufficient to create a "purchase" for DTPA purposes, that Riddick could argue that he was seeking a good faith extension, modification or reversal of existing law. Accordingly, the court reversed the decision of the trial court and stated that the trial court abused its discretion in awarding the association attorney's fees.

4. ***Elm Creek Owners Ass'n v. H.O.K. Invs., Inc.*, 12 S.W.3d 495 (Tex. App.—San Antonio 1999, no pet.).**

In 1992, the association and DL Joint Venture entered an agreed judgment declaring certain land within the Elm Creek Subdivision to be part of a greenbelt subject to passive use restrictions. In 1993, the association sold the property to H.O.K. Investments, Inc. which believed it could develop thirty acres within the greenbelt based on statements made by Elm Creek board members. The membership on the board changed, and Elm Creek sought a declaratory judgment to enforce the 1992 agreed judgment. H.O.K. Investments then filed a bill of review to set aside the 1992 judgment. H.O.K. also alleged breach of contract, misrepresentation and fraud. The two actions were consolidated into one by the trial court. In 1999, H.O.K. alleged that this should be a class action and moved to certify a class of defendants, including current and former owners of property in the Elm Creek Subdivision. At the hearing on the motion,

Elm Creek claimed that H.O.K. had violated due process by failing to tell the potential class defendants about the hearing. In reply, H.O.K. argued no notice was necessary. H.O.K. asserted that in any event, it had satisfied notice requirements by sending the property owners two letters. At the conclusion of the certification hearing, the trial court certified a mandatory class of defendants, divided into three sub-classes. The association appealed, challenging the notification procedure used before the certification hearing.

The court of appeals affirmed the decision of the trial court. The court found that due process does not require pre-certification notice to be sent to mandatory class members. Therefore, the trial court did not abuse its discretion in certifying the class. The court found that post-certification notice is required under the Tex. R. Civ. P.

5. ***Forsyth v. Lake LBJ Inv. Corp.*, 903 S.W.2d 146 (Tex. App.—Austin 1995, writ dism'd w.o.j.).**

Lot owners in the Horseshoe Bay subdivision were divided into two groups: one consisting of developers that supported the restrictions and one that opposed the restrictions. Claiming to represent all Horseshoe Bay property owners in a class action, the latter group sought a declaratory judgment pronouncing certain amendments to the restrictions void, plus damages on behalf of the class. The trial court denied class certification and the group of owners appealed.

The court of appeals affirmed the trial court's denial of the class certification. The court held that the group failed to demonstrate their adequacy of representation. In fact, the number of lot owners in favor of the restrictions actually exceeded the number opposed. The court noted:

> To comply with the adequacy of representation prerequisite, appellants must show that the class representatives will fairly and adequately protect the interests of the class members. This requirement has two basic components: (1) an absence of antagonism between the class representatives and the class members, and (2) an assurance that the representatives will vigorously prosecute the class members' claims and defenses.

I. Proper Parties to Litigation

1. ***Simpson v. Afton Oaks Civic Club, Inc.*, 145 S.W.3d 169 (Tex. 2004).**

Kettering Oaks subdivision consisted of fifty-nine lots restricted by a document filed in 1953 ("1953 Restrictions"). The 1953 Restrictions did not provide for a mandatory homeowners association, but provided a mechanism to create one—property owners could amend the restrictions every ten years during a specified six-month period by a simple majority vote. In 1955, Afton Oaks organized a homeowners association for the subdivision. Membership was voluntary, with no mandatory assessment provision and no lien rights. In June 1999, rather than wait for the next ten-year window to amend, Afton Oaks sought to create a mandatory homeowners' association pursuant to Chapter 204 of the Tex. Prop. Code. Tex. Prop. Code Ann.§ 204.006(a) provides that:

> If existing restrictions applicable to a subdivision (i) do not provide for a property owners' association and (ii) require approval of more than 60 percent of the owners to add to or modify the original dedicating instrument, a petition to add to or modify the existing restrictions for the sole purpose of creating and operating a property owners' association with mandatory membership, mandatory regular or special assessments, and equivalent voting rights for each of the owners in the subdivision is effective…

The rest of § 204.006 lists certain procedural requirements that must be in the amendment process. Afton Oaks, following this procedure, established a petitioning committee and circulated a petition. In May 2000, Afton Oaks filed a petition with the county real property records with signatures of thirty-eight of the fifty-nine lot owners. The petition amended the 1953 Restrictions and created a homeowners association with mandatory membership and the authority to establish and collect mandatory assessments. Simpson, a property owner in the subdivision, filed suit, asking the trial court: (1) to declare the

amending petition null and void; (2) to issue a permanent injunction prohibiting Afton Oaks from establishing, collecting, or attempting to collect assessments against property in Kettering Oaks in reliance on the amending petition; and (3) to grant a money judgment against Afton Oaks for assessments wrongfully collected. The trial court granted summary judgment in favor of Afton Oaks, and Simpson appealed.

The court of appeals dismissed the case for want of jurisdiction. The court held that the trial court lacked jurisdiction to hear the suit because necessary parties were not joined. The court reasoned that a declaratory judgment rendered in the absence of the other property owners would have prejudiced the unjoined property owners' rights and interests.

The Supreme Court of Texas reversed and remanded the case to the court of appeals to consider the merits of Simpson's appeal. The Court stated that their decision in *Brooks v. Northglen Ass'n* governed the case at bar because, as in *Brooks*, Afton Oaks raised its jurisdictional argument for the first time on appeal. Thus, failure to join other landowners in a property owner's action did not deprive the trial court of jurisdiction. The Court reiterated its holding in *Brooks*, in which the Court reasoned that a declaratory judgment action against a property owners association would not prejudice the rights of the other property owners because the suit would not bind unjoined owners, and nothing prevented the trial court from rendering complete relief to those parties before it. If the association was exposed to multiple suits, they were the result of its own inaction, because the association could have sought relief at trial by urging the trial court, among other things, to abate the case, join absent homeowners, or grant special exceptions. Here as in *Brooks*, the Court rejected the notion that fundamental error excused the association from bringing the issue to the trial court's attention. Accordingly, the association waived any objection by challenging jurisdiction for the first time on appeal.

On remand from the Supreme Court of Texas, the court of appeals reversed the judgment of the trial court and remanded the case. ***Simpson v. Afton Oaks Civic Club, Inc.*, 155 S.W.3d 674 (Tex. App.—Texarkana 2005, pet. denied).** In reversing, the court considered whether Afton Oaks lawfully amended the 1953 Restrictions. The key question was whether or not the subdivision could use the procedures set forth in Tex. Prop. Code Ann. § 204.006 to amend the 1953 Restrictions, when those restrictions provided a different, and specific, procedure to be followed in making such an amendment. Despite the fact that the 1953 Restrictions did not provide for a property owners association, they *did* provide that to amend the restrictions only a simple majority was required—not more than sixty percent. Here, the second prong of § 204.006(a) was not satisfied ("[i]f existing restrictions applicable to a subdivision…require approval of more than 60 percent of the owners to add to or modify the original dedicating instrument…"). Therefore, the court determined that the Tex. Prop. Code did not support the petition filed in this case. Afton Oaks suggested that, because the 1953 Restrictions set out a specific (and arguably unfavorable) window for amendments—six months every ten years—the procedures in the Tex. Prop. Code should take the place of the procedures set out in the 1953 Restrictions. The court found no support for this argument; in fact, the Code specifically states otherwise. § 204.003 of the Code provides that if the document creating the restrictions contains an express designation setting out procedures to follow in amending or modifying the existing restrictions, the document prevails over the Code. The court found that: (1) Afton Oaks did not qualify to use the procedures set forth in Tex. Prop. Code Ann. § 204.006 to amend the restrictions; and (2) that they did not amend the 1953 Restrictions according to the procedures provided in those restrictions.

2. ***Brooks v. Northglen*, 141 S.W. 3d 158 (Tex. 2004).**

Northglen argued to the Supreme Court of Texas that the trial court lacked subject matter jurisdiction because Brooks did not join all Northglen property owners as parties. Northglen did not raise this argument before the trial court or the court of appeals.

The Supreme Court of Texas held that Northglen waived the argument and that the doctrine of fundamental error did not excuse Northglen from raising the argument before the trial court. The

Court also found that the trial court was without jurisdiction to issue a judgment with respect to certain sections of Northglen where there were no plaintiffs, because any judgment with respect to those Sections would be purely advisory. Refer to Section V.A.1 of this article for discussion.

3. ***Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552 (Tex. App. – Houston [1 Dist.] 2005, pet. denied).**

Despite arguments that, under the Declaratory Judgment Act, failure to join all homeowners as parties to the original action deprived the trial court of jurisdiction, the court held that in light of case law the trial court held subject matter jurisdiction over the dispute. In addition, the court held that WWCH had organizational standing to bring suit. Refer to Section V.D.2 of this article for a more thorough discussion.

4. ***April Sound Mgmt. Corp. v. Concerned Prop. Owners for April Sound*, Inc., 153 S.W.3d 519 (Tex. App.—Amarillo 2004, no pet.).**

April Sound Subdivision and April Sound Country Club were developed together in 1972 by joint venture, with Southwest Savings as the original developer, to be part of a master-planned community. The restrictions contained provisions creating a maintenance fund by imposing a maintenance charge to be assessed to each lot in the subdivision. Pursuant to the restrictions, each lot was subject to an annual maintenance charge that included amounts relating to recreational facilities payable monthly to April Sound Recreation Corp. ("Recreation Corp."). Also, the restrictions provided in part that: (1) the maintenance charges collected would be paid into a maintenance fund to be held and used for the benefit of the subdivision; (2) the maintenance fund could be expended by the developer for any purpose which, in its judgment tended to maintain the property values in the subdivision and such a decision was final as long as it was made in good faith; (3) the maintenance charge included a sum to be determined by the Board of the association (the "property charge") and a sum to be determined by the Board of the country club (the "recreational charge"); (4) Recreation Corp. could add an additional sum to the recreational charge as in its judgment was necessary to carry out the objectives for which the maintenance charge was to be used; (5) the recreational charge was secured by the lien referred to in the deed restrictions. Further, the restrictions recognized the right of the Board of Recreation Corp. to determine and assess the exact amount of the maintenance charge and recreational charge and set the amount of the initial monthly charge, including the recreational charge, at $12.00 per month. In the late 1970's, Southwest Savings transferred its rights in the recreational facilities and the maintenance fund to the Recreation Corp. Subsequently, April Sound Management Corp. ("Mgmt Corp.") purchased the recreational facilities, and in connection with the acquisition, began administering the operations of the association and the subdivision infrastructure. Southwest Savings subsequently changed its name and was then succeeded by the FDIC. Concerned Property Owners for April Sound, Inc. ("CPO") claimed that after all or substantially all of the lots were sold, pursuant to the provisions set forth in the restrictions, the FDIC transferred all of the duties and prerogatives of the developer to CPO. Contending it had succeeded to the status and rights of the original developer, CPO filed suit against Mgmt Corp. seeking declaratory relief. CPO then filed a motion for summary judgment. Mgmt Corp. filed its response and a motion to abate the proceeding. Mgmt Corp. then filed a second motion to abate. CPO then filed another motion for summary judgment in order to address Mgmt Corp.'s counterclaim.

The trial court granted the summary judgment motion and declared that CPO, as developer, could, pursuant to the restrictions, at any time, and from time to time, adjust, alter, waive, discontinue, or abandon all or any part of the maintenance charge including without limitation, the recreational charge and the possible "additional charge." The judgment further declared that if CPO discontinued or abandoned the recreational charge, there could be no basis for any "additional" charges to be added to the recreational charge. Mgmt Corp. appealed.

The Court of Appeals reversed and rendered in part and otherwise remanded. Mgmt Corp. argued that the trial court erred by: (1) refusing to abate the lawsuit until the lot owners in the subdivision and

the association were properly joined in the lawsuit; and (2) by granting declaratory relief when all persons who have or claim any interest that would be affected by the declaration were not made parties to the lawsuit as required by Tex. Civ. Prac. & Rem. Code Ann. § 37.006. The court agreed—abatement of an action is proper where it is apparent that all parties whose interest would be affected by the action have not been made parties. Here, without joining the owners of the lots in the subdivision, CPO, sought and obtained an order declaring that pursuant to the deed restrictions it could, at any time and from time to time, adjust, alter, waive, discontinue, or abandon all or any part of the maintenance charge and recreational charge. § 37.006(a) provides: [w]hen declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding." Applying rules of statutory construction, the court noted that "must" creates a condition precedent—if the owners of the lots in the subdivision "would be affected" by the declaratory judgment sought and ordered, they "must" be joined as parties and the suit should have been abated. Because no bright-line rule exists to determine whether the lot owners should have been made parties, the court considered the declaration made by the trial court in the context of the deed restrictions and applicable property law. The rules governing the amenities and recreational facilities associated with the use and enjoyment of real estate should be definite and certain so as to lend stability and predictability of land titles. Construing the deed restrictions in light of the intent of the plan for development of the subdivision, the recreational opportunities presented by the development were designed to provide the owners with significant rights, benefits, and recreational opportunities incidental to ownership of property in the development. The general rule that some of the owners of property in a subdivision may not release or modify applicable restrictions without the concurrence of others who own property in the subdivision is grounded upon the vesting of rights and privileges in lots in common with other lot owners in the subdivision. The court pointed out that CPO's action for declaratory judgment was not a suit against a lot owner to enforce compliance with one or more lot restrictions, which would not implicate rights of other lot owners. Instead, it was an action for a declaration that the developer has the power to adjust, alter, waive, discontinue, or abandon all or any part of the recreational charge notwithstanding the provision in the restrictions that the recreational charge was to be determined by the Board of the country club. The declaratory relief sought by CPO implicated significant incidental rights of the owners of lots in the subdivision. Thus, considering that property rights are fundamental and the benefits that would be achieved by stabilizing uncertainty regarding deed restrictions, and because the interests of non-party lot owners would be affected by the declaration, the court held that the trial court erred in not granting Mgmt Corp.'s plea in abatement as required by § 37.006(a). The court explained that its disposition on these issues disposed of the remainder of the appeal.

5. ***Truong v. City of Houston*, 99 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2002, no pet.).**

The deed restrictions for the subdivision provided in part that: (1) lots were restricted to residential use only; (2) releases needed approval from more than 50% of the owners of the front footage lots; and (3) releases from the deed restrictions had to be executed in writing at least two years before "the expiration of any fifteen (15) year period thereafter." Mandujano's predecessor in interest operated a commercial enterprise on a subdivision lot, obtained permits from the City of Houston to do so, and received inspections from various city departments between 1976 and 1994. Mandujano purchased that lot in 1995 and from that time on paid license fees, permit fees, sales fees and occupancy taxes to the city. Giron purchased a subdivision lot in 1995 and received a permit from the city to operate a commercial enterprise on the property in 1996. Since that time, Giron continuously posted a sign in conformity with the permit. The Truongs purchased a subdivision lot in 1997 and obtained occupancy and sign permits, as well as building permits authorizing the construction of a commercial structure on their property. They allegedly spent $50,000 to make commercial renovations. When obtaining the various permits, Mandujano, Giron, and the Truongs (collectively, "the Appellants") all swore that they were personally familiar with the title to

the real property and that there were no deed restrictions that prohibited the issuance of the permits. Additionally: (1) Mandujano agreed in her occupancy permit application that if her occupancy violated a deed restriction the permit was void; (2) Giron's sign permit application stated: "the sign does not violate any applicable deed restrictions;" and (3) Mr. Truong's affidavit for a commercial building permit stated: "I swear that neither the improvements to be constructed under the building permit, if issued, nor the intended use will violate any deed restrictions." The city, pursuant to the authority granted to it under Tex. Loc. Govt. Code Ann. §§ 212.131-133 brought suit against the Appellants to enforce the deed restriction. Specifically, the city sought to enjoin the Appellants from any commercial activity on their property. In their answer, the Appellants raised several affirmative defenses, some of which were based in equity. The city moved for summary judgment and the trial court granted the motion.

