

A Reprint from *Tierra Grande*, the Real Estate Center Journal

LETTER of the LAW

by JUDON FAMBROUGH

Creating, Changing, Extending Deed Restrictions

Subdivisions with deed restrictions overseen by property owners associations form the nucleus for much of Texas' new residential development. The trend began in the late '70s and early '80s.

Many of the deed restrictions implemented in the '70s faced expiration in the late '80s and 90s. Some contained no provisions for modification or extension. In geographic areas not covered by zoning ordinances, the predicament discouraged investing in and maintaining the property, in some cases resulting in dilapidated housing and unhealthy, unsanitary living conditions. Many older subdivisions had racial covenants with no mechanism for removal.

Consequently, in 1987, Chapters 201, 204 and 205 were added to the Texas Property Code (TPC) to provide a procedure for extending, creating, augmenting, modifying and removing restrictions. Chapters 210 and 211 were added in 2005. The legislation did not supersede existing procedures, but instead added new ones for counties and cities with certain population.

The legislative rules for creating, changing and extending restrictions fall into four categories. The first category applies to sparsely populated counties where:

- changes are needed to qualify for federally insured mortgages,
- subdivisions lack a procedure for amending the deed restrictions or
- subdivisions have a procedure for amending the restrictions, but a unanimous vote is required.

The second category applies to more moderately populated counties where a committee of homeowners or the property owners association may initiate a change or extension of the restrictions through a petition process. The third category applies to more heavily populated counties where only a committee of homeowners may initiate a change or extension through the petition process. The fourth category applies to heavily populated counties where only the property owners association may initiate a change or extension through the petition process.

The first category, found in TPC Section 205.003, allows property owners associations in counties with less than 65,000 people to amend restrictions to qualify the subdivision either for Housing and Urban Development or the Veterans Administration insured or guaranteed loans.

The process requires property owners associations to file the necessary amendments in the county real property records. Amendments must:

- reference TPC Sections 25.003 and 25.004 for the authority to amend the restrictions and
- have a majority of the association's governing body sign it.

The second category, found in Chapter 211 of the TPC, became effective September 1, 2005. It describes a method by which the governing body of property owners associations may adopt a process to amend their restrictions when the present restrictions have no procedure or where the procedure requires a unanimous vote. The new law affects subdivisions lying entirely or partially in the unincorporated areas of counties with populations less than 65,000.

The governing body of the property owners association initiates the process with a two-thirds vote to submit the proposed amendment procedure to the property owners in the subdivision or in units or parcels within it.

Not later than 30 days before the date of the vote, the property owners association must mail to each affected property owner a notice that includes the exact:

- wording of the amendment process and
- day by which the ballot must be received to be counted.

The property owners association pays for the costs of the ballots and for canvassing, tabulating and certifying the votes.

Each property owner within the subdivision or an affected parcel gets one vote regardless of the number of lots owned. Lots with multiple owners

get only one vote. Lienholders cannot vote. It is unclear how mineral owners are treated.

Property owners vote by secret ballot. A vote cannot be counted unless placed in an unmarked envelope that is placed inside another envelope that bears the signature and printed name of the property owner.

The presiding officer of the property owners association appoints an election committee and a chairman to canvass and count the votes. The proposal passes if it receives two-thirds approval of the voting property owners. The passage binds all property owners in the subdivision or in the units or parcels within the subdivision to which the amendment applies.

For the amendment to become effective, the chairman of the election canvassing committee certifies the results to the presiding officer. The presiding officer files an instrument in the real property records of each county where the subdivision is located indicating the adoption of the amendment procedure.

Once the procedure is adopted, any subsequent proposed amendments to the restrictions must be submitted using the newly adopted process. If the adoption fails, the property owners association must wait at least one year before submitting the same amendment procedure to property owners for a vote.

Note. Chapter 211 allows the property owners to adopt a new method to amend their deed restrictions. The chapter does not outline the procedure. This is left to the discretion of the property owners association.

The third category, found in Chapter 210 of the TPC, was also added in 2005. It represents a means for extending or modifying restrictions in residential subdivisions in counties having a population between 170,000 and 175,000. It also applies to any adjacent counties having a population between 45,000 and 75,000.

