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## 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. Chapter 212 was added in 2011. The legislation did not supersede existing procedures, but instead added new ones for counties and cities with certain population.

Each statute will be discussed separately. The statutes vary depending on the population of the county or city in which the subdivision is located and the required method needed to create, change or extend the restriction. This article gives an overview of each statute and is not meant to be an exclusive guideline. Each statute needs to be read for details.

#### Chapter 205

Chapter 205 of the TPC applies to the more sparsely populated counties (those with less than 65,000 people) when change to the restrictions is needed to qualify the subdivision for either Housing and Urban Development or the Veterans Administration insured or guaranteed loans. The subdivision must lack a procedure for amending the deed restrictions or the amendment process requires a unanimous vote.

The process requires property owners associations to file the necessary

amendments in the county real property records. Amendments must:

- reference TPC Sections 205.003 and 205.004 for the authority to amend the restrictions and
- have a majority of the association's governing body sign it.

#### Chapter 211

Chapter 211 is somewhat similar to Chapter 205 in that it applies to subdivisions lying entirely or partially in the unincorporated areas of counties with populations of less than 65,000. It also includes subdivisions lying entirely within the extraterritorial jurisdiction of a municipality in counties with populations between 65,000 and 135,000.

If the population requirements can be met, then any residential subdivisions lying within these regions may use Chapter 211 when the present restrictions have no procedure for amending them or the procedure requires a unanimous vote.

On June 17, 2011, the application of the chapter was expanded until Sept. 1, 2015, to include a unit or parcel of residential subdivision where the instrument creating the restrictions provides that an amendment is not operative until a future date or at the expirations of a specific period. When this is present, any amendment under Chapter 211 becomes effective immediately when filed in the deed records following the approval by the owners in spite of this language in the restrictions.

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.

#### Chapter 210

Using a petition process, Chapter 210 represents a means for extending or modifying restrictions when the residential

subdivisions are located in counties with populations between 200,000 and 220,000. It also applies to any adjacent counties having populations between 45,000 and 80,000. Gated communities with private streets are included in this amendment process as long as they lie outside a city, town or village or outside the extraterritorial jurisdiction of a city, town or village.

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.

## Chapter 201

Chapter 201 describes a method for modifying, amending or extending restrictions, again through a petition process, for residential subdivisions lying entirely or partially in:

- a city having a population of more than 100,000 or within the extraterritorial jurisdiction of such a city,
- the unincorporated area of a county having a population of at least 3.3 million or an adjacent county thereto having a population of at least 40,000 or
- the incorporated area of a county having a population of at least 40,000 that is adjacent to a county having a population of at least 3.3 million.

Exceptions exist within these defined areas. For example, the petition process discussed in Chapter 201 does not apply to those areas where existing restrictions provide for:

- automatic extensions for an indefinite number of successive periods of ten years, subject to a right of waiver or termination, in whole or in part, by less than 50 percent plus one of the owners as set forth in the instrument creating the restrictions or
- an indefinite number of successive extensions of at least ten years of

the terms of the restrictions by written and filed agreement of less than 50 percent plus one of the owners as authorized by the instrument creating the restrictions.

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.

Effective Sept. 1, 2009, another exception was added. Basically, if the existing deed restrictions for the subdivision outline a procedure for successive extensions, that procedure may be used indefinitely as long as the existing deed restrictions do not expressly prohibit it.

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

Chapter 204 sets forth yet another way to change the restrictions in residential subdivisions located entirely or partially in a:

- county with a population of at least 3.3 million,
- county with a population between 285,000 and 300,000 and that is

adjacent to the Gulf of Mexico and that is adjacent to a county having a population of at least 3.3 million or

- county with a population of at least 275,000 adjacent to a county with a population of at least 3.3 million and contains part of a national forest.

The chapter does not apply to portions of a subdivision that are zoned for or that contain a commercial structure, an industrial structure, an apartment complex or a condominium development governed by Title 7 of the TPC. For purposes of this subsection, an “apartment complex” means two or more dwellings in one or more buildings that are owned by the same owner, located on the same lot or tract, and managed by the same owner, agent or management company.

According to the statute, the authority to change the restrictions lies with the property owners association. In this regard, Chapter 204 defines the property owners association to include homeowner associations, community associations, civic associations, civic clubs, committees and similarly named associations excluding 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 begins the process by approving and circulating 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.

## Chapter 212

Chapter 212, effective June 17, 2011, details the sixth statutory method for changing restrictions. It applies to subdivisions that are located wholly or partially in a municipality having a population of at least two million that is within a county having a population of at least 3.3 million. The subdivision must have restrictions that:

- have an expiration date,
- allow for at least one extension after the initial one expires and
- do not expressly allow or deny the extension of the initial period for successive periods of renewal.

(**Note.** The extension referenced above must be by a majority vote of the property owners, signified on a written instrument that is acknowledged and filed of record for a maximum period specified in the restrictions.)

Pursuant to Chapter 212, restrictions may be extended by the written consent of the majority of the owners of lots in the subdivisions without respect to the number of lots owned by one person. Consent may be reflected by the owner’s signature on a petition or written ballot. The vote of multiple owners of a lot may be reflected by the signature of one of the owners. Once the petition or ballot is signed, it is effective even though the lot or unplatted property is subsequently conveyed.

The extension is effective without the creation of or any action by a property owners association, homeowners association, community association, civic club or similar organization.

The distribution of the petitions, ballots or both may be door-to-door or at a meeting of the owners called for the purpose of voting on the proposed extension. The petitions, ballots or both

must be filed of record in the county where the subdivision is located before the earlier of:

- the first anniversary date of the acquisition of the first signature or
- the expiration of the extension period during which the signatures were collected.

The statute also stipulates that the signatures must be obtained during the same extension period and the restrictions may be extended only once during each unexpired extension period.

Once the majority consents to the extension, it takes effect the date the petitions, ballots or both are filed of record. The extension lasts for a period equal to the original restrictions or for a shorter period specified in the petitions, ballot or both. However, the restrictions, once

extended, may be prematurely terminated by the consent of a majority of the owners of lots in the same manner as the restrictions were extended including the filing of the results in the deed records. The vote may allow each restriction to terminate on different dates.

A valid extension binds all lots and unplatted property in the subdivision. Any statute giving a property owner the right to opt out does not apply to this chapter. A valid extension is binding on all lienholder or persons who acquire title to property in the subdivision at a foreclosure sale or by deed from a foreclosing lienholder.

The extension of a restriction that is void and unenforceable under the U.S. Constitution is still void and unenforceable. The extension has no effect on their validity.

Finally, as with the other methods, the procedure described in the chapter is not exclusive. The procedures provided in the original restrictions may be used for successive extensions as long as a majority of the lots in the subdivision is required.

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

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