
**DEED RESTRICTIONS:
PROTECTING HISTORIC NEIGHBORHOODS
IN A CITY WITHOUT ZONING**

**Historic Houston
Preservation Day Symposium**

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**May 20, 2000
Jones Hall
University of St. Thomas**

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I. INTRODUCTION

A. Restrictive Covenants

Restrictive covenants (also known as deed restrictions, but referred to as "Restrictions" in this Article) 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. Many Houston neighborhoods have, or have had, Restrictions. For example, historic Westmoreland Addition has Restrictions in the original deeds to owners, 100 years ago. Other areas of similar historic importance, like Montrose and the Heights, were not blessed with Restrictions by their original developers.

In the only significant city in the United States without zoning, Houston's historic neighborhoods must look to Restrictions as a major part of the land use regulation scheme for protecting the historic character of the neighborhood. Formalized, comprehensive zoning does not appear in Houston's future, for many reasons, some good and some bad. Fortunately, Houston long ago (1965) adopted as a major part of its governmental land use regulation scheme the unique idea of the City enforcing private residential restrictions. This amounts to a governmental acceptance of a citizen directed "zoning" of Houston between those areas with residential Restrictions and those without. Within the protected zone, the City has placed its substantial resources to protect those neighborhoods. Despite the continued rejection of standard land use controls, Houston has stood by its Restriction enforcement. In fact, the enforcement of Restrictions was applauded and encouraged by many of the leaders of the anti-zoning movement in the early 1990's.

The City is a partner with the Houston Bar Association in assisting lower income neighborhoods in creating, updating and extending Restrictions through the Pro Bono Deed Restriction Project. The Project provides free real estate lawyers to neighborhoods with average house values below \$76,000 (median value in the City) and without enforceable assessments under valid Restrictions, provided there is 51% owner occupancy. The City Planning Department Contact is Chris Fisher (713-837-7963).

B. Modification and Extension

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 define neighborhood needs, limit proposed modifications to those addressing those needs, and pursue compliance with the statutory provisions for an enforceable modification.

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 their property. Any vigilant property owner can exercise their 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

Most modern Restrictions specifically contain a provision for the modification or extension of the duration of the term of the Restrictions. Typically, require 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. Status as original developer of the subdivision does not provide special standing for the purpose of modification or extension of Restrictions, unless the developer retains ownership of property in the subdivision. Current case law is unclear whether modifications must be consistent with the plan of development for the subdivision or whether the modification need only comply with procedural requirements, whereupon the effects (even to the point of removing significant restrictions) are irrelevant.

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):

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; and
 - d. "civil damages" for violation of Restrictions.
3. TEX. PROP. CODE CH. 203 authorizes Harris County 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:
 1. 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
 2. a POA may amend Restrictions to comply with HUD or VA requirements for insured/guaranteed loans.
6. TEX. PROP. CODE CH. 206 provides for extension of assessments for Clear Lake City by a procedure similar to Chapter 204.
7. TEX. PROP. CODE CH. 207 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. A copy is attached.
8. TEX. PROP. CODE § 5.006 authorizes recovery of attorney's fees in actions based on breach of Restrictions.
9. TEX. LOC. GOV'T CODE CH. 230 authorizes the City of Houston and other unzoned cities to enforce certain Restrictions (limited to use, set back, lot size, or size, type and number of structures). See Houston Code Section 10-551 - 10-555 outlining the City of Houston's powers to enforce restrictions. The City of Houston Deed Restriction Hotline is (713) 652-3272.

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.

2. *Application (§§ 204.002 and 204.003)*

Chapter 204 applies to:

- ! "Subdivision": same definition as Chapter 201 (201.003(2)) located entirely or in part in a county with a population of 2,800,000 or more [Harris County], excluding a condominium development.
- ! 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 the subdivision. That provision prevails over Chapter 204 (§ 204.003).

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 set forth in the POA's Articles and Bylaws (§204.009).

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 their 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).

- 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 or based on the total 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(c)).
- 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)(8) 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).

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

- 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.

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 (in the Houston Area: Houston and Pasadena) or unincorporated portions of counties with a population exceeding 2,400,000 [i.e., Harris County] or adjacent counties with population of 190,000 or more. A "residential real estate subdivision" must have the following characteristics (§ 201.003(2)):

- It must be referenced on a recorded plat or be 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."

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

- Restrictions are automatically extended;
- Restrictions may be terminated by less than 50% plus one of the owners; or
- Restrictions may be extended by 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 for approval by owners. The petition sets forth:

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

- d. *Petition Approval* - To extend or create Restrictions, **50%** of owners must sign. To modify Restrictions, **75%** of the owners must sign. Signatures must be acknowledged. The required percentage may be obtained by counting any 1 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 office 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 contracted by the author questioned the procedure, however it appears to comply with technical requirements of Chapter 201.

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).

- e. *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);

- f. *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 practically 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 Procedures

8 *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.

9 *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.