The court of appeals noted that Tex. Loc. Govt. Code Ann. § 212.137 was amended to specifically state that a municipality is acting in its governmental capacity when it sues to enforce a land use restriction. However, the court held that the legislation had no application to the case because the amendment became effective while the case was pending. The court instead analogized the city's enforcement of the deed restrictions in accordance with principles of zoning and land-use regulation powers, which have long been held to be governmental functions. Accordingly, the court held that the city's action in enforcing the residential use-only deed restriction was a governmental function. Further, the court noted that governmental functions are generally not subject to affirmative defenses. After finding that the city was serving in its governmental function when enforcing the deed restrictions, the court addressed the merits of the Appellants' affirmative defense of estoppel. Appellant's asserted that they relied on the non-enforcement of the deed restrictions. Affirmative defenses based in equity have been consistently held not to apply when the activity complained of is a governmental function, but a limited exception has been recognized in some circumstances where an equitable estoppel claim has been raised. The court applied a "totality of the circumstances" test to determine if justice required that the Appellants be allowed to pursue their claim of estoppel, taking into consideration the conduct of both parties and noting that a party with "unclean hands" would not be permitted to pursue equitable relief. The court concluded that manifest injustice would not occur if Appellants were barred from pursuing their equitable estoppel claim. Although the Appellants may have relied on permits that authorized their commercial activities, the permits were acquired through misrepresentations. Additionally, the court noted the short amount of time that the Appellants had been operating their businesses in violation of the deed restrictions—where the city attempted to enforce the deed restrictions within five years of the purchase of the property, the court was hesitant to find reliance on the part of the Appellants to the extent that a "manifest injustice" would occur if they were not permitted to pursue their estoppel claim. Accordingly, the court held that the trial court did not err in granting summary judgment against the Appellants' equitable affirmative defenses. Appellants argued that the variances granted to them by the property owners' association released them from the deed restriction, thus making summary judgment for the city inappropriate. The court found that the documents given to the Appellants by the association were not variances—a variance is an authorization for a use of real property in a manner prohibited by a zoning ordinance. While enforcement of deed restrictions by the city was similar to the enforcement of zoning laws, there were no ordinances that governed the use of the land in this dispute. Thus, the court held the trial court did not err when finding that Appellants did not raise an issue of material fact by presenting proof of "variances" from the association. Appellants argued that because Tex. Prop. Code Ann. § 204.010 allows an owners' association to compromise or settle litigation, the alleged variances granted to them by the Association acted as a settlement or compromise of the suit brought by the city. The court found that there was no statutory authority given to the association to allow land use forbidden by an ordinance. The city sued Appellants pursuant to Tex. Loc. Govt. Code Ann. §§ 212.131-133, which provides that a non-zoned, incorporated city has the power to sue to enforce any restriction contained or incorporated by reference in a recorded plan, plat,

replat, or other instrument affecting a subdivision inside the city's boundaries. Reading the two statutes in harmony with each other, the court found that owners' associations may compromise litigation on behalf of subdivision homeowners, but not on behalf of parties who are not subdivision owners. To find otherwise would create an absurd result—any private party who brought a lawsuit that affected matters of the subdivision could have his suit settled or compromised by an owners' association without any authorization from the party that brought the suit. Appellants argued that proof of releases from various property owners raised an issue of fact, thus making summary judgment in favor of the city inappropriate. The court disagreed and held that the trial court did not err in finding that Appellants did not raise an issue of fact with proof of their invalid releases. First, property owners in a subdivision may not grant releases of deed restrictions without the agreement of the other owners within the subdivision. Second, a restrictive covenant may provide for amendments to the deed restrictions, but the method of amendment must be stated. Here, the applicable deed restriction provided that releases must be executed in writing before at least two years before "the expiration of any fifteen (15) year period thereafter." The applicable fifteen-year period ended on August 24, 2000 and Appellants did not receive their releases before August 24, 1998. Conceding that the releases granted to them were not timely, Appellants argued that the purpose of the two-year period was to provide notice to the other residents of the changes that were authorized, and that because the property had previously been used for business purposes, the two-year requirement should be waived. But the court disagreed—ongoing violations of deed restrictions do not inform property owners that their rights are being affected in the same manner that valid releases do. Applying rules of contract construction and interpretation, the court found the restrictive covenant to be unambiguous in its requirement that the releases be in writing and executed at least two years before the expiration of the applicable fifteen-year period. Relying on Tex. Civ. Prac. & Rem. Code Ann. § 37.006, Appellants argued that summary judgment was wrong because the city failed to join the owners of all subdivision lots as parties. The court explained that § 37.006 did not govern the case because the suit brought by the city was not a declaratory action. Instead, joinder of parties was governed by Tex. R. Civ. P. 39(a). Thus, the proper procedural tool to raise the issue of defect in parties was a motion to abate and as to this issue the Appellants failed to preserve error. Appellants also argued that the trial court erred by granting summary judgment in favor of the city because the court failed to balance the equities. The court had already considered the totality of the circumstances and concluded that Appellants' should not be able to proceed with an estoppel defense because of their admitted violation of the deed restrictions and their deceptive obtainment of permits. Thus, the court concluded that the Appellants' own conduct foreclosed any responsibility of the trial court to balance the equities. Accordingly, the court held that the trial court properly rendered summary judgment in favor of the city.

6. ***Dahl v. Hartman*, 14 S.W. 3d 434 (Tex. App.—Houston (14th Dist.) 2000, pet. denied).**

Trial court dismissed declaratory judgment action filed by resident against property owners association. The court of appeals affirmed. The lawsuit claimed that the association did not follow the Tex. Prop. Code in extending deed restrictions and those certain Code provisions were unconstitutional. The court of appeals held that the trial court did not abuse its discretion in finding that all property owners in subdivision were necessary parties to the owner's declaratory judgment action. The trial court found that invalidation of the deed restrictions would affect the property interests of all real property owners in the community and, therefore, all owners were necessary parties. Refer to Section VI.H.2 of this article for discussion.

7. ***Jim Walter Homes v. Youngtown, Inc.*, 786 S.W.2d 10 (Tex. App.—Beaumont 1990, no writ).**

Nearly a year after the Edwards purchased a lot in the restricted subdivision, they contracted with Jim Walter Homes ("JWH") for construction of a home on the lot. JWH began construction and shortly thereafter stopped construction, informing the Edwards that they were in violation of certain restrictions. The Edwards went to the developer and contended that they were given permission to proceed. The Edwards and JWH made an agreement whereby JWH would be held harmless from any

expense arising out of possible litigation. JWH resumed construction and completed the house in spite of the fact that they were sent notice from the developer requesting them to cease construction and remove the house. The developer sued JWH and the Edwards, whom the trial court found to be jointly and severally liable for damages. The judgment also ordered removal of the house.

On appeal, JWH contended that it was not liable as it had no ownership interest in the subject property and the court of appeals agreed. Restrictive covenants which run with the land are created only by parties in privity of estate and bind subsequent vendees. Accordingly, a builder could not be held liable to the subdivision developer for violation of the deed restrictions in constructing the house since the builder had no ownership interest. In dicta, the court discussed the possibilities of a tortious interference by a business relationship against JWH. This could not be considered on appeal, however, because the issue was not mentioned at trial.

8. ***Wohler v. La Buena Vida in W. Hills, Inc.*, 855 S.W.2d 891 (Tex. App.—Fort Worth 1993, no writ).**
Beneficiaries to trusts are not necessary parties. Refer to Section V.A.7 of this article for discussion.

J. Res Judicata

1. ***Gaughan v. Spires Council of Co-Owners*, 870 S.W.2d 552 (Tex. App.—Houston [1st Dist.] 1993, no writ).**
Gaughan bought three condominium units from the developer, Century Condominium Ltd. and then failed to make any mortgage payments or maintenance assessment payments. Century foreclosed and then sued Gaughan for the deficiency, which suit was ultimately settled. The association then brought suit against Gaughan for the unpaid maintenance assessments. Gaughan claimed the action was barred by res judicata because of the settlement of the deficiency suit.

The court of appeals held that res judicata did not apply in this case as the subject matter of the suit to collect assessments had little or nothing to do with the subject matter of the deficiency suit. The court stated that the two claims were separate and distinct and should not have been brought in the same litigation as contended by Gaughan.

K. Notice

1. ***H.H. Holloway Trust v. Outpost Estates Civic Club Inc.*, 135 S.W.3d 751 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).**
Despite the fact that that the reference to the location of the recorded restrictions on purchaser's deed was incomplete, the statement was found to be sufficient to put a subsequent purchaser on notice that there were restrictions that applied to the property. Refer to Section II.B.2 of this article for discussion.

2. ***Lee v. Perez*, 120 S.W.3d 463 (Tex. App.—Houston [14th Dist.] 2003, no pet.).**
The court of appeals refused to impose an irrebuttable presumption of notice on parties other than the purchasers of real property. Commercial lessee was not charged with constructive notice of recorded deeds restricting the leased lots to residential uses, and thus, lessee was not precluded from bringing action against lessors for breach of implied warranty of suitability for commercial purpose. Refer to Section IV.A.3 of this article for discussion.

3. ***Herman v. Shell Oil Co.*, 93 S.W.3d 605 (Tex. App.—Houston [14th Dist.] 2002, no pet.).**
Empire granted Shell an option to buy a .6887 acre strip of land in Harris County. The option provided that, if exercised, no other gas stations would be allowed on the surrounding eight-acre tract owned by Empire. Empire subsequently sold thirty-three acres, including the option tract, with the deed expressly subject to Shell's option. The property was then sold to Corum with the deed expressly subject to Shell's option. In March 1985 Corum transferred 20 acres (excluding the option tract) to Corum/Micro with the deed expressly subject to Shell's option. In July 1985, Corum deeded the .6887 acre tract to Shell after the option was exercised. The deed contained a restriction on gas stations that extended to all of Corum/Micro's twenty acres, rather than just the eight acres originally covered by the option. This deed, like all of the others, was recorded. In 1989, Corum/Micro conveyed its twenty acres to Westside, but the deed made no reference to the restriction. That same day, Westside re-conveyed the property to Herman,

again without reference to the restriction. Herman developed the property as a shopping center. Herman alleged that his largest tenant refused to renew its lease in 1998-99 because it could not develop a gas station on the premises. In 1999, Herman sued Shell to declare the restriction inapplicable to his property. He amended his petition to claim damages for slander of title and cloud on title due to the loss of the lease. Both parties moved for summary judgment. The trial court held the land use restriction was valid.

The court of appeals affirmed the trial court's judgment that the restriction applied to eight acres of Herman's tract. Herman argued that he had no notice of the option because it was not in his deed from Westside, nor in Westside's deed from Corum/Micro. The court held that any mistakes made in drafting those deeds did not invalidate Shell's rights because purchasers are charged with knowledge of the provisions of recorded instruments that form an essential link in their chain of ownership. Herman could not claim lack of notice because it was undisputed that the option was in his chain of title. Herman also argued that because Corum's deed to Shell was signed after the adjacent property was transferred to Corum/Micro, his interest passed without encumbrance of the restriction. The court disagreed. While the provision in Corum's deed to Shell was outside his chain of title, the option was not. Review of the deed records would have shown the property was subject to the option, and reasonable inspection would have shown Shell had exercised it. Thus, Herman had constructive notice of the option and restriction. Herman also argued that Shell could not rely on the option agreement because it was only a promise to impose a restriction rather than a restriction itself. The court found that either would create a valid cloud on Herman's title and defeat his claim for damages. Finally, Herman argued that the option was void because Shell failed to exercise the option in accordance with its terms—the restriction was extended beyond the eight acres in the original option. The court disagreed. Generally, parties to an option to purchase real property can only enforce the option by strict compliance with its terms, but the parties can modify the option or the terms of the underlying sale by mutual agreement. Additionally, the court noted that Shell only sought to enforce the restriction against the original eight acres, and the trial court did not extend judgment any further.

4. ***Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487 (Tex. App.—Texarkana 2002, pet. denied).**
A purchaser of real property is charged with knowledge of the provisions and contents or recorded instruments. Refer to Section IV.I.1 of this article for discussion.

5. ***A.C. Musgrave, Jr. v. Owen*, 67 S.W.3d 513 (Tex. App.—Texarkana 2002, no pet.).**
Owner of property was put on constructive notice of the contents of agreement filed of record prior to purchase. Refer to Section II.C.3 of this article for discussion.

6. ***Village of Pheasant Run Homeowners Ass'n, Inc. v. Kastor*, 47 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).**
A person who buys land is deemed to have constructive notice all recorded instruments. The court distinguished the holding in *Catalina Square Imp. Comm. v. Metz*, 630 S.W.2d 324 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd), based upon the discussion in the *Pilarcik* case that the term "altered" applies to changes in existing construction and that such changes can require approval and here the exterior alteration was substantial as opposed to that in *Catalina*. Refer to Section IV.E.5 of this article for discussion.

7. ***Elm Creek Owners Ass'n v. H.O.K. Invs., Inc.*, 12 S.W.3d 495 (Tex. App.—San Antonio 1999, no pet.).**
Right to notice and a hearing is not a protectable property interest; notice and a hearing are the process used to protect a property interest, not the interest itself. Refer to Section VI.H.4 of this article for discussion.

8. ***Ashcreek Homeowner's Ass'n, Inc. v. Smith*, 902 S.W.2d 586 (Tex. App.—Houston [1st Dist.] 1995, no writ).**
Owners that were in violation of restrictive covenants were required to receive notice of violation in question prior to litigation. Refer to Section VI.B.21 of this article for discussion.

9. ***Simms v. Lakewood Village Prop. Owners Ass'n, Inc.*, 895 S.W.2d 779 (Tex. App.—Corpus Christi 1995, no writ).**
Owners were put on notice of restrictions prior to their recordation due to general plan and scheme of subdivision. Refer to Section III.A.1 of this article for discussion.

10. ***City of Houston v. Muse*, 788 S.W.2d 419 (Tex. App.—Houston [1st Dist.] 1990, no writ).**
Owners had actual and constructive notice of restrictions. Refer to Section IV.A.9 of this article for discussion.

11. ***Urban Renewal Agency of San Antonio v. Bridges Signs, Inc.*, 717 S.W.2d 701 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).**
Bridges applied for governmental permits to build a billboard. Maps provided to the governmental agencies by the Urban Renewal Agency ("URA") mistakenly showed that the area for the proposed billboard was not within the URA's urban renewal project. The permits were issued and Bridges built the billboard. The URA, citing restrictions against new billboards in the area, sued for injunctive relief. The jury found that Bridges knew or should have known about the restriction and that Bridges was not excused from the restriction. The trial court disregarded the jury's findings and entered a judgment in favor of Bridges notwithstanding the verdict.

The court of appeals found that the trial court's judgment was improper and reversed and remanded with instructions to grant permanent injunction against use of the property in violation of the URA's restrictions. Because the deed of conveyance and the contract for sale both clearly indicated that the property was within the project, the court found as a matter of law that Bridges had actual notice that the restrictions applied to the property. Further, had Bridges made a reasonable inquiry, it would have learned of the restriction against new billboards.

12. ***Hicks v. Loveless*, 714 S.W.2d 30 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).**
Although restrictions were not filed until after property purchased, purchaser had actual knowledge of restrictions to be filed and was therefore bound. Refer to Section IV.A.13 of this article for discussion.

