

# **COMMUNITY ASSOCIATION LAW**

**For Real Estate Legal Assistants**

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

## I. Introduction

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

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

"Condominium unit owners constitute a democratic subsociety, of necessity more restrictive in the use of condominium property than might be acceptable given traditional forms of property ownership. Therefore, each constituent must relinquish some degree of freedom of choice and agree to subordinate some of his traditional ownership rights when he elects this type of ownership experience." *Raymond*, 662 S.W.2d at 89; *see also Board of Directors of By The Sea Council of Co-Owners, Inc.*, 644 S.W.2d at 780-81. The relinquishment of certain ownership rights is consistent with the condominium concept in Texas, which envisions the ownership of two estates merged into one: the fee simple ownership of an apartment or unit in a condominium project and a tenancy in common with other co-owners in the common elements. *Dutcher v. Owners*, 647 S.W.2d 948, 949 (Tex. 1983).

## II. Preparation to Handle a Community Association Law Matter

### A. Preliminary Considerations

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

2. Determine what type of ownership you are dealing with.
  - a. Condominium
  - b. Townhouse
  - c. Single-family
3. Determine what type of association, if any, you are dealing with.
  - a. Texas non-profit corporation
  - b. Unincorporated association
  - c. Former non-profit corporation
  - d. Check corporate status, registered agent, and officer information.
4. Review applicable statutory authority, including:
  - a. Texas Non-Profit Corporation Act.
  - b. Texas Property Code
    - (1) Chapter 201 and 202 - Restrictive Covenants
    - (2) Condominium Act (Chapter 81)
    - (3) Uniform Condominium Act (Chapter 82)
    - (4) Chapter 204 – Powers of Associations

***NOTICE OF OPPORTUNITY TO BE HEARD:*** Not later than the thirtieth day after the date of this notice you may request a hearing before the Association's Board of Directors to contest any of the matters herein set forth. The request must be in writing, must state generally the matter(s) which you are contesting and the reasons for the contest and must be mailed or delivered to this law firm. If you fail to request a hearing by the thirtieth day after the date of this notice, it will be assumed you do not contest any of these matters.

5. Assemble and review association specific documents and information.
  - a. Governing documents (covenants and restrictions, articles of incorporation, bylaws, rules and regulations, etc.)
  - b. Association books and records
  - c. Related litigation
  - d. Prior correspondence

6. Understand how the board works, what their duties (and limitations) are, and who you represent.

**B. Notice of Restrictions**

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

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

**C. Construction of Restrictive Covenants**

Prior to 1987, it was well established in Texas that restrictive covenants were to be *strictly construed* against the party seeking their enforcement and all doubt had to be resolved in favor of the free use of the property. *DeNina v. Bammel Forest Civic Club*, 712 S.W.2d 195, 198 (Tex. App. -- Houston [14th Dist.] 1986, no writ). *Davis v. Huey*, 620 S.W.2d 561 (Tex. 1981). However, effective June 18, 1987, Chapter 202 of the Texas Property Code was adopted, Section 202.003(a) of which provides "[a] restrictive covenant shall be liberally construed to give effect to its purposes and intent."<sup>1</sup>

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

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

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<sup>1</sup> *See L. Burton, Matters of Interpretation*, Vol. 10, No. 6 C.A.I. Multi Gram - Greater Houston Chapter (Nov. 1987).

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

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

(a) An exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.

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

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

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

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

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

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

a footnote in *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 (Tex. App. - Houston [1st Dist.] 1994, writ denied) in which a vigorous dissent noted:

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

Liberal versus strict construction apparently awaits final determination by the Texas Supreme Court. Ultimately, a comparison of the facts of the apparently conflicting decisions tends to the conclusion the facts generally outweigh most applications of rules of construction.

