2006 - 2013 SUPPLEMENT TO
SURVEY OF TEXAS CASE LAW AFFECTING
PROPERTY OWNERS ASSOCIATIONS

Presented By
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Mr. Hailey is a principal with the law firm of Roberts Markel Weinberg Butler Hailey PC and focuses his practice on the representation of property owners associations and the preparation of project documents for real estate developers. He and his firm represent over 1000 property owners associations.

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• Fee Dispute Committee of the Houston Bar Association
• President, Vice-President, Director and Chairman of the Greater Houston Chapter of the Community Association Institute's (CAI) Legal Committee
• Member of the Texas Legislative Action Committee of CAI

Publications and Seminars

“*Flagpoles, Condos, Turf & More – An Overview of 2013 State Law Changes for Texas Property Owners Associations*”
Webcast co-presented with Sharon Reuler and sponsored by State Bar of Texas, July 16, 2013

“*Overview of 2011 Legislation Affecting Texas POAs*” State Bar College Summer School 2012 sponsored by State Bar of Texas, July 2012

“*Overview of 2011 Reform Legislation for Texas POAs*" 34th Annual Advanced Real Estate Law Course sponsored by State Bar of Texas, July 2012

“*2011 HOA Reform Laws: Select Issues; Developer-Declarant Perspectives*”
Webcast co-presented with Sharon Reuler and Bob Burton and sponsored by State Bar of Texas, April 3, 2012

“*2011 HOA Reform Laws: Select Issues; Records, Meetings, and Elections*”
Webcast co-presented with Sharon Reuler and Paul D. Grucza and sponsored by State Bar of Texas, November 8, 2011

“*New Day for Texas HOAs: Overview of 2011 Reform Legislation for Condos and Owners Associations*”
Webcast co-presented with Sharon Reuler and sponsored by State Bar of Texas, June 30, 2011

"*The Texas POA Primer - Tips for Working with Condo & Homeowner Associations*"
32nd Annual Advanced Real Estate Law Course co-written and co-presented with Sharon Reuler and sponsored by State Bar of Texas, July 2010

"*Legislative Update for Real Estate Lawyers: Condos and Owners Associations – More 'Band-Aid' Laws*"
New POA Laws for 2009 Webcast co-presented with Sharon Reuler and sponsored by State Bar of Texas, June 19, 2009

"*Survey of Texas Case Law Affecting Property Owners Associations*"
28th Annual Advanced Real Estate Law Course sponsored by State Bar of Texas, July 2006

"*Practical Tips for Dealing with Property Owners Associations*"
Mortgage Lending Institute, October, 2005 sponsored by The University of Texas School of Law

"*Practical Tips for Dealing with Property Owners Associations*"
27th Annual Advanced Real Estate Law Course 2005 sponsored by State Bar of Texas, July 2005

"*Statutory Evolution of Condominiums and Property Owners Associations in Texas*"
Mortgage Lending Institute, September, 2002, co-written and co-presented with Sharon Reuler and sponsored by The University of Texas Law School

"*Survey of Recent Case Law Affecting Property Owners Associations*"
24th Annual Advanced Real Estate Law Course sponsored by State Bar of Texas, July 2002

"*Statutory Evolution Property Owners Associations In Texas: Including An Overview of What They Are and Their Statutory Powers and Limitations*"
18th Annual Real Estate Law Conference, sponsored by South Texas College of Law, May 2002

"*Property Owners Associations: An Overview, Including What They Are, How They Are Created, and Their Statutory Powers*"
17th Annual Real Estate Law Conference: sponsored by South Texas College of Law, May 2001

"*Recent Legislation Affecting Property Owners' Associations*"
11th Annual Advanced Real Estate Drafting Course sponsored by State Bar of Texas, February, 2000

"*New HOA Laws*"
Sponsored by the 9th Annual Texas Land Title Institute, December, 1999

"*Survey of Recent Texas Case Law Affecting Property Owner's Associations*"
20th Annual Advanced Real Estate Law Course sponsored by State Bar of Texas, June, 1998

"*Amendments to Restrictive Covenants and Condominium Declarations*"
9th Annual Advanced Real Estate Drafting Course sponsored by State Bar of Texas, February, 1998

"*Drafting Documents Associated with Judicial Foreclosures, Assessment Lien Foreclosures and Mechanics Lien Foreclosures*"
7th Annual Advanced Real Estate Drafting Course sponsored by State Bar of Texas and Houston Bar Associations, February, 1996

"*New Answers for Regional Problems*"
Sponsored by University of Houston, Center for Public Policy, 1993

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Mr. Brown was born in Shreveport, Louisiana in 1983. He received a B.A. in Biology from the University of Texas in 2005. He then went on to earn his law degree from South Texas College of Law in 2009 graduating cum laude. While attending South Texas, Mr. Brown was an active participant in both the Mock Trial and Moot Court programs receiving multiple best speaking and best brief awards. He is a member of the State Bar of Texas, Houston Bar Association, and Houston Young Lawyers Association. Mr. Brown is admitted to practice in the U.S. District and Bankruptcy Courts for the Southern, Eastern, and Northern Districts of Texas as well as the Eastern and Western Districts of Arkansas. Mr. Brown practices Bankruptcy Law, Construction Law, Residential and Commercial Real Estate, Corporate Law, and Community Association Law.

Practice Areas
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Construction Law
Residential and Commercial Real Estate Law
Community Association Law
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Bar Admissions
State Bar of Texas
United States District Courts for the Southern, Eastern, and Northern Districts of Texas
Bankruptcy Courts for the Southern, Eastern, and Northern Districts of Texas
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Ms. Boyd joined the firm's Real Estate Section in 2012 bringing eight years of experience in representing community associations. Ms. Boyd represents single-family residential, condominium, and commercial community associations throughout Texas and her practice focuses on all aspects of Community Association Law. She currently serves on the Board of Directors of the Greater Houston Chapter of the Community Associations Institute and is dedicated to fostering responsible and successful community associations.

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Community Association Law

Education
J.D., South Texas College of Law, 2000
B.A., Southwestern University, 1997

Affiliations
Board of Directors, Community Association Institute (2012 through present)
Member, American Bar Association
Member, Houston Bar Association
Member, Houston Young Lawyers Association
Member, Galveston Bar Association

Bar Admissions
State Bar of Texas
United States District Court for the Southern District of Texas

Publications, Presentations and Media
"*Show Me the Money*"
Greater Houston Neighborhood Associations; Workshop Presenter, Cypress Creek United Civic Associations Trade Show and Seminar (2007)
"*Learn All About CAI*"
Guest on Community Associations Institute Radio Community Spotlight Show (September 24, 2010), CBS 650 Talk Radio
"*An HOA Lawyer's Insights on Board Duties, Deed Restriction Enforcement and Small Claim Collections*"
Speaker, Friendswood Homeowner Association Education Forum (January 29, 2011)
"Property Tax Foreclosure Suit - The Good News for Associations"
Austin Chapter Community Association Institute, Community Association Living
"Top 5 Things Every Manager Needs to Know"
Greater Houston Chapter of Community Association Institute, Legal Seminar, 2011 Legislative Changes Revisited The Essentials of Community Risk Management

Honors
Listed, Thomson Reuters *Super Lawyers* "Rising Stars" (Editions 2009, 2010, 2011)
Listed, *H Texas Magazine* "Top Lawyers" (2011-2013)
Listed *Texas Monthly* "Top Attorneys" (2013)

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2006 – 2013 SUPPLEMENT TO SURVEY OF TEXAS CASE LAW AFFECTING PROPERTY OWNERS ASSOCIATIONS

I. INTRODUCTION, SCOPE AND DISCLAIMER

This article covers reported Texas cases over the last eight years (2006-2013) that have involved the law affecting property owners' associations (including condominium associations) and restrictive covenants. It serves as a supplement to the "Survey of Texas Case Law Affecting Property Owners Associations" ("Survey") that covered reported Texas cases over the prior twenty-two years (1984-2005). The Survey is still available on the State Bar's On-Line Library and is essential to the full utilization of this article. Since this article is a supplement, the formatting and categories track that in the Survey. This requirement lead to a few idiosyncrasies in the format of this article, including (i) repeating those categories from the Survey where there were no cases to report in the last eight years, and (ii) the non-sequential numbering of certain sections of the Texas Property Code which were not present in the Survey and were added to this article. As a postscript to the Survey, it would be wrong to assume there were no relevant cases prior to 1984. A number of significant cases were reported prior to 1984, but as with most things – limits had to be placed somewhere.

As with the Survey, every reported case involving property owners' associations or restrictive covenants over the past eight years has not been included, as a few of the reported cases had nothing to do with the law affecting property owners' associations and restrictive covenants. It is also possible some reported cases may have been overlooked. An in-depth discussion of each case is also well beyond the scope of this CLE article and has not been attempted. Rather, the focus of this article is on the significant holdings in each case discussed, as these holdings concern the law governing property owners' associations and restrictive covenants.

As was with the cases in the Survey, many of the facts and holdings in the following cases were so intertwined it was difficult to separate them. Accordingly, no such attempt was made and the facts and holdings are summarized the first time the synopsis of a case appears in this article. Subsequent references to the case refer the reader to the first time the case is discussed in this article. True of most areas of the law, the facts of a case are always important and this concept is particularly true in this area of the law. Indeed, it has been said that the cases regarding restrictive covenants appear to be in hopeless conflict, until the facts in each case are understood. With that, the reader is cautioned to refer to the facts and opinion of any case in question the first time the case is summarized, rather than the synopsis in this article. In summary, this article should be used as a directory of those Texas cases <u>reported</u> over the last eight years that discuss or comment on the law affecting property owners' associations and restrictive covenants; when used in conjunction with the Survey, the reader should have a good vantage point of the case law affecting property owners' association for the past thirty years.

II. CREATION OF RESTRICTIONS

A. General Plan of Development

1. <u>***Baywood Estates Property Owners Association, Inc. v. Jack P. Caolo*, 392 S.W.3d 776 (Tex.App.—Tyler 2012, no pet.)**</u>

Owners of four subdivision lots filed action against the Baywood Estates Property Owners Association, Inc. for declaration that association did not have the authority to collect assessments from them to maintain a park and boat ramp. Association counterclaimed for the past due assessments. Owners filed two traditional motions for summary judgment and a no evidence motion for summary judgment asserting that association had no authority to govern or collect assessment to maintain the park and boat ramp. Association filed a traditional motion for summary judgment and two motions for no evidence summary judgment regarding the same issues, and sough judgment on its counterclaim. The trial court entered summary judgment for the owners. The association appealed. The court of appeals reversed and remanded to the trial court for further proceedings.

Southwest Resorts Company filed the plat for the Baywood Subdivision. Lots 253 and 254 were set aside as a common area for the subdivision park and boat ramp. Southwest began selling lots that including the following covenant in the deeds:

> Grantees herein do mutually agree and bind themselves with other present and future property owners of said BAYWOOD ESTATES, to an individual assessment of TEN and NO/00 ($10.00) Dollars per year for the maintenance of parks and ramp area in said Baywood Estates.

The association was later created and incorporated for the purpose of maintaining the park and ramp area in the subdivision. Southwest then conveyed Lots 253 and 254 to the association.

The court reviewed the trial court's interpretation of the covenant. In doing so, the court used Tex. Prop. Code §202.003(a) to liberally construe the covenant to give effect to its purposes and intent. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex.1998). Based on *Uptegraph v. Sandalwood Civic Club*, the court stated that it must give the words and phrases their commonly accepted meaning. 312 S.W.3d 918, 925 (Tex.App.—Houston [st Dist.] 2010, no pet.). The court further noted that covenants must be reviewed in a whole in light of the particular facts at the time the parties agreed to the covenants.

The owners argued that the association had no authority over the park because the plat and restrictions indicated that the public and the owners own the park. The court reviewed the Owner's Certificate filed with the plat. It stated that Southwest "does hereby dedicate to public use forever, the streets, roads, alleys and easements as shown" on the plat. The plat shows the location of streets and utility easements. It also identifies Lot 253 as "Park Area." The plat was approved by the commissioners' court on May 3, 1971. A document called the Baywood Estates Property Restrictions was filed the next day. The restrictions set out building restrictions and reference the utility easements but do not mention the park or the boat ramp. The court said that it could not presume that Southwest considered the park to be included in the term "easement." Therefore, the owners could not prove as a matter of law that Southwest intended to dedicate the park to the public.

The owners further argued that, to acquire authority, the association must be created in compliance with the law. The owners contend that the deeds from Southwest do not express a scheme or plan of development to form a mandatory property owners association that would collect assessments to maintain the park.

"A general plan or scheme of development can be established by (1) express covenant; (2) by implication from the filed map; (3) parol representations made in sales brochures, maps, advertising and oral statement on which a purchaser relied in making his purchase; (4) reciprocal covenants in all deeds out of the common developer; or (5) the developer pursuing a course of conduct indicating a neighborhood scheme. *Lehmann v. Wallace*, 510 S.W.2d 675, 680 (Tex.Civ.App.—San Antonio 1974, writ ref'd n.r.e.)." If an association proves that a general plan or scheme was created for the benefit of all the owners, the association has the right to the enforcement of the covenants. *Raman Chandler Props. L.C. v. Caldwell's Creek Homeowners Ass'n Inc.*, 178 S.W.3d 384, 394 (Tex.App.—Fort Worth 2005, pet. denied).

The court found that the covenants within the deeds indicated that Southwest had a general plan or scheme of development for the subdivision regarding the upkeep of the park and ramp area, which was later transferred to the association. Further, the court found that the deeds also provided that the lots owners would pay for such maintenance. Therefore, these covenants concerned the subdivision, related to the park and boat ramp, specifically bound the deed grantees and their assigns, was intended to apply to others, and each owner had notice. Further, the court found that the deeds included a restrictive covenant that ran with the land. However, because Southwest sold 299 lots in the subdivision and the summary judgment evidence only contained a few deeds showing the restrictive covenant, the court found that neither the owners nor the association were entitled to summary judgment. The owners failed to show that some lots are not subject to the restrictions. The association did not show that all of the lots are subject to the restrictions.

2. *<u>Ski Masters of Tex. v. Heinemeyer</u>*<u>, 269 S.W.3d 662 (Tex.App.–San Antonio 2008, no pet.)</u>

In 2004, Ski Masters of Texas (Ski Masters) purchased certain real property for commercial use, part of which was included in the original 6.76 acre tract originally platted and subdivided for the Carlson Subdivision (tracks four and five) and part of which was outside of the original platted subdivision tract. The Carlson Subdivision was subject to restrictive covenants, one of said restrictions being a residential-use only restriction. Residents of the Carlson Subdivision (Residents) and Ski Masters sued each other and the court of appeals consolidated the cases. The Residents were seeking enforcement of the restrictive covenants and Ski Masters was seeking a declaration that its property was not "subject to any valid restrictions enforceable by the Residents. At a bench trial the court entered a judgment for the residents and Ski Masters appealed.

In its appeal, Ski Masters challenged the Residents' standing to enforce a restrictive covenant, the existence of a valid express restrictive covenant, application of the doctrine of implied reciprocal negative easement and the award of attorneys' fees. The court immediately dismissed Ski Masters' argument with regard to the existence of a valid express restrictive covenant and stated that while the original conveyance of tract four contained no restrictions, Ski Masters' deed specifically identified the covenants and the respective recorded instrument. The issue for the court of appeals was whether the Residents had standing to enforce the restrictions against Ski Masters when all of the residents were outside the tract's chain of title.

Ordinarily, restrictive covenants are only enforceable by the contracting parties or those in direct privity. However, citing *Giles v. Cardenas*, the court's opinion stated "where many property owners are interested in a restrictive covenant, any one of them can enforce it."

In reviewing the general rule, the court of appeals quoted the rule as set forth in *Hooper v. Lottman*:

> The general rule may be safely stated to be that where there is a general plan or scheme adopted by the owner of a tract, for the development and improvement of the property by which it is divided into streets and lots, and which contemplates a restriction as to the uses to which lots may be put, or the character and location of improvements thereon, to be secured by a covenant embodying the restriction to be inserted in the deeds to purchasers, and it appears from the language of the deed itself, construed in the light of the surrounding circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject thereto, and to have the benefit thereof, and such covenants are inserted in all deeds for lots sold in pursuance of the plan, a purchaser and his assigns may enforce the covenant against any other purchaser, and his assigns, if he has bought with actual or constructive knowledge of the scheme, and the covenant was part of the subject-matter of his purchase. 171 S.W. 270 (Tex.App.-El Paso 1914, no writ).

The court of appeals noted that whether or not the Residents have standing to enforce the restrictive covenants depend on two factors, (1)"the existence of a general plan or scheme of development" and (2) "that was part of the inducement for purchasers to obtain land within the restricted are." The court of appeals further reasoned, stating that courts of equity have upheld similar cases, that the existence of a general building scheme or plan tends to make the property more attractive for residential purposes and induces the buyer to purchase that property and "it can be assumed that he pays an enhanced price" for the restricted property. The court stated that the standing "to enforce a restrictive covenant against another similarly situated property owner does not turn on whether the deed of the owner against whom enforcement is sought contains the restriction. If the deed of the property owner against whom enforcement is sought contains the restriction, standing is based on an implied mutuality of covenants among the various purchasers." If the restrictions are not contained in the deed, then the basis for standing comes from the doctrine of implied negative reciprocal easements.

Quoting *Evans v. Pollock*, the court explained that the "doctrine of implied reciprocal negative easements applies when a developer sells a substantial number of lots within a subdivision by deeds containing the restrictive covenant, and the party against whom the restriction is sought to be enforced had notice of the restriction but the deed did not actually contain the restriction." The only real difference is that the party seeking to enforce the restriction has the burden to show that a "substantial number" of the deeds in the subdivision contain the restriction.

The court found that because the first deed of the subdivided property to the Flemings stated that "Grantor…, by this instrument subjects the remainder of the 6.76 acres of land with the same restrictions, conditions and option, whether embodied in future instruments or not," and because the Fleming deed also provided that the restrictions would renew automatically, a general plan or scheme was clearly evidenced. Additionally, Ski Masters had notice of and was aware of the restrictions. In fact, the realtor for Ski Masters tried to get the other owners in the subdivision to waive the restriction for Ski Masters. The Residents also testified that the restrictive covenants were part of their reasons for purchasing in the subdivision.

Ski Masters further argued that there was no general scheme or plan because two of the lots were conveyed without the restriction, the plat referenced in the deed was never recorded and that ten tracts have been significantly re-subdivided. In its analysis of these arguments, the court explained that deviation from the restrictions in individual circumstances does not necessarily destroy the general scheme or plan and that the "failure to record the plat is not dispositive." The Residents here did not rely wholly on an unrecorded plat, but rather produced other evidence of the general plan or scheme.