13. ***Whiteco Metrocom, Inc. v. Indus. Props. Corp.*, 711 S.W.2d 81 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).**
Even though there was no prohibition against the erection of a billboard in the restrictions, the restriction requiring prior approval of the billboard was valid. Refer to Section IV.E.11 of this article for discussion.

14. ***Preston Tower Condo. Ass'n v. S.B. Realty, Inc.*, 685 S.W.2d 98 (Tex. App.—Dallas 1985, no writ).**
Tenants put on notice of restrictions by clause in lease obligating tenants to comply with restrictions, necessitating a duty to inquire about same. Refer to Section IV.G.2 of this article for discussion.

L. Ratification

1. ***Ostrowski v. Ivanhoe Prop. Owners Improvement Ass'n, Inc.*, 38 S.W.3d 248 (Tex. App.—Texarkana 2001, pet. denied).** Issue of fact existed regarding ratification, therefore, issue was severed and remanded. Refer to Section V.D.6 of this article for discussion.

2. ***Samms v. Autumn Run Cmty. Improvement Ass'n, Inc.*, 23 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).**
The court of appeals found that the association acted within the bounds of the deed restrictions, and therefore defendants were never in a position to repudiate the association's actions; therefore, the association was never in a position to ratify. Refer to Section V.D.7 of this article for discussion.

3. ***Caldwell v. Callender Lake Prop. Owners Improvement Ass'n*, 888 S.W.2d 903 (Tex. App.—Texarkana 1994, writ denied).** Owners ratified actions of association and, therefore, could not otherwise complain of actions of association. Refer to Section VI.B.22 of this article for discussion.

M. Rights of Mineral Owner After Estate Severed

1. ***Prop. Owners of Leisure Land, Inc. v. Woolf & Magee, Inc.*, 786 S.W.2d 757 (Tex. App.—Tyler 1990, no writ).**
A group of property owners sued Woolf & Magee, Inc. ("Woolf") seeking a declaratory judgment and

permanent injunction regarding Woolf's construction of an emergency evacuation route from its oil well on two lots in the subdivision. The evacuation route was being constructed in an effort to comply with an order from the Railroad Commission. The restrictions governing the property, filed after the severance of the mineral estate, prohibited the lots from being used for a street, access road, or public thoroughfare, and further restricted the use of the lots to single family residential purposes. The trial court rendered judgment in favor of Woolf, finding that the use was related to the right of the lessee of a severed mineral interest to use the surface estate for access.

On appeal, the property owners argued that although the mineral owner or lessee has the right to reasonably burden the surface estate for the benefit of its own estate, the mineral owner or lessee cannot burden the surface estate of other lots in the subdivision. The court of appeals affirmed the trial court's decision, holding that the mineral owner cannot be limited by surface owners after the estate is severed. Since the restrictions were imposed subsequent to the severance of the mineral estate, they did not determine the scope of the implied surface easements that are incidental to the ownership of the minerals.

N. Tortious Interference with Contract

1. ***Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. P'ship*, 985 S.W.2d 667 (Tex. App.—Corpus Christi 1999, pet. denied).**
The court of appeals found there was no tortious interference with the Cantus' existing leasing contracts or with its contract with management company, because the association was justified under Texas law in interfering with those contracts. Refer to Section IV.I.2 of this article for discussion.

O. Covenants Not to Compete

1. ***Rolling Lands Invs., L.C. v. Northwest Airport Mgmt., L.P.*, 111 S.W.3d 187 (Tex. App.—Texarkana 2003, pet. denied).**
The court of appeals disagreed with appellant's assertion that a fueling rights deed restriction was an unreasonable covenant not to compete and therefore unenforceable. The court held that the fueling rights restriction was a restraint on the use of a single parcel of land and thus should not be reviewed as a non-competition contract. Rather, the deed restriction was a covenant running with the land and should be analyzed as such. Refer to Section II.C.2 of this article for discussion.

2. ***Ehler v. B.T. Suppenas Ltd.*, 74 S.W.3d 515 (Tex. App.—Amarillo pet. denied).**
The court held that Tex. Bus. & Com. Code Ann. § 15.50 (which sets forth the statutory criteria for non-competition agreements) is not applicable to rights and liabilities of property owners. Refer to Section IV.N.1 of this article for discussion.

P. Property Rights

1. ***City of Heath v. Duncan*, 152 S.W.3d 147 (Tex. App.—Dallas 2004, order, pet. requested).**
Both the property owners and the City of Heath owned lots in a subdivision that was restricted to residential use. The city proposed construction of a park on its subdivision land and executed an agreement with the Texas Parks & Wildlife Commission ("TPW"), which provided that the project property would not be converted to anything other than public recreation use. The city then notified TPW that it was going to use a small area of the land dedicated to the park project to construct a water tower. When the property owners learned of the city's change of plans, they sued for injunctive relief to block the construction of the water tower and the park project on the grounds that the plans violated applicable deed restrictions. The city counterclaimed, seeking condemnation of "the real property interests, if any, that the Condemnees have in and to the certain Declaration of Restrictions." The parties entered into a temporary injunction that barred the city from construction on the project until a condemnation award was obtained and deposited into the registry of the court. Special commissioners appointed by the trial court rendered an award in favor of the condemnees. The city and two of the property owners filed objections, which triggered the jurisdiction of the trial court to try the condemnation suit.

The city filed a motion to deposit the award into the registry of the court, and the property owners filed a motion to withdraw the funds. The trial court

ordered that the money be withdrawn. After withdrawal, the property owners amended their petition to seek declaratory relief, a permanent injunction, attorney's fees and damages from the city's alleged violations of the temporary injunction. The city filed a motion to dismiss for lack of jurisdiction, arguing that the property owners lacked standing. The city's motion was denied, and they filed an interlocutory appeal.

The court of appeals affirmed. The city argued that the property owners had no compensable property interest that provided them with standing to seek an injunction or damages. The city argued that there was no controversy to be decided because the deed restrictions were not "property". The city's argument relied *City of Houston v. Wynne*, 279 S.W. 916, 919 (Tex. Civ. App.—Galveston 1925), *writ ref'd per curium*, 281 S.W. 544 (1926), which held that deed restrictions that merely forbid certain uses of land are not compensable property rights. The court felt that the language in *Wynne* relied on by the city needed to be read in the context of the specific facts of that case and noted that the same court held in *City of Houston v. McCarthy*, 464 S.W.2d 381, 386 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.), that damages could be recovered in a condemnation proceeding to acquire such restrictive covenants. The court, agreeing with the holding in *McCarthy*, found that the restriction on the use of the property is a property right for which compensation could be recovered and thus affirmed the trial court's judgment. The city next argued that, by withdrawing the condemnation award, the property owners relinquished any basis for standing "other than the nonexistent compensable property interest." Although both parties agreed that once the award was withdrawn the city's right to violate the deed restrictions could not be contested, the question of the value of the deed restrictions and whether injunctive relief can be supported on grounds other than the deed restrictions remains. Thus, the court held that the property owners have standing to litigate the issue of adequate compensation and the value of the deed restrictions, if any. The city also argued that the property owners lacked standing to seek declaratory and injunctive relief as taxpayers, owners of proximate property, or third-party beneficiaries of the TPW contract. The court did not have to address all three arguments because it held that the property owners had standing as taxpayers. Generally, unless standing is conferred by statute, taxpayers must establish a particularized injury distinct from that suffered by the general public in order to challenge government action. But an exception to the general rule exists—a taxpayer may sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury. Tex. Parks & Wild. Code Ann. § 26.001 requires notice and a public hearing by a municipality before any land dedicated and used as a park can be converted to another type of use. The property owners alleged that the site of the water tower was removed from land previously dedicated for a park and that the city gave no public notice nor held any hearings about the change, as required by the § 26.001. The court held that these circumstances were sufficient to provide the property owners with standing to seek declaratory and injunctive relief under the taxpayer exception without showing of a particularized injury.

Q. By A City

1. ***Truong v. City of Houston*, 99 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2002, no pet.).**

The court of appeals noted that Tex. Loc. Govt. Code Ann. § 212.137 was amended to specifically state that a municipality is acting in its governmental capacity when it sues to enforce a land use restriction. However, the court held that the legislation had no application to the case because the amendment became effective while the case was pending. The court instead analogized the city's enforcement of the deed restrictions in accordance with principles of zoning and land-use regulation powers, which have long been held to be governmental functions. Accordingly, the court held that the city's action in enforcing the residential use-only deed restriction was a governmental function. Refer to Section VI.I.5 of this article for discussion.

2. ***Oldfield v. City of Houston*, 15 S.W.3d 219 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**

The Tex. Loc. Govt. Code states that a municipality "may" sue in any court to enjoin or abate a violation of a restriction contained or incorporated by reference in a plan, plat or other instrument. The

provision does not require the enforcement of the deed restrictions, but gives the city the discretion to enforce them. As a result, the court held Oldfield could assert his defenses against the city just as he would if he were suing a private entity. Refer to Section VI.B.16 of this article for discussion.

[Editor's Note: The portion of the *Oldfield* decision holding that a municipality's enforcement of deed restrictions is a proprietary function has been superceded by statute. Tex. Loc. Govt. Code Ann. § 212.137 was specifically amended in 2001 to clarify that a municipality's enforcement of deed restrictions is a governmental function.]

3. ***Davis v. City of Houston*, 869 S.W.2d 493 (Tex. App.—Houston [1st Dist.] 1993, writ denied).**
City of Houston had authority to enforce a residential use only restriction. Refer to Section IV.A.7 of this article for discussion.

4. ***Young v. City of Houston*, 756 S.W. 2d 813 (Tex. App.—Houston [1st Dist.] 1988, writ denied).**
The City of Houston's enforcement of a residential use only restriction was upheld by the court of appeals. Refer to Section IV.A.11 of this article for discussion.

R. Civil Penalties

1. ***Air Park-Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900 (Tex. App. —Dallas 2003, no pet.).**
The trial court acted within its discretion in denying subdivision zoning committee statutory civil damages for lot owners violation of restrictive covenants, where owners and committee each prevailed on some issues concerning the restrictive covenants and by-laws, where losing other issues. Tex. Prop. Code Ann. § 202.004(c)'s language is permissive in nature and denial of statutory civil damages for violations of restrictions is in trial court's discretion. Refer to Section VI.B.9 of this article for discussion.

2. ***Dickerson v. Debarbieris*, 964 S.W.2d 680 (Tex. App.—Houston [14th Dist.] 1998, no pet.).**
Award of $12,000.00 in damages under Tex. Prop. Code Ann. § 202.004(c) upheld. Refer to Section IV.I.3 of this article for discussion.

S. As Easements

1. ***Hubert v. Davis*, 170 S.W.3d 706 (Tex. App. – Tyler 2005, no pet.).**
Subdivision declaration conveyed an easement rather than a restrictive covenant, and paragraph in the declaration setting forth time limits on restrictions and covenants did not apply to the easement. Refer to Section VI.B.3 of this article for discussion.

2. ***Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Assoc., Inc.*, 178 S.W.3d 384 (Tex. App. – Fort Worth 2005, pet. denied).**
The court held that the Developer did not retain the right to burden the common areas of the subdivision by granting another association an easement, pointing out that only if the Developer followed the specific procedure for amending the restrictions or the plat as set forth in the covenants could it have had the right to create an easement for the benefit of some entity or owner other than the Association and its lot owners. Refer to Section VI.B.2 of this article for discussion.

VII. DEFENSES TO ENFORCEMENT OF RESTRICTIONS

A. Abandonment, Waiver and Laches

1. ***Pilarcik v. Emmons*, 966 S.W.2d 474 (Tex. 1998).**
In order for the waiver defense to be established, evidence of number and severity of other violations must be established. Refer to Section IV.D.1 of this article for discussion.

2. ***Sharpstown Civic Ass'n, Inc. vs. Pickett*, 679 S.W.2d 956 (Tex. 1984).**
Prior identical or insignificant violation of restrictions does not constitute waiver. Refer to Section IV.A.2 of this article for discussion.

3. ***Lee v. Perez*, 120 S.W.3d 463 (Tex. App.—Houston [14th Dist.] 2003, no pet.).**

Deed restriction, limiting lots to residential uses, was not waived, though there was anecdotal evidence of commercial use in the area, where prior tenant on one of the lots left when he received a letter from city objecting to use of lot for a tire business. Refer to Section IV.A.3 of this article for discussion.

4. ***Air Park-Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900 (Tex. App.—Dallas 2003, no pet.).**

The defense of laches may preclude specific performance and enforcement of restrictive covenants. Refer to Section VI.B.9 of this article for discussion.

5. ***Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**
One violation of restrictions does not lead to abandonment of restrictions. Refer to Section VI.F.4 of this article for discussion.

6. ***Oldfield v. City of Houston*, 15 S.W.3d 219 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**
Issue of fact existed (therefore, summary judgment improper) as to whether City of Houston had waived its right to enforce restrictive covenant in question, where insubstantial violation existed on adjoining lot. Refer to Section VI.B.16 of this article for discussion.

7. ***Alma Invs., Inc. v. Bahia Mar Co-Owners Ass'n*, 999 S.W.2d 820 (Tex. App.—Corpus Christi 1999, pet. denied).**
Trial court did not make findings of fact and conclusions of law on affirmative defenses; therefore, defenses waived for purposes of appeal. Refer to Section V.I.1 of this article for discussion.

8. ***Pebble Beach Prop. Owners' Ass'n v. Sherer*, 2 S.W.3d 283 (Tex. App.—San Antonio 1999, pet. denied).**
To establish waiver of restrictive covenants, the property owner has the burden of proving that the property owners' association voluntarily and intentionally relinquished its right to enforce the restrictive covenants, by showing that other violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions been abandoned. Refer to Section IV.C.2 of this article for discussion.

9. ***Cox v. Melson-Fulsom*, 956 S.W.2d 791 (Tex. App.—Austin 1997, no pet.).**
Defendant had burden of proving plaintiff intentionally relinquished right to enforce restrictions. Refer to Section IV.C.3 of this article for discussion.

10. ***Colton v. Silsbee State Bank*, 952 S.W.2d 625 (Tex. App.—Beaumont 1997, no writ).**
Where prior violation is insignificant, statute of limitations accrues on subsequent and more substantial breach of restrictions. Refer to Section VI.C.2 of this article for discussion.

11. ***Garlington v. Boudreaux*, 921 S.W.2d 550 (Tex. App.—Beaumont 1996, no writ).**
Garlington filed suit against the Boudreauxs, owners of the adjacent patio home, seeking an injunction requiring them to remove an eight-foot fence from Garlington's property. The fence was in violation of the restrictive covenants; however, the Boudreauxs already had a six-foot fence in place when Garlington purchased her property. Furthermore, Garlington had a sunroom on her property facing the Boudreauxs which also violated the restrictions. The Boudreauxs replaced the six-foot fence with an eight-foot fence after installing a satellite dish and a hot tub. Garlington admitted that numerous other violations existed in the subdivision, including her own sunroom; however, she contended that the violations were not so extensive as to justify abandonment.

The trial court rendered judgment in favor of the Boudreauxs, allowing them to keep their fence. The court of appeals reversed, holding that although other violations existed throughout the subdivision and a shorter fence was in place when Garlington bought the property, these facts did not waive Garlington's right to enforce the restrictions that materially affected her. The court noted that there is a distinction between the rights of a proprietor (i.e. subdivider) and an individual lot owner.

12. ***City of Houston v. Muse*, 788 S.W.2d 419 (Tex. App.—Houston [1st Dist.] 1990, no writ).**
Court found no evidence to support defense of laches. Refer to Section IV.A.9 of this article for discussion.

