

RESTRICTIVE COVENANTS: MODIFYING AND UPDATING

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RESTRICTIVE COVENANTS: MODIFYING AND UPDATING

I. INTRODUCTION

A. Restrictive Covenants

Restrictive covenants are often referred to as deed restrictions (referred to as "Restrictions" in this Article) and are private, contractual covenants which limit land use. Restrictions are placed on real property by affirmative action of the owner of the real property (usually the initial developer), for the benefit of that property only, with a typical intent to enhance the value of that real property. Restrictions affect subsequent owners of the real property, usually for a stated term and for any extensions. There are no limitations on the subject matter of Restrictions, except for compliance with law and public policy.

Restrictions are of two types: real and personal. Personal covenants are also known as "equitable servitudes." Most Restrictions dealt with by real estate attorneys are real, but that should not be taken for granted. Real covenants run with the land, binding all future owners, while personal covenants are for the benefit of a specific named party, and any permitted assigned. *Tarrant Appraisal District v. Colonial Country Club*, 767 S.W.2d 230, 235 (Tex. App.—Fort Worth 1989, writ. denied). Unless there is evidence in the dedicatory instrument that the Restriction is for the benefit of other land, the covenants will be personal to the grantor. *Davis v. Skipper*, 83 S.W.2d 318, 322 (Tex. Comm. App. Sec. A 1935—Opinion Adopted); *Baker v. Alford*, 482 S.W.2d 908 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ.); *see also Brehmer v. City of Kerrville*, 320 S.W.2d 193 (Tex. Civ. App.—San Antonio 1959, no writ.)(personal restrictions on their face could still be enforced by other lot owners if there is a general scheme or plan). The presumption is in favor of personal covenants. *McCart v. Cain*, 416 S.W.2d 463, 465 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.). *Baker v. Henderson*, 153 S.W.2d 465 (Tex. Comm. App. Sec. A 1941, Opinion adopted) held that personal covenants are not assignable without an express assignment provision. However, a Federal Court opinion interpreting Colorado law has held that since a personal covenant is a Restriction subject to contract law, and general contract law holds that contract rights are assignable unless specifically prohibited, a personal covenant is therefore assignable. This analysis could sway a Texas court since Restrictions are generally governed by contract law principles.

El Paso Refinery, LP v. TRMI, 302 F.3d 343, 355-58 (5th Cir. 2002) contains a comprehensive overview of Texas law on personal and real covenants. The court cited the test for whether a covenant "runs with the land" (which is the distinction between real and personal covenants) as follows:

- i) touches and concerns the land,
- ii) relates to a thing in existence, or specifically binds the parties and their assigns,
- iii) is intended by the original parties to run with the land, and
- iv) the successor to the burden has notice.

(citing *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987) and 16 Tex. Jur. 3d *Covenants, Conditions and Restrictions* Sec. 10 (2002)).

B. Modification and Extension

1. Residential Restrictions

As time passes, the needs of a residential neighborhood change. Restrictions drafted before 1970 (particularly those drafted before 1960) rarely adequately address land use and redevelopment issues today. Modern Restrictions control all nature of use and development in a residential neighborhood. As suburban dwellers look to moving to close-in established neighborhoods, and as dwellers in those neighborhoods seek the protections provided by Restrictions in newer suburban neighborhoods, community associations are looking to modify their outdated Restrictions to provide the essential elements of protection sought by residential neighborhoods.

Often, older Restrictions do not have adequate provisions for renewal or modification, forcing use of the statutory provisions of the Texas Property Code which allow modification and extension without unanimous consent even if the Restrictions do not address modification or extension. For practical reasons of neighborhood consensus, the modification of existing Restrictions often requires a neighborhood to focus on the most significant issues only. Restrictions with the extensive detail and dramatic community association control typical in suburban neighborhoods often will not receive support in an established neighborhood.

A key element in modifying Restrictions in an established neighborhood is a well organized community association able to: (i) define neighborhood needs, (ii) limit proposed modifications to those addressing those needs, and (iii) pursue compliance with the statutory provisions for an enforceable modification.

2. Commercial Restrictions

Like residential Restrictions, commercial Restrictions may become outdated. However, since most commercial restrictions arose beginning in the 1970's, they are, generally, well drafted and not requiring the comprehensive updating typical of an older residential neighborhood. More typically, modification of commercial restrictions is required to address changes in land use, correct errors, clarify uses due to changes in terminology or accommodate commercial transactions.

C. Creation

Some neighborhoods have no Restrictions (or the Restrictions have expired). Those neighborhoods confront a completely different task in adopting Restrictions from the neighborhood modifying or extending Restrictions. The neighborhood must reach a strong consensus for the need for Restrictions and the primary goals to be achieved by adopting Restrictions.

Often the first critical decision is the geographic definition of the "neighborhood." The focus in that decision is not historic boundaries (whether subdivision plat boundaries or streets). Instead, the focus must be upon an area with a shared vision and the desire to work together for a common good. However, if a Chapter 201 statutory creation process is contemplated, the "neighborhood" is that geographic area once subject to Restrictions.

The scope of Restrictions considered by such a neighborhood should be more restrictive than that of a neighborhood with existing Restrictions looking to update those Restrictions. These neighborhoods may utilize Chapter 201 of the Texas Property Code (which contains the infamous "opt out" provision) only if previously subject to Restrictions limiting a majority of area to residential use only. There is no mechanism to force a property owner to restrict her or his property. Any vigilant property owner can

exercise her or his opt out rights by affirmatively rejecting the Restrictions when initially presented or by filing a statement in the Real Property Records within one year after the filing of the Restrictions.

Where no Restrictions ever existed which limited a majority in area to residential use only, unanimous consent is required of the property owners in the affected area.

The critical elements in the proposed Restrictions for an established residential neighborhood which has none currently are (i) residential use, and (ii) minimum performance standards for new construction and remodeling. For practical reasons of neighborhood consensus, insignificant provisions should be minimized. However, where Restrictions have lapsed, simply reinstating the expired Restriction is usually palatable to the neighborhood.

II. COMMON LAW MODIFICATION OF RESTRICTIONS

A. Introduction

Most modern Restrictions specifically contain a provision for the modification or extension of the duration of the term of the Restrictions. Typically, the provision requires an affirmative vote by a majority of owners within the affected area. Without a specific provision to the contrary, the consent of all of the affected property owners is required to modify or extend Restrictions.

B. Identification and Review of Applicable Restrictions

The first task for an attorney dealing with a request to modify, extend or add to Restrictions is to review the Restrictions. Simple as it seems, insuring that ALL currently effective Restrictions have been reviewed can be a problem and the attorney may want to have a title review performed to insure both that they identify the applicable Restrictions, but that they are reviewing a recorded copy. Never accept a summary or "copy typed" version. Particularly older residential neighborhoods will prepare and rely upon "handed down" typed copies of older, hard to read Restrictions and these can have errors.

C. Counseling the Client

Once the Restrictions have been identified and reviewed, the attorney has 2 tasks: i) counsel the client about the proper interpretation, and ii) determine the process for modification. Generally, the attorney is approached only after the client has a specific modification in mind. The attorney must confirm the motivation for the change and insure that all relevant sections in the Restrictions are identified. Many clients will be too limited in their request to the attorney and if the attorney gives the client what is requested, the client may not achieve their goal. Further, the attorney should counsel the client on other shortcomings or pitfalls in the Restrictions so that the client may take the opportunity to use the modification process to "clean up" other areas, even if not on the client's mind when they approached the attorney. Typically, the modification process takes significant effort and a client will appreciate the thoughtful attorney who goes beyond the specifics of the literal request to highlight other appropriate modifications.

D. Rules for Interpretation of Restrictions

The rules of contract construction apply to Restrictions. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). Whether Restrictions are ambiguous is a question of law. *Id.*

Restrictions are construed in light of the circumstances in place when adopted. *Id.* Restrictions are unambiguous as a matter of law if they can be given a definite legal meaning, but are ambiguous if

susceptible to more than one reasonable meaning. *Id.*

Restrictions are encumbrances on realty and therefore, under common law, are to be strictly construed in favor of the free use of land. *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981); *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987); *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Benard v. Humble*, 990 S.W.2d 929 (Tex. App.—Beaumont 1999, writ denied). However, Restrictions are enforced as written where the language and intent is clear. *WLR, Inc. v. Borders*, 690 S.W.2d 663, 667 (Tex. App.—Waco 1985, writ ref'd n.r.e.). Restrictions are strictly construed, favoring the grantee and disfavoring the grantor. *Davis*, 620 S.W.2d at 565. Any ambiguity is resolved in favor of the least restrictive reasonable interpretation. *Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, L.L.P.*, 848 S.W.2d 772 (Tex. App.—Texarkana 1993, writ denied); *Wilmoth*, 734 S.W.2d at 657.

In 1987, the Texas legislature reversed years of well settled case law by providing that: "A restrictive covenant shall be liberally construed to give effect of its purposes and intent." TEX. PROP. CODE § 202.003(a). See *Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474 (Tex. App.—Houston [14th District] 1988, writ denied); *Hodas v. Scenic Oaks Prop. Ass'n*, 21 S.W.3d 524 (Tex. App.—San Antonio 2000, pet. denied); *SAMMS v. Autumn Run Cmty. Improvement Ass'n*, 23 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Village of Pheasant Run Homeowners Ass'n v. Kastor*, 47 S.W.3d 747, 750 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *VICC Homeowners' Ass'n v. Los Campeones, Inc.*, 143 S.W.3d 832, 835 (Tex. App.—Corpus Christi 2004, no pet.) ("To ensure that a covenant's provisions are given effect, we interpret the intent of the provisions by giving liberal interpretation to the covenant's language.").

Unfortunately, the case law has not uniformly applied strict versus liberal construction. In fact the cases are in conflict, with some cases applying liberal construction based on Section 202.003(a) and others ignoring it all together and referencing the prior common law. See *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987); *Ashcreek Homeowner's Ass'n v. Smith*, 902 S.W.2d 586, 588-89 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Crispin v. Paragon Homes, Inc.*, 888 S.W.2d 78, 81 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.) (explaining that the statutory rule of liberal construction does not trump common law rules of construction and stating that a majority of courts of appeals agree, but noting the conflict); *City of Pasadena v. Gennedy*, 125 S.W.3d 687, 693-95 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (discussing the potential conflict between the common law and Section 202.003(a)).

An appellate court will review a trial court's interpretation of Restrictions de novo. *Air Park-Dallas Zoning Comm. v. Crow Billingsley AirPark, Ltd.*, 109 S.W.3d 900, 909 (Tex. App.—Dallas 2003, no pet.).

Several courts of appeal have held that ALL owners of a restricted area MUST be parties to a declaratory judgment action seeking a court interpretation of Restrictions. *Dahl v. Hartman*, 14 S.W.3d 434, 436 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Letsos v. Katz*, 489 S.W.2d 317, 319 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ); *Riddick v. Quail Harbour Condominium Ass'n*, 7 S.W.3d 663, 672 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). However, the Texas Supreme Court held in two separate Restrictions cases that if the objection to jurisdiction of the trial court for failure to join all necessary parties is first raised on appeal, it is waived and the case may proceed. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163 (Tex. 2004); *Simpson v. Afton Oaks Civic Club, Inc.*, 145 S.W.3d 169, 170 (Tex. 2004). The result of such a case will be binding only against the parties. *Brooks*, 141 S.W.3d at 163. The risk of inconsistent judgments was not considered a sufficient concern to prevent this result. *Id.*

E. Rules for Modification of Restrictions

1. Original Declarant/Grantor.

The party creating Restrictions has the unilateral right to terminate or modify them so long as they continue to own all the property subject to the Restrictions. *Hill v. Trigg*, 286 S.W. 182, 183 (Tex. Comm. App. 1926, judgment adopted); *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 313 (Tex. App.—Fort Worth 2001, no pet.). Thereafter, a unilateral right to modify is enforceable only if it meets the 3 part test generally applicable to modification of Restrictions (discussed in the following section) AND the party retaining the right must possess a property interest in the benefited area. *Dyegard*, 39 S.W.3d at 314; *Baldwin v. Barbon Corp.*, 773 S.W.2d 681, 684-85 (Tex. App.—San Antonio 1989, writ denied).