With regard to Ski Masters' argument that there is no general scheme or plan due to the fact that ten tracts have been significantly re-subdivided, the court found that Ski Masters presented no supporting evidence.

Further, though tracts four and five were re-drawn and subdivided, the deed to the owner prior to Ski Masters, contained the restrictions and referenced the Fleming deed even though they were not referenced in the deed to the previous owner. The court found that this re-draw of the tracts did not negate the general plan or scheme. Finally, as an alternative argument, Ski Masters argued that the general scheme or plan was abandoned and no longer binding because the plat was not recorded and because it appeared that another owner was using his property for business purposes. The court explained that "abandonment occurs when there are 'substantial violations within the restricted area.'" Ski Masters had the burden to prove that "the violations were 'so great as to lead the mind of the average man to reasonably conclude that the restriction…had been abandoned and its enforcement waived.'" *Oilfield v. City of Houston*, 15 S.W.3d 219, 226-27 (Tex.App.-Houston [14th Dist] 2000, pet. denied). Three property owners testified that no property was being used for purposes other than residential. The court of appeals concluded there was no abandonment.

B. Implied Negative Reciprocal Covenants

1. ***Ski Masters of Tex. v. Heinemeyer*, 269 S.W.3d 662 (Tex.App.–San Antonio 2008, no pet.)**

If the restrictions are not contained in the deed, then the basis for standing comes from the doctrine of implied negative reciprocal easements. Refer to Section II.A.2 of this article for discussion.

C. Personal Covenants or Covenants Running with the Land

1. ***Wasson Interests, Ltd. v. Adams*, 405 S.W.3d 971 (Tex.App.—Tyler 2013, no pet.)**

In 1993, Kelly and Karen Adams became the assignees of a lot (the Adamses' Lot) that was being leased from the City of Jacksonville. The Adamses' Lot was located in the Lake Springs Subdivision. In 2010, Wasson Interests, Ltd. became the successor in interest of a tract of land that was deed restricted for residential purposes only and was formerly owned by the City. Additionally, the Wasson tract was across the road from the Adamses' Lot, but it was not part of the Lake Springs Subdivision. Wasson began keeping various livestock and storing inoperable vehicles on the Wasson tract. This resulted in an "evil" smell.

The Adamses filed suit to enjoin Wasson from placing livestock on the Wasson tract. The trial court granted a permanent injunction against Wasson. Wasson appealed.

On appeal Wasson argued the Adamses lacked standing to enforce the restrictive covenant. The court of appeals agreed. The court identified that the applicable law stated that in order for a party to enforce a covenant restricting the land use of a successor in interest, the covenant must run with the land. *Wayne Harwell Prop. v. Pan Amer. Logistics*, 945 S.W.2d 216, 218 (Tex.App.—San Antonio 997, writ denied). A covenant runs with the land when the covenant is: (1) made between parties in privity of estate at the time the covenant was made; and (2) is contained in a grant of land. In other words, restrictive covenants are ordinarily enforceable only by contracting parties and those in direct privity of estate with the contracting parties. *Ski Masters of Texas LLC v. Heinemeyer*, 269, S.W.3d 662, 668 (Tex.App.—San Antonio 2008, no pet.) First, the court found no privity between the Adamses and Wasson. The Adamses' predecessor to the Adamses' Lot was not a party to the City's grant of the Wasson tract to Wasson's predecessor.

The court rejected the Adamses' second argument that they were in privity of estate with Wasson because both the Adamses' Lot and the Wasson tract derive from the City. The Adamses argued that privity of estate existed because both the Adamses' Lot and the Wasson tract derive title from the City. The court stated that common source of title is that one element for privity of estate. In 1962, the Adamses' Lot was leased by the City to Bill Canino for ninety-nine (99) years. The Adamses became the assignees of this lease in 1993. This gave the Adamses privity of estate with the City and the Adamses become successor covenantors to the restrictions Bill Canino assumed in the 1962 covenant. In 1983, the City granted the Wasson tract to M.G. Moore by a warranty deed containing the "residential development only" restriction. Wasson became the successor in interest to the Wasson tract in 2010. The court stated that the Adamses were not successor covenantees to the rights of the City, the original covenantees, in the City's grant of the Wasson tract to M. G. Moore in 1993. Therefore, the court found that the Adamses lacked standing to enforce the restrictions on the Wasson tract.

2. ***Veterans Land Bd. of the State of Tex. v. Lesley*, 281 S.W.3d 602 (Tex.App.-Eastland 2009, pet. denied)**

In 1952, Wyatt and Mildred Hedrick, owners of about 4,100 acres of land now known as the Mountain Lakes Development (Mountain Lakes), sold and conveyed to H.S. Foster full interest in the surface estate of Mountain Lakes Development and a one-half interest in the mineral estate reserving the other one-half interest for themselves. The deed to Foster conveyed the executive estate to Foster providing that Foster "shall have full complete and sole right to execute oil, gas and mineral leases covering all the oil, gas and other minerals in the following described land."

Betty Yvon Lesley, Kenneth Lesley and Bobby John Foster, heirs and devisees of H.S. Foster acquired interest to the entire surface estate and one-half interest in and to the mineral estate of Mountain Lakes. In 1998, the Lesleys and Foster sold and conveyed the surface estate to Mountain Lakes to Bluff Dale, a developer whose intent was to either develop the property as a residential neighborhood or sell the property to another developer. The Lesleys and Foster retained a one-fourth interest in the mineral estate and granted to Bluff Dale the right to execute all future oil, gas, sulphur and other mineral leases (Executive Estate). Bluff Dale later conveyed the property to Properties of the Southwest, L.P. (who later changed its name to Bluegreen) subject to "any prior reservations or conveyances of oil, gas and other minerals, restrictions, covenants, conditions, rights-of-way and easements of record."

Bluegreen then developed the property as a residential subdivision known as the Mountain Lakes Development. Bluegreen subsequently recorded a declaration of covenants, conditions and restrictions (Declaration) and established a property owners association. One of the restrictions contained in the Declaration was one prohibiting any "commercial oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind…"

Appellees, (1) Betty Yvon Lesley and Kenneth Lesley and (2) Kenneth Lesley and Perry Elliot (as independent executors of the Estate of Bobby John Foster) filed suit against Bluff Dale, Bluegreen, the association and numerous individual lot owners and the Veterans Land Board of the State of Texas alleging among other things that the defendants, as the executive estate owners owed a duty of utmost good faith to them as non-executive mineral interest owners, that the duty was fiduciary and that they breached the duty. They argue specifically that Bluegreen and the association breached this duty by creating and recording the restriction that prohibited mineral development. Appellees sought a declaration from the court of appeals regarding ownership of the mineral interests, ownership of the executive rights, breach of the alleged duty owed to the non-executive mineral interest owner, and that Declaration was void and unenforceable.

The trial court granted the association's no-evidence partial summary judgment only with regard to the issue of breach of contract and breach of fiduciary duty, holding that the association "was not liable to appellees for breach of any duty associated with ownership of the executive rights because the [association] did not own, and had not owned, the executive rights. The association did not appeal.

In its judgment, the trial court determined that Bluegreen was the owner of the executive rights and thus breached the duty owed to appellees as non-executive mineral interest owners. The court further ruled that "Bluegreen breached the contractual requirements of the Lesley/Foster to Bluff Dale deed and the Lesley to Bluff Dale Deed by failing to give requisite notice of the filing of the Declaration of Covenants," and determined that the declaration was unenforceable and could not be used to restrict or prohibit mineral development.

The court of appeals held that there was no affirmative duty to lease the minerals. The court analyzed *In re Bass*, which "establishes that no breach of fiduciary duty can occur until the executive exercises the executive rights" and "a breach occurs if (1) the executive exercises the executive rights, (2) the executive acquires benefits from the minerals for himself by exercising the executive rights, and (3) the executive fails to acquire every benefit for the non-executive mineral owners that he acquired for himself." The court further held that Bluegreen did not exercise the executive rights by creating and recording the declaration. In fact, the court states that the recording of restrictions prohibiting mineral development shows that Bluegreen was not intending to exercise the executive rights and thus no duty arose.

Appellees argued that Bluegreen breached the notice requirements in the deeds when it didn't notify them of the recording of the declaration. The court noted that Bluegreen was not a party to the original deeds to Bluff Dale and would thus only be bound by its notice requirement if the covenant was one that ran with the land. Because the court determined that the notice requirement did not burden the land and it was a personal covenant and did not run with the land. The court of appeals reversed the judgment of the trial court in its entirety.

D. Constructive Knowledge

1. ***Rakowski v. Comm. to Protect Clear Creek Village Homeowners' Rights*, 252 S.W. 3d 673 (Tex.App.-Houston [14th] 2008, pet. denied)**

The committee sued the Clear Creek Civic Association and Rakowski because the association was trying to sell a park that Rakowski, the buyer, intended to use for commercial purposes. The trial court granted separate motions for summary judgment. One stated that the association was the owner of the park. The other stated that the restrictions applied to the park, prohibiting commercial use and requiring the association to maintain it for recreational purposes. Rakowski and the association appealed.

Since both parties moved for summary judgment, the court of appeals reviewed all of the summary judgment evidence, questions presented and rendered judgment. Interpretations of restrictive covenants are reviewed *de novo* and liberally construed pursuant to Tex. Prop. Code §202.003(a), "to give effect to their purposes and intent and to harmonize all provisions so that none are rendered meaningless."

Appellants first argued that the park was not within the platted boundaries of the subdivision, so the restrictions did not apply. The restrictions specifically referenced the park as a "Recreational Area," and the plat has a portion labeled as "Recreation Area." As subsequent sections were added to the neighborhood, their restrictions also referenced the park as a "Recreational Area." These restrictions and the plat put parties on notice. The lack of a metes and bounds description is immaterial.

Appellants second contention was that the restrictions were not recited in the deed. Restrictions could apply to a property in a number of ways other than a recitation in the deed, including constructive knowledge.

In their third argument, the appellants contended that the restrictions only applied to the lots in the subdivision. The court of appeals noted that this interpretation ignores the provisions of the restrictions that specifically refer to the park, thereby failing to give meaning to every provision.

In their fourth argument, the appellants stated that the restrictions allowed future owners to take the park free and clear of restrictions. However, this provision only applied when the park is sold at a foreclosure sale in the event of a default on a loan that was used to improve the park.

The Committee then argued that the association did not have the right to convey the property because there was a defect in the transfer of the park to the association. The appellants countered that the Committee did not have standing because it does not have any claim to ownership. The court first determined that the Committee did have standing by virtue of being composed of homeowners and, additionally, by the restrictions that provided an owner the right to prosecute deed restriction violations. Then, the court overruled the Committee's argument about ownership since it would render the Committee without standing if the association did not own the park on behalf of the homeowners.

The court of appeals affirmed the decision of the trial court.

III. CREATION OF ASSOCIATIONS

A. No Limitation on Developer

(No cases during this timeframe.)

B. Condominiums – Conveyance of Property Before Incorporated

1. *Plano Parkway Office Condo. v. Beaver Properties*, LLC; 246 S.W.3d 188 (Tex.App.-Dallas 2007; no pet.)

Bever Properties, LLC and Jesse M. Taylor, DDS, PA sued the Plano Parkway Office Condominiums seeking a declaration that the condominium declaration did not apply to the unit it purchased because the unit was conveyed by the developer after the condominium declaration was filed in the real property records, but prior to the association filing its articles of incorporation and because the articles of incorporation provided that the association had no members. The trial court granted a partial summary judgment against the association based on §82.101 of the Texas Uniform Condominium Act (Chapter 82, Tex. Prop. Code or TUCA) which requires a certificate of incorporation to be issued for a corporation with members prior to conveying units. The association appealed. The court of appeals reversed and remanded.

The court of appeals looked at the intent of the legislature when drafting the provisions of TUCA, and based on the purpose of TUCA and the lack of specified consequences for failure to comply with these particular provisions. The court cites to comment 1 of §3-101 of TUCA which provides that "'the first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association' in order to clarify the relationship between the unit owners and the developer/declarant and to allow unit owners a say in governance during the initial period of developer/declarant control." In its opinion, the court determined that because there are no consequences provided in the statutes for a defect in the articles of incorporation, the legislature's intent was not to defeat the entire condominium regime, but rather to allow the owner to pursue appropriate relief under §82.161. "Adopting Beaver Properties' interpretation could create uncertainty and undermine the very unit owners' rights the Act was intended to protect. The court held that §82.101 of TUCA should be interpreted as directory rather than mandatory.

C. Tex. Prop. Code §204.006

1. ***Gillebaard v. Bayview Acres Ass'n, Inc.*, 263 S.W.3d 342 (Tex.App.-Houston [1st Dist.] 2007, no pet.)**

In 1995 the Gillebaards purchased five lots within Bayview Acres, a deed restricted subdivision. Later, in 1999, owners in Bayview Acres circulated a petition to amend the neighborhood's restrictions in accordance with Chapter 201 of the Tex. Prop. Code. One of the amendments was to include a residential-use restriction. Several years later, in July 2004, the Gillebaards contracted to sell their property to a condominium developer. The following month, relying on §204.006, the individual appellees formed a property owners association petition committee for the purpose of creating a property owner's association and to further amend the deed restrictions, relying on §204.005, to include a modification to the residential-use restriction to require all property within Bayview Acres to be used for single-family, residential purposes. The appellees also simultaneously filed articles of incorporation for Bayview Acres Association, Inc. The amended restrictions were ultimately approved and the Gillebaards sought to have their property excluded from the amended restrictions.

On September 27, 2004, the Gillebaards filed suit against the individual appellees and the association seeking a declaration that the amended restrictions were (1) invalid and unenforceable because appellees did not comply with Chapter 204, or alternatively (2) that the amended restrictions didn't apply to the Gillebaards' property because they opted out under Tex. Prop. Code, Chapter 201, or alternatively (3) that the amended restrictions were invalid and unenforceable because of the changed character of Bayview Acres. Both sides moved for summary judgment. The trial court denied the Gillebaards' motion and granted the appellees' summary judgment finding that the amended restrictions were valid and enforceable.

On appeal, the issue for the court is whether the 1999 restrictions were properly amended. The court looked at §204.006(a), which provides, in pertinent part:

> If existing restrictions applicable to a subdivision do not provide for a property owner's association and require approval of more than sixty percent of owners to add or modify the original dedicating instrument, a petition to add or modify the existing restrictions for the sole purpose of creating and operating a property owners' association with mandatory membership, mandatory regular or special assessments, and equivalent voting rights for each of the owners in the subdivision is effective if:
>
> > (1) a petition committee has been formed as prescribed by §201.005.

§204.005 provides, in pertinent part:

"A property owners' association has authority to approve and circulate a petition relating to the extension of, addition to, or modification of existing restrictions."

After reviewing the applicable provisions of §204.006, the court of appeals held that per the plain language, the owners must first seek to amend the existing restrictions for the "sole" purpose to provide for the creation and operation of a property owners' association before said association may circulate a new petition to add or modify the deed restrictions in any other way. The amendments to create a property owners' association under §204.006 and to amend existing restrictions per §204.005 may not be done simultaneously.

D. Tex. Prop. Code §202.004

1. ***Summers v. Highland Composite Property Owners Ass'n, Inc.*, 363 S.W3d. 210 (Tex.App.–Corpus Christi 2011, no pet.)**

The Summers appeal from a judgment, following a trial court, in favor of Highland Composite Property Owners Association, Inc., for unpaid assessment and attorneys' fees. The Summers contend that Highland lacks authority to collect unpaid assessments because it is not a valid property owners association and therefore does not have the capacity and right to enforce restrictions pursuant to Tex. Prop. Code §202.004(b). Four of the Summers' lots are located in the Wildwood Acres subdivision, while two of their lots are locating in the Greentree subdivision. The record reflects that several owners from each of the subdivisions made an affidavit designating Highland as their representative to enforce a warranty deed with vendor's lien that all of the property in four listed subdivisions, including Greentree and Wildwood Acres, are subject to. The Summers argued that the designations refer to a deed whose restriction their property is not subject. The court of appeals found in considering each designation as a whole, each reflects the intention of the owners to designate Highland as representative to enforce deed restrictions in his or her respective subdivision. As a result, Highland was a designated representative under Tex. Prop. Code §202.004(b).

The Summers further contend that even if Highland is a designated representative with capacity to enforce the requirement to pay fees required by the deed restrictions, it does not have authorization to collect those fees for itself, inasmuch as it is not a valid property owners association. The restrictions establish a fund for road maintenance and the removal of litter to be held by a Garden Club or some other facility organized by the purchaser or grantee. Therefore, in order to hold the fees collected, Highland was required to show that it is a valid property owners association.

The court stated that Tex. Prop. Code §204.006 was inapplicable because it applies only to those restrictions which require additions or modifications by a vote of more than 60% of the owners. The restrictions in question required a majority vote of the owners in order to make additions to or modifications of the restrictions. Although the court did not apply Tex. Prop. Code §204.006, it stated that it could infer from the language in Tex. Prop. Code §204.006, the Legislature contemplated that a property owners association may be formed whether by designation in the deed restrictions or by approval of the percentage of homeowners designated in the original restrictions, or by the percentage designated in the statute.

The court ultimately determined that Highland was not a valid property owners association. There was no evidence that a majority vote of the property owners in the subdivisions in question authorized Highland as a property owners association. Highland urged the court to use the definitions in Tex. Prop. Code §204.004(a) and §209.002(7) for property owners association. The court said that other than initiating this lawsuit to collect fees, there was no evidence to reflect that Highland managed or regulated any of the residential subdivisions for the benefit of the owners in the subdivisions as required by Tex. Prop. Code §209.002(7). The court further determined that neither Highland's articles of incorporation, nor the designations used in the suit provided sufficient evidence to find a valid property owners association. As such, the court found that the fees collected should be held in the registry of the court for the benefit of the entity entitled to hold such funder under the restrictions.

IV. ARCHITECTURAL/USE RESTRICTIONS

A. Residential Use

(No cases during this timeframe.)

B. Single Family

1. ***Meehl v. Wise*, 285 S.W.3d 561 (Tex.App.-Houston [14th Dist.] 2009, no pet.)**

Deborah and Mark Meehl bought two adjacent lots in January 2006. They began building a 3800 square-foot home with the intention of running a bed-and-breakfast-style retreat for people with bipolar disorder. The neighbors sought a temporary restraining order and injunction to stop the promotion and construction of the retreat center against the Maureen J. Meehl Bipolar/BPD Foundation, Inc. and the Meehls, individually and as officers of the foundation. The Meehls counterclaimed for declaratory judgment and a permanent injunction. A bench trial resulted in a permanent injunction against the Meehls in November 2007. The Meehls appealed, seeking a determination that the trial court erred in enforcing a 1965 deed restriction (which prohibited any lot from being used "for any purpose other than that of a single family residence") to prevent homeowners from allowing a nonprofit corporation to operate a community home for persons with bipolar disorder in the homeowners' residence.