13. ***Buzbee v. Castlewood Civic Club*, 737 S.W.2d 366 (Tex. App.—Houston [14th Dist.] 1987, no writ).**
Statute of limitations defense does not apply if there is a change in character of violation. Without extraordinary circumstances, defense of laches does not apply where cause of action comes within provisions of statute of limitations. Refer to Section IV.A.12 of this article for discussion.

14. ***Tanglewood Homes Ass'n, Inc. v. Henke*, 728 S.W.2d 39 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).**
The association sued the Henkes for erecting several structures on their property in violation of two building setback restrictions, one which applied to main residences and one which applied to attached garages and outbuildings. In a jury trial, judgment was rendered in favor of the Henkes. The jury found that the both of the applicable restrictions had been waived prior to the time the improvements were constructed.

The association's complaint on appeal was that the jury charge asked whether the "building setback lines" restrictions had been abandoned, and did not distinguish between the two separate setback line restrictions. The Henkes argued that because the restriction referring to garages referenced the restriction referring to the main residence, a violation of one constituted a violation of the other. The court of appeals disagreed, holding that although the setback lines were identical, the two restrictions served distinct purposes. The court further held that there was sufficient evidence that the garage setback line restriction was abandoned because 15 out of 56 homes in that section of the subdivision had attached garages or carports which extended over the setback line. With respect to the main residence setback line restriction, however, the court held that it had not been abandoned because there were only 5 violations existing and those were not "severe in nature." The association also tried to argue that Texas courts treat the doctrines of waiver and abandonment as the one in the same. The court elected not to decide in this case whether the two doctrines were treated the same in Texas because the court held that in this case, the jury charge defined them differently. Accordingly, because the jury answered one issue affirmatively and not the other, there was no conflict because of the different definitions listed in the instructions. The court reversed and rendered judgment in favor of the association as to the main residence restriction, but affirmed as to the garage restriction.

15. ***Homsey v. University Gardens Racquetball Club*, 730 S.W.2d 763, (Tex. App.—El Paso 1987, writ ref'd n.r.e).**
Homsey, a lot owner in the subdivision, refused to pay dues and assessments to the Racquet Club pursuant to the restrictive covenants governing the subdivision, claiming that his family did not use the club. Homsey argued the covenant was not reasonable, pursuant to a general scheme to benefit the land, and was not for the exclusive use and benefit of the landowners. The trial court rendered judgment in favor of the association.

The court of appeals affirmed, holding: "[a] chief consideration of a covenant 'touching and concerning the land' is whether it is so related to the land as to enhance its value and confer benefit upon it." The benefit here was membership in the club by virtue of ownership in the subdivision. The court further held that the nonexclusivity of this particular club was irrelevant because it also benefited the landowners in the subdivision as well as the public. The court also discussed the definition of waiver citing prior case law that held ten violations out of a subdivision containing 180 lots and seven violations out of a subdivision containing over 100 lots are insufficient to establish abandonment.

16. ***Hicks v. Loveless*, 714 S.W.2d 30 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).**
Other violations were not inconsistent with residential use, therefore, could not be used to prove waiver of residential use only restriction. Refer to Section IV.A.13 of this article for discussion.

17. ***Seureau v. Tanglewood Homes Ass'n, Inc.*, 694 S.W.2d 119 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).**
The association sued and obtained a summary judgment against Seureau ordering him to dismantle

and remove a shed or carport which was erected in violation of a building setback restriction. In Seureau's response to the motion for summary judgment, he included an affidavit in which he specified twelve other structures in his section of the subdivision which were in violation of the same restriction. The court of appeals reversed and remanded, holding that Seureau's affirmative defense of waiver involved a fact issue precluding summary judgment.

This decision was distinguished from that of *Finkelstein v. Southhampton Civic Club*, 675 S.W.2d 271 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.), where a summary judgment was affirmed in a similar case where the affirmative defense of waiver was raised. In *Finkelstein*, the court reasoned, only two similar violations were presented as evidence of waiver. The court in that case held that this, at best, only proved isolated instances of breach of the restriction, not waiver.

18. ***Mills v. Kubena*, 685 S.W.2d 395 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).**
One other violation in subdivision does not waive restriction. Refer to Section IV.A.16 of this article for discussion.

B. Changed Conditions

1. ***Oldfield v. City of Houston*, 15 S.W.3d 219 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**
Defendant could not complain of changed conditions that occurred prior to his acquiring property. Refer to Section VI.B.16 of this article for discussion.

2. ***Indep. American Real Estate, Inc. v. Davis*, 735 S.W.2d 256 (Tex. App.—Dallas 1987, no writ).**
The original owners of a restricted lot in a subdivision sued the other homeowners to have the deed restrictions as to that lot declared invalid and unenforceable. The homeowners counterclaimed, seeking a declaration that the restrictions were valid. While the suit was pending, Independent American Real Estate ("IARE") bought the lot in question and intervened in the lawsuit. The trial court rendered summary judgment in favor of the homeowners.

IARE complained on appeal that summary judgment was improper because it presented evidence in its response that raised a fact issue that, because of changed conditions, the deed restrictions no longer secured the benefits for which they were intended. The court of appeals held that the "changed conditions" referred to by IARE were either not supported by the evidence or not relevant to raise a fact issue because they existed outside the restricted area. IARE also attempted to argue that their lot was included in the restrictions by mistake and that because zoning had changed the lot from residential to commercial, the restrictions were terminated. The court, however, was not persuaded. The court held that restrictions on a border lot would be enforced if those restrictions still served their purpose with respect to the interior lots and that zoning changes do not abrogate restrictions. Further, the fact that IARE would be deprived of the most valuable use of their property was insufficient to void restrictions which still benefited the interior lots.

C. Statute of Limitations

1. ***Musgrave v. Brookhaven Lake Prop. Owners Ass'n*, 990 S.W.2d 386 (Tex. App.—Texarkana 1999, pet. denied).**
The association could only claim damages that were less than four years old prior to the day the suit was filed. Refer to Section II.C.4 of this article for discussion.

2. ***Malmgren v. Inverness Forest Residents Civic Club, Inc.*, 981 S.W.2d 875 (Tex. App.—Houston [1st Dist.] 1998, no pet.).**
Malmgren, a homeowner in Inverness Forest Subdivision, purchased and brought home a Vietnamese pot-bellied pig on Thanksgiving, 1991. On many occasions, including the day he brought the pig home, Malmgren showed the pig off to his neighbors. One of these neighbors, Wanda Elder, was a "block captain" for the Inverness Forest Civic Club. Among the responsibilities of block captains was the reporting of deed restriction violations to the club. One of the deed restrictions applicable to lots in Inverness Forest prohibited "[t]he raising or keeping of hogs, horses, poultry, fowls, or other livestock on any part of the subdivision." On November 8, 1995, the civic club filed suit in justice court seeking to

enjoin Malmgren from keeping the pig on his premises. The justice of the peace ordered the parties to mediation, but the parties could not come to an agreement. The civic club voluntarily nonsuited the case on March 25, 1996. The civic club refiled suit in district court on April 26, 1996. Malmgren asserted the defenses of laches and statute of limitations, the district court suit having been filed more than four years after Malmgren brought the pig home.

The trial court granted summary judgment to the civic club on its deed restriction claim. The court also denied Malmgren's summary judgment motion based on the limitations defense. The civic club then moved for summary judgment on its claim for attorney's fees. The trial court granted the motion and awarded the civic club its attorney's fees.

The court of appeals reversed the trial court and rendered judgment that the civic club take nothing from Malmgren. The court held that Malmgren had introduced evidence sufficient to prove that he brought the pig home on Thanksgiving of 1991. The court also held that the civic club was charged with this knowledge because Elder was the civic club's agent and she had the responsibility to report alleged violations. The civic club argued that the four-year statute of limitations (which applied to actions to enforce restrictive covenants) had not been violated because the justice court suit was filed within four years. The civic club then cited Tex. Civ. Prac. & Rem. Code Ann. § 16.064 for the proposition that the statue of limitations was tolled during the period between the filing in justice court and the subsequent filing of the same case in district court. The court held that this argument was without merit because § 16.064 only applies when the first case is dismissed for lack of jurisdiction and not, as in this case, where the plaintiff voluntarily nonsuits the case. Citing Tex. Govt. Code Ann. § 27.034, the court stated that the justice court has concurrent jurisdiction in deed restriction cases (including the power to grant injunctive relief in this type of deed restriction case). The civic club's voluntary nonsuit, explained the court, was not sufficient to invoke § 16.064. Malmgren also charged the trial court with error in granting summary judgment on the issue of attorney's fees. The civic club agreed with Malmgren that the trial court erred in so granting. Accordingly, the court reversed the judgment on attorney's fees.

D. Estoppel

1. ***Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Assoc., Inc.*, 178 S.W.3d 384 (Tex. App. – Fort Worth 2005, pet. denied).**

In addressing whether the trial court erred in rendering judgment based upon the theory of estoppel in pais, because there were no pleadings to support this theory in the Association's live pleading at the time of trial, the court held that the issue was not preserved for review on appeal. When it was clear that the parties tried a theory by consent the court would not disregard it on appeal. Further, the court found that there was more than a scintilla of evidence to support the estoppel in pais theory, and the evidence was not so weak or the evidence to the contrary so overwhelming that the answer should be set aside. Refer to Section VI.B.2 of this article for discussion.

2. ***Cimarron Country Prop. Owners Ass'n v. Keen*, 117 S.W.3d 509 (Tex. App.—Beaumont 2003, no pet.).**

In 1997, the Keens became homeowners in Cimarron Country subdivision. Shortly thereafter, the Keens approached the association and inquired about the restriction against operating a business from any residential property because they desired to operate a daycare service out of their home. In January 1998, the Keens received a letter from the association, stating in part:

> Thanks for… requesting permission to conduct child care in your home. The Board has discussed this issue and sees no problem with this type of 'home business' provided that you keep only 5 or 6 children and have no outside employees. The intent of the deed restrictions is to prohibit full-fledged businesses with disruptive customer activity from operating in a residential neighborhood.

An April 1998 letter from the association to the Keens indicated that there may have been revocation of permission. However, a subsequent

July 1998 letter from the association to the Keens indicated that the association would not enforce the deed restriction so long as certain "criteria" did not exist:

> With reference to your previous request… the… [Board] would like [to] clarify its position… [The applicable deed restriction] states: 'In no event shall any residential tract be used for any business purpose.' The Board…intends to enforce this restriction [and] will use the following criteria to determine whether a business exists… before taking steps to enforce [the deed restriction]: (1) the presence of employees; (2) the presence of signs, either on the Cimarron Country property or elsewhere in the community; (3) the use of any form of advertisements; (4) the existence of heavy traffic to and from a Cimarron Country address; and (5) valid complaints from other homeowners concerning criteria 1 through 4, or other deed restrictions.

The association took no action against the Keens' daycare until almost three years later in May 2001, at which time it sent a letter requesting that the operation of the daycare cease "immediately." The Keens contended that, by this time, the daycare had become a substantial part of their income and that they had made expenditures to enhance the business. The association filed suit against the Keens to enforce the applicable deed restriction and sought a permanent injunction and damages. Relying on the doctrine of quasi estoppel, the Keens asserted that the association was estopped from enforcing the deed restriction as written. The trial court presented the jury with several questions and instructions.

After the jury trial, the jury rejected the association's claim and the trial court entered judgment in favor of the Keens. The association appealed.

The court defined the doctrine of quasi estoppel as, "an equitable defense that precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." The doctrine applies when it would be unconscionable to allow a party to maintain a position inconsistent with one to which the party acquiesced, or from which the party accepted a benefit. The court noted that juries are not to determine the expediency, necessity, or propriety of equitable relief; rather, the decision to grant or deny equitable relief is for the trial court. The court held that the record contained legally and factually sufficient evidence to sustain the jury's finding that the July 1998 letter effectively permitted the Keens to operate the daycare so long as they complied with the criteria listed in the letter.

3. ***Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**

Estoppel only applies when one party changes its position materially based upon the actions of another party. Refer to Section VI.F.4 of this article for discussion.

4. ***Oldfield v. City of Houston*, 15 S.W.3d 219 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**

Issue of fact existed (therefore, summary judgment improper) as to whether City of Houston was estopped from enforcing restriction where city was attempting to enjoin business use of property although city had been accepting business inventory taxes and applying commercial rates for utility services for over 20 years. Refer to Section VI.B.16 of this article for discussion.

E. Arbitrary, Capricious or Discriminatory Actions

1. ***Anderson v. New Prop. Owners' Ass'n of Newport, Inc.*, 122 S.W.3d 378 (Tex. App.—Texarkana 2003, pet. denied).**

Property owners association rejected owner's driveway plans. court of appeals found that association did not have the authority to act as a property owners' association or as an architectural control committee under its documents and therefore, the rejection of the driveway plans were an arbitrary and capricious exercise of discretionary authority. Refer to Section IV.E.3 of this article for discussion.

2. ***Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. P'ship*, 985 S.W.2d 667 (Tex. App.—Corpus Christi 1999, pet. denied).**

The court of appeals noted that when reviewing an action of a board of directors of a condominium association courts apply a "reasonableness" standard "recognizing that they may not enforce arbitrary, capricious, or discriminatory rules." Refer to Section IV.I.2 of this article for discussion.

F. Failure to Timely File Suit

1. ***Buckner v. Lakes of Somerset Homeowners Ass'n, Inc.*, 133 S.W.3d 294 (Tex. App.—Fort Worth 2004, pet. denied.)**

Under architectural control provision of subdivision deed restrictions, stating that "[i]n the event" the subdivision homeowners association's architectural control committee failed to approve or disapprove of exterior changes within 30 days after submission, or "in any event" if no suit to enjoin had been commenced before completion of the changes, then approval would not be required, the association would suffer the default consequence of deemed approval of nonconforming exterior changes if the association did not seek injunctive relief before the changes were completed, regardless of whether the association had failed to approve or disapprove within 30 days after submission of the request. Refer to Section VI.B.5 of this article for discussion.

VIII. ATTORNEY'S FEES

A. Trial Court's Abuse of Discretion

1. ***Jakab v. Gran Villa Townhouses Homeowners Ass'n, Inc.*, 149 S.W.3d 863 (Tex. App.—Dallas 2004, no pet.).**

Determination who is the "prevailing party" for purposes of award of attorneys fees under Tex. Prop. Code Ann. § 5.006 requires interpretation of deed restrictions and how that interpretation affects the financial position of the parties. The court of appeals held that the homeowners association was already fully compensated and, therefore, is not the prevailing party and not entitled to attorney's fees. Refer to Section V.D.4 of this article for discussion.

2. ***Musgrave v. Brookhaven Lake Prop. Owners Ass'n*, 990 S.W.2d 386 (Tex. App.—Texarkana 1999, pet. denied).**

In determining whether the trial court abused its discretion in awarding the attorney's fees, the court of appeals looked at: (1) the nature of the case, including its difficulties, complexities and importance; (2) the amount of money involved and the client's interest at stake; (3) the amount of time necessarily spent by the attorney on the case and the skill and experience reasonably needed to perform the services; and (4) the entire record of the case, as determined by the common knowledge of the justices of the court and their experience as lawyers and judges. With respect to the attorney's fees to be awarded on appeal, the court found that they must be conditioned upon the appeal being successful. The attorney's fees awarded for an appeal was also reduced by the court. Refer to Section II.C.4 of this article for discussion.