#### D. The Community Association

1. **Board of Directors:** A board of directors may exercise its powers only as a body at duly called and conducted meetings or by unanimous written consent. *American Bank & Trust Co. v. Freeman*, 560 S.W.2d 444 (Tex. App. -- Beaumont 1977, writ ref'd n.r.e.). Under the Texas Non-Profit Corporation Act, meetings may also be conducted by telephone; and pursuant to a 1994 amendment, the articles of incorporation may permit action by written consent of less than all directors subject to strict notice requirements. Tex. Rev. Civ. Stat. Ann - art. 1396-9.10 (Vernon Supp. 1995).

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

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

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

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

## E. Court Jurisdiction

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

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

3. **Justice Courts.** Justice courts have jurisdiction in restrictive covenant cases if the case is within their amount in controversy jurisdiction. *Ex parte Manojar*, 894 S.W.2d 85 (Tex. App. -- Houston [14th Dist.] 1995, no writ) (although homeowner disputed ownership in association's suit to recover delinquent assessments, title was only incidentally or collaterally involved). However, justice courts are by statute denied jurisdiction in suits to enforce a lien on land, Tex. Gov. Code Ann. Section 27.031(b) (Vernon 1994), and justice courts have no jurisdiction to issue injunctions. *Belknap Hardware & Mfg. Co. v. Lightfoot*, 75 S.W.2d 481 (Tex. Civ. App. -- Eastland 1934, no writ).

H.B. 387 (copy attached) amends Section 27.034 of the Texas Government Code regarding jurisdiction of justice courts in a county with a population of 2.8 million or more. The Act (effective June 17, 1995) provides such justice courts have concurrent jurisdiction with the district courts "of suits relating to enforcement of a deed restriction of a residential subdivision that does not concern a structural change to a dwelling" and confers such jurisdiction "regardless of the amount in controversy."

H.B. 387 does not appear to alter a justice court's lack of jurisdiction to enforce association liens or grant injunctive relief (note that Government Code Section 27.031 was not amended). However, the amount in controversy limit for Harris County justice courts is removed, and such justice courts may be a pragmatic option when foreclosure is not sought and a damages award (including Texas Property Code Chapter 202 "civil damages") may be sufficient to obtain compliance.

## III. Assessment Collection

### A. Preliminary Considerations

1. Determine the amount of assessments.
  - a. Annual
  - b. Monthly
  - c. Special

- d. Late charge [see § 204.010(a)(10)]
  - e. Interest
  - f. Credits for payments
2. Make independent decision as to the validity of debt.
- a. Review Governing Documents
  - b. Review account
  - c. Review prior correspondence and history of delinquency
3. Collection should proceed in accordance with a written uniform collection procedure (review Governing Documents and applicable statutes which might effect collection procedure options).
- a. Association demand
  - b. Attorney demand
  - c. Settlement parameters
  - d. Possible notice of lien
  - e. Possible non-judicial foreclosure
  - f. Possible suit
4. Risks
- a. No financial benefit
  - b. Partial financial benefit
  - c. Counterclaim for related or independent reason
  - d. Remember Federal Fair Debt Collection Practices Act requirements for all communications with debtor, including demand letters and suits

Our firm represents the Pine Village North Association ("the Association") and has been hired to assist it in collecting the above referenced debt. We are attempting to collect a debt. All information obtained will be used for that purpose.

You are also advised of the following:

- 1. Unless you, within thirty (30) days after receipt of this notice, dispute the validity of the debt, or any portion thereof, the debt will be assumed to be valid by this law firm.
- 2. If you notify us, in writing, within thirty (30) days after receipt of this notice, that the debt or any portion thereof, is disputed, we will obtain a verification of the debt and mail same to you.