Amendments made pursuant to retained right are also subject to the requirement that they be reasonable, not arbitrary or capricious. *Dyegard*, 39 S.W.3d at 315.

In *Dyegard*, the court addressed a challenge to the unilateral amendment of Restrictions by a developer. The developer amended the applicable Restrictions when a dispute arose about whether the Restrictions prohibit certain conduct, as interpreted by the developer and disputed by certain owners. To resolve the dispute, the developer simply amended the Restrictions to clearly prohibit the conduct. After an extensive review of the right to reserve amendment authority and the relevant law in Texas and other states, the court upheld the developer's amendment authority, but remanded for consideration of whether the developer retained any property rights in the neighborhood and that the amendment was reasonable. See, *Validity, Construction and Effect of Contractual Provisions Regarding Future Revocation or Modification of Covenant Restriction Use of Land*, 4. A.L.R. 3d 570 (1965) for a general discussion of the law and issues of a developer retaining unilateral power to modify Restrictions.

2. General Rules.

Authority to amend or modify Restrictions requires satisfaction of a 3 part test:

- (i) The instrument creating the restrictions must establish both the right to amend and the method of amendment.
- (ii) The right to amend implies only those changes contemplating a correction, improvement or reformation of the agreement rather than destruction of it, and
- (iii) Any amendment may not be illegal or against public policy.

Hanchett v. East Sunnyside Civic League, 696 S.W.2d 613, 615 (Tex. App. – Houston [14th Dist.] 1985, writ. ref'd. n.r.e.); *Dyegard*, 39 S.W.3d at 313; *VICC Homeowners' Ass'n*, 143 S.W.3d at 836. *But see Meyerland Cmty. Imp. Ass'n v. Temple*, 700 S.W.2d 263 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Any amendment must be accomplished in the exact manner required in the Restriction. *Norwood v. Davis*, 345 S.W.2d 944, 948 (Tex. Civ. App.—Austin 1961, no writ); *Dyegard*, 39 S.W.3d at 313; *Youssefzadeh v. Brown*, 131 S.W.3d 641, 645 (Tex. App.—Fort Worth 2004, pet. denied).

3. Effect of Modification.

A properly adopted modification binds all property encumbered by the Restrictions. *Dyegard*, 39 S.W.3d at 314. This is a logical result considering that all owners take their property subject to the

recorded Restrictions. *Id.* (quoting *Baldwin v. Barbon Corp.*, 773 S.W.2d 681, 682 (Tex. App.—San Antonio 1989, writ denied)).

F. Limitations on Modifications

1. Discriminatory Amendments.

A majority of owners may not amend Restrictions to "single out" a limited area for special treatment, as to do so "...would invite foreseeable mischiefs not within the original intent of the subdivider. The most obvious of such mischiefs to result are uncertainties and possible discriminations." *Zent v. Murrow*, 476 S.W.2d 875, 878 (Tex. Civ. App.—Austin 1972, no writ).

2. Amendments as Terminations.

An amendment which effectively destroys the Restriction was rejected in *Hanchett v. East Sunnyside Civic League*, 696 S.W.2d 613, 615 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.), holding that the right to amend implies only corrections, improvements or reformation. However, in *Meyerland Cmty. Imp. Ass'n*, the court allowed an amendment to eliminate critical components from the Restrictions so long as the proper procedure was followed, despite a challenge that the amendment was inconsistent with the common scheme of development for the overall development of which area modifying its Restrictions was a section. 700 S.W.2d at 267.

3. Amendments by the Developer.

Developer unilateral amendments, pursuant to specifically retained authority, are subject to limitations that (i) the Developer must retain a property interest in the benefited land, and (ii) the amendment must be reasonable and not arbitrary or capricious. *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 314 (Tex App.—Fort Worth 2001, no pet.)

4. Modification "Windows".

Most Restrictions provide for an initial term, then automatic renewals, usually every 10 years. Many residential Restrictions from the 1950's-1970's contain modification provisions which limit modifications and extensions to a specified time period (usually 6 months) immediately prior to an automatic renewal date. The concept was that owners would have foreseeability as to the Restrictions for extended periods, without concern that they might change in random intervals. The period when modification and extension is prohibited is a "Freeze-out" period. The period when modification or extension is permitted is a modification/extension "Window." These types of provisions have bedeviled neighborhoods for years, as they are forced to wait for the window to open, then act within the window. Some attorneys hoped that TEX. PROP. CODE CH. 204 could be used to modify residential Restrictions within the freeze-out period under the argument that the Restrictions prohibited modifications (at least as to the freeze-out period). This argument was rejected in *Simpson v. Afton Oaks Civic Club*, 155 S.W.3d 674 (Tex. App.—Texarkana 2005, pet. denied), holding that the provision for modification in a window as sufficient to preclude applicability of Chapter 204.

5. Non-Competition Restrictions.

A modification to establish limits on use for the benefit of adjacent, non-owned property, such as to assist a neighboring property owner to attract a tenant which desires to have protection from the establishment of a competing store, may be a violation of the Texas Free Enterprise and Antitrust Act of 1983, TEX. BUS. & COM. CODE Sec. 15.04. In *Kroger Co. v. J. Weingarten, Inc.*, 380 S.W.2d 145, 150

(Tex. Civ. App. Houston 1964, writ ref'd n.r.e.), the court interpreted prior Texas antitrust law to prohibit the enforceability of a similar restriction as constituting an unlawful trust to prevent competition. Such limitation would be valid if established incident to a lease or property transfer in which the party establishing the Restriction has an interest. *Id.* The court refused a request to reform the Restriction or to otherwise "do equity". *Id.* at 151-52.

III. TEXAS STATUTES LIBERALIZING MODIFICATION OF RESTRICTIONS

A. Applicable Statutes

The Texas Legislature dramatically modified several basic concepts of restrictive covenant law starting in 1985. The cumulative effect of these statutory provisions is to import various concepts from municipal land use law (based on the police power) into restrictive covenant law (based on private contract). An attorney considering the modification of Restrictions should recognize these statutes and consider how they may affect the modification process.

1. TEX. PROP. CODE CH. 201 authorizes creation or modification of Restrictions by a property owner petition.
2. TEX. PROP. CODE CH. 202 provides for:
 - a. liberal construction of Restrictions;
 - b. a strong presumption of reasonableness for actions of property owners' associations;
 - c. property owners' association ("POA") standing to enforce Restrictions;
 - d. "civil damages" for violation of Restrictions may be assessed by a court; and
 - e. limits regulation of political signage.
3. TEX. PROP. CODE CH. 203 authorizes a county with a population of over 200,000 to enforce certain Restrictions anywhere in the County.
4. TEX. PROP. CODE CH. 204 provides:
 - a. for creation of a POA where none was created under Restrictions;
 - b. statutory powers to POAs;
 - c. for assumption of architectural control by POAs; and
 - d. for modification of Restrictions by a POA petition.
5. TEX. PROP. CODE CH. 205 provides:
 - a. a residential subdivision covered by a partial replat is subject to the Restrictions from the prior plat and that Chapter 204 provisions must be followed to modify the Restrictions; and
 - b. a POA may amend Restrictions to comply with HUD or VA requirements for insured/guaranteed loans.

Chapter 205 applies only to a county with 65,000 or more population.

6. TEX. PROP. CODE CH. 206 provides for extension of assessments for very large owners' associations by a procedure similar to Chapter 204. This chapter was requested by Clear Lake United Civic Association to address the pending lapse of its assessment rights under Restrictions which did not provide for modification or extension. Chapter 206 applies only to a subdivision

with 4,600 or more houses located in part in a city with at least 1,600,000 population (Houston) located in a county with at least 2,800,000 population (Harris County).

7. TEX. PROP. CODE CH. 207 requires disclosure of information by a property owners' association in the form of a "resale certificate". The information provided is binding on the association.
8. TEX. PROP. CODE CH. 208 provides for the modification of Restrictions in a Historic Neighborhood which are part of a Common Scheme for Preservation of Historic Property, as well as eliminates some technical defenses to the adoption of those Restrictions. This chapter was requested by the Houston Heights Association. It was originally Chapter 207 and was renumbered in 2003. Chapter 208 applies only to a "historic neighborhood" located in part in a city with at least 1,600,000 population (Houston) located in a county with at least 2,800,000 population (Harris County). A historic neighborhood is either (i) a former city incorporated before 1900, (ii) an area subdivided prior to 1900, or (iii) certain designated historic districts.
9. TEX. PROP. CODE CH. 209 is the "Texas Residential Property Owners Protection Act" and provides a significant list of protections to residential property owners. It applies only to residential Restrictions which provide for mandatory membership in an owners association with assessment powers. Protections include:
 - A "Management Certificate" must be recorded with information about the subdivision
 - Owners Association records must be reasonably available, but exclude attorney's records
 - Right to a hearing before an owners association board or panel prior to an enforcement action (fine, charge or filing suit)
 - Limitation on attorney's fees for enforcement and foreclosure actions
 - No foreclosures if the debt is solely fines or attorneys fees
 - Notice and right of redemption for foreclosures.

Chapter 209 was adopted in response to public outcry when an elderly Houston woman lost her home due to her failure to pay an insignificant amount of fees and the home was purchased at the non-judicial foreclosure sale by a third party investor who refused to re-sell if for less than fair market value.

10. TEX. PROP. CODE CH. 210 provides a procedure for the extension or modification of restrictive covenants in certain small counties. Ch. 210 only applies to subdivisions located in counties with a population between 170,000 and 175,000 or a county between 45,000 and 75,000 that is located adjacent to a county with a population between 170,000 and 175,000.
11. TEX. PROP. CODE CH. 211 provides for the modification of restrictions in subdivisions located in the unincorporated areas of counties of 65,000 or less where either there is no existing procedure to amend the restrictions or they may not be amended without the unanimous consent of all the property owners in the subdivision.
12. TEX. PROP. CODE § 5.006 authorizes recovery of attorney's fees in actions based on breach of Restrictions.
13. TEX. LOC. GOV'T CODE §§ 212.151 and 212.153 authorize the City of Houston and other unzoned cities to enforce certain Restrictions (limited to use, set back, lot size, or size, type, number and orientation of structures). *See* HOUSTON, TEX., CODE §§ 10-551 - 10-555.

A chart outlining the applicability of the various “bracketed” sections in Tex. Prop. Code Ch. 200, et. seq. is attached as Exhibit “D”.

B. TEX. PROP. CODE CH. 204 - Modification of Restrictions by Property Owners' Association

1. Background and Purpose

Chapter 204 was added to the Property Code effective August 28, 1995, by the 74th Legislature. It codifies the powers of a property owners' association to act as a community association for the neighborhood referenced in the Restrictions, and provides for a streamlined process to modify and extend Restrictions in that neighborhood. The goal of Chapter 204 is to eliminate many of the costs and administrative burdens created by the "opt out" provision of Chapter 201. Chapter 204 is a significant benefit to a neighborhood which qualifies for its use. A chart outlining the process required by Chapter 204 is attached as Exhibit "A".

2. Application (§§ 204.002 and 204.003)

Chapter 204 applies to:

- "Subdivision": same definition as Chapter 201 (§ 201.003(2)), where the subdivision (excluding a condominium development) is located (i) entirely or in part in a county with a population of 2,800,000 or more [Harris County]; in a county with a population of 250,000 or more that is adjacent both to the Gulf of Mexico and to a county having a population of 2.8 million or more [Galveston and Brazoria Counties]; or in a county with a population of 275,000 or more that is both adjacent to a county with a population of 3.3 million or more and contains part of a national forest [Montgomery County]. Analysis of the statutory definition of “subdivision” is attached as Exhibit “C.” As a general rule, this is the area shown on the recorded subdivision plat for the neighborhood or the area burdened by the Restrictions on the neighborhood. The “subdivision” can not be gerrymandered to achieve approval.
- Restrictions without regard to effective date (§ 204.002(b)).