The court of appeals determined that Tex. Hum. Res. Code §123.003(a) did not apply, since it pertained to zoning regulations rather than private restrictive covenants. Subsection (b) made unenforceable restrictive covenants adopted on or after September 1, 1985 that restricted the use of property as a community home. However, Tex. Prop. Code §202.003(b) was adopted in 1987 and applied to all restrictive covenants. This section requires the use of the property as a community home to conform to the Hum. Res. Code. The trial court had erred by not applying the correct law, so the permanent injunction was dissolved as an abuse of discretion.

The court of appeals determined, through uncontroverted evidence, that Mark Meehl is handicapped, as defined by the Fair Housing Act (FHA). Debra Meehl and the Foundation did not present any evidence to establish that they were part of a protected class under the FHA. Regardless, "membership in a protected class is not a prerequisite for standing to assert a claim under the Fair Housing Act." With respect to the FHA, the only provision that applied was §3604(c) about advertising for sale or rental a preference or limitation based on membership in a protected class. The appellants failed to show that the neighbors had violated that provision.

The court of appeals also reviewed whether the Meehls and the Foundation were entitled to a declaratory judgment and a permanent injunction against the neighbors. It determined the Meehls and the Foundation were entitled to declaratory relief that the restrictive covenant does not prohibit the operation of a community home. Since the trial court had not applied the Community Homes Act, the case was remanded so the trial court could consider injunctive relief there under.

C. Trailers/Mobile Homes

1. ***Letkeman v. Reyes*, 299 S.W.3d 482 (Tex.App.-Amarillo 2009, no pet.)**

The Letkemans owned a house, cut it in half, and moved it to a lot they intended to buy. Before the project was completed, neighbors complained to the Letkemans that moving a pre-existing house onto the land violated the deed restrictions. The Letkemans continued with their project, and the neighbors sued for and were granted injunctive relief. The court of appeals affirmed. On appeal, the definition of "pre-fabricated" is at issue.

In its analysis, the court looked to Tex. Prop. Code §202.003(a), which provides that restrictive covenants must be "liberally construed to give effect to their purposes and intent." The court further stated that when interpreting such restrictive covenants, the court is required to apply the general rules of contract construction and is obligated to apply the common meaning of words, such as "pre-fabricated" in this case. The Letkemans argued that the term "pre-fabricated" applies only to factory-built structures. Testimony from one of the drafters of the declarations clarified that the intent of the deed restrictions was that all of the homes would be new, site-built construction. The Letkemans acknowledged this intent in a document addressed to the property owners on April 17, 2008. The court found that the term applied to structures that were "already or previously made (whether it is made as a whole or in parts for later assembly) as opposed to something that is erected from scratch."

The court of appeals also found that the trial court had properly issued the permanent injunction. Moving a house onto the property was a substantial breach of the deed restrictions, and the trial court did not abuse its discretion. The other owners did not have to prove any actual harm.

2. ***Jennings v. Bindseil*, 258 S.W.3d 190 (Tex.App.-Austin 2008, no pet.)**

Jennings installed a modular home on his property. Neighbors (Bindseil Landowners) sued and filed a traditional motion for summary judgment. Jennings filed a traditional motion for summary judgment and a no-evidence motion for summary judgment. The trial court granted summary judgment in favor of the Bindseil Landowners. The issue on appeal was whether the modular home violated 1978 deed restrictions against "mobile homes."

On appeal, the court examined the construction of the restriction prohibiting "mobile homes" stating that the courts generally do not favor covenants restricting the free use of land; however, if the covenants are "clearly worded and confined to a lawful purpose," the courts will enforce them. In its analysis, citing to Tex. Prop. Code §202.003(a), the court restated the rule which provides as follows:

> When the language of a restrictive covenant is unambiguous, the Tex. Prop. Code requires that the restrictive covenant be liberally construed to give effect to its purpose and intent. However, if the language is found to be ambiguous, the restrictive covenant is construed strictly against the party seeking to enforce the restriction, and all doubts must be resolved in favor of the free and unrestricted use of the property.

Jennings argued that his property was exempt from the deed restrictions based on regulatory, statutory and various other differences between his modular home and other "factory-built" houses. The court analyzed the differences between "modular" and "manufactured" homes, recognizing that they are regulated by different authorities. Nevertheless, the court found the differences to be "technical and minor." Looking at the "common and ordinary meaning," the court of appeals determined that the term "mobile home" described factory-built structures, despite the fact that mobile homes are regulated differently from modular homes, which, in turn, are subject to the same regulations as site-built housing. The court examined the meaning of "mobile home" at the time the declaration was written, when the drafters could not have contemplated the emergence of modular housing. In its opinion, the court held that "the covenant is unambiguous in its prohibition of mobile homes and any generic successors, regardless of minor changes in construction technology, design, or regulation." The court instructed the trial court to determine "whether Jennings's home constitutes a mobile home or a generic successor of a mobile home as prohibited by the deed restriction, giving effect to the liberal construction required for unambiguous deed restrictions."

While Jennings concedes that he had notice of the deed restrictions, whether he had notice that his actions in placing a modular home on his property violated deed restrictions is another issue that was sent back to the trial court. The issues of whether Jennings substantially breached the covenant, thereby allowing a permanent injunction, and the award of attorney's fees to the Bindseil Landowners were also remanded.

D. Roofs

(No cases during this timeframe.)

E. Architectural Control Committees

1. ***Leake v. Campbell*, 352 S.W.3d 180 (Tex.App.—Fort Worth 2011, no pet.)**

Therman Campbell moved into Sunny Meadows Addition, which was subject to recorded deed restrictions. Article 1, Section 3 of the restrictions stated that "no structure shall be erected, altered, placed or permitted … other than … [a] private attached or detached garage or carport … facing a direction other than the street" (Section 3). Additionally, Article 1, Section 17 stated that a "recreational vehicle … must be stored or parked in a fenced or enclosed area in the back 1/4 of the property" (Section 17). Shortly after moving in, Campbell began adding improvements to the property, including an RV shelter. Once the association was notified of such additions, without seeking architectural control committee (ACC) approval, a member of the association's board approached Campbell notifying him of such noncompliance. Campbell then applied for ACC approval and was denied. Campbell's neighbors, Scott and Susan Leake, then filed suit against Campbell seeking a declaratory judgment that the RV shelter, along with other structures, were in violation of Section 3 of the restrictions. The trial court granted Campbell's motion for summary judgment. The Leakes appealed.

In their first issue on appeal, the Leakes contested the trial court's construction of the following restrictive covenant, in pertinent part, was in error:

> No building shall be erected, placed or altered on any lot until the construction plans, specifications…have been approved by the [ACC]
>
> …[i]n the event the committee or it's [*sic*] designated representative fails to approve or disapprove within 15 days after plans…have been submitted to it or *in any event* if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required…[*Emphasis added.*]

The court of appeals agreed and began their analysis by noting that restrictive covenants are construed in accordance with general rules of contract construction. Whether restrictive covenants are ambiguous is a question of law and "a covenant is unambiguous as a matter of law if it can be given a definite or certain legal meaning." Mere disagreement over interpretation does not render the restrict covenant ambiguous and an unambiguous restrictive covenant should be liberally construed to "give effect to its purpose and intent" in accordance with Tex. Prop. Code §202.003(a). In reviewing the "in any event" restrictive covenant, the court held that the waiver of approval only applied if the subject homeowner actually applied for ACC approval and completed the subject structure prior to the association filing suit. Since Campbell never applied for ACC approval prior to commencing construction, the "in any event" language was not triggered.

In their next issue on appeal, the Leakes argued they conclusively proved the RV shelter violated Section 3 because it was a private carport facing the street. In analyzing the merits of the Leakes arguments, the court considered whether the RV shelter was a carport, as governed by Section 3, or an enclosed area, as governed by Section 17. Because the restrictive covenants failed to define "enclosed area," the court looked to the common definition of "enclosed." The court found enclosed means to "surround or encompass; to fence or hem on all sides." Additionally, the court observed that the Texas Criminal Court of Appeals found a building with three doorways that were incapable of being shut was not "enclosed." In light of the common definition and court of criminal appeals case, the court found the RV shelter appeared to be designed for the purpose of protecting the RV from the elements rather than enclosing it. Under this analysis, the court held the RV shelter was not an "enclosed area," but was instead merely a carport facing the street in violation of Section 3, and therefore, sustained the Leakes argument.

2. ***La Ventana Ranch Owners' Ass'n, Inc. v. Davis*, 363 S.W.3d 632 (Tex.App.—Austin 2011, pet. denied)**

The Declaration of Covenants, Conditions and Restrictions for La Ventana Ranch Owners'

Association, Inc., a successor declarant controlled association, prohibited the installation of propane storage tanks and the drilling for or removing water. Nevertheless, in November and December of 2006, the association's Architectural Committee (AC) granted numerous water well variances and propane tank variances. The approvals were approved by AC members Sharon Davis and Manley Crider. Thereafter, the association threatened legal action against the homeowners who relied on the variances and installed the propane tanks or water wells.

The homeowners filed suit and the association counterclaimed against Davis and Crider for breach of a fiduciary duty to the association's homeowners and for acting arbitrarily and capriciously resulting in the variances being void under Tex. Prop. Code §202.004. A jury found Crider and Davis had not acted arbitrarily or capriciously in granting the water well variances but had breached a fiduciary duty by "arbitrarily and capriciously" granting the propane tank variances. The court also awarded the homeowners attorneys' fees to be paid by the successor declarant. All parties' appealed.

On appeal, the court first considered the association's argument that the trial court erred in validating the water well variances because they actually constituted waivers which the AC had no authority to grant and that the evidence was "legally insufficient to support the jury's finding that the variances were properly granted…" Restrictive covenants are subject to general rules of contract construction and the court's "primary duty in construing a restrictive covenant is to ascertain the drafter's intent from the plain language of the instrument, affording words and phrases their commonly accepted meanings." The court found that the water well variances did not constitute waivers as to the subject declaration but rather waived the particular declaration only as to a particular property and instance. In turning to the legal sufficiency argument, the court found the evidence legally sufficient to support the finding that a majority of the AC voted to approve the water well variances.

In turning to the homeowners' issues on appeal, the court first considered the argument that there was insufficient evidence to support a finding that a fiduciary relationship existed. The association, countered that the fiduciary relationship was established through the testimony of Davis and Crider. The court rejected this argument and sustained the homeowners' argument. Fiduciary duties can arise as a matter of law in certain formal relationships or informally from a "moral, social, domestic, or purely personal relationship of trust and confidence." In looking at whether an informal fiduciary duty arose, the court looked to Davis' and Crider's testimony. Davis testified that she was "entrusted like a politician might be entrusted, to act in the best interest of the constituents." Crider testified that the property owners placed him "in a position of trust to determine what was going to happen in the community." The court found that this testimony said "nothing about the actual trust and confidence placed in them by the property owners themselves." Additionally, this testimony could not establish whether or not the property owners were justified in placing any trust in Davis and Crider. Looking to Texas Supreme Court case of *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962), the court observed informal fiduciary duties were not established where parties did not testify to facts "other than their own subjective feelings."

In relation to the jury finding that Davis and Crider acted arbitrarily and capriciously in granting the propane tank variances under §202.004, the court rejected the finding and held that the §202.004 arbitrary and capricious standard was inapplicable in the variance determination because the declaration granted the AC "'sole and absolute discretion to determine whether the necessary conditions for granting a variance have been met."

Lastly, the court addressed the award of attorneys' fees under the Texas Uniform Declaratory Judgments Act (UDJA). The successor declarant argued the award of attorneys' fees was not supported by the evidence and was improper because it was not a real party in interest, no claims were asserted against it, and it was merely in the same position "as the other lot owners…who did not obtain variances." The court rejected all of these arguments finding the trial court did not abuse its discretion as the successor declarant was in fact the successor to the prior declarant, exercised control of the association's board of directors by appointing three (3) of the five (5) members, has claims asserted against it, and filed an answer.

In relation to whether the award of attorney's fees was supported by the evidence, under the UDJA the trial court "may award costs and reasonable and necessary attorney's fees as are equtiable and just." Whether the fees are "reasonable and necessary is an issue of fact to be determined by the fact-finder" with the "expert testimony of an interested witness, standing alone," being "sufficient to support the reasonableness and necessity of a fees award." The court found plaintiffs' attorney's testimony legally sufficient to support the award of attorneys' fees but remanded the issue for reconsideration of the amount "that would be equitable and just" in light of the homeowners' issues which were sustained on appeal.

3. ***Patel v. Wofford*, 349 S.W.3d 50 (Tex.App.—El Paso 2010, no pet.)**

The Arnett Addition is part of a subdivision, which is governed by certain protective covenants. These covenants state in pertinent part:

> No building shall be erected . . . on any lot other than single family dwellings except that duplexes may be constructed on Lots 1 . . .No building shall be erected . . . until the construction plans and specifications have been approved by the Architectural Control Committee…A majority of the committee may designate a representative to act for it. In the event of the death or resignation of any member of the committee, the remaining members shall have full authority to designate a successor.

In 2008, a newly passed city ordinance rezoned Lot 1 to be a Multi-Family Dwelling District. Shortly thereafter, Ramanbhai Patel purchased Lot 1 in the Arnett Addition with the intention of building a triplex. Patel obtained a Waiver of Protective Covenants from L.V. Arnett. At the time, Arnett was the only member of the architectural control committee (ACC). After granting the Waiver, Arnett promptly resigned and appointed three replacements to the ACC.

Shortly after being appointed, the ACC filed suit against Patel. The trial court entered judgment in favor of the ACC finding that: (1) Patel failed to obtain ACC approval; (2) Arnett lacked authority to modify the covenants; and (3) Arnett issued the Waiver without authority. Patel appealed.

On appeal, Patel argued the trial court erred when it found he failed to obtain the ACC approval and Arnett lacked authority to issue the waiver. The court agreed. The court found the covenants plain language allowed Arnett, as the sole member and majority of the ACC, to appoint himself as a representative of the ACC. Additionally, the covenants' unambiguous language allowed the ACC to approve buildings that did not purport to the covenants. Therefore, as the representative of the ACC, which had the authority to permit the construction of buildings not in compliance with the covenants, Arnett had the authority to issue the waiver to Patel.

4. ***Hourani v. Katzen*, 305 S.W.3d 239 (Tex.App.-Houston [1st Dist.] 2009, pet. denied)**

Carlton Park and the Carlton Park Owner's Association were created and the declaration was filed in 1984. The development consisted of 11 acres, divided into 9 lots. The association disclaimed rights to the lake on Lots 7 and 8. However, in 1989, Carlton Park Owner's Association forfeited existence for failure to pay its franchise tax to the Secretary of State.

In 1993, Katzen bought Lot 7 "subject to any and all restrictions, liens, covenants, conditions and easements, if any, relating to [the property], but only to the extent they are still in effect." Lot 7 was bordered by property owned by other people on the sides and the rear of the lot. The lake extended across the front of the lot except for 15 feet on the eastern side of the lake. There was a 15' setback line from the eastern side boundary that was near to or touches the lake. There was also a 15' setback line from the edge of the lake according to the Restrictions, Section 2.4(o). Later, in 2004, Katzen contracted with Sprouse House Custom Homes to build a single-family residence on Lot 7. The City of Piney Point Village granted a special variance to Katzen to build an engineered driveway/bridge within the setbacks. Katzen submitted his plans to the other property owners since there was no association in existence. Two of the homeowners responded with letters of disapproval for the plans. Hourani responded with a letter that threatened to sue if Katzen proceeded with his plans.

In 2005, Katzen sued the other homeowners, seeking declaratory relief alleging that the restrictions prevented access to his property. He requested a special master with a background in engineering. In 2006, Hourani reinstated the association with the Secretary of State. In 2007, the trial court granted summary judgment in favor of Katzen, invalidating part of the restriction and allowing construction of a driveway in compliance with the special master's report. It also awarded attorney's fees to Katzen to be paid by Hourani.

The court of appeals found that the trial court did not abuse its discretion in appointing a special master. It was an "exceptional case" and "good cause" existed for a master with a background in engineering to assist the court with complex issues of soil stability and lake retention. The court of appeals reviewed the summary (declaratory) judgment *de novo*.

Hourani contended the trial court erred by requiring that plans be submitted to the special master, rather than the board under Section 2.2 of the Restrictions. The association had failed to pay its franchise taxes and forfeited existence in 1989. Katzen could not have complied with Section 2.2 in 2004, and nothing in the Restrictions required submission to or written approval from individual property owners in lieu of the board.

Even though the association was restored at the time the judgment was rendered, the judge did not require Katzen to resubmit his plans to the owners whose opinions were already known. Additionally, Tex. Prop. Code §204.011 (b) and (c) provided "that the authority of an architectural control committee, that is, as here, vested by virtue of the Restrictions in the property owners' association, will expire when, inter alia, the property owners' association 'ceases to exist.'"

5. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)**

Linden submitted an ACC application to construct a chain-link fence around the perimeter of her lot. An agent of the association, called the Lindens to inform them that the application had been denied. A setback provision was cited as the reason. The Lindens believed that the setback provision did not apply to the lot, and wrote a letter to the ACC to that effect. The association's agent had said that a letter would be sufficient and would give the ACC another forty-five days to consider the application. The association's agent received the letter on March 15, 2004. The association did not take action in the following forty-five days. The Lindens sent a letter to the association on May 5, 2004 stating that they would begin construction on the fence immediately, pursuant to paragraph 3 of the deed restrictions which presumptively approved the fence since the ACC did not take any action on the application in the 45 days following March 15, 2004.

The association sued on the basis of a deed restriction violation, seeking a permanent injunction, an order to remove the fence and attorney's fees. The Lindens counterclaimed for declaratory judgment that their fence was compliant and attorney's fees. During the trial, the Lindens also asked for a declaratory judgment regarding whether the chain-link was an allowable fencing material and whether it was in harmony with other existing structures. The jury found in favor of the Lindens. The association appealed.

The association alleged the trial court abused its discretion in failure to grant a permanent injunction mandating removal of fence, erred in ordering the association take-nothing, and in finding the equities weighed in favor of Linden and that equitable relief for the association was not expedient, necessary, or proper. The elements for injunctive relief include the existence of a wrongful act, imminent harm, irreparable injury and an absence of an adequate remedy at law. "A party must substantially violate a deed restriction before the trial court may issue a permanent injunction."

A trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to guiding rules or principles, or misapplies the law to the established facts. The jury found that the construction of the fence was not a wrongful act, because the Lindens complied with the approval process. The association failed to act on the application within 45 days which resulted in a presumptive approval. Therefore, the association failed to satisfy the first element required for injunctive relief.

The association argued the evidence was legally insufficient to support the finding that Linden's construction of the fence was not a wrongful act and that the association proved that it indeed was a wrongful act. For legal sufficiency, the court of appeals examined the evidence that supported the finding, ignoring all evidence to the contrary. The court of appeals found that the evidence was legally sufficient to support the jury's conclusion that the construction of the fence was not a wrongful act. Linden complied with the instructions she was given by the association's agent by sending a letter to the ACC. The association failed to act on it within 45 days, and paragraph 3 of the restrictions created a presumptive approval.

On question one of the jury charge, the jury found that the Lindens had not received written approval from the ACC to build the fence. In its fifth issue, the association asserted that this showed that the Lindens had violated substantive law, thus allowing for an injunction. The court of appeals overruled this issue because the restrictions provided a presumptive approval 45 days after the submission of an application.

The association challenged the legal and factual sufficiency of the evidence that the Lindens did not violate the deed restrictions in building the fence. In its review of legal sufficiency, the court of appeals examined the evidence that supported the finding and ignored all evidence to the contrary. For factual sufficiency, the court of appeals will review all of the evidence and will set aside a verdict only if the finding is so contrary to the evidence that it is clearly the wrong verdict. The association's agent testified that the letter was not viewed as an application, so the committee did not act. The jury is the ultimate judge of witness credibility. The record did not show that the evidence overwhelmingly countered the verdict.

The association contended that the evidence was factually insufficient to support the jury's finding that the construction of the fence was not a wrongful act in its seventh issue. The court again reviewed all of the evidence. The Lindens complied with the approval process and the association's agent's suggestion for reapplication. Even though the committee did not consider the letter a reapplication, the construction took place after the 45-day review period. There was nothing in the review of the evidence that indicates that the jury's finding on this issue was clearly wrong.

The association asserted there was a conflict in the jury's findings. In question one, the jury found that the fence was constructed without written approval from the ACC. In question two, the jury found that the fence was not wrongfully constructed. In question five, the jury found the Lindens did not violate the deed restrictions when they constructed the fence. The court reviewed the issue *de novo*. The jury questions did not address the same material facts, so they were not in fatal conflict. The court overruled the appellant's issues.

The association argued that the trial court erred when it made the applied findings that the March 15 letter constituted a reapplication; a second 45 day review period started on March 15 because of the letter; and the association's failure to act presumed approval of the chain-link fence. It was not the trial court, but the jury who made these necessary findings.

The association argued it should have been awarded its attorney's fees under Tex. Prop. Code §5.006(a). However, the association was not the prevailing party in this action, so it was not entitled to attorney's fees under §5.006(a).

The association claimed the trial court did not have jurisdiction to grant a declaratory judgment because not all of the homeowners were joined in the suit. Precedent in *Brooks v. Northglen*, *Simpson v. Afton Oaks*, and *Wilchester West LDEF, Inc. v. Wilchester West Fund, Inc.* determined that there was nothing that prevented the trial court from granting complete relief without the joinder of all of the homeowners. Additionally, the association could have asked the trial court to abate the case, join the homeowners or grant special exceptions. The association did not.

The association claimed that there was no legal basis for a declaratory judgment, so the trial court abused its discretion. A purely factual dispute that does not determine rights, statutes or other legal relations is not an appropriate matter for a declaratory judgment. So, the court did err when it rendered declaratory judgment regarding whether the deed restrictions prohibit chain-link fencing and whether the chain-link fence is in harmony with surrounding structures because these were purely fact issues. However, the declaratory judgment stating the fence construction complied with the restrictions was appropriate because it defined the relationship between the Lindens and the association under the deed restrictions.

The association argued the trial court erred because the jury was required to make a conclusion of law regarding the deed restrictions. The court of appeals reviewed this issue for abuse of discretion, and the error only rises to the level requiring reversal if an improper judgment was rendered. It concluded that the trial court did submit a question of law to the jury regarding an unambiguous deed restriction, thereby abusing its discretion. However, the jury reached the same conclusion the trial court should have reached, so there was no harm. The association did not allege any harm in its brief, either.

The association contested the award of attorney's fees to the Lindens. Whether a party is entitled to an award of attorney's fees under a particular statute is reviewed *de novo*. The award of attorney's fees under the Declaratory Judgment Act was reviewed for abuse of discretion. The court of appeals could not find a reason to reverse the declaratory judgment, so the Declaratory Judgment Act was a reasonable basis for awarding attorney's fees to the Lindens.

F. Satellite Dishes
(No cases during this timeframe.)

G. Adults Only
(No cases during this timeframe.)

H. Subdivision of Lots
(No cases during this timeframe.)

I. Rules and Regulations
(No cases during this timeframe.)

J. Nuisance

1. ***Wiese v. Heathlake Community Ass'n, Inc.*, 384 S.W.3d 395 (Tex.App.—Houston [14th Dist.] 2012, no pet.)**

Heathlake Community Association, Inc. is a West Harris County subdivision governed by the declaration of covenants, conditions, and restrictions. Section 10 of the declaration states, "No … boat … shall be semipermanently or permanently stored in the public street right-of-way or on driveways. Storage of such items must be screened away from public view." Aaron

Wiese moved into the Subdivision and started regularly parking his boat in public view in his driveway or the street for multiple days at a time.

The association filed suit seeking a permanent injunction against Wiese preventing him from parking his boat in public view for any period in excess of 24 consecutive hours. After trial, the trial court found Wiese had violated the declaration and granted the association its permanent injunction. Wiese appealed.

The court of appeals first addressed Wiese's argument that the covenant is ambiguous and creates an irreconcilable conflict. Whether a restrictive covenant is ambiguous is a question of law for the court and an unambiguous covenant is one that "can be given a definite or certain legal meaning, consistent with the appropriate rules of construction." A covenant is ambiguous "if, after applying the same rules of construction, its terms are susceptible to more than one reasonable interpretation." The court found there was no ambiguity or conflict because the restriction only applies to streets and driveways and does not encompass garages or enclosed areas, both of which the storage of boats would be permitted.

In turning to the permanent injunction, the court reviewed the requirements for obtaining injunctive relief where a party must "ordinary show (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of irreparable injury; and (4) the absence of an adequate remedy at law." When seeking enforcement of a deed restriction, instead of irreparable injury, the party must only show that the "defendant intends to do an act that would breach the restrictive covenant." Once an injunction is granted, it "must be specific in its terms to be enforceable, describing in clear and precise detail the acts sought to be restrained…be broad enough to prevent subsequent violations of those already committed, but not so broad as to enjoin a defendant from activities that are a lawful and proper exercise of his rights."

Wiese argued the permanent injunction granted by the trial court exceeded the terms of the declaration because the 24-hour rule was unsupported by the declaration as the declaration neither defined "semipermanently" nor contained a provision expressly stating a 24-hour time limit. The association countered Wiese by claiming the association's practice of enforcing a 24-hour rule for the past two decades was sufficient to establish a 24-hour rule. The court disagreed. First, the court noted that covenants restricting the free use of land are not favored. Any ambiguity in restrictive covenants is construed strictly against the party seeking to enforce the ambiguity. To help define the ambiguous term "semipermanently," the court turned to the intent of the drafters of the declaration. Because no evidence of the drafters' intent was presented, there was no evidence the drafters intended "semipermanently" to be synonymous with 24 hours. Under the strict construction of ambiguous provisions, and due to lack of evidence, the court found the trial court erred by creating the 24-hour rule.

Lastly, the court addressed the association's argument that the injunction was supported by their nuisance covenant which provides:

> No activity, whether for profit or not, shall be carried on any Lot which is not related to single family residential purposes. No noxious or offensive activity of any sort shall be permitted nor shall anything be done on any Lot which may be or become an annoyance or a nuisance to the neighborhood.

While the court acknowledged that some evidence was presented showing the storage of a boat in excessive of 24 hours was a nuisance, it was not enough to establish a nuisance because the trial court's conclusion was not supported by a time frame and "some communities permit homeowners to store their boats for as much as 48 hours without interruption…"

2. ***Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374 (Tex.App.-Dallas 2009, no pet.)**

The association sued the Webbs for breach of the association's restrictive covenants. In its lawsuit, the association sought statutory damages pursuant to Tex. Prop. Code §202.004(c) as well as attorneys' fees and an injunction to prevent the Webbs from constructing a shed on their property for which no proposal had been submitted. The association also sued for various allegations of nuisance. The parties agreed to a temporary injunction preventing the building of the unapproved shed. Following the trial, the jury returned a verdict for the association awarding $55,000 in damages and $40,400 in attorneys' fees. The Webbs appealed and the court of appeals reversed and remanded.

On appeal with regard to the alleged violation of architectural standards, the Webbs argued that the court erred with regard to the submission of jury question twenty as it referenced violations of architectural standards and the association's petition only addressed the alleged failure to get approval for the shed, making no mention of an alleged violation of architectural standards or the existence of such standards.

In its analysis, the court noted that all jury questions must be supported by the pleadings. However, the court analyzed circumstances where issues not contained in the pleadings may be included, considering whether or not any issues of this case had been tried by consent. In its opinion, the court stated that "although issues may be tried by consent, 'written pleadings, before the time of submission shall be necessary to the submission of questions…,'" however, "trial by consent is precluded where proper objection is made on the record before submission to the jury." The court found that the Webbs' attorney made repeated objections with regard to the issue of approval of the structure and the trial court overruled all of the objections. The association never sought to amend its pleadings nor did it argue trial by consent.

The association argued that the Webbs waived their complaint about the pleadings based on the agreed temporary injunction that the parties entered. The agreed temporary injunction recited the violation of the restrictive covenants. The association pled in its petition that "if the Webbs were allowed to continue construction the 'architectural and aesthetic appearances of the neighborhood will be compromised'", however, the court found that the association did not plead any violations or even the existence of architectural standards.

Additionally, with regard to the nuisance claims, the Webbs contested the legal sufficiency of the evidence to support the jury's findings as to "(1) operation of security cameras, (2) taking photographs of Glenbrook members and of the neighbors' property, (3) placing animal feces on a neighbor's property, (4) placing a dead rodent on a neighbor's property and (5) the totality of circumstances." According to the trial court's record, the Webbs failed to object to the legal sufficiency with regard to these matters therefore they waived challenges to legal sufficiency.

Finally, with regard to the permanent injunctions rendered by the trial court, the Webbs argued on appeal that the injunctions were vague, overbroad and unsupported by the jury's findings.

The injunctions rendered by the trial court required the Webbs to (1) refrain from making "any improvements, changes or substantial repairs on or to the exterior of the property without first submitting a written application for architectural approval…;" (2) refrain from "yelling obscenities at all members and other people within the boundaries of Glenbrook…;" (3) refrain from "yelling obscenities at members, wherever located"; (4) "immediately remove the cameras located on the exterior of the dwelling…and to refrain from installation or operation of any surveillance cameras anywhere on the exterior of the Property…;" (5) refrain from "playing excessively loud music that can be heard from outside the dwelling located on the property;" (6) refrain from "playing obscene music that can be heard outside of the dwelling located on the property;" (7) refrain from "making obscene gestures…to any member, wherever located and to other people while publicly visible anywhere within the Glenbrook boundaries;" (8) refrain from "taking any photographs, audiotapes and/or video tapes of any property within Glenbrook, or persons on any premises within Glenbrook, other than the Property or persons who reside therein or who are guests thereon;" (9) refrain from "disposing of dead rodents or creatures of any species, by placing them on the property of any other member of Glenbrook;" (10) refrain from "disposing of animal feces or any other form of excrement or trash…on the property of another member of Glenbrook;" (11) refrain from "driving vehicles up and down the property lines of the Property nearer than forty feet to the Property's boundaries…and to refrain from driving any vehicles on the Property at a speed faster than 10 miles per hour."

The court of appeals reversed and remanded injunctions numbered 1, 3, 4, 6, 7 and 8; reversed and rendered judgment dissolving the injunctions on 9, 10 and 11; and affirmed injunctions numbered 2 and 5.

Specifically, the court of appeals found with regard to injunctions numbered 1, 3, and 4, 6, 7 and 8, that the relief granted exceeded the relief requested and was not supported by the evidence. These injunctions were reversed and remanded to the trial court.

With regard to injunction number 2 above, the Webbs argued that it was vague and indefinite and that a description of the land was required. Because the Webbs described the boundaries of the association in detail in their statement of facts on appeal, the court of appeals overruled this objection.

With regard to injunction number 5, the court of appeals looked to the plain meaning of the word "loud" and determined that this restriction is similar to the "reasonable person standard and therefore is not so vague or overly broad as to render it unenforceable."

For injunctions numbered 9 and 10, the court of appeals found that the association never alleged in its petition that the Webbs disposed of dead rodents or animal feces on other members' properties nor did it request relief related to same. Because these injunctions were not supported by pleadings, evidence or requested relief, the court of appeals reversed and rendered a judgment dissolving these injunctions.

Finally, for injunction numbered 11 above, the court of appeals found that while the association's pleadings did allege that the Webbs would drive vehicles on their property "in an unsafe and annoying manner" creating a nuisance and requested relief for same, no question on this issue was presented to the jury. On appeal, the association didn't respond to the Webbs' argument regarding this injunction. Because there was no jury support for this injunction, the court of appeals reversed and rendered a judgment dissolving this injunction.

3. ***Tex. S. Univ. v. Cape Conroe Prop. Owners Ass'n, Inc.*, 245 S.W.3d 626 (Tex.App.-Beaumont 2008, no pet.)**
Cape Conroe filed suit against TSU for non-payment of annual assessments on thirteen lots acquired by the university and for damages for TSU's "taking of its property interest." TSU responded with a plea to the jurisdiction.

TSU asserted that Cape Conroe's pleadings do not demonstrate that TSU waived immunity nor allege a taking. TSU further asserts that it is protected from foreclosure as the lots are real property owned by a university, a political subdivision of the State.

The court of appeals examined the difference between immunity from suit and immunity from liability. Under the principle of immunity from liability, the State is protected "from judgment even if the Legislature has expressly consented to the suit," however the court may still have jurisdiction to hear the case. Under immunity from suit, the State must expressly consent to the suit, otherwise the action is barred and the court will not have jurisdiction to hear the case.

TSU challenged the sufficiency of Cape Conroe's pleadings, however the court overruled this challenge finding that Cape Conroe's pleadings were sufficient "to put TSU on notice that Cape Conroe sought to hold TSU liable for the taking of Cape Conroe's entitlement to annual maintenance fees." The court found that Cape Conroe notified TSU of its claim and that TSU refused to pay the annual maintenance fee; that Cape Conroe alleged in its pleadings that TSU acquired the lots for a public purpose and alleged a violation of Article I, Section 17 of the Texas Constitution. Specifically, Cape Conroe alleged that TSU "failed to hold formal condemnation proceedings for the purpose of compensating Cape Conroe for taking its property interest for public use."

TSU further argued that its failure to comply with the deed restrictions does not constitute a taking and that TSU never owed assessments because such property restrictions cannot be enforced against the state. The court, however, noted (citing *Harris County Flood Control District v. Glenbrook Patiohome Owners Ass'n*) that the "First Court of Appeals concluded that the governmental taking of property burdened with such restrictive covenants, when taken for public use, allowed a property owners' association to recover damages."

In its pleadings, Cape Conroe also alleged a nuisance claim against TSU for TSU's refusal on multiple occasions to mow "severely overgrown grass and weeds on the property." The court noted that Article I, Section 17 of the Texas Constitution recognizes a nuisance claim as an alternative theory for a taking under certain circumstances.

The court examined §43.002 of the Tex. Prop. Code with regard to TSU's contention that the trial court erred in denying its plea to the jurisdiction with regard to foreclosure of the properties owned by TSU. §43.002 provides in pertinent part:

"The real property of the state, including…the real property of a political subdivision of the state is exempt from attachment, execution, and forced sale…"

The court in affirming the judgment of the trial court found that while it does invalidate a lien and void a judgment, the terms of this provision, "do not divest the trial court of jurisdiction over the creditor's claims" and "does not create immunity from a takings claim."

K. Convenience Stores
(No cases during this timeframe.)

L. Sexually Oriented Businesses
(No cases during this timeframe.)

M. Fences

1. ***Moran vs. Memorial Point Property Owners Ass'n, Inc.*, 410 S.W.3d 397 (Tex.App.—Houston [14th] 2013, no pet.)**
The Memorial Point Property Owners Association, Inc. sued homeowners seeking to enforce a restriction prohibiting construction of a fence within 25 feet of the platted building set-back line. The trial court entered judgment in favor of association and the court of

appeals affirmed.

The homeowners claimed the restriction was abandoned, waived, or ambiguous. The court said the restriction was unambiguous and the trial court did not err in concluding that the restriction had not been waived or abandoned. The restriction states, "no fence, wall, or hedge shall be built nearer to any street than the building set-back line indicated on the plat of this Subdivision filed in the County Clerk's Office in Polk County, Texas." According to the plat, the street was intended to be 60 feet wide, and the set-back line depicted on the plat is 25 feet from the edge of the street. The Morans submitted plans for constructing a fence attaching a copy of the plat that Mr. Moran had revised to show the location of his driveway and the proposed location of the fence. The drawing included notations indicating that the street is 60 feet wide, and Mr. Moran drew the location of the proposed fence just inside the setback line. The application was approved by the association. Before the fence was built, a board member noticed the holes for the fence posts appeared to be too close to the street at which time the Morans responded that they believed the building set-back line was 25 feet from the center of the road. The Morans refused to move the fence and the association sued.

At trial, the Morans submitted evidence which included a drawing that Mr. Moran provided to the company that built the fence. The Morans provided a different drawing to the association showing (1) the distance between the center and the edge of the street was only 10 feet; (2) the set-back line was 15 feet from the street's edge; and (3) the fence was to be built 30 feet from the center of the street. Essentially, it appeared as though the association approved the construction of a fence 25 feet from the edge of the street as platted, but Morans' instructions to the construction company called for the fence to be built 20 feet from the edge of the street as paved.

On appeal, the Morans claimed that the restriction was ambiguous. The Morans also argued that the restriction was abandoned and its enforcement was waived because the association acquiesced in many prior violations of it.