3. ***Fonmeadow Prop. Owners' Ass'n, Inc. v. Franklin*, 817 S.W.2d 104 (Tex. App.—Houston [1st Dist.] 1991, no writ).**

The association brought an action against the homeowners for breach of the deed restrictions, to recover unpaid maintenance assessments, interest, attorney's fees and court costs and to foreclose its lien securing the assessments. Although the trial court rendered judgment in the association's favor, it reduced the amount of attorney's fees from $1,640.20, the amount pled by the association, to $750.00. The court of appeals held that this was within the trial court's discretion as the trial court has "great latitude in fixing attorney's fees, subject to review for abuse of discretion." The court further held that the fact that a trial court may decide a case differently than an appellate court justice would under similar circumstances is not an abuse of discretion.

4. ***Inwood N. Homeowners' Ass'n, Inc. v. Wilkes*, 813 S.W.2d 156 (Tex. App.—Houston [14th Dist.] 1991, no writ).**

The association sued Wilkes to recover delinquent assessments, interest, costs and attorney's fees. The trial court rendered judgment in favor of the association; however, it reduced the amount of attorney's fees pled from $1,486.00 to $500.00. The

evidence as to the amount of attorney's fees expended was uncontroverted. Accordingly, the association complained on appeal that the trial court abused its discretion in reducing the fees. The court of appeals affirmed the trial court's judgment, holding that it was within the trial court's discretion to reduce the fees if it found that the fees were unreasonable or unwarranted, or some other circumstances that would make the award wrong.

B. Texas Property Code § 5.006

1. ***Anderson v. New Prop. Owners' Ass'n of Newport, Inc.*, 122 S.W.3d 378 (Tex. App.—Texarkana 2003, pet. denied).**
Owner not entitled to attorneys fees under Tex. Prop. Code Ann. § 5.006(a) because she was not a prevailing party who asserted the action. Refer to Section IV.E.3 of this article for discussion.

2. ***Ostrowski v. Ivanhoe Prop. Owners Improvement Ass'n, Inc.*, 38 S.W.3d 248 (Tex. App.—Texarkana 2001, pet. denied).**
Tex. Prop. Code Ann. § 5.006 is not applicable to award of attorney's fees because action was filed under Texas Uniform Declaratory Judgment Act. Refer to Section V.D.6 of this article for discussion.

3. ***Mitchell v. Laflamme*, 60 S.W.3d 123 (Tex. App.—Houston [14th Dist.] 2000, no pet.).**
If a party pleads facts, which, if true, entitle him to attorney's fees, he need not specifically plead the applicable statute in order to recover under it. Here, the court of appeals allowed owners to recover attorneys' fees under Tex. Prop. Code Ann. § 5.006(a) even though they sought them under different statutes in the pleadings. Refer to Section VI.B.14 of this article for discussion.

4. ***Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).**
Attorneys' fees under Tex. Prop. Code Ann. § 5.006 must be reasonable. Refer to Section VI.F.4 of this article for discussion.

5. ***Pebble Beach Prop. Owners' Ass'n v. Sherer*, 2 S.W.3d 283 (Tex. App.—San Antonio 1999, pet. denied).**
Association president was not entitled to recovery of attorney's fees under Tex. Prop. Code Ann. § 5.006 as a counter-defendant. Refer to Section IV.C.2 of this article for discussion.

6. ***Beere v. Duren*, 985 S.W.2d 243 (Tex. App.— Beaumont 1999, pet. denied).**
The provisions of Tex. Prop. Code Ann. § 5.006 are mandatory. Refer to Section IV.E.7 of this article for discussion.

C. Texas Property Code § 82.161(b)

1. ***River Oaks Place Council of Co-Owners v. Daly*, 172 S.W.3d 314 (Tex. App. – Corpus Christi 2005, no pet.).**
Daly's contention that he was entitled to attorneys' fees under the Texas Condominium Act was overruled, because Daly was not a prevailing party under the Condominium Act. Refer to Section IV.F.1 of this article for discussion.

D. Segregation of Attorney's Fees

1. ***Gorman v. Countrywood Prop. Owners Ass'n*, 1 S.W.3d 915 (Tex. App.—Beaumont 1999, pet, denied).**
The association filed liens against various homeowners for nonpayment of maintenance assessments. The homeowners filed suit against the association to have the liens removed as clouds upon their titles. After the homeowners filed suit, the association released the liens, but filed a counterclaim against the homeowners for the unpaid maintenance fees. The trial court awarded a judgment for the unpaid maintenance fees against each homeowner who was a party to the suit, and awarded attorney's fees to both sides. Subsequently, the trial court granted a new trial on the attorneys fee issue, severed that issue from the remainder of the cause and awarded the association attorneys fees of just over $8,800.00. The homeowners appealed that decision.

The court of appeals affirmed the decision of the trial court. The parties to the case agreed that the association's cause of action related to a breach of a restrictive covenant, and therefore Tex. Prop. Code Ann. § 5.006 applied. The appeal was based upon the homeowners' position that the trial court had erred in failing to segregate the association's attorney's fees regarding its action on the liens,

from the association's attorney's fees regarding the collection of the past due maintenance fees on its counterclaim and that the attorney's fees were excessive. The court discussed when an attorney must segregate fees based upon different causes of action in the same case. In this case, the court found that the attorney representing the association had adequately segregated its fees in defending the suit by the homeowners from its fees in prosecuting its counterclaim for the delinquent maintenance assessments and that the attorney's fees were not excessive.

E. Attorney's Fees Involving FCC Antenna Regulations

1. ***River Oaks Place Council of Co-Owners v. Daly*, 172 S.W.3d 314 (Tex. App. – Corpus Christi 2005, no pet.).**

The court held that the trial court did not err by disregarding the jury's findings that Daly's claim was frivolous. It pointed out that a trial court may disregard a jury's answer to a question in the charge only when the answer has no support in evidence or the question is immaterial. The court found that the Association wholly failed to identify any evidence regarding Daly's bad faith. Further, the amount of attorneys' fees was immaterial, because Daly's claim was not found to be frivolous and the Association could not be awarded attorneys' fees anyway. Refer to Section IV.F.1 of this article for discussion.

F. Contingent Fee Arrangement Does Not Preclude Recovery

1. ***Sloan v. Owners Ass'n of Westfield, Inc.*, 167 S.W.3d 401 (Tex. App.—San Antonio, 2005, no pet.).**

Westfield subdivision was subject to a declaration that was executed and filed in the county real property records in 1998. The declaration provided, in part, that: (1) each lot was subject to an annual maintenance charge; (2) a lien ran with the land was established on the lots to secure payment of the maintenance charge and all past-due interest accrued on the charge, along with reasonable expenses, costs, and attorney's fees incurred in collection thereof; (3) the lien was noted on the deed to each lot along with a reference to the recordation of the restrictions; and (4) the association had the authority to bring legal action to compel compliance with the provisions in the restrictions and to bring an action to foreclose the lien of any lot owner failed to cure default within 30 days after notice. The Sloans became owners of a lot in the subdivision in 2001 and were assessed maintenance charges, but they failed to pay. After providing the Sloans with a written demand for the unpaid assessments, the Association brought suit on the debt in 2003 seeking recovery of the unpaid assessments, plus costs, interest, and reasonable attorney's fees. The association then made a motion for summary judgment.

The trial court granted the association's summary judgment motion and entered a judgment against the Sloans for actual damages in the amount of $1,172.82, attorney's fees in the amount of $2,000, plus additional attorney's fees on appeal, and interest. The court further ordered that the association's lien be foreclosed and granted an order of sale. The Sloans appealed.

The court of appeals affirmed. The Sloans argued that foreclosure of the lien as security for attorney's fees was improper because the association did not actually incur any legal fees due to the contingent nature of their fee arrangement with counsel, but the court disagreed. Prior case law provides that an attorney who provides legal services under a contingent fee agreement has a quantum meruit claim against the client in the event of breach. Because the association was liable to its counsel for services provided, to be paid out of proceeds received in result of this litigation, the association had incurred legal fees that were secured by the lien. Additionally, the language in the restrictions was clear that it intended for property owners to be accountable for attorney's fees in connection with the collection of unpaid assessments. The terms of the fee agreement between the association and counsel were irrelevant. The Sloans also argued that the homestead protection provided in the Texas Constitution prohibited foreclosure for debts such as attorney's fees, but the court disagreed. In *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1897), the Supreme Court of Texas held that a when property has not become a homestead at the execution of a lien, the homestead

protections against certain debts have no application even if the property later becomes a homestead. Here, the lien was established years before the Sloans took possession and established their homestead rights in the property. Although *Harris* did not specifically address the property owner's obligation for attorney's fees, the Court focused on the existence of the lien prior to the homestead right being established and the property owner's notice of the lien and the obligations it was intended to secure. Here, the obligations intended to be secured by the lien were included in the Declaration, and the Sloans had notice of the obligations and the lien at the time they purchased the property.

G. Declaratory Judgment Act

1. ***Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Assoc., Inc.*, 178 S.W.3d 384 (Tex. App. – Fort Worth 2005, pet. denied).**

The court held that the award of attorney's fees under the Declaratory Judgment Act was proper where the association sought declaratory relief. Refer to Section VI.B.2 of this article for discussion.

2. ***River Oaks Place Council of Co-Owners v. Daly*, 172 S.W.3d 314 (Tex. App. – Corpus Christi 2005, no pet.).**

The court stated that the Declaratory Judgment Act does not require an award of attorneys' fees to the prevailing party but provides that the court may award attorneys' fees, and held that the trial court did not err by refusing to award Daly attorneys' fees. See Section IV.F.1 of this article for discussion.

IX. AMENDMENT/TERMINATION OF RESTRICTIONS

A. Procedure Set Forth in Restrictions for Amendment Prevails Over Texas Property Code

1. ***Simpson v. Afton Oaks Civic Club, Inc.*, 155 S.W.3d 674 (Tex. App.—Texarkana 2005, pet. denied).**

The key question was whether or not the subdivision could use the procedures set forth in Tex. Prop. Code Ann. § 204.006 to amend the restrictions, when those restrictions provided a different, and specific, procedure to be followed in making such an amendment. Tex. Prop. Code Ann. § 204.003 provides that if the document creating the restrictions contains an express designation setting out procedures to follow in amending or modifying the existing restrictions, the document prevails over the Code. Refer to Section VI.I.1 of this article for discussion.

B. By Developer

1. ***Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Assoc., Inc.*, 178 S.W.3d 384 (Tex. App. – Fort Worth 2005, pet. denied).**

The court of appeals addressed the issue of when and if a developer loses its right to make adjustments to a dedicated plat of a subdivision and what rights, if any, inure to the benefit of the homeowners who purchase lots within a subdivision during the start-up phase of the development, before the deed restrictions allow for or establish the actual homeowners' association that will ultimately hold the obligations and duties previously held by the developer. The court looked to the language in the restrictions and held that the Developer no longer had the right to unilaterally amend the restrictions. Refer to Section VI.B.2 of this article for discussion.

2. ***Youssefzadeh v. Brown*, 131 S.W.3d 641 (Tex. App.—Forth Worth 2004, no pet.).**

A subdivision developer is generally free to amend restrictions in covenants prior to the sale of lots in the subdivision, assuming the amendments do not violate public policy. The sale of the lots triggers any amendment mechanism set forth in the restrictions. When the power to amend the land use is reserved by the developer, the amendment and a restrictive covenant must be in the precise manner authorized by the dedicating agreement. Refer to Section VI.B.6 of this article for discussion.

3. ***City of Pasadena v. Gennedy*, 125 S.W.3d 687 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).**

The original deed restrictions for the Pasadena River Oaks Subdivision were executed and filed by

the developer, Columbian, in 1980. Section I of the deed restrictions provided that:

> These restrictions shall be covenants running with the land and shall be binding… from the present time until January, 2000. The then owners of a majority of the lots affected by these restrictions ... may, by a written instrument executed and filed for record not more than six (6) months prior to January, 2000, or any five (5) year period after January, 2000, change these restrictions, covenants, and conditions in whole or in part as to all of said property, or as to any part thereof…

The only applicable provision concerning the developer's ability to amend the restrictions can be found in Section VI, and provided that:

> The undersigned shall have and hereby reserves the right to modify and amend these restrictions, conditions and covenants with reference to location or setback of any of the improvements within the subdivision… to such extent as it deems for the best interests of the subdivision as a whole…
> /s/
> Hugo A. Ramirez, M.D.--President
> COLUMBIAN VILLAGE
> CORPORATION

In 1989, Columbian dissolved and assigned its modification and amendment rights to Dr. Ramirez personally. In April 1996, the City of Pasadena and several homeowners from the Pasadena River Oaks subdivision (collectively, "the enforcing parties") sued Gennedy to enforce the deed restrictions of the subdivision. They alleged that Gennedy's front-yard fence, which was fewer than 40 feet from the street, violated Section II, Paragraph 19 of the original deed restrictions, which provided that "[n]o fence or wall of any character shall be erected nearer to the front lot line than 40 feet therefrom…" In March 1997, after the lawsuit's filing, and pursuant to Section VI of the deed restrictions, Dr. Ramirez executed and filed an instrument that amended Section II, Paragraph 19 of the original restrictions by adding the following italicized language: "[n]o fence or wall of any character shall be erected nearer to the front lot line than 40 feet therefrom, *except that a fence or wall may be erected on [Gennedy's lot] within 25 feet of the front line of said lot*…" In their complaint, the enforcing parties sought permanent injunctive relief, damages, and attorney's fees.

After the trial court granted summary judgment in favor of the enforcing parties, Gennedy appealed and the case was remanded. On remand, the trial court rendered judgment that the enforcing parties take nothing, and declared that Gennedy's fence was lawfully located and not in violation of the restrictions. Specifically, the trial court found that: (1) the deed restrictions had expired on their own terms in January 2000; (2) as of the date of trial, the restrictions had not been extended or renewed; and (3) the restrictions were modified and lawfully amended in 1997. The trial court declined to award attorney's fees to either side. Both parties appealed.

The court of appeals reversed and remanded the case. The enforcing parties argued that the evidence was legally insufficient to show that the deed restrictions had expired in January 2000, and the court agreed. Applying general rules of contract construction, the court found that the language in Section I unambiguously showed that the restrictions were intended to continue beyond January 2000. The second sentence, which provided for amendments every 5 years after January 2000, would be meaningless if the preceding sentence was held to mean that the restrictions expire in January 2000. Additionally, the preamble to the restrictions stated that the developer adopted the restrictions in order to create and implement a uniform plan for the development as an "exclusive residential district," and the court found it unpersuasive that the developer of an exclusive subdivision would intend for the restrictions to expire in just under 20 years. Finally, the restrictions required the architectural control committee's approval of a variety of building plans, including those for remodeling and alteration, not just initial construction. The enforcing parties argued that the evidence was legally insufficient to show that the deed restrictions were validly amended in 1997, and the court agreed. The court began by noting a developer's right to impose, alter, cancel, or abrogate entirely any restrictions it chooses on its subdivision. This is a unilateral right

if no lots in the development have been sold. If lots have been sold, the developer may still have the power to amend the restrictions if the dedicating instrument grants him the right and a method of doing so, provided that the amendment is made in the exact manner provided by the dedication. This right is limited in that the developer must retain ownership in property within the subdivision. The rationale for this limitation is that it is believed to impose some economic restraint against arbitrary action—as long as the developer has an interest in the subdivision, his own economic interests will cause him to exercise his right in a manner that will take into account harm to other lots in the subdivision. The court noted Gennedy's failure to produce any evidence that either the developer or Dr. Ramirez retained any ownership interest in the subdivision property when the 1997 amendment occurred. In fact, the enforcing parties presented undisputed evidence that (1) Columbian had dissolved before the amendment occurred and thereafter owned no subdivision property; and (2) Dr. Ramirez had not personally owned subdivision property since 1989. The court further agreed with the enforcing parties that the trial court erred in not ordering Gennedy to move his fence to the set-back line in the original deed restrictions.