The petition process may be initiated either by the property owners association or a committee of at least three owners. It begins with the petition

to extend or modify all or part of the existing restrictions being sent to each owner's mailing address as shown on the appraisal district's records. The petition must be sent by certified mail, return receipt requested.

The petition may contain separate signature pages as long as each page fully states or references the proposed extension or modification. The wording of a reference must be substantially the same as the following.

"We the undersigned owners of property in the _____ Subdivision indicate by our signatures on this document our approval or disapproval of the proposal(s) circulated by _____ on or about (date) to (extend or modify) our restrictive covenants. We acknowledge that we have fully reviewed the proposal(s)."

The petition must state the date by which a response must be received to be counted.

The needed vote for approval or disapproval of all or part of the petition is 66 percent of the owners of real property in the subdivision. Lienholders, contract purchasers and owners of minerals beneath the subdivision cannot vote. For multiple ownership, the signatures of a majority counts as one vote. For married owners, the signature of one spouse is sufficient to count as one vote. An owner is considered having cast a vote if the owner signs the petition indicating approval or disapproval of all or part of the proposal.

Special rules apply to subdivisions with multiple sections having different restrictions but with a single property owners association representing the entire subdivision. An approval by 66 percent of the total number of property owners in the subdivision binds each section. The statute does not address the possibility of a vote by each section of the subdivision to extend or modify only its restrictions.

After the votes are counted, the property owners association or the petition committee must certify the results with a written resolution showing:

- the exact terms of the proposed extension or modification,
- the number of votes for and against the entire proposal or, as the case may be, the number of votes for and against each specific part of a proposal and
- that the petition was delivered (sent) to each record owner in the subdivision by certified mail, return receipt requested.

The property owners association or the petition committee must make the

resolution and the signature pages available to any owner on request.

An extension or modification that is approved becomes effective when the resolution is filed as a dedicatory instrument with the county clerk in each county where the subdivision is located. The extension or modification binds all the properties in the subdivision.

Note. The words *restrictions*, *owner*, *petition* and *lienholder* are defined in Section 201 of the TPC by reference. However, the term petition committee is not defined by reference even though Section 201 contains a definition along with specific directions for implementing one. It is unclear if the process for forming a petition committee is governed by Section 201.

The third procedure is detailed in TPC Section 201.004 et seq., applies to residential subdivisions located within cities having a population of at least 100,000 or within the extraterritorial jurisdiction of such cities. Unincorporated areas with populations of at least 2.4 million also are covered, as well as adjacent counties having populations of at least 30,000 within their unincorporated areas.

There are exceptions, though. The petition process does not apply to those areas where existing restrictions provide for:

- automatic extensions for an indefinite number of successive periods, terminated only by a right of waiver or termination by less than 50 percent of the property owners plus one or
- an indefinite number of successive extensions evidenced by written and filed agreement of less than 50 percent of the property owners plus one.

Likewise, the petition process does not apply to an addition to or modification of an existing restriction when the instrument creating the restriction requires a written and filed agreement by less than 75 percent of the owners in interest in the subdivision. The fact that the developer or architectural control committee must consent to any additions or modifications does not affect the exception.

Interestingly, a city, county or unincorporated area meeting the population requirements of Chapter 201 continues to be subject to the petition process even when the population later drops below the threshold levels.

The petition process begins with the formation of a petition committee consisting of at least three property owners. Only one petition committee may exist at a time. To form the committee, a notice prescribed in Section 201.004 must be signed and acknowledged by

each committee member and filed in the county real property records. The notice must contain the newly proposed restrictions or proposed modifications to the existing ones.

The petition to extend, renew or create new restrictions must then be circulated among the property owners for their approval. Section 201.007 contains the requirements for the circulated petition. Owners consent by signing the petition. Owners may sign the petition and elect to exclude their property from the restriction, though.

For a petition to pass, a majority of the affected property owners must consent. The majority must consent in all three of the following categories: lot owners, owners of separate parcels and owners of square footage in the subdivision. In calculating square footage, areas dedicated for roadways, utilities or public purposes are excluded.

Once the necessary majority signs the petition, the committee must file the petition in the county real property records and impart two notices to all record owners in the subdivision within 60 days. One notice must be published once a week for two consecutive weeks in a newspaper of general circulation where the subdivision is located. The other notice must be sent to each property owner by certified mail, return receipt requested. The notice must contain:

- the name of the subdivision covered,
- a copy of the petition,
- a statement that the required number of owners signed and
- the date the petition was filed with the county clerk.