The court stated that a covenant is not ambiguous simply because there may be disagreements about its interpretation. Rather a covenant is ambiguous only if it is susceptible to more than one reasonable interpretation. The court stated that it must "liberally construe the covenants' language to ensure that its provisions are given effect." *Bernard v. Humble*, 990 S.W.2d 929, 930 (Tex.App.—Beaumont 1999, pet denied). The court further stated that the restriction must be given its "plain grammatical meaning unless doing so would defeat the parties' intentions as evidenced clearly in other parts of the document." *Moore v. Smith*, 443 S.W.2d 552, 555 (Tex. 1969). The court reviewed the restriction and found that the restriction clearly refers to the plat (i.e. 25 feet from the edge of platted street which is 60 feet wide). The court further stated that the fact that only 20 feet of the street's platted width had actually been paved does not render the set-back line's location ambiguous. The court also reviewed the Morans' claims that the terms "hedge," "wall," and "fence" were ambiguous. The court gave these words their plain meaning. A "fence" is "a barrier intended to prevent escape or intrusion or to mark a boundary; [especially] such a barrier made of posts and wire or boards." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 456 (1991). A "wall" includes "a masonry fence around a garden, park, or estate" or "a structure that serves to hold back pressure (as of water or sliding earth)." A "hedge" is commonly defined as "a fence or boundary formed by a dense row of shrubs or low trees." Based on these definitions, the court found that the restriction unambiguously required the placement of a "boundary or barrier" within 25 feet of the edge of the platted street, regardless of whether the boundary was made of "masonry, boards, wire, or densely planted shrubbery."

Factors regarding abandonment and waiver are "the number, nature, and severity of the existing violations, any prior enforcements of the restriction, and whether it is still possible to realize to a substantial degree of the benefits of the restriction despite the violations." *Architectural Control Comm. Of Oak Terrace Estates v. McCormick*, No. 09-10-00495-CV, 2011 WL 5588733, at *1 (Tex.App.—Beaumont Nov. 17, 2011, no pet.) (mem. op.) (citing *Finkelstein v. Southampton Civic Club*, 675 S.W.2d 271, 278 (Tex.App.—Houston [1st Dist.] 1984, write ref'd n.r.e.)). Further, to prevail in a defense of abandonment and waiver, the Morans' "must prove that violations then existing are so great as to lead the mind of the 'average man' to reasonably conclude that the restriction in question has been abandoned and its enforcement waived." *Martin v. Romero*, No. 09-10-00496-CV, 2011 WL 1304881, at *3 (Tex.App.—Beaumont, Apr. 7, 2011, no pet.) (mem. op.) (quoting *Finkelstein*, 675 S.W.3d at 278). The Morans asserted evidence showing a violation rate of at least 11.8% and possibly as high as 37.5%. The court found: (1) evidence showed objects other than fences, walls and hedges; (2) speculative violations (i.e. pictures do not show the distance between the platted street and the challenged hedge, wall, or fence); (3) violations of a different nature (i.e. fences enclosing utility equipment, or walls, fences and hedges that are perpendicular to the street).

The subdivision contained approximately 500 properties, about 110 of which were developed. Using only the evidence of relevant violations (5), the violations represented 1.00% of the entire subdivision and 4.55% of the developed properties. Even if the court limited it to Morans' block (1 out of 36 lots), the rate of just 2.78% did not support waiver. The court reviewed case law in its opinion about waiver. The court found that "Texas courts have found that violation rates of 1.9% to 8.9% were not sufficient to support waiver and abandonment."

2. *Sanchez v. Southampton Civic Club, Inc.*, 367 S.W.3d 429 (Tex.App.—Houston [14th Dist.] 2012, no pet.)

Southampton Place is a deed restricted neighborhood in Houston. The restrictions state, "[E]very deed … shall expressly reserve … a right of easement … (3) feet in width …. to be used … for the laying of gas mains, water mains, storm and sanitary sewer laterals and connections, and electric light poles, telephone poles and other proper or necessary public utility other than railroad, street railway, and other transportation lines." Patricio Sanchez moved into the subdivision and began building a fence within the three-foot easement which abutted a back alleyway used for garbage collection throughout the neighborhood.

Southampton Civic Club, Inc., as trustee of the Subdivision, filed suit, and sought a permanent injunction against Sanchez. The trial court granted Southampton's motion for summary judgment. Sanchez appealed.

On appeal, the court began its analysis of the restrictive covenant by looking to the general rules of contract construction with their primary task being determination of the framers intent. Whether a restrictive covenant is ambiguous is a question of law and if it is unambiguous then its construction is also a question of law. A restrictive covenant is unambiguous "if it can be given a definite or certain legal meaning." The court determined the restrictive covenant was unambiguous and looked at Texas case law to determine whether or not garbage collection is a public utility. Relying on the 1928 case of *Moore v. Logan*, 10 S.W.2d 428 (Tex. Civ. App.—Beaumont, 1928, writ dism'd), the court found the act of ridding the premises of waste, whether through a private contractor or a governmental entity, is a public utility.

The court also examined the covenants' language to determine whether or not the easement was for garbage collection. There were three categories of utilities identified in the covenant. First, the covenants allowed "gas mains, water mains, [and] storm and sanitary sewer lateral and connections." Second, the covenants allowed "electric light poles, telephone poles[,] and other proper or necessary public utility." Third, the covenants prohibited "railroad, street railway, and other transportation lines." Under these three categories, the court found that the covenants were broad enough to allow various easements, including those that can be "laid," "erected," or more and garbage collection is a proper public utility use.

Next the court determined that the Sanchez's fence and landscaping were a violation of the deed restrictions which provide that "no permanent improvements or buildings shall ever be erected [on the three-foot strip of land at issue] which will interfere with the use of said easement…" Because the fencing and landscaping are permanent improvements that interfere with trash collection, they were in violation of the restrictions, regardless of whether the trash collection has continued because there is still interference.

Lastly, the court found no abuse of discretion in the trial court's refusal to award civil damages under §202.004 because there was no evidence of Sanchez "knowingly, intentionally and deliberately disregard[ing] the restrictive covenants…"

3. *Uptegraph v. Sandalwood Civic Club*, No. 01-07-00764-CV, 2010 WL 457468 (Tex.App.-Houston [1st Dist.] 2010, no pet.)

In June 2004, Kara and Scott Uptegraph bought a house at the corner of Sandalwood Drive and Beechmont Road facing Sandalwood Drive. The next month, they submitted plans to the architectural control committee (ACC) for a new house facing Beechmont Road. These plans were rejected because the 3-car garage was closer to the street than the 25' setback line in the recorded plat. The builder thought the setback lines were relative to the orientation of the house, rather than fixed. In October, the Uptegraphs submitted a second set of plans. The ACC approved the plans on October 19, 2004.

Almost one year later, the Uptegraphs had a survey drafted that changed the location of the fence. The ACC was not notified. In October 2005, the Uptegraphs constructed a wrought iron fence closer to the street than the setback line. On October 23, 2005, the ACC sent a letter asking the Uptegraphs to stop construction because plans were not approved and the fence violated the setback line. Two days later, the Uptegraphs stopped construction and submitted plans. The ACC rejected the plans, and the builder was verbally notified, but the fence was still completed. On November 2, 2005, the ACC sent a letter to the builder and Uptegraphs stating the new fence did not comply with the restrictions, construction without approval was another violation, and the installed concrete sidewalk and driveway were also in violation. The Uptegraphs promptly submitted a fourth set of plans. The ACC approved the concrete sidewalk and driveway, but rejected the newly constructed fence that was in violation of the setback line. A meeting on November 28, 2005 at the Uptegraphs' property between representatives of the board, the ACC and the Uptegraphs did not result in an agreement. The next month, the board sent a letter to the Uptegraphs stating the board had approved plans for a fence, but the fence the Uptegraphs had constructed was non-compliant and had not been approved. The board threatened suit if it was not removed. Mr. Uptegraph requested a hearing before the board.

In February 2006, a letter from the civic club's attorney to Uptegraphs scheduled the hearing for February 16, 2006. However, if the plans were not approved, the fence would need to be removed by March 18, 2006 or a suit would be filed. At the hearing, the board denied the appeal of the ACC's decision and required the Uptegraphs to remove the fence that was violating the setback line. On March 14, 2006 the Uptegraphs' attorney objected on the basis that the entire board was not present and requested another hearing with the full board. He attached to the request a fifth set of plans with the fences that the Uptegraphs planned in case they were denied. The next day, the civic club's attorney replied that the board's decision stood and there would be no additional hearing. The plans were forwarded to the ACC. The Uptegraphs agreed to move the fence if the fifth set of plans were approved. The Civic club's attorney sent a letter concerning the driveway depicted in the fifth set of plans and indicated the depiction was an earlier version and the height of the fence and the fence materials needed to be included. A sixth set of plans were sent to the Board, with a counteroffer to reroute sections of the existing fence. The following month, the civic club's attorney sent a letter to the Uptegraphs' attorney stating the sixth set of plans had been approved, except for the fence facing Beechmont. By April 9, 2006, the violating portions of existing fence were not removed, so the civic club filed suit under Tex. Prop. Code §202.004(c).

The Uptegraphs counterclaimed that their fence did not violate the restrictions, or, alternatively, the civic club had been arbitrary, capricious or discriminatory in not granting a variance. They also asked for damages for breach of contract and attorney's fees. In a two-day bench trial, the civic club was awarded its declaratory and injunctive relief, $20,000 in damages and $75,000 in attorney's fees. The Uptegraphs appealed on three issues.

The Uptegraphs' first issue was that the trial court misinterpreted the restriction as a matter of law. In its analysis, the court of appeals reviewed the general rules with regard to interpretation of restrictive covenants. First, the opinion stated that pursuant to Tex. Prop. Code §202.001(4), restrictive covenants are subject to general contract construction rules and interpretation of the covenants are reviewed *de novo*. Second, the court's "primary duty in construing a restriction is to ascertain the drafter's intent from the instrument's language," looking at the covenant as a whole, based on circumstances at the time it was drafted. When reviewing the covenant, the court gives all words and phrases their "commonly accepted meaning."

Arguments with regard to the ambiguity of a restrictive covenant are matters of law that the court must decide. In its opinion, the court stated that "a covenant is unambiguous if, after appropriate of rules of construction have been applied, the covenant can be given a definite or certain meaning," however, if after application of the construction rules, "a covenant is susceptible of more than one meaning, the covenant is ambiguous," but "mere disagreement of a restrictive covenant's meaning does not necessarily render the covenant ambiguous." Additionally, pursuant to the common-law rule of strict construction, "all doubts concerning a restrictive covenant's terms are resolved in favor of the free and unrestricted use of the land and any ambiguity must be strictly construed against the party seeking to enforce the covenant." (quoting *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987)).

Neither party claimed the covenant was ambiguous. The argument centered on the phrase "minimum setback lines." The Uptegraphs argued that the phrase meant the minimum possible distance from the lot line, in this case, the 5' utility easement on a side lot line referred to in Section 14 of the restrictions. The appellate court ruled that "minimum setback lines" in Section 9 means the setback lines on the recorded plat or 25' on Sandalwood Drive.

The Uptegraphs then suggested that there was insufficient evidence to support the trial court's findings of fact and conclusions of law that the civic club acted reasonably in denying fence plans." The court reviewed this argument *de novo*, and would uphold the judgment "if [it] can be sustained on any legal theory supported by the evidence." The court had already determined, 25' is the minimum setback and held that the civic club properly interpreted the restrictions and was reasonable in denying permission to proceed with plans that violated the restrictions. Furthermore, the Uptegraphs failed to meet their burdens regarding the civic club acting in an arbitrary, capricious or discriminatory manner. Specifically, the court stated that "the fact that two other houses in the subdivision had fences closer to a street than the minimum setback line, [did] not establish that [the civic club's] decision to deny the Uptegraphs' request was arbitrary, capricious, or discriminatory," nor did it establish waiver or abandonment on the civic club's part. The court further stated, "when lot owners acquiesce in substantial violations within a restricted area, said acquiescence can amount to an abandonment of the covenant or a waiver of the right to enforce it." Abandonment is established when a party proves that "the violations are so great as to lead the mind of the average man to reasonably conclude that the restriction in question has been abandoned." In analyzing whether or not abandonment has occurred, courts consider "'the number, nature, and severity of the then existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant."' (quoting *Tanglewood Home Assoc., Inc. v. Henke*, 728 S.W.2d 39, 43-44 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.; quoting *New Jerusalem Baptist Church, Inc. v. City of Houston*, 598 S.W.2d 666, 669 (Tex.Civ.App.-Houston [14th Dist.] 1980, no writ.) In this instance, two houses violating the minimum setback line did not establish waiver or abandonment and the court looked to Texas courts that have found violation rates between 1.9% and 8.9% not sufficient to support waiver and abandonment.

Finally, the Uptegraphs allege the trial court erred in assessing damages under Tex. Prop. Code §202.004(c) without evidence of actual injury or harm. The court first had to determine whether damages assessed by a trial court "under section 202.004(c) are limited to compensation for actual injury or harm shown to have resulted from the violation of a restrictive covenant." After examining several other Texas cases regarding statutory damages, the court concluded that the "damages" under Tex. Prop. Code §202.004(c) were punitive, and a showing of actual harm was not a prerequisite for the court to assess $200 per day the violation existed.

N. Alcohol Sales

(No cases during this timeframe.)

O. Water Wells

1. ***La Ventana Ranch Owners' Ass'n, Inc. v. Davis*, 363 S.W.3d 632 (Tex.App.—Austin 2011, pet. denied)**

The association made argument on appeal that the trial court erred in validating water well variances because they actually constituted waivers which the Architectural Committee (AC) had no authority to grant and that the evidence was "legally insufficient to support the jury's finding that the variances were properly granted…" Restrictive covenants are subject to general rules of contract construction and the court's "primary duty in construing a restrictive covenant is to ascertain the drafter's intent from the plain language of the instrument, affording words and phrases their commonly accepted meanings." The court of appeals found that the water well variances did not constitute waivers as to the subject declaration but rather waived the particular declaration only as to a particular property and instance. In turning to the legal sufficiency argument, the court found the evidence legally sufficient to support the finding that a majority of the AC voted to approve the water well variances. Refer to Section IV.E.2 of this article for discussion.

P. Industrial Use

(No cases during this timeframe.)

Q. Religious Freedom

(No cases during this timeframe.)

R. Setbacks

1. ***Schroeder v. Ranch Escondido Cmty. Improvement Ass'n*, 248 S.W.3d 415 (Tex.App.-Beaumont 2008, no pet.)**

The Schroeders filed suit for a declaratory judgment that the association could not impose a requirement of a "Harmonious Sight Line" in addition to the 30-foot building setback in the deed restrictions. The trial court granted summary judgment in favor of the association.

On appeal, the Schroeders argued that the matter is ripe, and the association should be enjoined from amending the deed restrictions. The court of appeals determined that the case was not ripe because it was not certain as to whether the deed restrictions would be amended.

The Schroeders also argued that a request for injunction should not be subject to the doctrine of ripeness. The court disagreed holding that relief cannot be granted based on a situation that may or may not arise in the future.

The court of appeals affirmed the judgment of the trial court.

S. Exterior Walls

1. ***Jamison v. Allen*, 377 S.W.3d 819 (Tex.App.—Dallas 2012, no pet.)**

Cedar Oaks Phase Two is a deed-restricted subdivision. In relevant part, the deed restrictions allowed certain materials to be used for the construction of a homes' "exterior walls." Michael and Dianne Jamison moved to Cedar Oaks and began constructing a new home. The Jamisons chose to use a type of fiber cement called, "HardiPlank" for the siding on their home. Their neighbor, Dale Allen, informed the Jamisons that HardiPlank was not allowed for the construction of exterior walls pursuant to the deed restrictions. The Jamisons responded that the Allens used HardiPlank on the gables of their own home and continued construction.

The Allens sued seeking declaratory judgment that the "exterior walls" deed restriction was valid. They also sought to enforce the restriction against the Jamisons. The Jamisons asserted the affirmative defense of quasi-estoppel based on the Allens' use of HardiPlank on his own gables. The trial court rejected this defense based on its own definition of "exterior wall," which did not include gables. The trial court ruled for the Allens. Additionally, the trial court made findings of fact and conclusions of law that the "exterior wall" of the Allens' home was "completely covered" in "approved materials." The Jamisons appealed.

The Jamisons first argued the trial court erred when it defined "exterior walls" to exclude gables. The court of appeals agreed. The court noted that when construing an undefined term in a restrictive covenant, the court must determine the parties' intent by giving the term its plain, everyday meaning unless the contract shows the parties used the term in a technical or different sense. Under this standard, the court turned to the dictionary for the plain meaning of "wall."

Webster's Dictionary defines "wall" as "a vertical member used to define and divide space . . . one of the sides of a room or building that connects the floor and ceiling or foundation and roof." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2572 (1981). The definition included "a side of a building or room, typically forming part of the building's structure." THE NEW OXFORD AMERICAN DICTIONARY 1898 (2001). The court turned to Webster's Dictionary again to define "gable" as "the vertical triangular portion of the end of a building from the level of the cornice or eaves to the ridge of the roof," and "the end wall of a building as distinguished from the front or rear side." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 927. The Oxford Dictionary defined it as "the part of a wall that enclosed the end of a pitched roof[:] (also gable end) a wall topped with a gable[;] a gable-shaped canopy over a window or door." THE NEW OXFORD AMERICAN DICTIONARY 692. The court disagreed with the trial court because the everyday definition of "wall" includes the area that "connects the foundation and the roof." The court found that the "gables involved here are part of the structure of the parties' homes—the gables support the roof of both homes and also the entryway of the Allens' home." Therefore, the everyday definition of the term "exterior wall" includes gables.

The Jamisons next argued the trial court erred by rejecting their defense of quasi-estoppel based on its finding that the Allens exterior walls were completely covered in approved material. The court agreed. The affirmative defense of quasi-estoppel, "precludes a person from asserting, to another's disadvantage, a right inconsistent with a position previously taken . . . It will apply when a person knowingly acts or conducts himself in a particular manner and then takes a position inconsistent with that act." *Foreny 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd.*, 349, S.W.3d 258, 268 (Tex.App.-Dallas 2001, pet denied). Having found the plain meaning of "exterior walls" included gables, and the Allens admitted to using HardiPlank for their gables, the court found the trial court erred in ruling there was no evidence to support a quasi-estoppel defense. Clearly, the Allens used HardiPlank on their exterior walls and were now complaining of the Jamisons for doing the same. The court reversed the trial court's judgment and rendered judgment that the Allens take nothing.