Chapter 204 does not apply to:

- Portions of a Subdivision zoned or containing commercial/industrial structures, an apartment complex, or a condominium. (§ 204.002(c)).
- An express Restrictions provision for the extension of, addition to, or modification of the Restrictions by a designated number of owners of real property in a subdivision that is not included in a County described by Section 204.002(a)(3). Tex. H.B. 3518, 80th Leg., R.S. (2007)(modifying Property Code Section 204.003).

In *Simpson v. Afton Oaks Civic Club*, 155 S.W.3d 674 (Tex. App.—Texarkana 2005, pet. denied), the court held that Sec. 204.003 prevents use of the modification procedures of Chapter 204 where the Restriction contains different, and specific, procedures for modifications, even if those procedures prohibit modification during specified long period of time. Afton Oaks Restrictions have a typical provision seen in many residential Restrictions of the 1950's, 1960's and 1970's, which provide for modification only within a 'window' immediately prior to the automatic renewal dates for the Restrictions, in this case a 6 month period prior to 10 year renewals. The civic club orchestrated an attempted modification outside that period utilizing Chapter 204 under the argument that Chapter 204 should apply during any period when Restrictions either don't provide for modification or don't permit it. The court rejected this argument based on a plain reading of Sec. 204.003(a) stating "...the restrictions provided an

express method for amendment and ...Afton Oaks did not amend the restrictions according to that procedure." *Id.* at 4.

3. Property Owners' Association (§§ 204.004, 204.009 and 204.010)

Chapter 204 creates a statutory community association entity designated as a "POA." Chapter 204 codifies the position taken by community association attorneys in litigating the authority of community associations.

a. Statutory Definition - A designated representative of the owners in a Subdivision, whose members are those owners. It may be referred to as a homeowners' association, community association, civic association, civic club, association, committee, or similar term in Restrictions (§ 204.004(a)).

b. Form - The POA must be non-profit and may be incorporated or unincorporated (§ 204.004(b)).

c. Creation Pursuant to Restrictions - The POA's board of directors/trustees must be selected under the Restrictions and any applicable articles of incorporation or bylaws (§ 204.004(c)).

d. Texas Non-Profit Corporation - Where a POA is referenced in Restrictions as a Texas non-profit corporation, the powers and purposes set out in its articles of incorporation and bylaws are incorporated into the Restrictions by implied reference (§ 204.009).

e. Implied Powers - Unless limited by the Restrictions, articles of incorporation, or bylaws, POAs may act through their board of directors/trustees and exercise 21 enumerated powers set forth in § 204.010. These powers are broad and incorporate all rights typical of a POA, including the following:

- (1) Adopt and amend bylaws;
- (2) Regulate the use, maintenance, repair, replacement, modification, and appearance of the Subdivision;
- (3) Grant easements, leases, licenses and concessions through or over the common area;
- (4) Adopt and amend rules relating to collection of delinquent assessments and the application of payments;
- (5) If the Restrictions allow for an annual increase in the maximum regular assessment without a vote of the membership, assess the increase annually or accumulate and assess the increase over a number of years;
- (6) If the Restrictions or Chapter 204 vests architectural control authority in the POA, implement, record, and modify written architectural control guidelines;
- (7) Exercise other powers typical to a POA;
- (8) Exercise other powers necessary and proper for the governance and operation of the POA (§ 204.010); and
- (9) Those powers set forth in the POA's Articles and Bylaws (§ 204.009).

The limitation in the preamble to Sec. 204.010 "Unless otherwise provide by the restrictions or the association's articles of incorporation or bylaws, the property owners association...may..." was interpreted by the Texas Supreme Court in *Brooks v. Northglenn Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004). *Brooks* held:

- Sec. 204.010 is constitutional;
- Late fees may be adopted in addition to interest on late payments where the Restrictions are silent on late fees;

- Sec. 204.010(10) fees may not be the basis for non judicial foreclosure because there is not notice in the original Restrictions; and
- Any limitations in the Restrictions regarding assessments will be given effect.

4. Creation of POA (§ 204.006)

Chapter 204 provides a special procedure to allow a neighborhood with Restrictions, but without a POA designated in those Restrictions, to modify its Restrictions to designate a POA. By so doing, the neighborhood will not only have a POA with all of the powers enumerated in Chapter 204, but the neighborhood may utilize the Chapter 204 modification and extension provisions rather than those in Chapter 201. For example, a neighborhood seeking to modify its Restrictions but desiring to avoid the expense, procedural hassle, and opt out risk of Chapter 201 procedures may use a 2-step procedure in order to utilize the Chapter 204 modification procedure. First, the neighborhood would create a POA using the procedure set forth in Chapter 204.006. Second, the POA would modify the Restrictions under Chapter 204.005 (see Section III.B.5 of this article). Some practitioners had argued that the process in Sec. 204.006 to establish the POA and the process to amend the Restrictions can occur together. However, in *Gillebaard v. Bayview Acres Assoc., Inc.*, 263 S.W.3d 342 (Tex. App.—Houston [1st Dist.] 2007, pet. denied), this interpretation was rejected. In *Gillebaard*, several lots comprising approximately six acres in a residential subdivision were sold for the construction of a condominium project. In an effort to block this development, the surrounding neighbors attempted to amend their existing deed restrictions to create a POA and simultaneously amend the restrictions to single-family use only. *Id.* at 344-45. The court interpreted the plain language of Sec. 204.005 and 204.006 to reflect a “due order of action:” first, a petition to create a POA and establish how it will operate; second, the POA circulates a new petition for the purpose of amending the restrictions in other ways. A POA cannot have the power to act on the homeowners’ behalf unless the restrictions have first been amended to create a POA with such powers. As such the one-step process was invalid.

The appropriate process to create a POA is as follows:

a. Application - In Subdivisions where Restrictions do not provide for a POA and require more than **60% owner** approval to add to or modify the Restrictions, a POA may be added to the Restrictions through the petition process (§ 204.006(a)).

b. Petition Committee - A three (3) person petition committee is formed pursuant to TEX. PROP. CODE § 201.005 and a notice recorded (§ 204.006(a)(1)).

c. Petition Contents - The petition modifies the Restrictions for the **sole** purpose of creating and operating a POA with mandatory membership, mandatory assessments, and equivalent voting rights for each of the owners in the Subdivision (§ 204.006(a)). The author and Michael Gainer believe that this section does not require mandatory assessments to be implemented.

d. Petition Approval - The petition must be approved by the owners (excluding lienholders, contract purchasers, and mineral owners) of at least **60%** of the property (not owners) in the Subdivision (§ 204.006(a)(2)).

e. Petition Procedure - Same as under § 204.005, not Chapter 201 (§ 204.006(a)(3)).

f. Time for Approval - One (1) year from creation of the petition committee (§ 204.006(b)).

g. Effect of Petition Approval - Binding on all property in the Subdivision to which Chapter 204 is applicable [*i.e.* not to zoned or used for commercial or industrial property, apartments, or condominiums]. There is no opt out provision. (§ 204.006(c)).

5. Extension of, Addition to, or Modification of Restrictions (§204.005)

Chapter 204 codifies a streamlined procedure whereby a neighborhood with a POA established in its Restrictions may extend, add to, or modify its Restrictions.

a. POA - The POA may approve and circulate a petition for the extension of, addition to, or modification of Restrictions. The POA is not required to comply with Chapter 201 (§ 204.005(a)).

b. Petition Approval - The petition must be approved by the owners (excluding lienholders, contract purchasers, and mineral owners) of at least **75%** of the property in the Subdivision or a smaller percentage acquired by the Restrictions, and filed of record (§ 204.005(b)).

c. Multiple Sections - Where a single POA represents multiple sections of a neighborhood with separate Restrictions, approval may be on a section-by-section basis based on approval of either (i) at least **75%** of the owners (excluding lienholders, contract purchasers, and mineral owners) or (ii) owners of at least **75%** of the number of properties in the POA's jurisdiction (§ 204.005(c)).

d. No Opt Out - The petition is binding on all properties in the Subdivision subject to Chapter 204 (§ 204.005(d)).

e. Notice - Owners must be notified in writing, by hand delivery to residences in the Subdivision or regular mail to the owners' current addresses as reflected in the POA's records (§ 204.005(e)).

f. Owner Approval - The signature of one co-owner evidences the approval of multiple owners of a property (§ 204.005(e)).

g. Evidence of Approval (§ 204.008) - Any of the following:

- (1) Owner's signature to a written ballot summarizing the amendment and specifying the date for return;
- (2) Vote at a meeting of the POA, after written notice stating the purpose of the meeting is delivered to each owner;
- (3) Owner signature to the Petition by door-to-door circulation;
- (4) Any method permitted in the Restrictions; and
- (5) Combination of the foregoing.

6. Lienholders (§ 204.007)

a. Lienholders are bound, except for increases in assessments where Restrictions do not subordinate assessments to purchase money or home improvement liens.

b. Lienholders are bound in all matters where the Restrictions subordinate purchase money or home improvements liens.

c. Purchaser at a foreclosure sale or from a foreclosing lienholder is bound in all matters.

7. Architectural Control (§§ 204.010(a)(18) and 204.011)

Chapter 204 codifies POA rights to implement architectural guidelines and to assume the authority of an architectural control committee ("ACC").

a. Application - Where Restrictions provide for the creation and operation of an ACC with the power to approve or deny applications for proposed original construction or modification of a building, structure, or improvement (§ 204.011(a)).

b. Transfer to Association (§ 204.011(b)) - ACC authority automatically vests in the POA on the earlier to occur of:

- (1) The expiration of the term of the ACC;
- (2) The completion and sale of the residence on the last available building site;
- (3) The person/entity designated as the ACC in the Restrictions assigns his/its authority in writing to the POA;
- (4) The assignee of the original holder of the authority of the ACC abandons its authority for more than one year; **or**
- (5) The Restrictions vest architectural control in the POA.

Note: It appears Chapter 204 resurrects a defunct ACC (where the foregoing events occurred prior to 8/28/95).

c. Vests in a Civic Association (§204.011(d))(Tex. H.B. 2218, 80th Leg., R.S. (2007))(modifying Property Code Section 204.011 by adding subsection (d)) - if existing restrictions applicable to a subdivision do not provide for a property owners' association, and a property owners' association has not been formed, the architectural control committee authority over the entire subdivision vests in a civic association other than a property owner's if:

- (1) The architectural control committee exercised its authority over all the lots in the subdivision for at least 10 years and over a majority of the lots for at least 20 years;
- (2) The architectural control committee created by the restrictions assigned the civic association the architectural control committee's authority over a majority of the lots in the subdivision.
- (3) The architectural control committee assigned the civic association the architectural control committee's authority over a majority of the lots and has exercised that authority over all the lots in the subdivision for at least 10 years; and
- (4) The architectural control committee authority has lapsed in the lots in which the civic association lacks authority, and the lapse is solely the result of the automatic termination of the architectural control committee authority or the death of a member of the architectural control committee or another cause resulting from the inability to locate a member of the architectural control committee or the member's assigns.

8. POA Authority Continues Until (§ 204.011(c)) -

- a. The Restrictions provide otherwise;
- b. The Restrictions are terminated; **or**
- c. The POA ceases to exist.

9. POA Authority (§ 204.010(a)(18)) - The POA may:
 - a. Implement written architectural control guidelines (which may be recorded); and
 - b. Modify the guidelines as the needs of the Subdivision change.

C. TEX. PROP. CODE CH. 201 - Creation, Extension, and Modification of Restrictions

1. Purpose

At common law, every owner must approve any new Restrictions. Community associations in Houston discovered that many renewal campaigns failed if an owner could not be found or, worse, refused to sign for any reason. Perhaps this was based on an unfounded fear or ignorance of the legal consequences of Restrictions.