After the two required notices are dispatched, a majority of the committee members must execute and file a certification of compliance. This ends the petition process and effectively changes the deed restrictions for the property owners who signed the petition.

Property owners who did not sign the petition may choose to have their property excluded by filing in the county property records within one year, a description of their property that references a recorded map and states that they chose to exclude their property from the restrictions.

Other property and property owners excluded are:

- property owned by a minor or person declared incompetent at the time the certification is filed unless:
 - actual notice of the filing was given to the guardian who has not chosen to opt out,
 - a competent predecessor in title signed the petition when they owned the property or

- the incompetent person signed the petition before being declared incompetent.
- property dedicated exclusively for public use or utilities,
- property owners who did not sign the petition and received no notice of filing of the petition,
- a lienholder whose lien was established on the property before the effective date of the petition and who refused to sign the petition. If the non-consenting lienholder forecloses on property after the owner signs the petition, the foreclosure frees the property from the new restrictions if the lienholder purchases it. If someone else purchases the property at the foreclosure sale, the property continues to be bound.

Chapter 204 of the TPC contains the fourth statutory method for changing restrictions. Here, the authority lies with property owners associations governing residential subdivisions that lie entirely or partially in counties with a population of:

- 2.8 million,
- at least 250,000 if adjacent to the Gulf of Mexico and also adjacent to a county having a population of 2.8 million or
- 275,000 if adjacent to a county of 3.3 million and containing part of a national forest.

According to the statute, the term property owners associations collectively refers to homeowner associations, community associations, civic associations,

civic clubs, committees and similarly named associations but not to condominiums. However, the property owners association, by whatever name, must be non-profit, such as a Texas non-profit corporation. Also, the board of directors or trustees must be elected or appointed according to the association's restrictions, articles of incorporation or bylaws.

The property owners association may approve and circulate a petition to extend, add or modify existing restrictions. No petition committee needs to be formed and no preliminary paperwork needs to be filed in the county real property records. The statute does not prescribe a certain form but indicates consent is evidenced by an owner's signature.

The statute dictates how notice of the petition must be circulated. All record owners must be notified of the petition by hand delivery or by mail sent to the last known address reflected in the association's records. Only one co-tenant need sign for the approval of co-owned property.

The proposal may be adopted by:

- written ballot,
- door-to-door circulation of the petition,
- a method permitted in the existing deed restrictions,
- a vote of representatives of members of the property owners association if prior written notice of the meeting and its purpose was delivered to each property owner,
- a combination of these methods.

The circulated petition becomes effective if it is approved by at least 75 percent of the owners of the real property in the subdivision and filed as a dedicatory instrument with the county clerk in the county where the subdivision is located. The 75 percent of owners is calculated excluding lienholders, contract purchasers and mineral owners.

The statute contains special rules for calculating the needed percentage when a single property owners association presides over several sections of a subdivision, each with its own restrictions. The statute provides that the petition is binding on the entire subdivision if at least 75 percent of all property owners approve. If less than 75 percent of all property owners approve, the petition is still binding on the sections receiving a 75 percent approval.

Unlike the second method of changing restrictions, if approved, the petition is binding on all property owners in the subdivision or sections. Non-consenting property owners may not opt out. Even lienholders are bound, as long as the restriction does not relate to a regular or special assessment.

For more information on restrictions, see Center publication 410, "Living with Deed Restrictions" (<http://recenter.tamu.edu/pubs/410.html>). ♣

Fambrough (judon@recenter.tamu.edu) is a member of the State Bar of Texas and a lawyer with the Real Estate Center at Texas A&M University. This article was coauthored by Wendy Linscomb, a former graduate research assistant with the Real Estate Center at Texas A&M University.



LOWRY MAYS COLLEGE & GRADUATE SCHOOL OF BUSINESS

Texas A&M University
2115 TAMU
College Station, TX 77843-2115

<http://recenter.tamu.edu>
979-845-2031
800-244-2144 orders only

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Tierra Grande (ISSN 1070-0234), formerly *Real Estate Center Journal*, is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, \$30 per year, including 12 issues of *Trends*.

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