T. Enclosures

1. ***Leake v. Campbell*, 352 S.W.3d 180 (Tex.App.—Fort Worth 2011, no pet.)**

The court of appeals considered whether the RV shelter was a carport or an enclosed area, as governed by the restrictive covenants. Because the restrictive covenants failed to define "enclosed area," the court looked to the common definition of "enclosed." The court found enclosed means to "surround or encompass; to fence or hem on all sides." Additionally, the court observed that the Texas Criminal Court of Appeals found a building with three doorways that were incapable of being shut was not "enclosed." In light of the common definition and court of criminal appeals case, the court found the RV shelter appeared to be designed for the purpose of protecting the RV from the elements rather than enclosing it. Under this analysis, the court held the RV shelter was not an "enclosed area," but was instead merely a carport facing the street in violation of the restrictive covenants, and therefore, sustained the Leakes argument. Refer to Section IV.E.1 of this article for discussion.

U. Boats

1. ***Wiese v. Heathlake Community Ass'n, Inc.*, 384 S.W.3d 395 (Tex.App.—Houston [14th Dist.] 2012, no pet.)**

The declaration states, "No … boat … shall be semipermanently or permanently stored in the public street right-of-way or on driveways. Storage of such items must be screened away from public view." Aaron Wiese moved into the Subdivision and started regularly parking his boat in public view in his driveway or the street for multiple days at a time. The trial court found Wiese had violated the declaration and granted the association its permanent injunction for parking his boat in excess of 24 hours.

The court of appeals noted that covenants restricting the free use of land are not favored. Any ambiguity in restrictive covenants is construed strictly against the party seeking to enforce the ambiguity. To help define the ambiguous term "semipermanently," the court turned to the intent of the drafters of the declaration. Because no evidence of the drafters' intent was presented, there was no evidence the drafters intended "semipermanently" to be synonymous with 24 hours. Under the strict construction of ambiguous provisions, and due to lack of evidence, the court found the trial court erred by creating the 24-hour rule. Refer to Section IV.J.1 of this article for discussion.

V. Propane Tanks

1. ***La Ventana Ranch Owners' Ass'n, Inc. v. Davis*, 363 S.W.3d 632 (Tex.App.—Austin 2011, pet. denied)**

In relation to the jury finding that two members of the architectural committee acted arbitrarily and capriciously in granting the propane tank variances under Tex. Prop. Code §202.004, the court of appeals rejected the finding and held that the §202.004 arbitrary and capricious standard was inapplicable in the variance determination because the declaration granted the Architectural Committee "'sole and absolute discretion to determine whether the necessary conditions for granting a variance have been met." Refer to Section IV.E.2 of this article for discussion.

V. ASSESSMENTS

A. Judicial Foreclosure

1. ***Tex. S. Univ. v. Cape Conroe Prop. Owners Ass'n, Inc.*, 245 S.W.3d 626 (Tex.App.-Beaumont 2008, no pet.)**

TSU argued that the court erred in denying its plea to the jurisdiction with regard to foreclosure of the state-owned properties pursuant to §43.002 of the Tex. Prop. Code §43.002 provides, in pertinent part, that "the real property of the state, including…the real property of a political subdivision of the state is exempt from attachment, execution, and forced sale…"

The court of appeals found that while this provision does invalidate a lien and void a judgment, the terms of this provision, "do not divest the trial court of jurisdiction over the creditor's claims" and "does not create immunity from a takings claim." Refer to Section IV.J.3 of this article for discussion.

2. ***Goddard v. Northhampton Homeowners Ass'n, Inc.*, 229 S.W.3d 353 (Tex.App.-Amarillo 2007; no pet.)**

Northhampton Homeowners Association, Inc. filed suit against Goddard for nonpayment of annual assessments and for monetary damages. The trial court granted a summary judgment in favor of the association and Goddard appealed.

Goddard purchased property within the association's jurisdiction in 2003. In 2004, the board of directors for the association raised the annual assessment from \$480.00 to \$600.00 payable in monthly installments. Goddard refused to pay the increased monthly installment and continued to pay at the rate of the 2003 assessment, which was \$40.00 per month, claiming the association did not have the authority to raise the assessment. The association rejected the deficient payments and filed suit seeking foreclosure of its lien. Goddard counterclaimed alleging violations of the declaration and sought declaratory relief to determine if a 2/3 affirmative vote of the owners was required in order to raise the assessment as per the declaration. The issue was whether or not the association was required to obtain an affirmative 2/3 vote of the owners prior to raising the annual assessment.

In a summary judgment motion, the association alleged that the assessment was proper and pursuant to the association's dedicatory instruments filed of record (specifically, the declaration and bylaws) and the lien was valid. The association alleged that its dedicatory instruments when read together provide that the board of directors for the association had the authority to set the annual assessments.

The declaration provided that, "the Board of Directors of the Association shall fix the date for the commencement of the assessment. The board is required to send notice of the annual assessment to each owner of a residential parcel located within the development." The association's bylaws provide that, "the Board of Directors has the power to establish, levy, assess and collect the assessments or charges provided in Article III…every person who is a record owner of a residential parcel subject to the declaration is a member of the Association. Further, the rights of membership are subject to payment of the annual and special assessments levied by the association."

After analyzing the declaration and bylaws for the association, the court of appeals determined that the requirement of a 2/3 affirmative vote provided for in the declaration was subject to the limitations of the preceding section three, which set the application period of that provision to expire on December 31, 1984. Because that provision had expired, the court then had to review the dedicatory instruments to determine how the association would have the authority to raise the assessments. The court explained that the association's bylaws provide that the board of directors has the power to "establish, levy, assess and collect the assessments or charges…" The bylaws and declaration were filed in the real property records and pursuant to Tex. Prop. Code, Chapter 202 are dedicatory instruments "that control the operation" of the association. The court of appeals affirmed the judgment of the trial court.

3. ***<u>Haas v. Ashford Hollow Cmty Improvement Ass'n, Inc.</u>*** **<u>, 209 S.W.3d 875 (Tex.App.– Houston [14th Dist.] 2006, no pet.)</u>**

The association filed suit for collection of annual assessments (2003-$301.01; 2004-no amount given in the petition), foreclosure of a lien and recovery of attorney's fees and costs. Haas, the property owner, filed a plea to the jurisdiction. The trial court entered a judgment in favor of the association for annual assessments, attorney's fees, costs and post-judgment interest and ordered foreclosure on the lien.

Haas appealed with five issues: (1) trial court lacked jurisdiction to enforce the lien; (2) trial court lacked jurisdiction over the association's claim; (3) trial court erred in awarding 2004 assessments; (4) trial court erred in awarding attorney's fees; and (5) attorney's fees were excessive. The court of appeals affirmed the judgment of the trial court.

Per Tex. Gov't. Code §25.1032(c)(3), the Harris County Civil Courts at Law have subject matter jurisdiction to hear a suit for the enforcement of a lien on real property, regardless of the amount in controversy.

Additionally, the amount in controversy met the minimum jurisdictional limit of $500, excluding interest, statutory or punitive damages and penalties, attorney's fees and costs. The court restated the rule as follows: "if one plaintiff asserts multiple claims against one defendant, the amounts of each separate claim are aggregated to determine the amount in controversy." Even though the association's claim to the 2004 annual assessments was not ripe at the time of the filing of the petition, the 2004 assessments would come due before the trial date. Haas did not proffer any evidence of bad faith on the part of the association. The association did not plead a specific amount as to the 2004 assessments, but this did not deprive the court of jurisdiction. The amount of the 2004 claim and the fact that it was delinquent was stipulated to at trial.

In his third issue, Haas complains that the trial court erred in awarding the 2004 assessments because the association did not amend its pleadings to include the amount of the 2004 assessments prior to trial. The claim was tried by consent when Haas stipulated to the amount of the 2004 assessments and that he was delinquent in paying that amount.

On the alleged error of the award of attorney's fees, Haas claims that the association did not comply with Tex. Prop. Code §209.008(a) by giving prior notice that the owner would be charged attorneys fees after a date certain. The court ruled that §209.008(a) does not apply when the suit is to "merely collect delinquent assessments or to enforce a lien due to nonpayment of the assessments."

As far as the reasonableness of the attorney's fees awarded, the court ruled them reasonable under the factors listed in Tex. Prop. Code §5.006(b) since it was unusual for a defendant to challenge jurisdiction and proceed to trial, especially when the defendant has admitted the assessments, interest, late charges and reasonable attorney's fees are secured by a lien on the property. The court of appeals also noted that the matters about jurisdiction and §209.008(a) were unusual, and they had to perform extensive legal analysis on these issues.

B. Nonjudicial Foreclosure

1. ***<u>Holly Park Condo. Homeowners' Ass'n, Inc. v. Lowery</u>*** **<u>, 310 S.W.3d 144 (Tex.App.—Dallas 2010, pet. denied)</u>**

Holly Park Condominium Homeowners' Association was formed in 1979 and governed by the declarations and bylaws. One of the provisions in the bylaws provided that a unit owner's unpaid assessments will create a lien, which "enforcement of such lien shall be by judicial foreclosure." Rene Lowery, a unit owner in the association, failed to pay her monthly assessments, which resulted in the association conducting a nonjudicial foreclosure.

Lowery sued for wrongful foreclosure and sought a declaratory judgment finding the non-judicial foreclosure void. The trial court granted Lowery's summary judgment on the basis that the association's by-laws did not permit a nonjudicial foreclosure, but rather required a judicial foreclosure. The association appealed.

On appeal, Lowery argued that Tex. Prop. Code §82.113(e), which normally grants an association the right to conduct either a judicial or nonjudicial foreclosure, is limited by subsection (d)'s language. Subsection (d) states, "Except as provided by the declaration, an association shall exercise its power of sale pursuant to Section 51.002." The court rejected this argument because subsection (d) applied to the *sale* procedure, not *foreclosure* procedures. Thus, subsection (d) did not limit the association's authority to conduct nonjudicial foreclosures.

Next, the Association argued that the Chapter 82 of the Tex. Prop. Code gave the association the right to foreclose liens through judicial or nonjudicial foreclosures because Chapter 82 trumped any limitations in the bylaws. The court rejected this argument as well. In its reasoning, the court observed that the association was created before January 1, 1994, the effective date of Chapter 82, and therefore, pursuant to §82.002, only certain provisions of the Chapter 82 applied. Any provision listed under §82.002 "[can] not invalidate existing provisions of the … by-laws … of a condominium for which the declaration was recorded before January 1, 1994." Because the association's bylaws stated the association's ability to foreclose liens "*shall* be by *judicial* foreclosure," the court found that the §82.113(e) would effectively invalidate that section of the association's by-laws. Thus, under §82.002, §82.113(e) is not applicable and the association's by-laws control only allowing judicial foreclosures.

2. *Duarte v. Disanti*, 292 S.W.3d 733 (Tex.App.-Dallas 2009; no pet.)

Homero Duarte's condominium unit was foreclosed upon by the condominium association at a non-judicial foreclosure sale for non-payment of assessments owed to the association. At the foreclosure sale, the property was purchased by Mark Disanti, a third party. Duarte wanted to redeem the property, but Disanti refused. Duarte brought suit seeking redemption of the foreclosed condominium. The trial court held that Chapter 209 of the Tex. Prop. Code did not apply to condominiums and rendered a judgment for Disanti. Duarte appealed.

The issue raised by Duarte is whether or not the redemption rights provided for in Chapter 209 apply to condominiums created prior to the enactment of TUCA. Under §209.011, the Code specifically states that Chapter 209 does not apply to condominiums governed by Chapter 82 of the Tex. Prop. Code. Duarte argued that because the condominium regime was created prior to the enactment of TUCA, it was not "governed" by Chapter 82 of the Tex. Prop. Code.

The court of appeals found that while the subject condominium regime was created prior to the enactment of the Act, certain provisions of Chapter 82 apply to all condominiums regardless of the date of creation. Specifically, §82.002, which provides the condominium association with a lien on the property for assessments and other charges due to the association, provides the authority for non-judicial foreclosure and gives a right of redemption for an association-foreclosed unit purchased by the association, applies to condominiums created prior to as well as after the enactment of Chapter 82 of the Code.

3. *EMC Mortgage Corp. v. Window Box Ass'n, Inc.*, 264 S.W.3d 331 (Tex.App.-Waco 2008, pet. denied)

Dolores Vande Veegaete, the owner of a condominium unit passed away in August 2001. Four months later, the note holder (Liberty Lending) sent a notice of default and intent to accelerate. The association filed a notice of lien for unpaid assessments during the same month. In January 2002, the note holder sent another letter to Vande Veegaete stating the mortgage was in default and in May 2002. The association posted the property for June 2002 foreclosure and acquired the property at the sale.

In February 2003, the note holder (now EMC Mortgage) filed suit to foreclose its lien, but subsequently dismissed its claims over three years later. EMC later sent notices, beginning in June 2006 to Vande Veegaete's estate and then posted the property for foreclosure in November 2006. The association then filed suit alleging that EMC is barred by limitations and cannot proceed with foreclosure. The trial court granted a summary judgment in favor of the association and EMC appealed.

EMC contended that the association did not have standing to assert a statute of limitations defense as a junior lienholder. Specifically, EMC asserted that "(1) its lien (was) subordinate to EMC's lien' (2) it (had) an equitable right to surplus funds; (3) Vande Veegaete's statute of limitations defense (did) not run with the land, and (4) its ownership status provided no additional rights because it acquired property before the maturity date."

The court of appeals examined the general rule: "As a general rule, only the mortgagor or a party who is in privity with the mortgagor has standing to contest the validity of a foreclosure sale pursuant to the mortgagors deed of trust." The court goes on to quote the exception, which states, "however, when the third party has a property interest, whether legal or equitable, that will be affected by such a sale, the third party has standing to challenge such a sale to the extent its rights will be affected by the sale."

As owner of the property, the association had an interest in the property and said interest would be affected by EMC's foreclosure, therefore the association had standing to challenge the foreclosure and to assert any applicable defenses.

Additionally, EMC contended the trial court erred by granting the summary judgment as the foreclosure was not barred by limitations.

EMC argued that the note was not accelerated and therefore pursuant to Tex. Civ. Prac. & Rem. Code Ann section 16.035(e), "the four-year limitations period does not begin to run until the maturity date of the last note, obligation or installment." The association argued that the note was accelerated thereby beginning the running of the limitations period.

In order to accelerate the note, the note must contain the option to accelerate and the note holder must send a notice of intent to accelerate and a notice of acceleration. While the note did contain the option to accelerate and the note holder did send a notice of intent to accelerate, the second letter sent in August 2002, the court determined could, "at most, be construed as a notice of intent to accelerate." In order to accelerate the note, the holder must "unequivocally advise the debtor that the debt is immediately due and payable."

C. Late Fees and Interest

(No cases during this timeframe.)

D. Increasing Maintenance Fees

1. ***Goddard v. Northhampton Homeowners Ass'n, Inc.*, 229 S.W.3d 353 (Tex.App.-Amarillo 2007; no pet.)**

The declaration established that, in order to raise the annual assessment, there must be an affirmative vote of 2/3 of the owners. However, following section of the declaration set the 2/3 vote requirement to expire on December 31, 1984. Because the provision had expired, the court of appeals had to review the dedicatory instruments to determine how the association would have the authority to raise the assessments. The court explained that the association's bylaws provide that the board of directors has the power to "establish, levy, assess and collect the assessments or charges…" The bylaws and declaration were filed in the real property records and pursuant to Tex. Prop. Code Chapter 202 are dedicatory instruments "that control the operation" of the association. Refer to Section V.A.2 of this article for discussion.

E. Special Assessments

1. ***Ritter v. Las Colonitas Condo. Ass'n*, 319 S.W.3d 884 (Tex.App.—Dallas 2010, no pet.)**

The Las Colonitas Condominium Association is a deed restricted condominium community. The relevant restrictions state that any special assessment for additions, alterations or improvements over $25,000 dollars must be approved by 51% of owners. However, the restrictions also state that if a special assessment is for the "replacement, repair, maintenance or restoration of any Common Elements" no owner approval is necessary. In March 2008, the Association's board of directors passed a $200,000 special assessment without a vote by the owners. Homeowners, led by Aida Ritter, complained that the special assessment was improper because it was for additions, alterations, or improvements.

The association filed suit seeking a declaratory judgment that the special assessment was valid. Ritter filed a counterclaim seeking a declaratory judgment that the special assessment was invalid and also asked the court to declare any election void, if an owner was prohibited from voting because he/she failed to pay the special assessment. Ritter also filed two supplemental counterclaims, the first with regard to a conflict in the bylaws regarding board nomination procedures and the second regarding lack of notice of the adjourned meeting. The trial court granted the association's summary judgment. Ritter appealed.

On appeal, Ritter argued that the board did not authorize the special assessment, the special assessment was for additions, alterations, or improvements, and the election of the new board of directors was not valid. The court rejected these arguments. First, the March meeting minutes clearly stated, "Information about the budget for *special assessment* of $200,000 for the condos motion by Bob McCranie was 2nd by Jeff Scolastico and it was approved by the board." Additionally, the association's website stated that the board approved the special assessment. Ritter failed to raise any evidence to show a fact issue existed as to the board approving the special assessment. Second, the Association's website clearly stated that the special assessment was "for the repair of the common elements at Las Colonitas. The repairs are extensive and necessary . . ." The words additions, alterations, improvements, or construction were not used anywhere except in Ritter's pleadings. Furthermore, Ritter failed to present evidence that if these items were new construction, that their cost exceeded $25,000. Therefore, in light of Ritter's lack of evidence to raise a fact issue, the special assessment was for the repair of the common elements, and thus did not require the approval of the owners.

With regard to the election issue, the court held that the Association's motion for summary judgment was broad enough to encompass later pleaded claims. The association argued in its motion for summary judgment that any challenges to the election were moot. Because the second supplemental counterclaim merely alleged different facts and not a separate cause of action, the contention was broad enough to defeat all challenges to the election. The court further held that because the association established that Ritter was present at the meeting, no grounds existed to complain about lack of notice.

F. Disconnecting Utilities

(No cases during this timeframe.)

G. Use of Maintenance Assessments

1. ***Ritter v. Las Colonitas Condo. Ass'n*, 319 S.W.3d 884 (Tex.App.—Dallas 2010, no pet.)**

The court of appeals held that based upon the facts, the $200,000 of repairs were the basis of a special assessment approved by the Board constituted repairs of the common elements as required by the declaration (versus capital improvements). Refer to Section V.E.1 of this article for discussion.

H. Inverse Condemnation

1. ***Tex. S. Univ. v. Cape Conroe Prop. Owners Ass'n, Inc.*, 245 S.W.3d 626 (Tex.App.-Beaumont 2008, no pet.)**

The court of appeals noted (citing *Harris County Flood Control District v. Glenbrook Patiohome Owners Ass'n*) that the "First Court of Appeals concluded that the governmental taking of property burdened with such restrictive covenants, when taken for public use, allowed a property owners' association to recover damages." Additionally, the court noted that Article I, Section 17 of the Texas Constitution recognizes a nuisance claim as an alternative theory for a taking under certain circumstances. Refer to Section IV.J.3 of this article for discussion.