3. Upon your written request within thirty (30) days after receipt of this notice, we will provide you with the name and address of the original creditor, if different from the current creditor.
5. Interpret the restrictive covenants in question.
  - a. Strict construction
  - b. Liberal construction
  - c. Historical construction by association

**B. Selected Assessment Collection Cases**

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

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

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

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

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

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

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

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

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

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

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

Outside Section 82.102(12), an association is not authorized to collect interest unless authorized by the governing documents, by statute or by agreement of the parties; and late charges may be authorized only in the governing documents or by agreement. *See Frey v. De Cordova Ben Estates Owners Association*, 647 S.W.2d 246 (Tex. 1983) (building permit, transfer and lease fees all invalid as not authorized by condominium declaration). *Cf: Lee v. Braeburn Valley West Civic*

*Ass'n*, 794 S.W.2d 44 (Tex. App. -- Eastland 1990, writ denied) (late charges and interest properly authorized by declaration). When not otherwise authorized, pre-judgment interest at the rate of six percent can be recovered "ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable." Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (Vernon 1987). *See also Concrete Construction Supply, Inc. v. M.F.C., Inc.*, 636 S.W.2d 475 (Tex. App. 1982, no writ) (any interest charged during statutory interest free period is more than double the permitted rate and therefore subjected creditor to penalties of forfeiture of all principal, double the usurious interest charged, and payment of debtor's costs and attorneys fees).

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

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

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

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

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

- a. Determine legal ability to proceed with such remedy under governing documents.
- b. Require verification of all components of the "debt".
- c. Get authorization to proceed by board after disclosure of all potential risks.

- d. Strictly comply with all requirements of the governing documents and Texas Property Code Section 51.002.
- e. Obtain appointment of trustee and record.
- f. Remember right to redeem property pursuant to Texas Uniform Condominium Act.

#### IV. Attorney Fees

##### A. Bases for Recovery

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

The Texas Property Code provides as follows:

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

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

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

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

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

##### B. Mandatory Award of Attorney Fees

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

A homeowner who successfully defends an action to enforce restrictive covenants does not "assert" or "prevail" in an action to enforce restrictive covenant and therefore is not entitled to

recover attorney's fees under Texas Property Code Section 5.006. *Meyerland Community Improvement Association v. Belilove*, 624 S.W.2d 620 (Tex. App. -- Houston [14th Dist.] 1981, writ ref'd n.r.e.). However, a homeowner is entitled to recover attorney's fees upon proof the association violated the restrictive covenants. *Sossen v. Tanglegrove Townhouse Condominium Association, supra*, 877 S.W.2d at 493.

C. **Amount of Attorney Fees is Discretionary With Court**

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

V. **Enforcement of Restrictive Covenants (other than for assessments)**

A. **Preliminary Considerations**

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

B. **Substantial Violation Required**

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

C. **Minor Violations Irrelevant**

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

D. **Number of Violations is Relevant**

Assuming other substantial violations, the number of such violations becomes important. *E.g.: Tanglewood Homes Association, Inc. v. Henke*, 728 S.W.2d 39 (Tex. App. -- Houston [1st

Dist.] 1987, writ ref'd n.r.e.) (15 garages violating setback restriction in 56 lot subdivision established abandonment as to garages, but 5 main residences of 56 lots violating setback restriction did not as to main residences).

E. **Mandatory Injunction**

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

F. **Civil Damages**

In addition to injunctive relief and attorney fees, a court may also assess "civil damages" for violation of a restrictive covenant pursuant to Tex. Prop. Code ann. Section 202.004(c) (Vernon 1995) which provides "[a] court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed \$200 for each day of the violation."

G. **Standing of Association**

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

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

VI. **Restriction Enforcement Defenses**

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

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

**Waiver Factors**: "Among the factors to be considered by the 'average man' are the number, nature, and severity of the then existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant." *New Jerusalem Baptist Church, Inc. v. City of Houston*, 598 S.W.2d at 669; *citing Cowling v. Colligan*, 312 S.W.2d 943 (Tex. 1958).