In 1985, after several unsuccessful attempts, neighborhood proponents succeeded in pushing TEX. PROP. CODE CH. 201 through the Legislature to allow extension, modification, and adoption of Restrictions without necessity of joining every affected owner.

With the passage of Chapter 204, the remaining importance of Chapter 201 is primarily to reestablish residential Restrictions. If possible, neighborhoods with Restrictions should use Chapter 204, even if the 2-step process of first creating a POA is necessary, in order to avoid the opt out problem. A chart showing the process required by Chapter 201 is attached as Exhibit "B".

2. Application (§ 201.001)

Chapter 201 applies only to a "residential real estate subdivision" (also defined as "subdivision") within the city limits or extraterritorial jurisdiction of cities with population exceeding 100,000, the unincorporated portions of counties with a population exceeding 2,400,000 [i.e., Harris County and Dallas County] or the incorporated or unincorporated portions of adjacent counties with population of 30,000 or more [all counties adjacent to Harris County and Dallas County]. A "residential real estate subdivision" must have the following characteristics (§ 201.003(2)):

- It must be (i) referenced on a recorded plat or (ii) a subdivision area located within the limits or extraterritorial jurisdiction of a municipality [Note: All of Harris County is believed to be within the municipal limits or the extraterritorial jurisdiction of some city, primarily the City of Houston]; and
- A majority of the land area (excluding streets and public areas) "is or was" restricted to "residential use only."

Analysis of the statutory definition of "subdivision" is attached as Exhibit "C." As a general rule, this is the area shown on the recorded subdivision plat for the neighborhood or the area burdened by the Restrictions on the neighborhood. The "subdivision" can not be gerrymandered to achieve approval.

Chapter 201 does not apply for purposes of extension or creation of Restrictions in neighborhoods where, per § 201.001(b):

- Restrictions are automatically extended for an indefinite number of successive periods of at least 10 years subject to a right of waiver or termination by a specified percentage of less than 50% plus one of the owners; or

- Restrictions provide for an indefinite number of successive extensions of at least 10 years of the term of the restrictions by written and filed agreement of a specified percentage of less than 50% plus one of the owners.

Chapter 201 does not apply for purposes of modification in neighborhoods where the existing Restrictions require a vote of less than 75% of the owners to modify said Restrictions (§ 201.001(c)).

3. Procedure (§§ 201.004-008)

Chapter 201 mandates the following procedure to extend, adopt, or modify Restrictions:

a. *Petition Committee* - At least 3 owners form a petition committee. The petition committee files a notice in the real property records describing the affected area and detailing the proposed action (§ 201.005(a)).

b. *Petition Contents* - A petition is then circulated to collect signature from the owners. The petition sets forth:

- (1) extension of existing Restrictions, or
- (2) modifications of the existing Restrictions, or
- (3) the proposed new Restrictions (§§ 201.005 and 201.007).

c. *Petition Approval* - The required percentage of signatures for approval is (i) to extend or create Restrictions - **50%**; and (ii) to modify Restrictions - **75%**. Signatures must be acknowledged. The required percentage may be obtained by counting approval from owners of the required percentage using any one of these criteria (§ 201.006(a) and (b)):

- (1) Lots;
- (2) Separately owned parcels; **or**
- (3) Square footage of lots (excluding roads and public areas).

Some neighborhoods have circulated a common law (i.e. non-statutory form) power of attorney without an acknowledgment for signature by owners to authorize an officer of the Petition Committee or Civic Club to sign for that owner in support of the Petition. The attorney-in-fact's signature is then acknowledged for the purpose of satisfying Chapter 201. Several title insurance companies contacted by the author questioned the procedure; however, it appears to comply with technical requirements of Chapter 201.

In addition to a common law power of attorney, Texas Probate Code § 490 contains a statutory durable power of attorney form, which allows a principal to give an agent a number of enumerated powers, but must be acknowledged. The statute's form powers are construed in a "broad and sweeping" manner. TEX. PROB. CODE ANN § 490(a) (Vernon 1993). It is noteworthy that durable power of attorney documents, statutory and non-statutory, do not lapse until revoked in writing. As such, it is recommended that the instrument creating the power of attorney specifically include a time limitation (i.e. six months).

In 1997, the Texas Legislature required the approval of the Petition (by acknowledged signature) of the developer or ACC representative (or their successors or assigns) if the Petition proposes to alter a right granted in the Restrictions to such party. This amounts to a veto power (§ 201.0051).

Some neighborhoods question whether a modification or extension would be valid if the approval is obtained from the record owner alone, even though the relevant property is community property.

Although there are no Texas cases in the restrictive covenant context which address this issue, the Texas Court of Appeals has held that persons who purchased an easement from a record owner of realty were bona fide purchasers though the realty was the community property of the record owner and his wife. *Heidelberg v. Harvey*, 391 S.W.2d 828 (Tex. Civ. App.—El Paso 1965, no writ). However, best practice is to obtain the approval of both the husband and wife, if possible.

d. Deadline for Filing Petition - The petition with acknowledged signatures must be filed with the County Clerk within 1 year from the date of recording the notice of creation of the petition committee (§ 201.006(b)) [but Note: Section 201.004(b) indicates a 2 year deadline].

e. Notice to Owner - Notice and a copy of the petition must be sent to all owners by certified mail within 60 days after the petition is filed. Additional notice is required by newspaper publication once a week for 2 consecutive weeks (§ 201.008). The Petition Committee should keep all Return Receipts indefinitely.

4. Opt Out Provisions (§§ 201.009-010)

An Owner may "opt out" of the Restrictions by:

a. Petition - Signing the petition and affirmatively electing to exclude his/its property. This may be done by checking the "opt out" blank the petition is required to include; or

b. Lawsuit - Filing suit to challenge the petition process within 6 months after the filing of the petition; **or**

c. Opt-out Statement - Filing a statement affirmatively electing to be excluded from the Restrictions in the real property records within 1 year after actual notice. Evidence of receipt by all owners of the certified mail notice to each owner is critical.

5. Parties Bound (§ 201.009)

All property is bound by the recorded Restrictions **except** (§ 201.009):

a. Opt-out - those whose owners formally opt out;

b. No Notice - those whose owners had no actual notice of the petition process;

c. Public Property - property exclusively dedicated for use by the public or for uses by utilities [Note: this raises the possibility of inhibiting some types of utility operations];

d. Minors/Incompetents - property owned by minors or incompetents; and

e. Lienholder - property owned by lienholders which did not sign the petition.

Lienholders and third parties acquiring their property interest after the date the petition is filed (as to consenting property owners) and after the 1-year anniversary date (as to non-consenting but non-objecting property owners) are bound.

6. Statute of Limitation (§ 201.010)

a. Suit Alleging Procedural Defects - The completeness or regularity of the procedures adopting the Restrictions may not be challenged by an owner who failed to utilize the "opt out" provisions (or whose predecessors failed to do so) except by suit for declaratory judgment filed within one hundred and eighty (180) days after the date the certificate of compliance is filed. This creates a short six (6) month statute of limitations for an objecting owner to challenge procedural satisfaction of the requirements of Chapter 201.

b. Suit Asserting Incompatible Restrictions - The foregoing statute of limitations does not apply to an owner seeking to exclude their property from the Restrictions. However, that relief is limited to a circumstance where the owner bears the burden of establishing proof that conditions of land use within the neighborhood at the time the certificate of compliance was filed was incompatible with the Restrictions. This limitation sets a high standard for an objecting owner, as it is very unlikely that the procedural requirements for approval by the requisite number of owners could be achieved if, in fact, the Restrictions are inconsistent with actual land use conditions. Further, in the unlikely event that a court finds such incompatibility, the court is authorized to alter the portion of the Restrictions which are in conflict to conform to actual land use conditions.

7. Exclusive Remedies

These remedies are exclusive. Comparable limitations are not contained in Chapter 204.

D. Comparison of Chapter 204 and 201 Statutory Modification Procedures1. Delegation of Authority

Chapters 201 and 204 resemble a delegation of the police power to a majority of owners in a subdivision. A majority can restrict the property rights of the minority without their consent. Under common law, this could not be achieved except by a governmental exercise of police power. The concept of a petition committee, notice by mail and publication, and adoption of Restrictions by a POA are reminiscent of the Texas version of the Standard Zoning Enabling Act set forth in TEX. LOC. GOV'T CODE CH. 211.

2. Benefits of Chapter 204 versus Chapter 201

- a. No Opt Out;
- b. No notice of completion by certified mail;
- c. Required notice may be either delivered to existing residences or mailed (regular delivery) to the POA's list of owners;
- d. Signatures need not be notarized; and
- e. Only one signature required to bind all co-owners.

3. Neighborhoods Which Do Not Qualify for Chapter 204

- a. Located outside a county with 2,800,000 population [i.e. Harris County]. (Note: Chapter 201 covers adj. counties with 190,000 population);
- b. Located outside a city with 100,000 population or more, or its extraterritorial jurisdiction;
- c. No currently valid recorded Restrictions which limit a majority in area to residential only; (Note: Chapter 201 allows expired Restrictions);

- d. No POA exists or the POA is not specifically created in Restrictions [although the neighborhood may create a POA as Step 1 under § 204.006 and then use the other provisions of Chapter 204 as Step 2] (Note: Chapter 201 does not require the existence or creation of a POA); and
- e. Portions zoned for or containing commercial/industrial structures, apartment complexes (2 or more units in 1 or more buildings under common ownership, on the same tract and with common management) or condominiums are excluded (Note: Chapter 201 would affect these areas if included in a "Residential Real Estate Subdivision" as defined in § 201.003 and the owners did not opt out).

4. Creation of Restrictions Under Chapter 201 Only

Restrictions may not be created under Chapter 204 for a neighborhood without existing Restrictions. Chapter 201 is the exclusive statutory provision providing a procedure for creation of Restrictions. However, Chapter 201 only applies to a neighborhood which has expired Restrictions.

5. Nonexclusive

Chapters 201 and 204 do not preclude modification of Restrictions in accordance with specific modification provisions of the Restrictions.

- TEX. PROP. CODE § 201.013 states: "The procedure . . . is cumulative and not in lieu of other methods of adding to, modifying, creating, or extending a restriction."
- TEX. PROP. CODE § 204.003 states: "An express designation in a document creating restrictions . . . that provides for the extension of, addition to, or modification of existing restrictions by a designated number of owners of real property in the subdivision prevails over the provisions of this Chapter." However, "[a] document creating restrictions that provides for the extension or renewal of restrictions and does not provide for modification or amendment of restrictions may be modified under this chapter, including modifying the provision that provides for extension or renewal of the restrictions.") Tex. H.B. 3674, 80th Leg., R.S. (2007)(amending Property Code Section 204.003 by adding section (b)).
- TEX. PROP. CODE § 204.005(a) states: "A property owners' association is not required to comply with [Ch. 204 provisions for modification.]"

E. TEX. PROP. CODE CH. 202 - Construction And Enforcement Of Restrictions

1. Purpose

Chapter 202 was adopted in 1987 to support the efforts of a "property owners' association" (as defined in Chapter 202.001(2)) to enforce Restrictions. Chapter 202 provides for liberal construction of Restrictions, a presumption of validity of a POA's exercise of discretionary authority in enforcing Restrictions, statutory authority for a POA to enforce Restrictions, and civil penalties for violation of Restrictions.