10 *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 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).

11 *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.

12 *Nonexclusive*

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

- TEX. PROP. CODE CH. § 201.013 states: "The procedure . . . is cumulative and not in lieu of other methods of adding to, modifying 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."

- 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

13 *Purpose*

Chapter 202 was adopted in 1987 to support the efforts of a "property owners' association" (as defined in Chapter 202.01(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.

14 *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.

15 *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), Pilarcik v. Emmons, 938 S.W. 2d 478 (Tex. App. - Fort Worth 1997, no writ). Unfortunately, several recent cases ignored this statutory mandate and instead relied upon pre-Chapter 202.003(a) court decisions mandating strict construction. *See, e.g.,* Ashcreek Homeowners' Ass'n, Inc. v. Smith, 902 S.W.2d 586 (Tex. App. - Houston [1st Dist.] 1995, 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., 942 S.W. 2d 64, 71 (Tex. App. - Corpus Christi, 1997, no writ history)(follows Ashcreek.) In the author's opinion, these unfortunate cases are wrongly decided. Several unpublished opinions by the First Court of Appeals correctly apply Section 202.003(a): Miller v. First Colony Community Association, Inc. 1993 Lexus 2443, H.C. Elliot Homes v. Greenbriar North Association, Inc., 1994 Lexus 2412, Wildwood Civic Association v. Martin 1995 Lexus 1575.

The confusion appears to stem from the Texas Supreme Court case of Wilcox v. Wilmoth, 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 Association, 943 S.W. 2d 906, 908 (Tex. App - Houston [First District] 1996, no writ history) 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.”

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.

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 Reg. MHMRS v. Kinnear, 877 S.W.2d 550 (Tex. App. - Beaumont 1994, no writ) (Note that Kinnear also espouses strict construction).

16 *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.

17 *Standing to Enforce Restrictions*

Section 202.004(b) authorizes a "Property Owner's 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 has contractual authority to enforce the Restrictions. At common law, a community association can not sue to enforce Restrictions unless it was created under the Restrictions. "Property Owner's 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.

18 *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

The recent 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 SELECTED MODIFICATION / CREATION ISSUES

When considering modifications to outdated Restrictions or the creation of new Restrictions, a number of fundamental issues routinely arise. The treatment on these major topics can make or break a petition 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 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 wide spread 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.

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 cost of neighborhood wide benefits(which should be enumerated). Without mandatory funding, some neighbors benefit without paying.

C. Development Controls

With the urban sprawl of Houston, 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 long time 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, required 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 Restriction's 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 decisive task, unless the ACC has significantly limited discretion. In a city such as Houston, where zoning is unknown and has been recently defeated, 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 the ACC's term 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

19 *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.

20 *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 order 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].

21 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 such as West University Place and Bellaire, 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 signs allowed. Although restricting non-political signage is clearly enforceable, prohibition of political signs has been challenged. By allowing some political signs for a reasonable duration, a neighborhood reduces the chances an owner will challenge these limits as unconstitutional. For these limits to be unconstitutional, a court must hold they violate free speech guarantees of the U.S. Constitution. Typically, courts have not found that enforcement actions by a POA under Restrictions do not constitute the necessary "state action" to create a constitutional issue. The author understands a Houston trial court decision regarding Meyerland held a complete prohibition of political signs as unconstitutional but upheld the Restrictions as to all non-political signs. A reasonable compromise is the limit the time signs will be displayed to a reasonable period before and after the election in question.

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 by clear performance standards or 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 a overwhelming percentage of the owners in a neighborhood. The practical aspects of enforcement of aesthetic Restrictions must be considered. Failure to enforce can result in waiver.

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, and (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. The legal department of the City of Houston has expressed concerns that access to public streets remain unrestricted, except by City ordinance.

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 pm to 6:00 am (unless performing work in the neighborhood). This provision applies only in counties with over 500,000 population and in neighborhoods with recorded subdivision plats and a majority of area restricted to residential use only. Texas Transportation Code §545.307.

I. Fences

Neighborhoods may wish to restrict the type and location of fencing and its height. 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 provide for modification, extension or termination of Restrictions provide they can be modified by a majority vote, automatically renew for 10-20 year periods and can be terminated by a super majority vote (75-90%). These actions bind all owners subject to the Restrictions. Many of procedural provisions of Chapter 204 should be incorporated into the modification/renewal/termination provision of Restrictions.

K. Transition Features

When significant new Restrictions are added, it is appropriate to provide transition features to deal with existing uses and structures and 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. Variations 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 in questions. 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. Variations should be strictly limited to prevent them from being used to evade the essential directives of the Restrictions. Variations are "safety valves" to deal with unusual circumstances only.

M. Records of POA

The availability of books and records should be limited to eliminate the opportunity for inspection by an owner who is being (or is contemplated to be) sued by the POA, particularly the POA's attorneys 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 limiting the time and place of inspection, cost and procedure for copying and safeguards against harassment.