I. Developer Liability for Assessments

1. ***Priddy v. Rawson*, 282 S.W.3d 588 (Tex.App.-Houston [14th Dist.] 2009, pet. denied)**

In January 1981, Wolfe Airpark, Inc. filed declarations of covenants, conditions and restrictions for Wolfe Airpark Civic Club. The declaration provided authority for the board of directors to charge the declarant up to ten percent (10%) of the annual assessment rate applicable to regular lot owners and defines the "declarant" as Wolfe Airpark, Inc., its successors and assigns. In February 1991, Wolfe Airpark, Inc. conveyed one hundred (100) undeveloped lots to Manvel Aviation, Inc. with "all and singular the rights an appurtenances thereto in anywise belonging" to Wolfe Airpark, Inc.

In April 2003, the civic club sued former members of board and the former members of board counterclaimed, suing current members of board and declarant's successor, Manvel Aviation, Inc. as third-party defendants for fraud, breach of fiduciary duty, director liability for deed-restriction violation and non-payment of assessments. Current board members and successor were granted summary judgment on former board member's claims. Former board members' claims against current board members and successor were severed from the rest of the suit with the airpark. The court affirmed the summary judgment.

The main disputes with regard to the interpretation of the declaration were "(1) whether Manvel assumed the status of Declarant upon conveyance of the 100 undeveloped lots; (2) whether Manvel owes assessments; and (3) whether Manvel was entitled to a vote at the Civic Club's annual board elections." Appellants argued that Manvel did not assume the status of Declarant, therefore it owed assessments at the higher rate and due to its failure to pay the higher rate, its voting rights were suspended.

Appellants argued that the issue as to whether or not Manvel assumed declarant status under the deed must be resolved before the court could consider application of the "safe harbor" provision because such resolution would also determine whether or not Manvel was delinquent on its assessments and entitled to vote at the board elections where appellees were elected.

The court of appeals found that §2.28 of the Tex. Non-Profit Corp. Act, the "safe harbor" provision, is not an affirmative defense. Rather, "the statutory language makes clear that the party seeking to impose liability bears the burden of proof." Additionally, the court of appeals found that appellants never argued that the declarancy issue must be resolved first for safe harbor to apply; therefore they failed to preserve this issue for appeal and waived the argument.

The current board of directors were charging declarant's successor a reduced rate of assessment, as prior boards of directors had done in the past (including boards that two of the appellants had served). The court found that the current board members had acted with ordinary care when they had, in good faith, relied on information prepared by previous boards to determine the rate of assessment for the declarant's successor.

With regard to appellants claim for breach of fiduciary duty, the court of appeals analyzed the argument as it related to Dickinson, President of Manvel Aviation, Inc. and the required elements to be met in order to prevail on such a claim. For a breach of fiduciary duty claim, "a plaintiff must show (1) a fiduciary relationship between the plaintiff and the defendant; (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of defendant's breach." The court also acknowledged that there are circumstances under which a fiduciary duty arises without a formal relationship. Specifically, the court stated that in order to enforce a fiduciary duty that arose from an informal relationship, "the relationship of trust and confidence must exist prior to and apart from, the agreement that is the basis of the suit."

Appellees argued that there was no evidence supporting any fiduciary duty owed by Dickinson. Additionally, the court noted in its opinion, that the record does not reflect nor did appellants contend that Dickinson was ever a board member or establishing a relationship of trust that would give rise to an informal fiduciary duty. The court of appeals found that the appellants failed to address the fiduciary duty issue and therefore waived any error.

J. Association's Duty to Repair Common Areas Independent From Owners' Obligation to Pay Assessments

(No cases during this timeframe.)

K. Lien Priority

1. ***Riner v. Neumann*, 353 S.W.3d 312 (Tex.App.—Dallas 2011, no pet.)**

Jose Lopez purchased a condominium unit. In 2004, Lopez took a loan from Novastar Mortgage, Inc. and executed the document, "Texas Home Equity Security Instrument". The equity loan was recorded in February 2004. Later, in April or May of 2005, Lopez became delinquent on his monthly assessments as required to be paid by the condominium's declaration. In June 2006, due to his delinquency, the condominium association foreclosed on Lopez's unit. Wade Riner purchased the unit. Subsequently, in August 2006, due to default on the equity loan, Novastar also foreclosed on Lopez's unit. Gaylon Neumann purchased the unit at this sale. Neumann moved personal property into the unit, but Riner removed the property and took possession.

Neumann sued Riner for trespass to title. The trial court granted Neumann's motion for summary judgment based on a claim of superior title. Riner appealed.

The court of appeals affirmed that Neumann's title was superior. To begin, the court looked to the declaration of the condominium. Section 5.8(a) stated, "monthly assessments … unpaid by a Unit Owner … shall constitute a lien on such Unit superior to all other liens … *except for* … (2) All liens … under any prior recorded … deed of trust." Section 5.8(b) went on to also include, "Such lien … shall attach from the date of failure of payment of the assessment …" The court found Sections 5.8(a) and (b) meant assessment liens were inferior to deed of trust liens so long as the deed of trust was recorded prior to default on the assessments.

In determining whether the equity loan was a deed of trust, the court gave the term its ordinary meaning and used Black's Law Dictionary to define "deed of trust." Using the dictionary definition and case law, the court found that a deed of trust is simply a "mortgage with power to sell on default." In reviewing the equity loan, the court noted it named a trustee and granted the trustee the power of sale. The equity loan gave the trustee the power to sell and convey the property at the foreclosure sale. The court was not persuaded that the equity loan failed as a deed of trust because it required a court order (i.e. litigation) before the lien could be foreclosed. The court found the equity loan to be a deed of trust in the ordinary meaning of the term. Because the equity loan was a deed of trust, and it was recorded in February 2004 more than a year before Lopez defaulted on his assessments, Neumann's lien was superior to Riner's lien.

L. Fraudulent Lien

1. ***In Re a Purported Lien or Claim Against Hai Quang La*, 415 S.W.3d 561 (Tex.App.—Fort Worth 2013, pet. denied)**

Hai Quang La and Theresa Thorn Nguyen were homeowners in the Carson Ranch Estates. They filed a verified motion under Tex. Govt. Code §51.903 seeking judicial determination that the "Reservations, Restrictions and Covenants" was a fraudulent lien. La and Nguyen argued the Declaration was fraudulent under §51.903 because it lacked both the: (1) true owner's signature, West Comm. Investments, L.P.; and (2) notary's signature. La and Nguyen asked the judge to conduct an ex parte review of their motion and entered an order, which held the restrictions were a lien.

Bernadotte Loomis, another homeowner in Carson Ranch Estates, filed a plea in intervention, a motion to set aside the order, and motion for new trial because the court of appeals violated her due process rights. The trial court found it lacked jurisdiction because the judgment was final. Loomis appealed.

First, the court determined whether Loomis had standing. La and Nguyen argued Loomis's property rights were not affected. The court disagreed. Generally any person whose property was intended to benefit under a restrictive covenant has standing to bring a suit to enforce the covenant. *Anderson v. New Prop. Owners' Ass'n of Newport, Inc.*, 122 S.W.3d 378, 384 (Tex.App.-Texarkana 2003, pet. denied). When many property owners have an interest in a restrictive covenant, any one of the owners can enforce it. Here, if the restrictions were fraudulent, they could not be enforced. Accordingly, Loomis clearly had standing to defend such action.

Pursuant to the language of §51.903, the court turned its analysis to whether the restrictions were a fraudulent lien. Under §51.903,

> The document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and:
>
> (A) Is not a document or instrument provided for by the constitution or laws of this state or of the United States;
>
> (B) Is not created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person; or
>
> (C) Is not an equitable, constructive or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States.

The court found "[r]estrictive covenants . . . are not liens or claims against real property." Tex. Gov't Code §51.903(a). The Texas Civil Practice and Remedies Code defines a lien as a "claim in property for payment of a debt and includes a security interest." Tex. Civ. Prac. & Rem. Code §12.001(3). Black's Law Dictionary defines a lien" as "a legal right or interest that a creditor has in another's property, lasting us[ually] until a debt or duty that is secures is satisfied." Black's Law Dictionary 1006 (9th ed. 2009). In contrast, the Tex. Prop. Code §202.001(4) defines a, "restrictive covenant" as "any covenant, condition, or restriction contained in a dedicatory instrument." In other words, a "restrictive covenant" restricts the use or occupancy of real property. Black's Law Dictionary defines "restrictive covenant" as a "private agreement, usu[ally] in a deed or lease, that restricts the or occupancy of real property, esp[ecially] by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." Black's Law Dictionary 421 (9th ed. 2009). The court further stated that at least one court has found that a restrictive covenant is a negative covenant that "limits permissible uses of land." *In Voice of the Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 665 (Tex.App-Austin 2005, no pet.).

Therefore, a restrictive covenant is not a lien within the meaning of §51.903. The court found that La and Nguyen's reliance on §51.903 was misplaced to challenge a restrictive covenant because it only applies to "documents or interests 'purporting to create alien or a claim against property." The court reversed the trial court's order and dismissed the underlying motion for judicial review.

M. Redemption

1. *Khyber Holdings, LLC vs. BAC Home Loans Servicing, LP*, 349 SW3d 178 (Tex.App. – Dallas 2011, no pet.)

Mortgage lender brought suit against purchaser of property at foreclosure seeking declaration that lender had right to redeem property under the Texas Residential Property Owners Protection Act [Chapter 209 Tex. Prop. Code]. The trial court denied the purchaser's motion for summary judgment and granted the lender's motion for summary judgment. The purchaser appealed contending that the lender was not a "person" within the meaning of the Act and it did not timely tender its redemption payment under the Act. The court of appeals held that (1) lender was a "person" within meaning of Act, and (2) lender timely exercised its right to redeem property.

BAC Home Loans Servicing acquired the property by special warranty deed from Mortgage Electronic Registration Systems Inc. Khyber Holdings purchased the property at a foreclosure sale in which the Property Owners Association of Lake Ridge was foreclosing its assessment lien. An "Affidavit as to Mailing of Post-Foreclosure Notice" dated the same day as the assessment lien stated that on June 8, 2009 a letter notifying BAC of the foreclosure sale was mailed to its last known address. BAC sent Khyber Holdings a letter dated August 31, 2009 of its intent to redeem the property. Khyber Holdings did not respond to the letter by the deadline given to it so BAC filed suit seeking a declaratory judgment that it was entitled to redeem the property pursuant to the Act. On November 29, 2009 Khyber Holdings sent BAC a letter stating that the price to redeem the property was the purchase price at the foreclosure sale, $99,000. BAC sent the funds and a redemption deed to Khyber Holdings. Khyber refused BAC's tender because it stated that the redemption period expired December 8, 2009 and it received the money on December 11, 2009.

First, Khyber Holdings asserted BAC was not a "person" within the meaning of the Act. The court relied on the conventions of statutory construction provided in the Texas Code Construction Act. The court ruled that this Act defined "person" to include a "corporation" unless the statute or context in which the word or phrase is used requires a different definition. Hence, the court held the Legislature's intent was to include BAC as a person.

In its second issue, Khyber Holdings claimed that under the Act, if the owner sends a written request to redeem the property on or before the last day of the redemption period, the owner had until the tenth day after the association or purchaser at foreclosure provided written notice to the owner of the amount needed to be paid to redeem the property. It is undisputed that Khyber Holdings sent the letter to BAC on November 29, 2009 and BAC received the letter on December 2, 2009. Khyber Holdings argues that the redemption period expired 10 days from the date it sent BAC notice pursuant to Rule 21a of the Texas Rules of Civil Procedure. BAC argues that the 10 day period runs from the date the letter was received by BAC. The court ruled that even if Rule 21a was used to determine the redemption deadline, BAC tendered payment timely as Rule 21a also extends the time period by 3 days whenever a party has a right or is required to do some act within a prescribed period after service of a notice by mail. Applying Rule 21a to the facts of the case, the court determined that the redemption period did not expire until December 12. Khyber admitted that the redemption check was tendered to it on December 11. Therefore, the court affirmed the trial court's decision.

N. Alternative Theories of Recovery

1. *Bundren v. Holly Oaks Townhomes Ass'n, Inc.*, 347 S.W.3d 421 (Tex.App.—Dallas 2011, pet. denied)

Holly Oaks Townhomes Association filed suit against the Bundrens, and their related entities for failing to pay the assessments based on debt, quantum merit, unjust enrichment, and fraud and deceit. The Bundrens counterclaimed alleging that Holly Oaks performed work on the sewer line under one of the units that prevented them from leasing the unit and caused them to incur costs. Three other condominium associations intervened in the lawsuit asserting similar claims for units owned by the Bundrens. These associations claimed that the Bundrens and their related entities engaged in a scheme designed to disguise the ownership of a unit by transferring the unit between themselves. The trial court entered a judgment against the Bundrens and their related entities for unpaid assessments on several units.

The Bundrens challenged the trial court's judgment based on various issues related to several deeds transferring the properties to third parties as well as the ratification of all actions by two corporations while they were unable to act. The court of appeals reviewed the ownership of the units and the transfers between the Bundrens and their related entities. The court determined that the trial court's judgment could be upheld because the Bundrens or their related entities were the legal owners of the units during the time period the assessments were not paid. The court found that any transfers by the corporations while the corporate charter was forfeited were void. The court further found that breaks in the chain of title that the Bundrens attempted to resolve by filing warranty deeds with a back dated effective date were not effective until the date the deed was executed and filed.

With regards to one particular unit (32), the court found because a third party owned the unit, the Bundrens, and their related entities were not the legal owners of the unit at the time the assessments were not paid. Further, one of the Bundrens' related entities foreclosed its deed of trust after the association foreclosed. Therefore, the court found that under Tex. Prop. Code §81.208, the entity that foreclosed would not be personally liable for any assessments that were due prior to the foreclosure. Based on two other (i.e. declaration did not included "trustee under a deed of trust" in the definition of "owner") issues regarding unit 32, the court rendered a take nothing judgment for this particular unit.

The association challenged the trial court's refusal to recover expert witness fees and expenses. The court stated that expert witness fees and expenses were not "litigation costs" under Tex. Prop. Code §82.113 or "costs of litigation" under Tex. Prop. Code §82.161 and therefore found no error in the trial court's refusal to award such fees.

Finally, Holly Oaks challenged the trial court's award of attorneys' fees in the amount of $68,000 for trial and $5,000 if appealed. Holly Oaks requested attorneys' fees of $141,853.85. Holly Oaks contends that Tex. Prop. Code §82.113 entitles it to recover all attorneys' fees incurred in collecting unpaid assessments. However, the court found that the declaration defines assessment to include "costs incurred in their collection, including reasonable attorney's fees." Further, the court found that Tex. Prop. Code §82.161 specifically allows for recovery of "reasonable" fees by the prevailing party in a suit to enforce a violation of the declaration. The court used the *Arthur Andersen* case to determine the reasonableness of the attorneys' fees. Although they could not find that the fees awarded were unreasonable, the court reversed and remanded the award of attorneys' fees to the trial court for reconsideration based on the reversal and rendition of damages on unit 32.

VI. ENFORCEMENT OF RESTRICTIONS

A. Authority to Enforce

1. ***In Re a Purported Lien or Claim Against Hai Quang La*, 415 S.W.3d 561 (Tex.App.—Fort Worth 2013, pet. denied)**

Generally, any person whose property was intended to benefit under a restrictive covenant has standing to bring a suit to enforce the covenant. When many property owners have an interest in a restrictive covenant, any one of the owners can enforce it. Here, if the restrictions were fraudulent, they could not be enforced. Refer to Section V.L.1 of this article for discussion.

2. ***Allan v. Nersesova*, 307 S.W.3d 564 (Tex.App.—Dallas 2010, no pet.)**

The Boardwalk on the Parkway Condominiums is a deed restricted condominium property. In relevant part, paragraph 1 of the Boardwalk's declaration stated, " … [the] covenants … limitations, and obligations … shall be a burden and a benefit to … any person acquiring or owning an interest in the property." Additionally paragraph 19 stated, "Failure to comply with [the declaration] shall be grounds for an action to recover sums due, for damages … which action shall be maintainable by … in a proper case … an aggrieved owner." Lastly, paragraph 38 required a unit owner to repair any damage he may cause to the condominium.

Autumn Allan owned a condominium unit at the Boardwalk directly beneath Aslan Koraev. Allan suffered water and sewer damage to her condominium caused by leaks originating in Koraev's unit. Pursuant to the declaration, Allan sued Koraev for breach of contract.

A jury awarded Allan $12,885.51. Koraev moved for a judgment notwithstanding the verdict, asserting Allan failed to prove as a matter of law the existence of a contract between Allan and Koraev. The trial court granted the motion, rendering a take nothing judgment. Allan appealed.

The court of appeals first acknowledged that under common law, restrictions on the free use of land are unfavored. The concept of a condominium, however, comes not from common law but is a statutory creation. When a unit owner accepts a deed to a condominium, he or she also accepts the terms, conditions and restrictions in the declaration which form a contract between the parties. Additionally, when a defendant admits to owning a condominium, it is unnecessary for the plaintiff to present evidence of ownership.

The court next turned to whether Allan could bring suit for her breach of contract. To have standing a plaintiff must be in either privity of contract with the defendant or be a third-party beneficiary. Because Allan was not a party to or an assignee of the contract between Koraev and the Association, the court of appeals looked to the third-party beneficiary analysis. A third-party may sue to enforce a contract as a third-party beneficiary only if the contracting parties entered into the contract directly and primarily for the third party's benefit. There is a presumption against conferring third-party status on noncontracting parties. There are three types of third party beneficiaries: (1) donee; (2) creditor; and (3) incidental. A party is a creditor beneficiary if three prongs are satisfied. One, the contract appears to have no intent to make a gift; second, performance will satisfy an actual or asserted duty of the promisee to the beneficiary, and third, the promisee intends that the beneficiary will have the right to enforce the contract.

In this case, all three prongs were satisfied. First, the declaration showed no intent to make a gift. Second, paragraph 1 imposed a duty on Koraev to follow the declaration, including paragraph 38. This duty was to "any person owning or acquiring interest in the property," such as Allan. This duty was satisfied upon performance. Lastly, paragraph 19 gave an "aggrieved owner," such as Allan, the right to bring an action against Koraev. For these facts and analysis, the court found Allan was a third-party beneficiary who had standing to sue Koraev, another unit owner for breach of contract pursuant to the declaration.

3. *Webb v. Voga*, 316 S.W.3d 809 (Tex.App.—Dallas 2010, no pet.)