2. Application

Chapter 202 applies to all "Restrictive Covenants." "Restrictive Covenants" are defined as any covenant, condition, or restriction contained in a "dedicatory instrument," whether mandatory, prohibitive, permissive, or administrative. A "dedicatory instrument" is broadly defined and includes a

declaration or similar instrument subjecting real property to Restrictions, bylaws or similar instruments covering either the administration or operation of a POA, the properly adopted rules or regulations of a property owners' association, and all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

3. Liberal Construction

Section 202.003(a) states "a [Restriction] shall be liberally construed to give effect to its purposes and intent." This is a clear legislative reversal of long-standing Texas case law which mandated the strict construction of Restrictions in favor of the free use of land. *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547 (Tex. App.—Houston [1st Dist.] 1994, no writ). Unfortunately, several early cases ignored this statutory mandate and instead relied upon pre-Chapter 202.003(a) court decisions mandating strict construction. *See, e.g., Ashcreek Homeowner's Ass'n v. Smith*, 902 S.W.2d 586 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (court saw no conflict between liberal construction rule of statute and strict construction rule of common law); *Simon Property Group v. Dillard Dept. Stores, Inc.*, 943 S.W.2d 64, 71 (Tex. App.—Corpus Christi 1997, pet. denied) (following *Ashcreek*). In the author's opinion, these unfortunate cases were wrongly decided, and as a result, may have served as a partial impetus for current practice of courts somewhat arbitrarily deciding which standard to use when construing restrictive covenants. As they should, many courts have adopted the statutory standard of liberal construction as stipulated by Section 202.003(a). *See, e.g., Lee v. Perez*, 120 S.W.3d 463, 466 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Air Park-Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 909 (Tex. App.—Dallas 2003, no pet.); *Truong v. City of Houston*, 99 S.W.3d 204, 214 (Tex. App.—Houston [1st Dist.] 2002, no pet.). However, other courts continue to more strictly construe restrictive covenants, contending that Section 202.003(a) does not alter the traditional common law rule of contract interpretation. *See Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.) (positing that Section 202.003(a) in no way trumps the common law rules of construction for interpreting restrictive covenants).

The confusion appears to stem from the Texas Supreme Court case of *Wilmoth v. Wilcox*, 734 S.W.2d 656 (Tex. 1987), which relied upon the prior common law rule of strict construction of restrictive covenants in favor of the free use of land. Unfortunately, that case was handed down shortly after the effective date of § 202.003(a), but does not reference it. Apparently, neither the Supreme Court nor the attorneys arguing the case were aware of the change, and it was not briefed. Nonetheless, several courts continue to rely upon *Wilcox* as support for the continuation of strict construction. This issue was addressed in dicta in *Herbert v. Polly Ranch Homeowners Ass'n*, in the following excerpt:

The Association argues that this standard of review [i.e. strict interpretation] was legislatively overruled by § 202.003, which requires us to give effect to their purposes and intent. Even though *Wilmoth* was decided after the effective date of § 202.003, the Association argues that this issue was never raised in that case. Copies of the brief filed before the Supreme Court in *Wilmoth*, show that the effect of § 202.003 was not an issue. The Association is correct about the adoption of § 202.003 in the *Wilmoth* case.... Even after the enactment of § 202.003, this Court stated that covenants restricting the free use of land were not favored. It is not necessary for us to resolve such discrepancies today, because under either approach we would reach the same result in this case.

Herbert v. Polly Ranch Homeowners Ass'n, 943 S.W.2d 906, 908 (Tex. App.—Houston [1st Dist.] 1996, writ denied)(citation omitted).

The author believes that in an appropriately argued case, an appellate court must apply the liberal construction mandated by § 202.003(a). The importance of liberal construction is that ambiguous

provisions in Restrictions should be construed in a manner favorable to the overall intent of the Restrictions to regulate land use. However, liberal construction will not solve poor drafting. Where a provision in a Restriction is unambiguous, even if the unambiguous provision does not state the intent of the owner, the provisions will be enforced as written. Courts will construe a Restriction which is unambiguous based on its clear statement without admitting evidence as to the actual intent of the parties. Where a provision is ambiguous, such evidence will be admitted to help determine the true intent of the owner who executed Restrictions. *See, e.g., Reagan Nat. Advertising of Austin, Inc. v. Capital Outdoors, Inc.*, 96 S.W.3d 490 (Tex. App.—Austin 2002, pet. granted, judgment vacated w.r.m.).

However, no "dedicatory instrument" may be construed to prevent the use of property as a "family home," defined to include certain homes for persons with specified medical conditions. TEX. HUMAN RES. CODE, Chapter 123; *see also Deep East Texas Regional Mental Health & Mental Retardation v. Kinnear*, 877 S.W.2d 550 (Tex. App.—Beaumont 1994, no writ). (Note that *Kinnear* also espouses strict construction.)

4. Discretionary Authority

Section 202.004(a) provides a presumption of reasonableness when a POA (or other representative designated by a property owner) exercises "discretionary authority." The presumption is overcome only by a preponderance of the evidence demonstrating that the action was "arbitrary, capricious or discriminatory." This presumption is similar to that afforded a municipality in enforcing land use regulations.

5. Standing to Enforce Restrictions

Section 202.004(b) authorizes a "Property Owners' Association" or "other representative designated by an owner of real property" to enforce Restrictions, whether or not said representative was created under the Restrictions and whether or not she or he has contractual authority to enforce the Restrictions. At common law, a community association cannot sue to enforce Restrictions unless it was created under the Restrictions. "Property Owners' Association" is broadly defined in Section 202.001(2) as: (i) an incorporated or unincorporated association, (ii) owned by or where members consist primarily of the owners of property covered by the dedicatory instrument, (iii) through which the owners (or a board of managers or similar governing body) manage or regulate the neighborhood. A court may be troubled with the requirement for the association to "manage or regulate" in the instance where the association is a civic club without any legal authority to act on behalf of owners who are not members.

6. Civil Penalties

Section 202.004(c) authorizes "civil damages" not to exceed \$200 for each day of a Restrictions violation. This is similar to the penalty for violation of municipal land use regulations. (Two hundred dollars was the maximum penalty for a municipal zoning violation at the time Section 202.004(c) was enacted.)

F. Summary

Legislative incursions into restrictive covenant law import many concepts of municipal land use law. Many of these provisions are limited to the City of Houston and Harris County. The State of Texas has now established a strong public policy supporting the enforcement of Restrictions and their creation, modification or extension.

IV. MODIFICATION TO STOP NEW DEVELOPMENT (Houston only)

A. City Prohibition of Replats if they "Violate" Restrictions.

A replat must not "attempt to **amend or remove** any covenants or restrictions." TEX. LOC. GOV'T CODE § 212.014(3) (*emphasis added*). In 2007, the Legislature added § 212.0146 to the Local Government Code, which is bracketed to Houston and states that a replat must not "amend, remove, **or violate**, or have the effect of amending, removing, **or violating**, any covenants or restrictions." TEX. LOC. GOV'T CODE § 212.0146 (3) (*emphasis added*). No replat may amend or remove Restrictions on the face of the plat being replatted, and in Houston, no replat may violate any existing Restrictions affecting the area being replatted, even if not referenced on the underlying plat.

Houston has, for many years, taken the position that it does not have the authority to approve a replat if the replat, on its face, has the effect of violating existing Restrictions (even though not referenced on the face to the original plat, or the replat). Other cities may have taken the same position. The 2007 amendment provides a statutory basis for Houston's position (where there was none before). There are no comparable provisions for counties regarding amending, removing or violating Restrictions.

In some neighborhoods, Restrictions affecting lot size, set back, etc., may not have been enforced and, in the opinion of the developer's real estate lawyer, are no longer enforceable due to waiver or change in conditions, but nonetheless remain of record. Sometimes the restrictions are ambiguous as to whether they would prevent the subdivision in question, but the landowner wishes to proceed with the development based on their attorney's legal opinion that the Restrictions are unenforceable or inapplicable, figuring that area property owners will not have the stomach or resources for a legal fight. Such situation should not affect the ability to replat property, even if arguably in violation of recorded Restrictions, except in Houston. In Houston, if a proposed plat arguably violates Restrictions, the replat must be disapproved, as it violates § 212.0146. The City of Houston takes the further position that it is the applicant's burden of proof to show that the Restrictions are not being violated.

B. Modification to Prevent City Approval of a Pending Replat.

Replats in the City of Houston have been denied where Restrictions were modified or created in the period between the initial plat application and final consideration, with the express intent to prohibit the pending subdivision. The City of Houston rejects the argument that the application of the modified Restrictions violates the applicant's vested rights in the regulations applicable at the time of application under Local Government Code Chapter 245, taking the position that the regulatory scheme has not changed, only the underlying facts.

In Houston, a neighborhood may wish to modify its Restrictions for the sole purpose of stopping "lot splitting" by developers, including a *pending* replat. This is exactly the fact situation in *Winter v. Bean*, 2002 WL 188832 (Tex. App.—Houston [1st Dist.] 2002) (unpublished opinion), where the court upheld the revised Restrictions. The court held that the modification provision in the Restrictions placed the Winters on notice that the Restrictions could be changed by a majority vote and they are bound by the subdivision limitations in the amendment.

C. Constitutionality of City Enforcement.

City enforcement of Restrictions through the platting process should be upheld against an attack that it is an unconstitutional enforcement of private contract and thus not a public purpose, as the city can assert that enforcement of private restrictions has a public benefit of protecting property values and preserving neighborhood character. *Young v. City of Houston*, 756 S.W.2d 813, 814 (Tex. App.—Houston

[1st Dist.] 1988, writ denied) (upholding direct City enforcement of residential restrictions). Further, Deed restriction enforcement is now statutorily designated as a *governmental* function. TEX. LOC. GOV'T CODE § 212.137.

V. MODIFYING RESTRICTIONS TO RESOLVE DISPUTES

Often, owners dispute the interpretation of Restrictions among themselves, with the Developer or with an owners' association. Sometimes an assumed limitation does not exist, is ambiguous, or is otherwise legally suspect. A direct solution is to revise the Restrictions to clearly address the issue. This fact situation occurred in *Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex App.—Fort Worth 2001, no pet.), where the Developer exercised its reserved unilateral right to amend the Restrictions in the face to dispute over whether the original Restrictions prohibited personal water wells. The amended Restrictions clearly prohibited them. The court upheld amending the Restrictions with the sole intent to specifically prevent the action which was the source of the initial dispute and to moot that dispute once the court determined that the authority existed (subject to a remand on 2 fact questions not determined by the trial court).

VI. SELECTED MODIFICATION / CREATION ISSUES FOR RESIDENTIAL NEIGHBORHOODS UPDATING RESTRICTIONS

Particularly in Houston, where Restrictions are the primary protection for residential neighborhoods, those neighborhoods will periodically approach an attorney for assistance in a comprehensive review and modification of the Restrictions. The modification process may take several alternative formats:

- A listing of specific sections which are deleted, replaced, or modified.
- A restatement of the Restrictions in the same format as originally used, with the modifications incorporated in a single, easy to read instrument.
- A restatement in a completely new format, utilizing modern drafting techniques.

Which format to choose is a function of the desires and politics of the neighborhood. In some neighborhoods, the shortest possible instrument to accomplish the task is desired. In others, the demand for "modern" Restrictions will lead to a comprehensive restatement/replacement.

When considering modifications to outdated Restrictions or the creation of new Restrictions in an existing residential neighborhood, a number of fundamental issues routinely arise. The treatment of these major topics can make or break a modification effort.

A. Property Owners Association

Where a POA is not established in Restrictions, any modification should include the designation of a POA. A POA automatically has all of the powers set forth in Chapter 204; Chapter 204 powers are significant and should eliminate many legal challenges to a POA's authority. Further, the POA will have the power to utilize Chapter 204 for modification and extension of Restrictions. Some neighborhoods have been troubled by the breadth of Chapter 204 powers and specifically limited the powers of newly created POAs to specifically eliminate any inferred powers under Chapter 204. This is permissible under Chapter 204.010.

Chapter 204 provides a procedure to create a POA by a vote of 60% of owners in a neighborhood utilizing the Chapter 204 modification procedures after the initiation of the process by a 3 person petition committee. The documentation for creation of a POA is significantly abbreviated by the elimination of the need to elaborate on the powers of the POA since Chapter 204 provides codified powers.