V. SUMMARY

The establishment or modification of Restrictions are encouraged as matters of good public policy by the State of Texas. Texas Property Code Chapters 201, 202 and 204 benefit residential neighborhoods seeking to adopt or modify Restrictions. However, these provisions do not eliminate the need for a clear neighborhood consensus on the proposed Restrictions and a strong community association to shepherd the Restriction process.

DRAFTING & MAINTAINING DEED RESTRICTIONS FOR HISTORIC NEIGHBORHOODS

TABLE OF CONTENTS

I.	INTRODUCTION	2
	A. <u>Restrictive Covenants</u>	2
	B. <u>Modification and Extension</u>	2
	C. <u>Creation</u>	3
II.	COMMON LAW MODIFICATION OF RESTRICTIONS	3
III.	TEXAS STATUTES LIBERALIZING MODIFICATION OF RESTRICTIONS	4
	A. <u>Applicable Statutes</u>	4
	1. TEX. PROP. CODE CH. 201	4
	2. TEX. PROP. CODE CH. 202	4
	3. TEX. PROP. CODE CH. 203	4
	4. TEX. PROP. CODE CH. 204	4
	5. TEX. PROP. CODE CH. 205	4
	6. TEX. PROP. CODE CH. 206	4
	7. TEX. PROP. CODE CH. 207	4
	8. TEX. PROP. CODE ' 5.006	4
	9. TEX. LOC. GOV'T CODE CH. 230	4
	B. <u>TEX. PROP. CODE CH. 204 - Modification of Restrictions by Property Owners Association</u>	5
	1. <i>Background and Purpose</i>	5
	2. <i>Application (' 204.002 and 204.003)</i>	5
	3. <i>Property Owners Association (' 204.004, 204.009 and 204.010)</i>	5
	4. <i>Creation of POA (' 204.006)</i>	6
	5. <i>Extension of, Addition to, or Modification of Restrictions (' 204.005)</i>	7
	6. <i>Lienholders (' 204.007)</i>	7
	7. <i>Architectural Control (' 204.010(a)(8) and 204.011)</i>	8
	8. <i>POA Authority Continues Until (' 204.011(b))</i>	8
	9. <i>POA Authority (' 204.010(a)(18))</i>	8
	C. <u>TEX. PROP. CODE CH. 201 - Creation, Extension, and Modification of Restrictions</u>	9
	1. <i>Purpose</i>	9
	2. <i>Application (' 201.001)</i>	9
	3. <i>Procedure (' 201.004-008)</i>	9
	4a <i>Opt Out Provisions (' 201.009-010)</i>	10
	5a <i>Parties Bound (' 201.009)</i>	11
	6a <i>Statute of Limitation (' 201.010)</i>	11
	7a <i>Exclusive Remedies</i>	11
	D0 <u>Comparison of Chapter 204 and 201 Statutory Modification Procedures</u>	12
	1a <i>Delegation Of Authority</i>	12
	2a <i>Benefits of Chapter 204 versus Chapter 201</i>	12
	3a <i>Neighborhoods Which Do Not Qualify for Chapter 204</i>	12
	4a <i>Creation of Restrictions Under Chapter 201 Only</i>	12
	5a <i>Nonexclusive</i>	12
	E0 <u>TEX. PROP. CODE CH. 202 - Construction And Enforcement Of Restrictions</u>	13
	1a <i>Purpose</i>	13

	2a	<i>Application</i>	13
	3a	<i>Liberal Construction</i>	13
	4a	<i>Discretionary Authority</i>	14
	5a	<i>Standing to Enforce Restrictions</i>	14
	6a	<i>Civil Penalties</i>	14
	F0	<u>Summary</u>	14
IVA		SELECTED MODIFICATION / CREATION ISSUES	15
	A0	<u>Property Owners Association</u>	15
	B0	<u>Assessments</u>	15
	C0	<u>Development Controls</u>	16
	1.	<i>Performance Standards</i>	16
	2.	<i>Architectural Control Committee</i>	16
	D0	<u>Residential Use/Home Occupation/Garage Apartments</u>	16
	1a	<i>Residential Use</i>	16
	2a	<i>Home Occupation</i>	16
	3a	<i>Garage Apartments</i>	17
	E0	<u>Satellite Dish Antennas</u>	17
	F0	<u>Signage</u>	17
	G0	<u>Aesthetics - landscaping, gardens, drives/parking, maintenance</u>	18
	H0	<u>Vehicles</u>	18
	1.	<i>Garage/Carport</i>	18
	2.	<i>Driveways/Parking Areas</i>	18
	3.	<i>Non-Functioning Vehicles</i>	18
	4.	<i>Parking on Street</i>	19
	I0	<u>Fences</u>	19
	J0	<u>Modification, Extension and Termination</u>	19
	K0	<u>Transition Features</u>	19
	L0	<u>Variance Procedures</u>	19
	M0	<u>Records of POA</u>	20
V.		SUMMARY	20