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

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

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

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

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

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

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

VII. **Litigation (assessment and non-assessment cases)**

A. **General Considerations**

1. Before you file suit.
  - A. Reasonable person test
  - B. Attorney fee awakening

- C. Collectability analysis
  - D. Board consideration
  - E. Paper trail/evidence and witness check
2. When filing suit
    - A. Check corporate status
    - B. Court analysis
    - C. Realize counterclaim potential
    - D. Mediation complications
  3. After suit is filed
    - A. Jury appeal (pictures; remember the little guy; demonstrate board interest)
    - B. Attorney fee dilemma
    - C. Discovery and the pro se defendant
    - D. Counterclaim reaction
  4. Judgment and Post-Judgment
    - A. Drafting an enforceable judgment
    - B. Possible appeal
    - C. Post-judgment discovery
    - D. Collection after foreclosure
  5. See Sample Pleadings
    - A. Demand letter
    - B. Plaintiff's original petition
    - C. Agreed judgment

**B. Selected Litigation Cases**

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

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

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

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

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

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

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

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

Although there is some authority for the termination of utilities (when provided for in the constituent documents), an association should be cautioned that such self-help remedy has inherent

risks and liabilities due to the potential damages which may result if the utilities (i.e., gas, electricity, and water) are disconnected. The disconnecting of access to cable is often an advised less risky alternative.

## VIII. Some Current "Hot Topics"

### A. Inspection of Books and Records

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

Most association books and records should be open to inspection by its members. However, there are very legitimate reasons why some should not such as protection of privacy rights of other members, litigation matters between the association and its members, etc. *Burton v. Cravey* is probably limited to its facts (the court specifically pointed out it was bound by an unchallenged finding of fact that the attorney's files were books and records of the association). In any event, the cases do indicate the need where possible to spell out confidential or privileged matters in the governing documents and for clear designation and segregation from other books and records of documents falling within those matters. Of course, inspection can also be denied if requested for an "improper purpose." *E.g. Perry v. Perry Brothers, Inc.*, 753 S.W.2d 773 (Tex. App. -- Dallas 1988, no writ) (the jury found demand to inspect the books and records was made in bad faith or for an improper purpose).

### B. Liability for Criminal Conduct of Third Parties

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

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

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

### C. Constitutional Challenges

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

Florida has lead the way in more recent times in extending constitutional due process requirements of notice and opportunity to be heard and equal protection rights to homeowners. *White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346 (Fla. 1979) (holding selective enforcement of restrictions violated due process and equal protection). Cf: *Majestic View Condominium Assoc., Inc. v. Bolotin*, 429 So. 2d 438 (Fla. App. 1983) (condominium association not required by due process clause to hold adversary proceeding before enforcing restrictions). Application of constitutional due process requirements to private community associations center around the concept of community associations as a form of "quasi-government" or "mini-government." E.g. *Holleman v. Mission Trace Homeowners Association*, 556 S.W.2d 632 (Tex. Civ. App. -- San Antonio 1977, no writ). Florida has also extended constitutional protections of free speech and assembly to homeowners. *Zimmerman v. DCA at Welby, Inc.*, 505 So.2d 1371 (Fla. App. 1987) (holding board rule unreasonably restricted unit owners from inviting public officers or candidates for public office to appear and speak in common areas).

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

### D. Fair Housing Amendment Act of 1988

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

In a typical case involving restrictions, the court held single-family only and prohibition of business or commercial use restrictions could not be enforced under FHAA to prohibit the state of Missouri from operating a group home for six mentally retarded males and two supervisors. The court stated discriminatory intent was shown because the homeowners continued to oppose the group home even though the state had given the homeowners reasonable assurances it would address the stated concerns of the residents. The court found discriminatory effect because enforcement of such restrictions would force such homes to cluster in non-restricted areas and defeat the state's goal of integrating the mentally ill into society. The court also found the group

operated as a functional family and that no adverse impact on real estate values had been shown. The court concluded a reasonable accommodation was available simply by not seeking the enforcement of the restriction. *Martin v. Constance*, 843 F. Supp. 1321 (E.D. Mo. 1994).

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

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

- E.     **Creation of Restrictions By Committee**
- F.     **Immunity for Association Volunteers**

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