4. ***Truong v. City of Houston*, 99 S.W.3d 204 (Tex. App. —Houston [1st Dist.] 2002, no pet.).**

In an action by the city to enjoin property owners from commercial activity on their property, the two-year requirement in the deed restrictions that releases be in writing and executed at least two years before the applicable fifteen-year period was not waived by the property owners' use of their property for business purposes. Property owners in a subdivision could not grant releases of deed restrictions without the agreement of the other owners within the subdivision. Refer to Section VI.I.5 of this article for discussion.

5. ***Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.).**

Court upheld developer's unilateral right to amend restrictions. Refer to Section IV.O.1 of this article for discussion.

6. ***Baldwin v. Barbon Corp.*, 773 S.W.2d 681 (Tex. App.—San Antonio 1989, writ denied).**

Barbon acquired a tract of ranch land and filed restrictions applying to the entire tract. The restrictions provided that the right to amend was reserved to Barbon without the consent of the other owners "until such time as all lots in the subdivision are owned by others than Barbon Corporation, if it is, in the opinion of the directors of Barbon Corporation, for the best interest of all property owners." A year later, a portion of the tract was platted as a subdivision. Baldwin then purchased his lot. Seven years after Baldwin acquired his lot, Barbon amended the restrictions to provide that only the portion of the tract platted as a subdivision was to be restricted. Baldwin sued to have this amendment declared invalid; however, the trial court upheld the amendment permitting the removal of the restrictions as to the remainder of the tract.

The court of appeals affirmed, holding that Baldwin purchased his property within the subdivision subject to the restrictions which clearly included the express right of Barbon to alter or amend.

C. Approval Necessary

1. ***Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552 (Tex. App. – Houston [1 Dist.] 2005, pet. denied).**

In considering whether amendments to the deed restriction were not effective because they failed for lack of notice and because the petition circulated by the homeowners' associations seeking approval of the amendments contained material non-disclosures that rendered the amendments invalid, the court looked to the restrictions, and pointed out that "[b]ecause the restrictions do not contain any specific notice requirement of a proposed amendment to the restrictions, WWCH's notice argument fail[ed]." It also found that the petition circulated by the homeowners' association seeking approval of the amendments did not contain material non-disclosures, and indeed expressly set forth the proposed amendments to the restrictions, so necessary approval was given by the homeowners. Refer to Section V.D.2 of this article for discussion.

2. ***Truong v. City of Houston*, 99 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2002, no pet.).**

In an action by the city to enjoin property owners from commercial activity on their property, the two-year requirement in the deed restrictions that releases be in writing and executed at least two years before the applicable 15-year period was not waived by the property owners' use of their property for business purposes. Property owners in a subdivision could not grant releases of deed restrictions without the agreement of the other owners within the subdivision. The ongoing violation of deed restrictions did not inform other property owners that their rights were being affected in the same manner that a valid release did; thus, the owners did not raise an issue of fact by providing the court with proof of their invalid releases. Refer to Section VI.I.5 of this article for discussion.

3. ***Dean v. Lafayette Place (Section One) Council of Co-Owners, Inc.*, 999 S.W.2d 814 (Tex. App.— Houston [1st Dist.] 1999, no pet.).**

In 1966, the condominium declaration for Lafayette Place was recorded. Under the terms of the declaration, it could be amended in two ways. First, it could be amended by written consent of 100% of the ownership interests of the condominium. Second, it could be amended by 51% of the ownership interests voting to adopt an amendment to the Texas Condominium Act, provided that the statutory change "would not otherwise apply to the Condominium regime". This case involved whether or not an amendment to the declaration which attempted to adopt the amendment provisions of the 1984 Texas Condominium Act was a valid amendment, and whether the amendment "otherwise applied to the Condominium regime". In June of 1990, the members of the association were presented with an amendment which would allow the declaration to be amended with a vote of 67% of the ownership interests of the association. At the meeting to vote for the amendment, 70.89% of the ownership interests were in favor of the amendment. The remaining 29.11% of the ownership interests simply did not attend the meeting. In 1996, a dispute arose between the homeowners over the issue of parking. Certain owners of units in the condominium complex sued the board of directors challenging the validity of the amendment to the declaration. The suit alleged that the board induced the owners to vote for the amendment by sending out a false and misleading notice and that the amendment was void because it was adopted on less than a 100% vote. The case was tried to the court without a jury based upon stipulated facts, and then a bench trial was held on the issue of ratification.

The case was submitted to the court based upon stipulated facts. After considering the stipulated facts and the briefing of the parties, the trial court held: (1) that the June, 1990 vote amending the declaration was in violation of the declaration because it was not a vote of 100% of the owners; (2) the 1990 amendment was voidable, not void; and (3) there were disputed fact issues on the issue of whether the appellants had ratified the 1990 amendment. There was also a bench trial on the issue of ratification. After testimony from both sides, the trial court held: (1) that all of the owners of the condominiums had ratified the 1990 amendment to the declaration; (2) therefore, the 1990 amendment was valid and enforceable; and (3) the appellants took nothing by their suit.

The homeowners appealed arguing that the amendment was void, or if merely voidable, it was never ratified. The court of appeals disagreed. The court found that although the trial court erred in holding that the 1990 amendment was voidable, but ratified, the trial court correctly held that: (1) the homeowners take nothing on their claims; and (2) the 1990 amendment to the declaration was valid and enforceable. The board of directors filed one cross-point of error, alleging that the trial court properly granted a take nothing judgment, but erred in basing that judgment on ratification. The court determined that it had jurisdiction over the board of directors' cross-point and addressed it on its merits. The board contended that the 1990 amendment was valid because the declaration allowed amendments to adopt newly-enacted provisions of the Condominium Act based upon a 51% vote of the ownership interests. The court interpreted the 1966 Condominium Declaration. The court reviewed the provision of the declaration that stated that if any amendment was thereafter made to the Texas Condominium Act which would "not otherwise apply" to the condominium regime, then the association may at a regular meeting, amend the declaration "in order to enable the application of

any such amendment to the Condominium Act," provided that such resolution receives the affirmative vote of at least 51% of the ownership interests of the condominium. The court noted that the declaration provided for amending the document by either 100% written consent of the owners, or by a 51% vote with respect to an amendment to the Texas Condominium Act which would "not otherwise apply". The question presented was whether a 70.89% vote was sufficient to adopt the amendment allowing 67% to amend the Declaration, or was a 100% vote necessary. The court found that the 1984 amendment to the Texas Condominium Act did not "otherwise apply to the condominium regime," and therefore, a vote of 70.89% of the homeowners was sufficient to allow the association to thereafter amend the declaration with a 67% majority vote.

4. ***Sunday Canyon Prop. Owners Ass'n v. Annett*, 978 S.W.2d 654 (Tex. App.—Amarillo 1998, no pet.).**

The Annetts owned two lots in the subdivision, one of them improved. The deed restrictions contained a provision by which any of the restrictions could be changed, modified, or terminated by written consent of at least 51% of the lot owners within the subdivision. By 1983, the roads in the subdivision had deteriorated to the point that the subdivision faced the possibility of losing postal and school bus services. In addition, many of the residents were contemplating moving out of the subdivision. In order to remedy the situation, a group comprised of more than 51% of the total lot owners executed and recorded a modification to the plat and deed restrictions. The modification created a property owners association and empowered the association to levy maintenance assessments against each lot. Membership in the association was mandatory, and each owner was entitled to one vote per lot owned. All charges, fees, and assessments, including interest and attorney's fees, were stated to be a lien on the lot against which they were charged and to be the personal obligation of the lot owner. The Annetts did not sign the modification, and they also notified the association that they neither wished to be a member, nor did they wish to be subject to the assessments and liens. The Annetts did, however, pay the assessments until 1989. In that year, the Annetts, claiming the assessments had been paid under protest, filed suit against the association. The Annetts claimed that the modification created new powers not contemplated by the original restrictions and, therefore, required unanimous owner approval. Because the modification was not unanimously approved, the Annetts contended the modification was void. The association counterclaimed for past due assessments and fees.

The trial court found that the restrictions were properly modified and, thus, the modification was enforceable against the Annetts' property. The trial court concluded, however, that insofar as the modification provided for assessments and a lien, the modification exceeded the scope of amendments contemplated by the original restrictions. The court declared these provisions unenforceable against the Annetts and permanently enjoined the Association from charging assessments against the Annetts property. Both parties appealed.

The court of appeals reversed the portion of the judgment that declared the assessments and lien unenforceable against the Annetts. The court affirmed the remainder of the trial court's judgment. The court summarily rejected the trial court's conclusion that the provision authorizing assessments and creating a lien was beyond the contemplation of the original restrictions. The court noted that the original restrictions provided for a means to amend the restrictions. Because the modification was created pursuant to the procedure outlined in the original restrictions, the entire modification, including the provision authorizing assessments and creating a lien, was valid and enforceable as to all lot owners in Sunday Canyon. The court awarded the association all unpaid assessments plus interest.

5. ***Miller v. Sandvick*, 921 S.W.2d 517 (Tex. App.—Amarillo 1996, writ denied).**

In 1986, Mrs. Miller, her former husband and the Sandersons (Mrs. Miller's sister and brother-in-law), filed a cancellation of the restrictions governing six specific lots within a subdivision where they owned property. The Millers and the Sandersons collectively owned 71 of the 96 lots in the subdivision (more than two-thirds). The amendment provision in the original restrictions read: "[t]hese covenants may be amended at any time by an instrument signed by two-thirds (2/3) of the then

owners of building sites or building plots, (each building site or building plot to have one vote)... ." In 1992, the Millers began constructions of a duplex on one of the lots in violation of the original restrictions. Four months later, other homeowners in the subdivision realized the Millers were building the duplex and met with the Millers and the Sandersons requesting that the building be brought into compliance. The Millers refused to stop construction reasoning that the cancellation instrument was valid because at the time of the amendment they, together with the Sandersons, owned two-thirds of the lots in the subdivision. The trial court disagreed and granted summary judgment in favor of the other homeowners, ordering the Millers to bring the building into compliance.

In its opinion, the court of appeals recited the law that in order for a subsequent instrument to amend the original restrictive covenants, three conditions must be met: (1) the instrument creating the original restrictions must establish both the right to amend and the method of amendment; (2) the right to amend such restrictions implies only those changes contemplating a correction, improvement or reformation of the agreement rather than a complete destruction of it; and (3) the amendment may not be illegal or against public policy. The court held that the language of the amendment provision meant what it said, "two-thirds (2/3) of the owners" had to approve the amendment. The court interpreted the parenthetical phrase ("each building site or building plot to have one vote") as merely a comment, not to be taken alone to render the initial sentence meaningless. The court stated that the parenthetical instructs that each lot is entitled to one vote, even though there may be multiple owners of one lot, rather than indicating that owners of multiple lots are afforded multiple votes. The court also held that the filing of the cancellation instrument did not give the homeowners constructive notice, "for it operated only prospectively and not retrospectively to those anterior holders of an interest in the lots." In its opinion, the court noted, "[t]he mere disagreement over the interpretation of the amendment provision does not make it ambiguous. ...And, because the amendment provision is so worded that it can be given a certain legal meaning, it is not ambiguous, and we will construe it as a matter of law."

6. ***Arthur M. Deck & Assocs. v. Crispin*, 888 S.W.2d 56 (Tex. App.—Houston [1st Dist.] 1994, writ denied).**

The Plaintiffs in this suit owned two lots in the middle of a subdivision, the amended restrictions for which allowed the lots to be subdivided. Intending to subdivide their two lots to build six houses, the Plaintiffs cleared and filled the lots, had the first of the six houses designed, and obtained approval from the City. Four months later, a majority of the other property owners approved new restrictions restricting each lot to one single-family residence. Plaintiffs sued the property owners and obtained a partial summary judgment declaring the new restrictions void. Pursuant to a settlement agreement, the property owners filed a release affirming the validity of the prior restrictions and agreeing not to change them until a date certain (approximately 2 years later). In return, the Plaintiffs promised they would not build any structure on their two lots which did not conform to the prior restrictions. The Plaintiffs then determined that due to the expense and delay caused by this litigation, it was no longer economically feasible to build only six houses, and entered into an agreement with a developer to build 18 houses on their two lots. Prior to this transaction closing, however, the property owners approved and filed a third set of restrictions again restricting the lots in question to one single-family dwelling per lot. This third set of restrictions excepted three other lots in the subdivision, which lots were separated from the rest of the subdivision by a brick wall and had been replatted to be part of another subdivision. The trial court upheld these new restrictions as valid and enforceable, making the proposed project in violation of the restrictions.

On appeal, the Plaintiffs asserted that because three other lots were treated differently, that the third set of restrictions were discriminatory as a matter of law. The Plaintiffs relied on *Zent v. Morrow*, 476 S.W.2d 875 (Tex. Civ. App.—Austin 1972, no writ), wherein the court of appeals held: "[a] rule that would permit the majority of the lot owners to alter or revoke the restrictions as to a few lots only, and to continue the covenants as to all other property in the section, would invite foreseeable mischiefs not within the original purposes of the subdividers." The court disagreed and affirmed the trial court's decision. The

court held that the restrictions were not discriminatory because the three lots treated differently by the restrictions were physically separated from the rest of the lots, making the circumstances unique as to those lots only. Plaintiffs' two lots, on the other hand, were in the middle of the subdivision and were not separated or distinct from the other lots, distinguishing this case from *Zent*, where there was no such separation.

7. ***Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78 (Tex. App.—Houston [1st Dist.] 1994, writ denied).**

Owners of subdivided lots have to be counted in obtaining requisite approval for an amendment despite language in the restrictions apparently indicating the contrary. Refer to Section IV.H.3 of this article for discussion.

8. ***French v. Diamond Hill-Jarvis Civic League*, 724 S.W.2d 921 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).**

The association filed suit against French for violating certain restrictions and French counterclaimed seeking a declaratory judgment that the restrictions no longer applied to the subdivision. Prior to trial, the association dismissed its claim and the case proceeded to trial on French's counterclaim. The restrictions provided that they could be released "by vote of a majority of the then owners of the lots." The majority of the affected owners had filed releases of the deed restrictions; however, the association contended that the restrictions were not released because the votes were not counted on a one lot-one vote basis. The trial court found in favor of the association.

The court of appeals reversed the trial court's decision, construing the language of the restrictions to "mean what it says, i.e., 'a majority of the then owners of the lots,' not the owners of the majority of the lots." As such, the restrictions were properly released.

9. ***Hanchett v. E. Sunnyside Civic League*, 696 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).**

The East Sunnyside Court subdivision had a set of restrictions which were entered into at 1995, the time of development. Neither the deeds nor the original restrictions contained any language that authorized or provided for amendment procedures. One of the restrictions required that all plans for a proposed home be approved by the architectural control committee ("ACC") prior to construction. Another restriction required that no dwelling could cost less than $8,500.00. In 1964, a majority of the lot owners executed an amendment which stated: "No house shall be moved in and placed on any lot in said subdivision." This amendment was not recorded, however, until 1977. Again, in 1977, a majority of the lot owners executed and recorded a second amendment providing for extension and renewal of the restrictions. Hanchett purchased his lot in 1970; however, in 1984 he purchased a house for $2,200.00 and had it moved onto his lot. The association filed suit and the trial court found that Hanchett was subject to the original restrictions, as well as to all of the subsequent amendments.

The court of appeals affirmed, but for different reasons, holding that the fact that neither the deed nor the original restriction contained amendment provisions was fatal to the enforceability of the two amendments. The court further stated that even if a right and method to amend had been established by the deed or the original restriction, the amendments in this case would be unenforceable, because there was not concurrence on the part of all the property owners. Further, the original restrictions requiring ACC approval did not apply because of the ACC members listed, one was dead, one was presumed dead and the other could not be located. The original restrictions did not provide a method for succession of membership to the ACC. Accordingly, the court held that the failure of Hanchett to adhere to that restriction did not justify requiring him to remove his house. The court affirmed the decision of the trial court requiring Hanchett to remove his house based solely on the fact that Hanchett's house violated the cost restriction contained in the original restrictive covenants.