The rights and powers of the members of a POA and the board of directors of a POA as set forth in the POA's Articles of Incorporation and Bylaws are now incorporated by reference within the Restrictions pursuant to Chapter 204. Together with the liberal construction and presumption of validity provisions of Chapter 202, attacks on procedural matters set forth in Bylaws will be virtually eliminated.

B. Assessments

A POA without funding will be ineffective. Although mandatory assessments are not required by law, voluntary assessments have no legal effect and are not recommended. However, more than a few newly created POAs have forgone mandatory assessments in recognition of the political realities of their neighborhoods, realizing that mandatory assessments will not be approved.

Every neighborhood should establish enforceable assessments in order to provide funding for their community association. In many established neighborhoods, a lien for enforcement of the assessment is not politically palatable (particularly a non-judicially enforced lien). Further, such a lien will not be effective against the homestead of existing property owners, but only against the homestead of subsequently purchasing owners. Particularly where Chapter 201 is the method of adoption or modification of Restrictions, a lien is an issue which could defeat a petition process because it may encourage widespread opposition and opt out. Conversely, where Chapter 204 procedure is used, a lien (particularly if only judicially enforceable and with safeguards for elderly owners) may be viable. Where concerns are raised on this issue, the better course is to eliminate any lien but retain a legally enforceable assessment. Where a community association is currently voluntarily funded, adopting other modifications to the Restrictions may be more important than obtaining an enforceable assessment and lien. The protections of Chapter 209 may be sufficient to convince owners which would formerly have opposed a POA with assessment rights and foreclosure ability to accept these ideas.

Concerns typically voiced by opponents to mandatory assessments include the following:

- (1) Philosophical/Political opposition to the mandatory requirement—often from a "property rights" view.
- (2) The current funding is adequate.
- (3) Concern with controls over use of funding—sometimes this is addressed with limitation on the powers of the POA.
- (4) Ability to increase annual assessments and create special assessments without limit—often, this is addressed by limits on annual increases without a supermajority vote of the owners.
- (5) An underlying concern with the "power" of the POA and its ability to control the neighborhood if it has funding.

Mandatory funding is best supported by the argument that it is the only fair method to allocate the cost of neighborhood-wide benefits (which should be enumerated). Without mandatory funding, some neighbors benefit without paying.

C. Development Controls

With continued urban sprawl, many citizens are choosing close-in neighborhoods to reduce commuting time. The desire for new, larger houses typically available in the suburbs is brought into close-in neighborhoods by those citizens. Sometimes these needs are satisfied by extensive remodeling of existing structures and, at other times, by demolition and construction of new housing on existing lots. This redevelopment was not contemplated by the original developers of close-in neighborhoods. The unwritten expectations of longtime owners in the neighborhoods may be shattered by the development of

large residential projects (whether single-family detached, townhouse, or condominium). These conflicts between neighbors should be addressed in modified Restrictions. Restrictions can address the issue in two ways: first, by definitive performance standards; and second, by requiring the approval of an architectural control committee with significant discretion.

1. Performance Standards

Performance standards are typically non-discretionary limitations on development. Examples include setbacks, height limit, pervious area, open space, construction materials, orientation of structure, view corridors, and lighting standards. Typically, these provisions can be mapped out on paper. Some Restrictions' performance standards are subject to a variance in the event of hardship due to unusual site conditions. Other performance standards relate to the size and ability to subdivide existing tracts in the neighborhood.

2. Architectural Control Committee

An Architectural Control Committee ("ACC") is an appointed/elected panel which exercises discretionary authority to insure compliance of new construction and remodeling of existing structures with the Restrictions and to insure consistency of architectural design. Typically, the ACC has broad discretion based on the desire of a neighborhood to have a consistent architectural approach, typically based upon a certain architectural style. The discretion of an ACC can be limited to the extent set forth in the Restrictions and could include only insuring that stated performance standards have been satisfied.

Modifying Restrictions to add an ACC where none has existed before will be a difficult and politically divisive task, unless the ACC has significantly limited discretion. In a city such as Houston, where zoning is unknown and has been defeated in the past, the philosophical objections to the ACC as a version of the "taste police" may be significant. Neighborhoods which originally had an ACC controlled by a developer—but where the ACC's term subsequently expired—have a good opportunity to reinstate an ACC, with appropriate limitations on discretion.

Unless maintenance of a neighborhood-wide architectural style is mandated, an ACC is unnecessary except as a procedure to insure enforcement of performance standards. Performance standards can provide most non-architectural control necessary for a residential neighborhood.

D. Residential Use/Home Occupation/Garage Apartments

1. Residential Use

Virtually all neighborhoods with Restrictions limit use to "residential" only. Several unfortunate recent decisions indicate that language to the effect that the neighborhood may be used for single-family residential houses only creates an architectural restriction, not a use restriction. Restrictions can be modified to clearly state that the use of the neighborhood shall be single-family residential use only and that the construction of improvements in the neighborhood shall include only single-family residential structures. "Single-family" can be appropriately defined for each neighborhood.

2. Home Occupation

With the downsizing of corporate America and the advent of the "Information Superhighway," more people have become entrepreneurs operating out of their homes in an effort to maintain low business overhead. Most Restrictions do not allow any business operations in the neighborhood. Violation is rampant.

Restrictions should be modified to allow "home occupations" restricted by reasonable performance standards. These standards should address:

- a. Number of outside employees, if any;
- b. Signage, if any;
- c. Outside storage, if any;
- d. No external activities;
- e. Traffic/parking;
- f. Light, sound, and smell;
- g. Compliance with applicable laws; and
- h. Permit from POA [optional].

3. Garage Apartments

Garage apartments are showing up in all manner of neighborhoods to provide housing for nannies, teenage/adult children, parents, and temporary guests. In intercity redevelopment areas, most new houses have a garage apartment. Garage apartments are usually on a second floor over the garage, with a separate bathroom and entrance and, often, a kitchen. These garage apartments range from 300 to 600 square feet. A neighborhood considering allowing garage apartments should address the following performance standards:

- a. No reduction in existing garage space;
- b. Height limit;
- c. Square footage limit;
- d. Whether or not allowed to be connected to principal dwelling structure;
- e. Prohibition of windows and doors immediately adjacent to neighbor's yard;
- f. Architectural integrity with existing garage and house;
- g. Renting;
- h. Cooking facilities; and
- i. Parking for occupants.

E. Satellite Dish Antennas

Many 1970s and 1980s Restrictions prohibit satellite dish antennas. Other Restrictions have no limits on antennas. When initially developed, satellite dish antennas were large and visually obtrusive. Current technology has reduced the size of satellite dish antennas and microwave antennas. However, they still need to be positioned where they have direct access to satellites or transmitting antennas, and therefore, the recommendations for location to maximize performance of the antenna often conflict with the aesthetic concerns of the neighborhood.

Effective October 14, 1996, the Federal Communications Commission ("FCC") adopted a rule preempting certain restrictions concerning the installation, maintenance, and use of direct broadcast satellite television broadcast and multi-point distribution service antennas (the "FCC Rule"). The FCC Rule mandates that receiving (as opposed to transmission) antennas of one meter or less in diameter may not be prohibited. Reasonable regulation is allowed so long as it does not interfere with obtaining acceptable quality signals. Restrictions on the installation of satellite dish antennae should be drafted to evidence the direct relationship between those regulations and health, safety, or public welfare considerations. The installation can be subject to a required notification to the POA/ACC and compliance with applicable laws, including building codes. Restrictions which impose more than minimal cost are presumed unreasonable.

F. Signage

Neighborhoods may wish to reduce the size and number of political signs allowed. In 2005, the Legislature added § 202.009 to the Property Code. This provision sets forth precise guidelines for the regulation of political signage by a property owners' association. A restriction can not prohibit a political sign during the 90 days before an election or the 10 days following an election. This does not, however, prevent the property owners' association from adopting certain aesthetic restrictions on signage as provided under the statute.

G. Aesthetics - landscaping, gardens, drives/parking, maintenance

Restrictions may legally restrict all types of aesthetic issues such as landscaping, gardens, driveways, parking, maintenance, building materials, architectural style, and the like. Aesthetics should be incorporated in Restrictions in a manner similar to development controls, either (i) by clear performance standards, or (ii) under the discretion of the ACC or board of directors, with appropriate guidance and limitations. Modifying Restrictions to deal with this issue requires a clear mandate from the neighborhood, or the petition will fail. Typically, modifications to Restrictions in aesthetic areas are designed to prohibit an objectionable action which occurred in a neighborhood. To be prohibited, such action should be objectionable to an overwhelming percentage of the owners in a neighborhood. The practical aspects of enforcement of aesthetic Restrictions must be considered. Once aesthetic Restrictions are adopted, a failure to enforce such Restrictions can result in waiver. *See Foxwood Homeowner's Assoc. v. Ricles*, 673 S.W.2d 376 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (court denied an injunction to enforce a deed restriction that prohibited garage conversions because the neighborhood knowingly allowed violations).

H. Vehicles

Many families now have 1 car for every licensed driver and, sometimes, an additional hobby car. Older Restrictions did not contemplate the number of automobiles now accommodated in a neighborhood. Safety and aesthetic reasons cause neighborhoods to consider how to modify Restrictions to deal with the increased number of vehicles parked in a residential neighborhood.

1. Garage/Carport

Minimum 2 car garage/carports can be mandated for a neighborhood. This will preclude conversion of vehicle storage space to living area. Some neighborhoods may not wish to allow carports. Often, certain types of vehicles (boats, RVs, trailer, campers, etc.) must be parked inside a garage or carport (or behind a fence).

2. Driveways/Parking Areas

Restrictions can mandate requirements for driveways (width, location, and manner of construction). Circular drives provide a place for vehicles to be parked off residential streets but are sometimes found to be aesthetically objectionable. "Parking pads" are sometimes prohibited in front yards, but are often allowed behind the front building setback line and in rear yards. Parking of vehicles on landscaped areas is often prohibited.

3. Non-Functioning Vehicles

Non-functioning vehicles are often required to be stored only in an enclosed garage. Sometimes they are allowed within a fenced rear yard.

4. Parking on Street

Some cities prohibit parking on residential streets between the hours of 1:00 a.m. and 6:00 a.m. This also encourages owners' cars to be parked in driveways at all times. This policy (i) reduces the opportunity for children to jump out from behind parked cars and be hit, (ii) allows police to patrol the neighborhood at night, and (iii) restricts access of burglars, since they have no place to park. Conceptually, Restrictions could regulate the use of public rights-of-way by the owners of property in the neighborhood, but would be invalid against non-owners.

In 1997, the Texas Legislature created a petition process for 25% of the owners or tenants in a neighborhood to request the City/County (as applicable) to post signs prohibiting overnight parking by commercial motor vehicles from 10:00 p.m. to 6:00 a.m. (unless performing work in the neighborhood). This provision applies only in counties with a population of 220,000 or more and in neighborhoods with recorded subdivision plats, where a majority of area is restricted to residential use only. TEX. TRANSP. CODE § 545.307.

I. Fences

Neighborhoods may wish to restrict the type, location, and height of fencing. Typically, fencing will be prohibited in the front yards. The height of fencing is typically restricted to 6-8 feet maximum. Some neighborhoods allow only certain types of fencing.

J. Modification, Extension and Termination

Typically, Restrictions which allow for modification, extension, or termination of Restrictions provide they can (i) be modified by a majority vote, (ii) automatically renew for 10-20 year periods, and (iii) be terminated by a super majority vote (75-90%). These actions bind all owners subject to the Restrictions. Many of the procedural provisions of Chapter 204 should be incorporated into the modification/renewal/termination provisions of Restrictions.

K. Transition Features

When significant new Restrictions are added, it is appropriate to provide transition features to deal with (i) existing uses and structures, and (ii) financial hardships. Existing uses/structures should be allowed to continue in existence as pre-existing, non-conforming uses/structures, but should not be allowed to intensify their use. Destruction or discontinuance of the use/structure should terminate the pre-existing, non-conforming rights. Financial hardship provisions should deal with the unusual needs of the elderly and poor related to cost of compliance with new Restrictions and payment of assessments.