D. By One Section of Development

1. ***Scoville v. Springpark Homeowner's Ass'n, Inc.*, 784 S.W.2d 498 (Tex. App.—Dallas 1990, writ denied).**

The Master Declaration for Springpark provided that any future additions to the subdivision had to file supplemental restrictions of their own and were to be subject to assessments for "their just share of the

Association expenses." Several years after the Second Addition was annexed and merged into the association, discord developed and the Second Addition homeowners filed an amendment to their restrictions in which they elected to secede from the association, rescind the association's authority and eliminate all references to the Master Declaration from their restrictions. The association then filed a declaratory judgment action seeking to have the Second Addition's amendment declared void. The issue raised by the association was whether the Second Addition homeowners were required to seek an amendment of the Master Declaration, as well as an amendment to the Second Addition's Supplemental Declaration. The terms of the Master Declaration provided that it could only be amended with the consent of 75% of the total number of members. The Second Addition's Supplemental Declaration, however, provided that it could only be amended by 90% of the "Owners of the Lots."

The court of appeals found that the restrictions for the Second Addition did not amend the Master Declaration. Since the court found that the actions of the homeowners in the Second Addition did not attempt to change or amend the Master Declaration, the homeowners in the Second Addition did not need to comply with the amendment provisions of the Master Declaration.

2. ***Meyerland Cmty. Improvement Ass'n v. Temple*, 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).**

The association filed a declaratory judgment action against 62 lot owners in Section 4 of the subdivision seeking to prohibit them from selling their property to a developer for a proposed nonresidential use. Each section within the subdivision was platted separately and each had its own set of restrictions. No general plan for the entire subdivision was recorded. The subdivision's original restrictions provided for an initial term of 25 years and for automatic, successive 10-year renewal terms "unless changed by a majority of the then-existing lot owners". The owners in Section 4 amended their restrictions to provide that the restrictions could be amended at any time to change the use of the property to other than residential single family use. The trial court rendered judgment in favor of the homeowners in Section 4, finding that there had been such a change in conditions affecting the property in Section 4 that it was no longer possible to secure in substantial degree the intended benefits of the residential-use only restrictions.

The court of appeals affirmed the trial court's decision, finding that: "the right of each section in the Meyerland Addition to change its respective restrictive covenants after 25 years evinces no intent to impose a continuing plan or scheme." This case was distinguished from *Hanchett* as those original deed restrictions did not contain any language that authorized or provided a procedure for the amendment of the restrictions. The court in dicta also discussed the proper timing for an amendment stating that the "unless" qualifies the date certain, thereby indicating an amendment could be accomplished at anytime.

E. Effect of Amendment

1. ***Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543 (Tex. App.—Houston [1st Dist.] 1994, no writ).**

If amendment is found to create a new lien made subsequent to homestead exemption, the lien will not be enforceable against homestead exemption. Refer to Section V.A.6 of this article for discussion.

F. Variances

1. ***Truong v. City of Houston*, 99 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2002, no pet.).**

In an action by the city to enjoin lot owners from commercial activity on their property, the documents given to the property owners by the owners' association were not variances, such that the owners would have been released from the residential-use-only restriction. A variance is a permission to use land in a manner forbidden by ordinance. Refer to Section VI.I.5 of this article for discussion.

X. ASSOCIATION AND DIRECTORS' LIABILITY

A. Deceptive Trade Practices Act

1. ***Riddick v. Quail Harbor Condo. Ass'n*, 7 S.W.3d 663 (Tex. App.—Houston [14th Dist.] 1999, no pet.).**

Payment of monthly fees does not constitute a purchase under DTPA, therefore, member of condominium association was not a consumer under DTPA. Refer to Section VI.H.3 of this article for discussion.

2. ***River Oaks Townhomes Owners' Ass'n, Inc. v. Bunt*, 712 S.W.2d 529 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).**
Alleging DTPA violations as well as violation of the statute governing procedures for removing unauthorized vehicles, a townhome owner recovered damages against the townhome association for towing two Corvettes from parking spaces in his complex. Both cars were towed three times.

The court of appeals reversed the trial court's judgment, holding that the owner failed to establish that he was a "consumer" under the DTPA with regard to parking facilities managed by the association. With regard to the towing statute, the court rejected the association's contention that the Corvettes were not "vehicles" under this statute because they were inoperable. Further, the court held that the towing violated the statute since no signs were visibly posted and knowledge of a condominium rule did not amount to receipt of notice.

B. Towing

1. ***River Oaks Townhomes Owners' Ass'n, Inc. v. Bunt*, 712 S.W.2d 529 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).**
Towing violated statute because no signs were posted and knowledge of the condominium rule was not sufficient to amount to receipt of notice. Refer to Section X.A.2 of this article for discussion.

C. Lis Pendens

1. ***Prappas v. Meyerland Cmty. Improvement Ass'n*, 795 S.W.2d 794 (Tex. App.—Houston [14th Dist.] 1990, writ denied).**
After homeowners within one section of the Meyerland subdivision recovered a judgment against the association allowing them to amend their restrictive covenants so that the property could be sold for commercial purposes, the association filed a lis pendens notice, which effectively quashed the sale. *See Meyerland Cmty. Improvement Ass'n v. Temple*, 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). Meyerland filed its lis pendens notice approximately one week before the closing was to occur. This act resulted in the transaction's failure despite the indisputable fact that everyone involved in the transaction already knew of the litigation. The lis pendens was filed after the trial court rendered its judgment; however, the case was still on appeal and the lis pendens was removed as soon as the supreme court refused the writ. Plaintiffs brought this suit against Meyerland contending that its filing of the lis pendens constituted slander of title and tortious interference with a contract. The trial court granted summary judgment in favor of Meyerland.

Although the appellants argued that the lis pendens in question fell outside statutory categories, malice actuated the filing and there was undue delay in the filing, the court of appeals held that the filing of the lis pendens was absolutely privileged and was part of the judicial process.

D. Association Liable as Transferee of Property

1. ***First Fin. Dev. Corp. v. Hughston*, 797 S.W.2d 286 (Tex. App.—Corpus Christi 1990, writ denied).**
Hughston sued First Financial, the developer of the condominiums, the construction company and the association for damages caused by the negligent construction and maintenance of an outside stairway. There was testimony that people, particularly children, were falling on the stairway, which was poorly lit, open to the elements, covered with a slick carpet, poorly maintained and had a hand rail which was in violation of the housing code. The developer had previously turned over control of the condominiums to the association upon sale of 80% of the units pursuant to the condominium declaration. A judgment was rendered solely against the developer and the construction company.

On appeal, the developer complained that the judgment against it should be reversed because, as a transferor of real property, it was not liable for injuries suffered by third parties after possession was transferred to the association. The court of appeals agreed, holding that the association had actual notice of the condition of the stairway. The court did, however, affirm the judgment as to the construction

company, holding it liable for half of the damages and the association liable for the other half.

E. Security

1. ***Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195 (Tex. 1995).**

Karelyn Siegler, a resident of Warwicks Towers high-rise condominium complex, was attacked and kidnapped from the parking garage of the complex. She later filed suit against Centeq (the manager and assignee of voting rights for the majority of the units), as well as the condominium association, alleging that they were negligent in failing to provide adequate security for the premises. Siegler's basis for suing Centeq was that it: (1) owned, controlled and/or managed the premises on which she was injured; and (2) Centeq was an agent of the association because of its controlling number of votes. The trial court rendered summary judgment in favor of Centeq. The court of appeals reversed and remanded, holding that a fact issue existed as to whether Centeq controlled security at the complex.

In its opinion, the Supreme Court of Texas noted that generally a person has no legal duty to protect another from the criminal acts of third parties. In deciding whether this case was an exception to the general rule, the Court assumed without deciding that the association had a duty to provide adequate security to its residents. The important factor was that of control. In recognizing the separate legal entity of the association/corporation, the Court held that the fact that Centeq had the power to elect a majority of the association's board of directors did not give it specific control over the safety of the premises. Accordingly, Centeq owed no duty to Siegler. Although the Court did not decide in this case whether homeowners associations have a duty to provide adequate security, it did cite cases from other states, which have held that the duty exists.

2. ***Berry Prop. Mgmt., Inc. v. Bliskey*, 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.).**

Bliskey, a tenant at the Wilderock Townhomes, leased her unit from Wilderock Owners, Inc., an investment group that owned several units in the Wilderock Townhomes. Those units owned by Wilderock Owners, Inc. were managed by Berry. Bliskey was sexually assaulted in the middle of the night in her townhome by an intruder that used a key to get into her front door. After the assault, the intruder told Bliskey that because she had cooperated with him, he would tell her how he gained access to her front door. The intruder told Bliskey that he broke into the management office operated by Berry where he found the files on each resident located in an unlocked file cabinet. He found from Bliskey's file that she lived alone in her unit and matched the unit number in her file to the door key, which was hanging on a pegboard and was clearly identified by the unit number. The association had a policy that management must have a key to all of the tenants' front door locks. One of the managers for Berry at the time of the assault testified that she was concerned about the lack of security at Wilderock, that there was poor lighting, and that she had never worked at a property that did not have a coding system or a separate lock box for the residents' keys. She also testified that she recommended that Berry purchase a lock box for the keys but that Berry refused.

Bliskey sued the association, Wilderock Owners, Inc. (the owner of her unit), and Berry (the manager) for negligence and deceptive trade practices. The association and the owner settled with Bliskey for $60,000. Bliskey prevailed at trial and was awarded damages for negligence, punitive damages, damages under the DTPA, pre-judgment interest and attorney's fees in excess of $17 Million. The court of appeals affirmed all aspects of the judgment except it modified the pre-judgment interest. The court held that because it was a policy of Wilderock Townhomes to have a key to all exterior locks, Wilderock and its manager had a duty to maintain the keys with ordinary care. The Supreme Court of Texas granted Berry's writ of error, being basically concerned with the award of both common law exemplary damages and DTPA additional damages; however, the case was settled and the writ was dismissed by agreement of the parties.

F. Fiduciary

1. ***Myer v. Cuevas*, 119 S.W.3d 830 (Tex. App.—San Antonio—2003, no pet.).**

Wurzbach Towers, a condominium regime, was formed in 1982 and incorporated as the Council of Co-Owners, Inc. ("the Council"). The owners of

individual units were shareholder members of the Council, and the Council elected a Board of Directors ("the Board"), which was responsible for day-to-day management and maintenance of the property. Myer, a unit owner, sued the Board and four Board members ("the Board members") in their individual capacity. Myer alleged: (1) violations of the open meetings requirements of the Uniform Condominium Act ("the Act"); (2) mismanagement of corporate assets; and (3) breach of fiduciary duty. Subsequently, new Board members were elected and Myer non-suited the Board entity and filed an amended petition naming only the four Board members.

The Board members filed an answer and a plea in abatement. The Board members' plea in abatement was granted and Myer was ordered to amend his petition to establish standing. The trial court dismissed Myer's case after failure to establish standing. Myer appealed.

The court of appeals affirmed. Myer argued that the Act statutorily confers standing on condominium owners to sue in their own names based on their proportionate ownership of the common elements. To lend support to this argument, Myer cited *Celotex Corporation v. Gracy Meadow Owners Association*, 847 S.W.2d 384, 390 (Tex. App.—Austin 1993, writ denied.), which noted that, "[w]here an individual co-tenant, e.g., a condominium owner, prosecutes a suit to recover damage to the common property, Texas law will allow the individual, in certain circumstances, to 'proceed with the action, recovering only the amount to which he shows himself entitled according to his proportionate interest in the common property.' " The court completely rejected this argument. First, the court explained that the Act does not establish standing for individual owners or exempt a plaintiff from the requirement of invoking the trial court's jurisdiction by establishing subject matter jurisdiction. Next, the court put the language from the *Celotex* case into context—the "certain circumstances" that the *Celotex* court referred to only occur in two situations: (1) "when the number or location of the co-tenants is such as to make their joinder impractical without causing great delay and inconvenience;" or (2) when a defendant fails to object to a plaintiff's failure to join the remaining co-tenants. Because neither of those circumstances was present, the court declined to depart from well-settled law. The court instead adhered to the reasoning in *Mitchell v. LaFlamme*, 60 S.W.3d 123, 128-29 (Tex. App.—Houston [14th Dist] 2000, no pet.), which held that recovery for damages done to common areas by a townhome association's failure to maintain the common areas belongs solely to the townhome association—the unit owners have no individual property right in the common areas for which they can sue for damages. The court, believing that this rule is necessary to prevent duplicate litigation, held that Myer lacked standing to sue for harm to the common elements of Wurzbach Towers. Many of Myer's allegations claimed that there was a breach of fiduciary duty. The court of appeals noted that in order to recover for breach of fiduciary duty, the plaintiff must establish that the defendant was the plaintiff's fiduciary. The court discussed elements of corporate law, noting that: (1) corporate officers owe fiduciary duties to the corporations they serve but not to the individual shareholders unless a contract or special relationship exists between them in addition to the corporate relationship; and (2) the right to proceed against an officer or former officer of a corporation for breaching a fiduciary duty owed to the corporation belongs to the corporation itself *Stubblefield v. Belco Mfg. Co., Inc.*, 931 S.W.2d 54, 55 (Tex. App.—Austin 1996, no writ). Myer didn't allege that a fiduciary relationship existed between him and the Board members; rather, he alleged that the Board members owed him fiduciary duties because of his position as a Council member. The Board members' plea in abatement gave Myer the opportunity to remedy this defect, but he failed to amend his pleadings to establish that a fiduciary duty was owed to him personally by the Board members. Thus, the court held that Myer lacked standing to sue for breach of fiduciary duty. Myer also argued that the Board members' financially irresponsible actions resulted in increased costs to the Council, which were passed on to the unit owners in the form of increased assessments. However, the court treated this complaint as they would treat a complaint from a shareholder who claimed that corporate officers' actions decreased the value of his stock—they dismissed it for lack of standing. Myer also complained that the Board allowed corporate funds to be used for the Board members' personal benefit.

He argued that the Board misrepresented the purpose of the expenditures to the co-owners and failed to reimburse the corporation for the personal expenses. The court noted that the allegations, if proven, would result in damage only to corporate assets and, because the corporation would be the aggrieved party, only the corporation would have standing to sue. Thus, the court held that trial court properly dismissed these claims. Myer claimed that the Board, contrary to the Tex. Prop. Code, failed to maintain adequate books, failed to safeguard funds despite evidence of embezzlement, and refused repeated requests by co-owners to establish a written procedure for handling records. Myer argued that he is a person specifically authorized by the Tex. Prop. Code to seek relief for this violation. The court explained that, for Myer to have standing to sue for violation of the Act, the declaration, or the by-laws, he must allege that he was adversely affected. Because Myer failed to allege how he was adversely affected, he did not establish standing to pursue this claim. The court recognized that the act of preventing an owner from viewing the books might be considered a harm in and of itself, but the Act expressly requires a person complaining of a violation of the Act to allege that they were "adversely affected." The court found that Myer did not fulfill this requirement and thus affirmed that portion of the trial court's judgment. Myer alleged violations of the open meetings provision of the Act, but failed to allege: (1) how he was adversely affected by the Board members' decision to hold unnoticed, closed meetings; or (2) that he complied with the Act's written request requirement. The court held that, because Myer failed to amend his pleadings even after the plea in abatement informed him of this defect, the trial court did not err in dismissing this claim. Myer alleged that Board members harassed and pressured various employees to resign in retaliation for disagreement with the Board members' positions and claimed the Board members acted on personal vendettas against certain employees, causing costly employee turnover. However, the court found that Myer didn't allege that he is a third-party beneficiary of the employment contracts and thus held that he lacked standing to prosecute any claim those employees may have for wrongful termination or employment discrimination. The court further held that any damages from "costly employee turnover" were borne by the corporation and that only the corporation has standing to sue to recover these damages.

2. ***Harris v. The Spires Council of Co-Owners*, 981 S.W.2d 892 (Tex. App.—Houston [1st Dist.] 1998, no pet.).**

The Spires was a high-rise condominium development in Houston. John and Geneva Harris moved into the Spires in 1988. By 1992, both John and Geneva required personal assistance because of health-related difficulties. The Harrises hired Martha Prudencio allegedly on the recommendation of the Spires. Prudencio was a former Spires employee. Prudencio continued to assist John after Geneva passed away in 1993. In 1994, John was diagnosed with Alzheimer's. John's son, David, became concerned about his father's finances after receiving a call from a car dealer regarding a guaranty John had executed to assist Prudencio lease a car, and after discovering approximately $90,000 in disbursements from John's account to Prudencio and her relatives. After being appointed John's attorney in fact, David sued the Spires for negligence, negligent misrepresentation or omission, and breach of fiduciary duty. The petition alleged that the Spires had failed to inform the Harrises that Prudencio had been fired under suspicion of theft. The Spires moved for summary judgment on the ground that it owed no duty to John and, thus, John had no cause of action as a matter of law. The trial court granted the Spires' motion on the basis that the Spires owed no duty to John. The Spires submitted an affidavit from Houshair Moarefi, the managing agent, alleging that neither the Spires nor its employees recommended Prudencio to the Harrises. Harris submitted an affidavit which directly controverted the Moarefi affidavit. On the issue of fiduciary duty, the Spires submitted an affidavit alleging that no such duty existed which was not rebutted by Harris.

The court of appeals affirmed in part and reversed and remanded in part. The court discussed in general the fact that Tex. Prop. Code Ann. § 82.103(a) recognizes a fiduciary relationship between an officer or member of a condominium board and its unit owners and that, in accordance with Restatement (Second) of Agency § 401 (1958),

this duty must be fulfilled with ordinary care, diligence, good faith, and judgment. The court also noted that a fiduciary duty may also arise by contract and then cited *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied), the only reported case dealing with a contractual fiduciary duty owed by a condominium association to its owners. The court held that because no evidence was offered by Harris on the issue of fiduciary duty and the Spires' evidence was unrebutted, summary judgment was proper. However, the court reversed on the issue of general duty. The underpinning of Harris's argument was that the Spires recommended Prudencio and, thus, created a duty to Harris. The Spires initially succeeded in negating this contention with Moarefi's affidavit. However, the affidavit offered by Harris explicitly contradicted Moarefi's statement. This created a fact issue and, thus, summary judgment was improper.

[Editor's Note: § 82.103(a) is not applicable to condominium developments created prior to 1994.]

3. ***Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied).**

Sassen's condominium unit was damaged by a fire. The association employed a general contractor to repair her unit and other damaged units. Sassen was not happy with the contractor's work and requested that the association stop the work and allow her to employ another contractor. After the association informed Sassen that it had a contract with that contractor and that the work would continue, Sassen padlocked her door and denied the contractor further access to her unit. Sassen then filed suit against the association alleging breach of fiduciary duty. The condominium declaration made an "irrevocable appointment" of the association as "an attorney-in-fact to deal with the property upon its discretion or obsolescence." After a jury found contributory negligence (association 60%; Sassen 40%), the trial court entered judgment in favor of the association notwithstanding the verdict, holding that the association had exclusive authority to direct and control a contractor to restore Sassen's unit.

The court of appeals reversed and rendered judgment for Sassen on the jury's verdict; however, it held that comparative negligence did not apply in this case. In its opinion, the court stated the general rules applicable to attorneys-in-fact and agency law. The court discussed Texas case law regarding the fact that the appointment of an attorney-in-fact creates an agency relationship, which creates a fiduciary relationship as a matter of law; and a fiduciary owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability. If the agent fails in its duty, it will be liable to the principal for the resulting damage. The appellate court further found that: (1) the jury's findings that the association acted in an arbitrary, capricious or discriminatory manner towards Sassen was equivalent to finding that the association breached its fiduciary duty; and (2) an agent's breach of its fiduciary duty (especially when the duty arises out of a written contract of agency) is a breach of contract, as well as a tort. Finally, the court held that due to Sassen's recovery of $38,000 in damages, the association's obligation to conduct the restoration resulting from the fire was eliminated.

G. Smoke Detectors

1. ***Gilstrap v. Park Lane Town Home Ass'n*, 885 S.W.2d 589 (Tex. App. —Amarillo 1994, no writ).**

A one-year-old boy died as a result of a fire in a condominium leased to his grandmother. While, the Texas Property Code governs the issue of smoke detectors in landlord/tenant relationships, neither the boy nor his mother were tenants and the association/defendant was not the landlord. Nonetheless, the boy's mother filed suit against the association for failing to install a smoke detector in the condominium. The association contended that it had no common law duty to install a smoke detector because the legislature preempted the area by placing the duty and liability on the landlord in §§ 92.251-92.262 of the Texas Property Code. § 92.252(a) provided that these Texas Property Code provisions were in lieu of common law, other statutory law, or local ordinances. Accordingly, the association attempted to argue that any common law liability it had to install a smoke detector was also preempted by the statute. The trial court rendered summary judgment in favor of the association based on the assumption that the Texas Property Code preempted any common law liability.

The court of appeals reversed and remanded, holding that the preemption provision of the statute only referred to the landlord-tenant relationship, and not outside that context as here. Accordingly, there was a fact issue with regard to whether the association had a common law duty to install a smoke detector.

H. Ultra Vires

1. ***Mitchell v. Laflamme*, 60 S.W.3d 123 (Tex. App.—Houston [14th Dist.] 2000, no pet.).**

The failure of a homeowners' association, a non-profit corporation, to maintain exteriors and common areas did not constitute an ultra vires act within the meaning of the ultra vires provision of the Non-Profit Corporation Act, and, thus, that Act did not require that a suit for damages to the common areas and exteriors be brought as a representative suit on behalf of the association. However, the court of appeals held that the suit needed to be brought as a representative suit on behalf of the association for other reasons. Refer to Section VI.B.14 of this article for discussion.

I. Derivative Actions

1. ***Myer v. Cuevas*, 119 S.W.3d 830 (Tex. App.—San Antonio 2003, no pet.).**

Recovery for damages done to common areas by a townhome association's failure to maintain the common areas belongs solely to the townhome association—the unit owners have no individual property right in the common areas for which they can sue for damages. Refer to Section X.F.1 of this article for discussion.

2. ***Mitchell v. Laflamme*, 60 S.W.3d 123 (Tex. App.—Houston [14th Dist.] 2000, no pet.).**

Recovery for damages to the common areas of a town house subdivision, due to the homeowners' association's failure to maintain them, belonged solely to the association itself, a nonprofit corporation, and, thus, town house owners had no individual contract or property right in the common areas for which they could sue for damages, but were required instead to bring a representative suit on behalf of the corporation, where association owned the common areas. An owner cannot personally recover damages for a wrong done solely to the corporation, even though the owner may have been injured by that wrong. Refer to Section VI.B.14 of this article for discussion.

3. ***Celotex Corp., Inc. v. Gracy Meadow Owners Ass'n, Inc.*, 847 S.W.2d 384 (Tex. App.—Austin 1993, writ denied).**

The condominium association brought an action under the DTPA against the manufacturer of roofing shingles, alleging that the shingles were defective. There was evidence presented at trial that one of the owners had knowledge that the shingles were not as represented and Celotex argued that the shingles should be imputed to the association. The trial court rendered judgment, awarding damages, attorney's fees, and prejudgment interest in favor of the association. The trial court awarded treble damages under the DTPA based upon segregating each owner's share of the damages award and trebling each owner's share.

The court of appeals modified the judgment to reduce the amount of additional damages under the DTPA. The court found that the association's claim under Tex. Prop. Code Ann. § 81.201(b) was a collective claim based on collective harm, not individual harm. The court stated that the association was entitled to bring the claim because the subject of the complaint was damage to a common element, thus resulting in common harm to each condominium owner. The court held that a damage award for collective harm cannot be treated as separate damage awards and then trebled individually pursuant to § 17.50(b) of the DTPA. The court concluded that the association's recovery of additional damages should be limited to two times that portion of the single damage award rendered by the trial court that does not exceed $1,000. The court refused to apply the imputed-knowledge theory holding that absent evidence that the owner possessing the knowledge was an officer or director of the association, the knowledge would not be imputed.

XI. CERTAIN ASSOCIATION CAUSES OF ACTION

A. Right to Institute, Defend, Intervene In, Settle or Compromise Litigation

1. ***Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552 (Tex. App. – Houston [1 Dist.] 2005, pet. denied).**

The court addressed whether a group of concerned homeowners (WWCH) had the authority to represent owners in the two subdivisions involved in this suit because WWCH did not own property in either subdivision. It interpreted the argument that WWCH did not have such authority as a challenge to WWCH's organizational standing and, applying the Supreme Court's three-pronged test for the determination of whether an organization has standing to bring suit, found that WWCH had standing to bring this action and that it may adjudicate the dispute on the merits. Refer to Section V.D.2 of this article for discussion.

2. ***Truong v. City of Houston*, 99 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2002, no pet.).**

In an action by the city to enjoin lot owners from commercial activity on their property in violation of a residential-use-only restriction, the owners' association was not authorized to settle the action under Tex. Prop. Code Ann. § 204.010, which sets forth the powers of property owners' associations. The owners' association did not represent the city; rather, it was representative of owners within the subdivision. Refer to Section VI.I.5 of this article for discussion.

B. Deceptive Trade Practices Act

1. ***Celotex Corp., Inc. v. Gracy Meadow Owners Ass'n, Inc.*, 847 S.W.2d 384 (Tex. App.—Austin 1993, writ denied).**

Damage award of nearly $29,000 in condominium owners association's DTPA suit against manufacturer of roofing shingles, brought on behalf of individual owners, was collective award based on collective harm and, while it could be proportionately distributed based on each owner's undivided interest in roof, it could not be segregated into individual damage awards and trebled on that basis under DTPA section providing for trebling of portion of damage award that does not exceed $1,000. Refer to Section X.I.3 of this article for discussion.

C. Condominiums

1. ***Celotex Corp., Inc. v. Gracy Meadow Owners Ass'n, Inc.*, 847 S.W.2d 384 (Tex. App.—Austin 1993, writ denied).**

A condominium cotenant may bring an action to recover for his proportionate share of damages to common property, but that recovery does not constitute a separate, individual award of damages, rather, there is a single finding of damages to the collectively owned property and a proportionate distribution based on ownership of the undivided interest. Refer to Section X.I.3 of this article for discussion.

D. Imputed Knowledge

1. ***Celotex Corp., Inc. v. Gracy Meadow Owners Ass'n, Inc.*, 847 S.W.2d 384 (Tex. App.—Austin 1993, writ denied).**

In a suit brought by an owners' association on behalf of all condominium owners against a manufacturer of roofing shingles, a condominium owner's knowledge that the shingles on her roof were not as represented was not imputed to the owners' association so as to limit recovery against the manufacturer because there was no evidence that the owner was either an officer or director of the association, and individual owners were not agents for each other or for the association. Refer to Section X.I.3 of this article for discussion.

XII. ASSOCIATION BOOKS AND RECORDS

A. Right to Inspect and Copy

1. ***Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).**

In a suit against the trustee for breach of fiduciary duty, the trust beneficiary sought to compel discovery of confidential communications between the trustee and the attorney for the trust. The trial court ordered the attorney to disclose communications made before the suit was filed, holding that the attorney-client privilege did not prevent beneficiaries of a trust from discovering pre-lawsuit communications relating to the trust. The court of appeals denied mandamus relief to the

trustee; however, same was granted by the Supreme Court of Texas.

In its opinion, the Supreme Court of Texas partly overruled *Burton v. Cravey*, 759 S.W.2d 160 (Tex. App.--Houston [1st Dist.] 1988, no writ). In *Burton*, the trial court allowed condominium owners to inspect records of the condominium association, including those in the possession of the association's attorney, finding as a factual matter that the attorney's records constituted part of the association's records. The court of appeals affirmed, holding that the attorney-client privilege did not apply where the condominium owners had an unqualified right of inspection. In this case, the Court agreed with *Burton* as to actual records of the association in the possession of their attorney, but disagreed that the owners' right to inspection "trumped" the privilege covering confidential attorney-client communications. The Court also expressed its disapproval of the court of appeals' dicta in *Burton* that the trial court could, in its discretion, decline to apply the attorney-client privilege even if all of the required elements are met.

2. ***Citizens Ass'n for Sound Energy (CASE) v. Boltz*, 886 S.W.2d 283 (Tex. App.—Amarillo 1994, writ denied).**

CASE was a non-profit corporation. The Boltzes, former officers and directors of CASE, requested information concerning a distribution of money obtained in a settlement. CASE provided a computer printout summary; however, this was not satisfactory for the Boltzes. The Boltzes then made an additional written request through their attorney to inspect and copy those records to which their right of inspection applied under § 2.23B of the Texas Non-Profit Corporation Act. The Boltzes were allowed to inspect several of CASE's records; however, their request for copies was denied. The trial court entered summary judgment in favor of the Boltzes and decreed that they were entitled to inspect and copy CASE's records by virtue of the Texas Non-Profit Corporation Act.

The court of appeals affirmed, holding that: (1) the inspection of books by a member of a non-profit corporation was not unconstitutional; (2) persons who had resigned from the board of directors of the non-profit corporation were still members entitled to inspection; (3) in the absence of a showing that the right of inspection had been used by a member for harassment, the right of inspection is not limited in number; and (4) the statutory amendment clarifying that the right to inspect included the right to copy was applicable to a request made prior to the amendment.

3. ***Burton v. Cravey*, 759 S.W.2d 160 (Tex. App.—Houston [1st Dist.] 1988, no writ).**

A group of dissident homeowners filed a petition for writs of mandamus and injunction because the association refused to allow them to inspect the association's books and records. The trial court granted the writs of mandamus, ordering the association to make the records available for inspection and copying, including those in the possession of the association's attorney. The trial court also enjoined the association from interfering with the homeowners' right to inspect the books and records.

On appeal, the association contended that mandamus was improper because the homeowners' failed to establish a cause of action or a probable right and a probable injury. The court of appeals disagreed and held that the homeowners did not have to establish an independent cause of action; they merely had to establish their statutory authority to inspect. The court held that once the association's attorney's files were found to be part of the books and records of the association, the homeowners were entitled to inspect them for any "proper purpose." Furthermore, it was the association's burden of proof to establish the absence of a "proper purpose." With regard to the issue of attorney-client privilege, the court held: "the attorney-client privilege is not absolute," and the interests of each party would have to be weighed.

[Editor's Note: *Burton* was partially overruled by the Texas Supreme Court in *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). Refer to Section XII.A.1 of this article for further discussion.]

III. ZONING

A. Priority of Restrictions

1. ***Indep. American Real Estate, Inc. v. Davis*, 735 S.W.2d 256 (Tex. App.—Dallas 1987, no writ).**	Change in zoning does not abrogate restrictions. Refer to Section VII.B.2 of this article for discussion.

The author acknowledges with gratitude the assistance of Everett Day (an attorney with Butler & Hailey) in updating this paper.

TABLE OF CASES

Supreme Court of Texas Cases

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