L. Variance Procedures

Variations allow limited nonconformance with limitations in Restrictions in unusual circumstances. Variances are necessary to deal with unusual circumstances of specific property where unusual hardship would occur from strict compliance with the Restrictions, but where the variance will not undermine the policy objectives of the Restriction(s) in question. Sometimes the Restrictions do not appropriately contemplate particular situations which exist in a neighborhood or may come to pass due to changing

uses, construction techniques, and technological change. No drafter can foresee the future. Variances should be strictly limited to prevent them from being used to evade the essential directives of the Restrictions. Variances are "safety valves" to deal with unusual circumstances only.

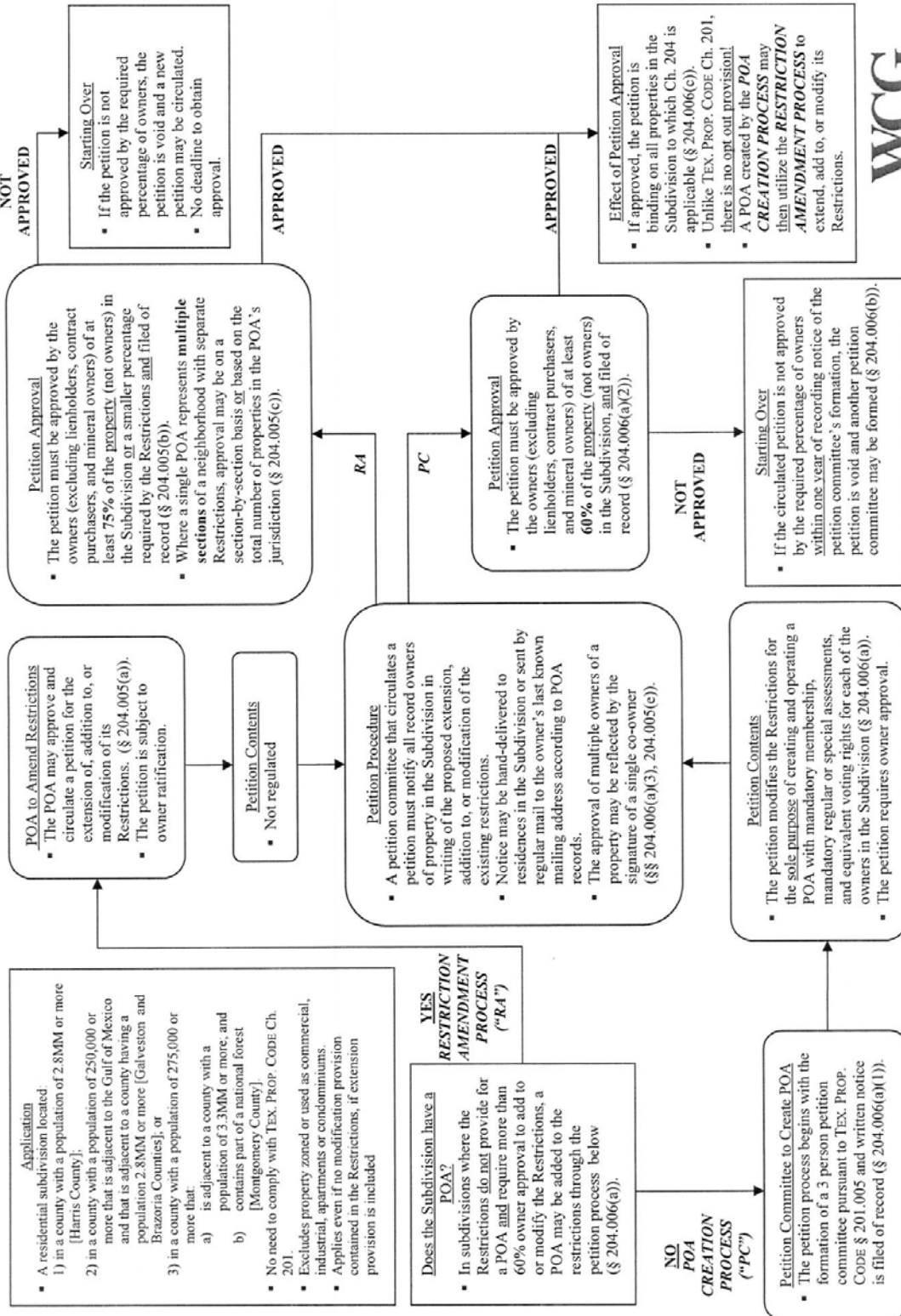
M. Records of POA

The availability of books and records can be addressed, consistent with the requirement of Chapter 209, to limit the opportunity for inspection by an owner who is being (or is contemplated to be) sued by the POA. In particular, the POA's attorney's records should be excluded. Language should be included to provide the POA the right to determine that the inspection is for a "proper purpose." Consideration should be given to (i) limiting the time and place of inspection, (ii) minimizing the cost and procedure for copying, and (iii) implementing safeguards against harassment.

EXHIBIT "A"

[See attached chart]

TEXAS PROPERTY CODE CHAPTER 204:
Creating a Property Owners' Association and Extending, Adding to, or Modifying Existing Restrictions



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 Attorneys at Law

CHAPTER 204 DEFINITIONS

Restrictions: 1 or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the county real property records, map records, or deed records.

Residential real estate subdivision or subdivision: all land within 1 or more maps or plats of land that is divided into 2 or more parts if the maps or plats cover land within a city, town, or village, or within the ETJ of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; or all land located within a city, town, or village, or within the ETJ of a city, town, or village that has been divided into 2 or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Owner: an individual, fiduciary, partnership, joint venture, corporation, association, or other entity that owns record title to real property in a subdivision, or the personal rep. of an individual who owns record title to subdivision property.

Petition: 1 or more instruments, however designated or entitled, by which 1 or more actions relating to restrictive covenants are sought to be accomplished.

Property Owners' Association ("POA"): a designated representative of the owners of property in a subdivision and may be referred to as a "homeowners association," "community association," "civic association," "civic club," "association," "committee," or similar term contained in the restrictions. The membership of the association consists of the owners of property within the subdivision. The association must be nonprofit and may be incorporated as a Texas nonprofit corporation. An unincorporated association may incorporate under the Texas Non-Profit Corporation Act (Sec. 22.001 et seq., Business Organization Code). The association's board of directors or trustees must be elected or appointed in accordance with the applicable provisions of the restrictions and the association's articles of incorporation or bylaws.

Real property records: the applicable records of a county clerk in which conveyances of real property are recorded.

Lienholder: an individual, corporation, financial institution, or other entity that holds a vendor's or deed of trust lien secured by land within the subdivision.

Dedicator instrument: each governing instrument covering the establishment, maintenance, and operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association, to properly adopted rules and regulations of the POA, or to all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

Restrictive covenant: any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative.

Regular assessment: an assessment, charge, fee, or dues that each owner of property within a subdivision is required to pay to the POA on a regular basis and that are to be used by the association for the benefit of the subdivision in accordance with the original, extended, added, or modified restrictions.

Special assessment: an assessment, charge, fee, or dues that each owner of property within a subdivision is required to pay to the POA, after a vote of the membership, for the purpose of paying for the costs of capital improvements to the common areas that are incurred or will be incurred by the association during the fiscal year. A special assessment may be assessed before or after the association incurs the capital improvement costs.

CHAPTER 204: STATUTORY POWERS OF A PROPERTY OWNERS' ASSOCIATION

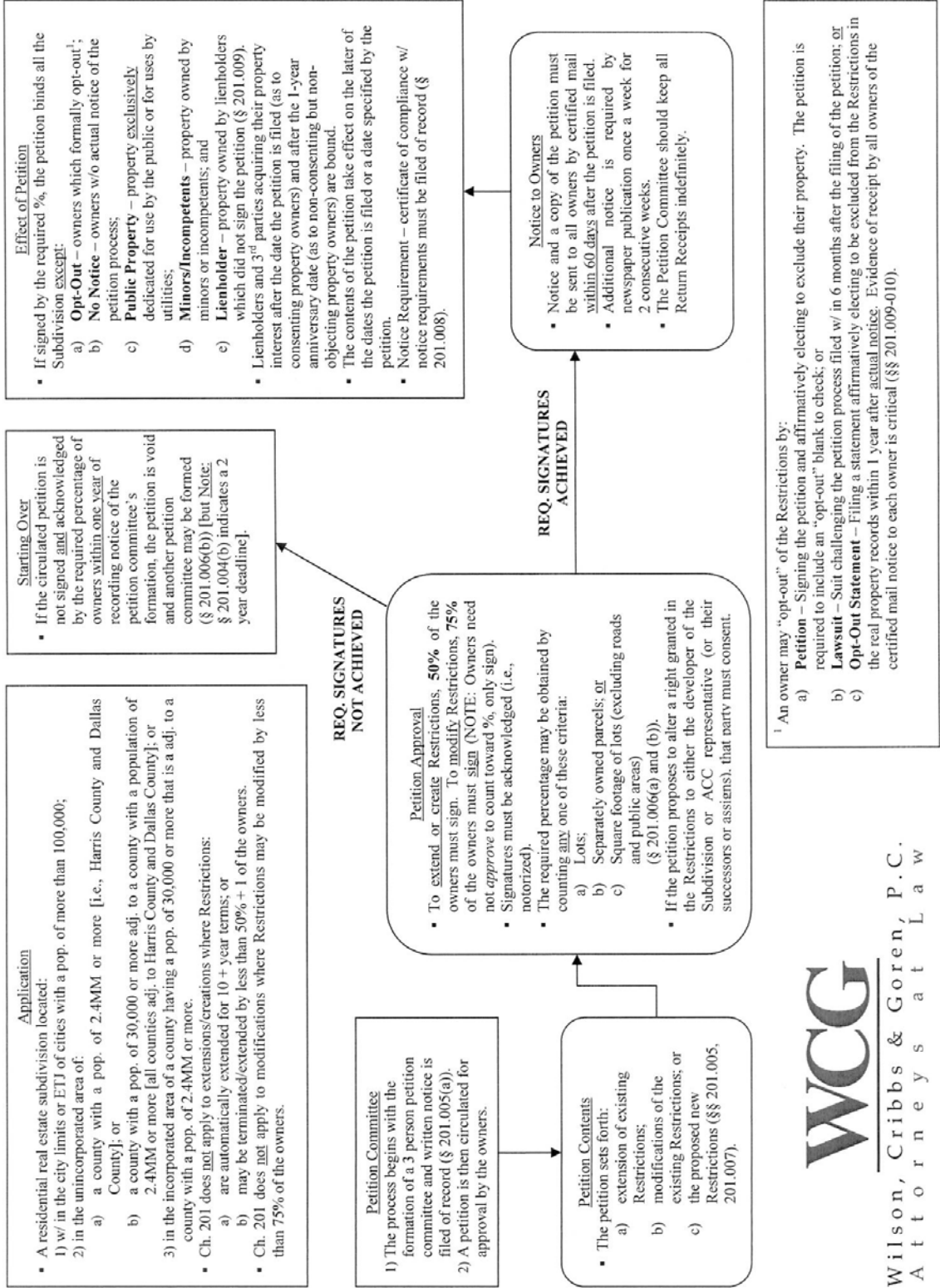
Unless otherwise provided by the restrictions or the association's articles of incorporation or bylaws, the POA, acting through its board of directors or trustees, may:

- (1) adopt and amend bylaws;
- (2) adopt and amend budgets for revenues, expenditures, and reserves and collect regular assessments or special assessments for common expenses from property owners;
- (3) hire and terminate managing agents and other employees, agents, and independent contractors;
- (4) institute, defend, intervene in, settle, or compromise litigation or administrative proceedings on matters affecting the subdivision;
- (5) make contracts and incur liabilities relating to the operation of the subdivision and the POA;
- (6) regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision;
- (7) make additional improvements to be included as a part of the common area;
- (8) grant easements, leases, licenses, and concessions through or over the common area;
- (9) impose and receive payments, fees, or charges for the use, rental, or operation of the common area and for services provided to property owners;
- (10) impose interest, late charges, and, if applicable, returned check charges for late payments of regular assessments or special assessments;
- (11) if notice and an opportunity to be heard are given, collect reimbursement of actual attorney's fees and other reasonable costs incurred by the POA relating to violations of the subdivision's restrictions or the POA's bylaws and rules;
- (12) charge costs to an owner's assessment account and collect the costs in any manner provided in the restrictions for the collection of assessments;
- (13) adopt and amend rules regulating the collection of delinquent assessments and the application of payments;
- (14) impose reasonable charges for preparing, recording, or copying amendments to the restrictions, resale certificates, or statements of unpaid assessments;
- (15) purchase insurance and fidelity bonds, including directors' and officers' liability insurance, that the board considers appropriate or necessary;
- (16) if the restrictions allow for an annual increase in the maximum regular assessment without a vote of the membership, assess the increase annually or accumulate and assess the increase after a number of years;
- (17) subject to the requirements of the Texas Non-Profit Corporation Act (Sec. 22.001 et seq., Business Organization Code) and by majority vote of its board of directors, indemnify a director or officer of the POA who was, is, or may be made a named defendant or respondent in a proceeding because the person is or was a director;
- (18) if the restrictions vest the architectural control authority in the POA or if the authority is vested in the POA under Section 204.011:
 - (A) implement written architectural control guidelines for its own use or record the guidelines in the real property records of the applicable county; and
 - (B) modify the guidelines as the needs of the subdivision change;
- (19) exercise other powers conferred by the restrictions, its articles of incorporation, or its bylaws;
- (20) exercise other powers that may be exercised in this state by a corporation of the same type as the POA; and
- (21) exercise other powers necessary and proper for the governance and operation of the POA.

EXHIBIT "B"

[See attached chart]

TEXAS PROPERTY CODE CHAPTER 201:
Creating, Extending, Renewing, Adding to, or Modifying Restrictions



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CHAPTER 201 DEFINITIONS

Restrictions: 1 or more restrictive covenants contained or incorporated by reference in a properly recorded map, plat, replat, declaration, or other instrument filed in the county real property records, map records, or deed records.

Residential real estate subdivision or subdivision: all land within 1 or more maps or plats of land that is divided into 2 or more parts if the maps or plats cover land within a city, town, or village, or within the ETJ of a city, town, or village and are recorded in the deed, map, or real property records of a county, and the land within the maps or plats is or was burdened by restrictions limiting all or at least a majority of the land area covered by the map or plat, excluding streets and public areas, to residential use only; or all land located within a city, town, or village, or within the ETJ of a city, town, or village that has been divided into 2 or more parts and that is or was burdened by restrictions limiting at least a majority of the land area burdened by restrictions, excluding streets and public areas, to residential use only, if the instrument or instruments creating the restrictions are recorded in the deed or real property records of a county.

Owner: an individual, fiduciary, partnership, joint venture, corporation, association, or other entity that owns record title to real property in a subdivision, or the personal rep. of an individual who owns record title to subdivision property.

Petition: 1 or more instruments, however designated or entitled, by which 1 or more of the purposes authorized by Ch. 201 are sought to be accomplished.

Real property records: the applicable records of a county clerk in which conveyances of real property are recorded.

Lienholder: an individual, corporation, financial institution, or other entity that holds a vendor's or deed of trust lien secured by land within the subdivision.

Petition committee or committee: a group of 3 or more owners who file with the county clerk a notice as required by Section 201.005(a) and who prepare and circulate a petition as allowed under Ch. 201.

Exhibit "C"**Definition of "subdivision" applicable to
Texas Property Code Chapters 201 & 204**

CHAPTER 201. Restrictive Covenants Applicable to Certain Subdivisions

§201.003. Definitions

(2) "Residential real estate subdivision" or "subdivision" means:

(A) **all land** *[All, not part]*

encompassed within one or more
maps or

plats of land *[platted prop.]*

that is **divided** into two or more parts *[ie. a 'subdivision of land']*
if the maps or plats cover land **within**

a **city,**

town, or

village, or

within the **extraterritorial jurisdiction of a**

city,

town, or

village *[excludes county outside ETJ]*

and are **recorded** in the

deed,

map, or

real property records of a county, *[public notice: recorded plats only]*

and the land encompassed within the maps or plats **is or was burdened by restrictions** limiting all or at least a **majority of the land** area covered by the map or plat, excluding streets and public areas, **to residential use only**; *[50%+ is res. Use restricted]*

[Summary: Land in a city(or ETJ of a city) if (i) more than 50% is now or previously subject to res. only restrictions and (ii) w/in a recorded map/plat. The land is the area shown in the map/plat.]

Or

- (B) **all land** *[All, not part]*
located within
a **city**,
town, or
village, or
within the **extraterritorial jurisdiction of a**
city,
town, or
village *[excludes county outside ETJ]*
that has been **divided** into two or more parts *[ie. a 'subdivision of land']*
and that is or was **burdened by restrictions limiting** at least a **majority of the**
land area burdened by restrictions, excluding streets and public areas, **to**
residential use only, *[50%+ is res. Use restricted]*
if the instrument or instruments creating the restrictions are **recorded** in the
deed or
real property records of a county. *[public notice: recorded instrument]*

[Summary: Land in a city(or ETJ of a city) if (i) more than 50% is now or previously subject to res. only restrictions, and (ii) both (a) there is an recorded instrument creating the restrictions, and (b) the land has been divided. The land would the land covered by the recorded instrument.]

This definition also applies to Chap. 204 per Tex. Prop. Code Sec. 204.001(1).

Exhibit "D"

[See attached chart]

Chapter and Title	Limitation	Applicability *
<p>201. Restrictive Covenants Applicable to Certain Subdivisions</p>	<p>This chapter applies to a residential real estate subdivision that is located in whole or in part:</p> <p>(1) within a city that has a population of more than 100,000, or within the extraterritorial jurisdiction of such a city;</p> <p>(2) in the unincorporated area of:</p> <p>(A) a county having a population of 2,400,000 or more; or</p> <p>(B) a county having a population of 30,000 or more that is adjacent to a county having a population of 2,400,000 or more; or</p> <p>(3) in the incorporated area of a county having a population of 30,000 or more that is adjacent to a county having a population of 2,400,000 or more.</p>	<p>→ Harris and Dallas County</p> <p>→ Montgomery, Waller, Ft. Bend, Brazoria, Galveston, Chambers, Liberty, Tarrant, Denton, Collin, Rockwall, Kaufman & Ellis County</p> <p>→ Montgomery, Waller, Ft. Bend, Brazoria, Galveston, Chambers, Liberty, Tarrant, Denton, Collin, Rockwall, Kaufman & Ellis County</p>
<p>203. Enforcement of Land Use Restrictions in Certain Counties</p>	<p>This chapter applies only to a county with a population of more than 200,000.</p>	<p>→ Harris, Dallas, Tarrant, Bexar, Travis, Collin, El Paso, Hidalgo, Denton, Ft. Bend, Montgomery, Williamson, Cameron, Nueces, Brazoria, Galveston, Bell, Lubbock, Jefferson, Webb, McLennan & Smith County</p>
<p>204. Powers of Property Owners' Association Relating to Restrictive Covenants in Certain Subdivisions</p>	<p>This chapter applies only to a residential real estate subdivision, excluding a condominium development governed by Title 7, Property Code, that is located in whole or in part:</p> <p>(1) in a county with a population of 2.8 million or more;</p> <p>(2) in a county with a population of 250,000 or more that is adjacent to the Gulf of Mexico and that is adjacent to a county having a population of 2.8 million or more; or</p> <p>(3) in a county with a population of 275,000 or more that:</p> <p>(A) is adjacent to a county with a population of 3.3 million or more; and</p> <p>(B) contains part of a national forest.</p>	<p>→ Harris County</p> <p>→ Galveston and Brazoria County</p> <p>→ Montgomery County</p>
<p>205. Restrictive Covenants Applicable to Revised Subdivisions in Certain Counties</p>	<p>This chapter applies only to a county with a population of 65,000 or more.</p>	<p>→ Harris, Dallas, Tarrant, Bexar, Travis, Collin, El Paso, Hidalgo, Denton, Ft. Bend, Montgomery, Williamson, Cameron, Nueces, Brazoria, Galveston, Bell, Lubbock, Jefferson, Webb, McLennan, Smith, Brazos, Johnson, Hays, Ellis, Ector, Midland, Wichita, Taylor, Potter, Grayson, Gregg, Guadalupe, Randall, Parker, Comal, Tom Green, Kaufman, Bowie, Victoria, Angelina, Orange, Hunt, Henderson, Rockwall, Liberty, Bastrop, Coryell, San Patricio</p>

<p>211. Amendment and Enforcement of Restrictions in Certain Subdivisions</p>	<p>This chapter applies only to a residential real estate subdivision or any unit or parcel of a subdivision located in whole or in part within an unincorporated area of a county if the county has a population of less than 65,000.</p>	<p>→ Residential real estate subdivisions located in the Unincorporated areas of Walker, Harrison, Nacogdoches, Starr, Wise, Anderson, Maverick, Van Zandt, Hardin, Hood, Navarro, Lamar, Rusk, Cherokee, Kerr, Val Verde, Polk, Burnet, Medina, Atascosa, Wood, Jim Wells, Wharton, Wilson, Cooke, Brown, Upshur, Matagorda, Caldwell, Waller, Erath, Hill, Hale, Jasper, Hopkins, Fannin, Kendall, Bee, Howard, Washington, Kleberg, Titus, Chambers, Cass, Palo Pinto, Austin, Shelby, Uvalde, Grimes, Aransas, Milam, San Jacinto, Gillespie, Panola, Fayette, Houston, Gray, Hockley, Limestone, Hutchinson, Lampasas, Colorado, Willacy, Tyler, Calhoun, Moore, Bandera, Montague, DeWitt, Jones, Gonzales, Freestone, Lavaca, Deaf Smith, Llano, Eastland, Bosque, Young, Falls, Leon, Burleson, Lee, Pecos, Frio, Scurry, Robertson, Gaines, Karnes, Nolan, Trinity, Jackson, Zapata, Wilbarger, Newton, Dawson, Andrews, Lamb, Callahan, Comanche, Madison, Red River, Morris, Camp, Terry, Duval, Zavala, Live Oak, Rains, Reeves, Franklin, Clay, Ward, Marion, Runnels, Sabine, Dimmit, Ochiltree, Stephens, Brewster, Mitchell, Parmer, Archer, Blanco, Jack, Coleman, San Augustine, Hamilton, McCulloch, Somervell, Swisher, Yoakum, Brooks, Childress, Presidio, Refugio, Goliad, Castro, Winkler, Floyd, Bailey, Dallam, Carson, Crosby, San Saba, La Salle, Lynn, Delta, Hansford, Haskell, Hartley, Jim Hogg, Mills, Wheeler, Garza, Martin, Kimble, Sutton, Crane, Hardeman, Fisher, Mason, Donley, Crockett, Baylor, Concho, Coke, Hemphill, Hall, Knox, Kinney, Upton, Hudspeth, Shackelford, Regan, Collingsworth, Lipscomb, Cochran, Sherman, Real, Schleicher, Dickens, Culberson, Jeff Davis, Menard, Armstrong, Oldham, Edwards, Irion, Throckmorton, Cottle, Briscoe, Stonewall, Foard, Motley, Sterling, Glasscock, Terrell, McMullen, Roberts, Kent, Borden, Kenedy, King and Loving County</p>
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*Population data obtained from Texas State Library and Archives Commission (<http://www.tsl.state.tx.us/ref/abouttx/population.html>), 2008 estimates.