Kathy Webb filed two lawsuits against Glenbrook Owners Association, Inc. and individual homeowners. Webb sought: (1) a declaration that the association waived enforcement of the declaration; (2) enforcement of certain restrictions; and (3) disclosure of information pursuant to Chapter 207 of the Tex. Prop. Code. The trial court dismissed both of Webb's lawsuits on summary judgment. Webb appealed.

On appeal, the association and homeowners asserted Webb lacked standing to bring suit because Webb's husband was the actual owner of the property. The court looked to each of the causes of action to determine whether Webb's ownership was critical to her standing to maintain these claims.

First, a declaratory judgment requires a justiciable controversy as to the rights and status of parties actually before the court. The Uniform Declaratory Judgment Act (UDJA) provides that "a person interested under a deed . . . may . . . obtain a declaration of rights, status, or other legal relations." The declaration defined "member" to "mean and refer to each Owner of a Lot" within the association. "Owner" is defined as the "owner of record . . . of fee simple title to any Lot." Accordingly, only owners of a lot in the association can seek declaratory judgments regarding the declaration. Second, Texas law is well settled that in order to enforce a restrictive covenant, the party claiming the restriction must show it existence and that it was for the benefit of his land. This burden of proof is upon the party seeking enforcement. Third, Chapter 207 only requires an association to disclose information to an "owner," which means the "person who owns record title to property in a subdivision." However, Webb was not named as an owner on the general warranty deed conveying the property.

In light of the above, the court found that Webb's ownership of property in the association was critical to her having standing. Because there was no evidence of her being the owner of record of a fee simple title to any property in the association, the court held that Webb lacked standing for her causes of action against the association and lot owners and, therefore, the trial court lacked subject matter jurisdiction over those causes of action. Due to the trial court's lack of jurisdiction, the judgment was vacated and the case was dismissed.

4. *Rakowski v. Comm. to Protect Clear Creek Village Homeowners' Rights*, 252 S.W. 3d 673 (Tex.App.-Houston [14th] 2008, pet. denied)

The court determined that the Committee did have standing by virtue of being composed of homeowners and additionally, by the restrictions that provided an owner the right to prosecute deed restriction violations. Refer to Section II.D.1 of this article for discussion.

5. *Schindler v. Baumann*, 272 S.W.3d 795 (Tex.App.-Dallas 2008, pet. denied)

The Schindlers sued Baumann for damages under breach of contract, negligence and violations of TUCA alleged to be a result of a water leak from Baumann's condominium unit above the Schindlers' unit.

For the breach of contract cause of action, the Schindlers relied only on the association's declaration of covenants, conditions and restrictions to evidence a contract between the Schindlers and Baumann. The court, however, rejected this evidence and explained that "nothing in (the) declarations…purport(ed) to create a contract between appellants and Baumann or (vest) appellants the right to sue to enforce the declaration" as this matter was between two owners rather than an owner or owners and the association.

The Schindlers also asserted a cause of action for negligence, however the only supporting evidence they submitted was an affidavit of David Schindler, which the court found to be insufficient as he had no personal knowledge making the affidavit conclusory.

Finally, the Schindlers asserted that they were entitled to damages under §82.117 of TUCA, which requires Baumann to pay for damage caused by negligent and willful misconduct. The court explained that "the fact that a person has suffered harm from an alleged violation of statute does not automatically give rise to a private cause of action," and the Schindlers presented no evidence supporting their contention of negligent and/or willful misconduct.

The court of appeals affirmed the judgment of the trial court.

6. ***Girsh v. St. John*, 218 S.W.3d 921 (Tex.App.-Beaumont 2007, no pet.)**

St. John, sued her neighbors, the Girshes for putting a mobile home on their property in violation of the deed restrictions. The trial court ruled in favor of St. John. On appeal, the Girshes argued that St. John did not have standing to file suit and that the trial court failed to find that the Girshes established their defenses.

The court determined that St. John had standing to sue since she was "entitled to benefit under the terms of a restrictive covenant." Also, the restrictive covenants explicitly stated that property owners in the subdivision may enforce the deed restrictions.

The court then turned to the issue of the statute of limitations. The statute of limitations in deed restriction cases is four years. The limit is measured from the time the breach of the restrictions occurred. The Girshes purchased and placed the mobile home on their property in 1984. St. John presented evidence that the mobile home was undiscoverable until 1998 or 1999 because another neighbor had not cleared brush from his property until then. The Girshes presented testimony at trial that indicated the trailer was visible well before the end of 1997. For the "discovery rule" to apply, "the nature of the injury must be inherently undiscoverable and that the injury itself must be objectively verifiable." The second prong was not in dispute. The court determined that the nature (or category, rather than this specific incident) of the injury was inherently discoverable with reasonable diligence. A full-sized, mobile home in a populated, residential subdivision would have been discovered with reasonable diligence, despite the "presence of indigenous flora spontaneously growing nearby."

The court of appeals reversed the trial court's decision, and rendered a judgment that St. John take nothing.

B. Construction/Interpretation of Restrictive Covenants

1. ***Moran vs. Memorial Point Property Owners Ass'n, Inc.*, 410 S.W.3d 397 (Tex.App.—Houston [14th] 2013, no pet.)**

The court of appeals stated that a covenant is not ambiguous simply because there may be disagreements about its interpretation. Rather a covenant is ambiguous only if it is susceptible to more than one reasonable interpretation. Refer to Section IV.M.1 of this article for discussion.

2. ***Sanchez v. Southampton Civic Club, Inc.*, 367 S.W.3d 429 (Tex.App.—Houston [14th Dist.] 2012, no pet.)**

A court's primary task in restrictive covenant construction is the determination of the framers intent. Whether a restrictive covenant is ambiguous is a question of law and if it is unambiguous then its construction is also a question of law. A restrictive covenant is unambiguous "if it can be given a definite or certain legal meaning." Refer to Section IV.M.2 of this article for discussion.

3. ***Wiese v. Heathlake Community Ass'n, Inc.*, 384 S.W.3d 395 (Tex.App.—Houston [14th Dist.] 2012, no pet.)**

Whether a restrictive covenant is ambiguous is a question of law for the court and an unambiguous covenant is one that "can be given a definite or certain legal meaning, consistent with the appropriate rules of construction." A covenant is ambiguous "if, after applying the same rules of construction, its terms are susceptible to more than one reasonable interpretation." Refer to Section IV.J.1 of this article for discussion.

4. ***Jamison v. Allen*, 377 S.W.3d 819 (Tex.App.—Dallas 2012, no pet.)**

The court of appeals noted that when construing an undefined term in a restrictive covenant, the court must determine the parties' intent by giving the term its plain, everyday meaning unless the contract shows the parties used the term in a technical or different sense. Under this standard, the court turned to the dictionary for the plain meaning of "wall." Refer to Section IV.S.1 of this article for discussion.

5. ***Baywood Estates Property Owners Association,***

***Inc. v. Jack P. Caolo*, 392 S.W.3d 776 (Tex.App.—Tyler 2012, no pet.)**

The court of appeals reviewed the trial court's interpretation of the covenant. In doing so, the court used Tex. Prop. Code §202.003(a) to liberally construe the covenant to give effect to its purposes and intent. The court stated that it must give the words and phrases their commonly accepted meaning. The court further noted that covenants must be reviewed in whole in light of the particular facts at the time the parties agreed to the covenants. Refer to Section II.A.1 of this article for discussion.

6. ***Epernay Community Association, Inc. vs. Saad Shaar*, 349 S.W.3d 738 (Tex.App. – Houston [14th] 2011, no pet.)**

In order to determine the parties' intentions, the court of appeals must review the entire agreement in order to give meaning to all of the provisions and to avoid rendering any as meaningless. Refer to Section VI.H.1 of this article for discussion.

7. ***Leake v. Campbell*, 352 S.W.3d 180 (Tex.App.—Fort Worth 2011, no pet.)**

Restrictive covenants are construed in accordance with general rules of contract construction. Whether restrictive covenants are ambiguous is a question of law and "a covenant is unambiguous as a matter of law if it can be given a definite or certain legal meaning." Mere disagreement over interpretation does not render the restrict covenant ambiguous and an unambiguous restrictive covenant should be liberally construed to "give effect to its purpose and intent" in accordance with Tex. Prop. Code §202.003(a). Refer to Section IV.E.1 of this article for discussion.

8. ***La Ventana Ranch Owners' Ass'n, Inc. v. Davis*, 363 S.W.3d 632 (Tex.App.—Austin 2011, pet. denied)**

Restrictive covenants are subject to general rules of contract construction and the court's "primary duty in construing a restrictive covenant is to ascertain the drafter's intent from the plain language of the instrument, affording words and phrases their commonly accepted meanings." Refer to Section IV.E.2 of this article for discussion.

9. ***Marzo Club, LLC v. Columbia Lakes Homeowners Ass'n.*, 325 S.W.3d 791 (Tex.App.—Houston [14th Dist.] 2010, no pet.)**

Tenneco Realty was the original developer of Columbia Lakes Subdivision. In the original restrictions, Tenneco Realty included the provision that "all reserves … are … unrestricted and to be used for any purpose designated by the Developer." In 1988, CLT Properties, Inc. assumed the role of developer. In 2005, CLT conveyed to Columbia Lakes, LLC various lots and two tracts of land located in areas identified as reserves and assigned all "its right, title, interest, equity and estate as [d]eveloper" with respect to the aforementioned property. Subsequently, in 2006, CLT conveyed to other corporations (the successor declarants) other various lots and various tracts of land identified as reserves with an assignment of the "right, title, interest, equity and estate as [d]eveloper" regarding those reserves. Finally, in 2008, Columbia Lakes, LLC assigned its right, title and interest in its role as developer of the subdivision to Columbia Lakes Homeowners Association. Purportedly acting under the authority as the developer, the association then adopted and filed in the real property records amendments to the original restrictions. These amendments disallowed the developers from altering any areas designated as reserves.

After filing the amendments, the association filed a declaratory judgment to declare its rights, powers, and authority under the recorded documents regarding its role as a developer of the subdivision. The successor developers and the association filed cross-motions for summary judgment. The trial court granted the association's motion, declaring that the developers must all consent to the recorded amendments in order for them to be legally effective. The successor developers appealed.

The court of appeals found that written instruments, such as plats, subdivision restrictions, and assignments of developer rights, which are recorded in the real property records, are subject to the general rules of contract construction. Specifically, the court's primary objective "is to ascertain and give effect to the intentions of the parties as expressed in the contract" and "examine the entire agreement in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless."

The court then examined the successor developers' third issue of whether or not the trial court erred in its judgment because the association only acquired developer rights as to the property specifically conveyed to it. The court agreed with the successor developers and held the trial court's declaration contrary to the unambiguous language of the relevant recorded instruments. Applying the general rules of contract construction to these instruments, the court found the instruments were unambiguous that each of the successor developers received developer rights only as to the property that was specifically conveyed to them. Therefore, each of the successor developers could only alter the designation of the reserves conveyed to them, not the reserves conveyed to anyone else.

10. ***Uptegraph v. Sandalwood Civic Club*, No. 01-07-00764-CV, 2010 WL 457468 (Tex.App.-Houston [1st Dist.] 2010, no pet.)**

Pursuant to Tex. Prop. Code §202.001(4), restrictive covenants are subject to general contract construction rules and interpretation of the covenants are reviewed *de novo*. The court's "primary duty in construing a restriction is to ascertain the drafter's intent from the instrument's language," looking at the covenant as a whole, based on circumstances at the time it was drafted. When reviewing the covenant, the court gives all words and phrases their "commonly accepted meaning." Arguments with regard to the ambiguity of a restrictive covenant are matters of law that the court must decide. Specifically, "a covenant is unambiguous if, after appropriate of rules of construction have been applied, the covenant can be given a definite or certain meaning," however, if after application of the construction rules, "a covenant is susceptible of more than one meaning, the covenant is ambiguous. Mere disagreement of a restrictive covenant's meaning does not necessarily render the covenant ambiguous." Pursuant to the common-law rule of strict construction, "all doubts concerning a restrictive covenant's terms are resolved in favor of the free and unrestricted use of the land and any ambiguity must be strictly construed against the party seeking to enforce the covenant." (quoting *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987)). Refer to Section IV.M.3 of this article for discussion.

11. ***Patel v. Wofford*, 349 S.W.3d 50 (Tex.App.—El Paso 2010, no pet.)**

When the protective covenants are unambiguous, the court of appeals must interpret it as a matter of law. Refer to Section IV.E.3 of this article for discussion.

12. ***Allan v. Nersesova*, 307 S.W.3d 564 (Tex.App.—Dallas 2010, no pet.)**

Under common law, restrictions on the free use of land are unfavored. The concept of a condominium, however, comes not from common law but is a statutory creation. When a unit owner accepts a deed to a condominium, he or she also accepts the terms, conditions and restrictions in the declaration which form a contract between the parties. Additionally, when a defendant admits to owning a condominium, it is unnecessary for the plaintiff to present evidence of ownership. Refer to Section VI.A.2 of this article for discussion.

13. ***Nelson v. Big Woods Springs Improvement Ass'n, Inc.*, 322 S.W.3d 678 (Tex.App.—Texarkana 2010, pet. denied)**

Homeowner's association, Big Woods Springs Improvement Association, Inc. was about to conduct its annual meeting to elect new board members. The association's bylaws stated only "[m]embers are entitled to one vote for each annual assessment fee (dues) paid." On June 3, 2007, Vera Hall, president of the board of directors called the annual meeting. At the meeting, Hall was presented a letter from the developer Big Woods Land Development, Inc. stating 288 lots had been sold to new purchasers on June 1. Of these new purchases, 174 were conveyed to Michael Nelson. In addition, one twelfth (1/12) of the annual assessment had been paid for each lot by each new purchaser. Hall adjourned the meeting in light of the letter. Once Hall and the rest of the board left, Nelson allegedly reconvened the meeting and elected himself and others as the new board (Nelson Group). Immediately after the election, the Nelson Group seized control over the association's bank account.

The association and the Nelson Group and developer filed cross-suits seeking declaratory judgments. The association prevailed and an appeal was filed.

On appeal, Nelson, individually, and developer first argued that the trial court erred in finding the election invalid. The court of appeals rejected this argument. The association's bylaws stated that "[to] be a Member of the Association," the person "must submit an Application for Association Membership to the Board of Directors prior to obtaining ownership of any lot or living unit." In addition, the bylaws stated a member could only vote if he paid the annual assessment fee. Here, it was undisputed that the 288 purported new members neither filed an application for membership, nor paid the full amount of annual dues. For this reason, they were not members and could not vote. Additionally, the court noted that even though the applicable deed restrictions granted "automatic membership" they still required the submittal of an application for membership. Furthermore, because the deed restrictions broadly allowed voting rights, while the bylaws narrowly allowed one vote per member if the member paid the annual assessment, the bylaws more restrictive language controlled.

14. ***Letkeman v. Reyes*, 299 S.W.3d 482 (Tex.App.-Amarillo 2009, no pet.)**

In its analysis, the court of appeals looked to Tex. Prop. Code §202.003(a), which provides that restrictive covenants must be "liberally construed to give effect to their purposes and intent." The court further stated that when interpreting such restrictive covenants, the court is required to apply the general rules of contract construction and is obligated to apply the common meaning of words. Refer to Section IV.C.1 of this article for discussion.

15. ***Jennings v. Bindseil*, 258 S.W.3d 190 (Tex.App.-Austin 2008, no pet.)**
Courts generally do not favor covenants restricting the free use of land; however, if the covenants are "clearly worded and confined to a lawful purpose," the courts will enforce them. The words and phrases of the restrictive covenants are given their "common and ordinary meaning," at the time the declaration was written. Refer to Section IV.C.2 of this article for discussion.

16. ***Rakowski v. Comm. to Protect Clear Creek Village Homeowners' Rights*, 252 S.W. 3d 673 (Tex.App.-Houston [14th] 2008, pet. denied)**
Interpretations of restrictive covenants are reviewed *de novo* and liberally construed pursuant to Tex. Prop. Code §202.003(a), "to give effect to their purposes and intent and to harmonize all provisions so that none are rendered meaningless." Refer to Section II.D.1 of this article for discussion.

C. Insignificant/Different Prior Violation
(No cases during this timeframe.)

D. Burden of Proof
(No cases during this timeframe.)

E. Delays
(No cases during this timeframe.)

F. Injunctions

1. ***Schuring v. Fosters Mill Village Community Ass'n*, 396 S.W.3d 73 (Tex.App.—Houston [14th] 2013, pet. denied)**
Fosters Mill Village Community Association was granted a permanent injunction ordering homeowners, Thomas and Rose Schuring to obtain the association's approval before installing any new roofing on their home. The Schurings submitted a request to install metal roofing. The association denied the request, but the Schurings installed the metal roof anyway.

Shortly thereafter, the Schurings moved to dissolve the injunction. They argued the circumstances had changed. Specifically, they alleged that: (1) a non-metal roof required expensive braces for the roof; (2) the Schurings' would lose home insurance if braces were used; and (3) if they became uninsured, their deed of trust allowed a forced sale of the home. The association disputed these claims through the evidence. The trial court denied the Schurings' motion to dissolve the permanent injunction, and the Schurings appealed.

The court of appeals observed that trial courts have the inherent power to modify final injunctive orders, to enforce a judgment, or accommodate changed conditions. On review of a trial court's grant or denial of such a motion, the court applied a two-step analysis. First, the court must determine whether or not the evidence showed "actual changed circumstances." Second, if the answer is yes to the first step, the court must determine if the trial court abused its discretion. The party seeking modification has the burden of demonstrating that changed circumstances require modifying the injunction.

For the first step of the analysis, the court assumed the Schurings established changed circumstances. Moving to the second step of whether the trial court abused its discretion, the court observed that the modification of an injunction may be appropriate when the changed circumstances render the injunction "unnecessary or improper." The required test to determine whether an injunction is "improper" is the balancing of equities. In the area of real estate covenants, equity balancing dictates that "when the disproportion between harm and benefit is the sole reason for not enforcing a restriction of land use, the disproportion must be one of *considerable magnitude*.

Under the balancing of equities test, the court did not find a disproportion between harm and benefit that was of considerable magnitude. Though the Schurings alleged the: (1) increase of expenses; (2) loss of home insurance; and (3) forced sale, all constituted an abuse of discretion by the trial court, the court disagreed. The evidence presented showed that the trial court could reasonably have found that: (1) there was a cheaper way to brace the roof; (2) the Schurings could have found an alternative home insurer; and (3) the deed of trust did not require the Schurings maintain the *same* home insurer. For all these reasons, there was no disproportion of equities of a "considerable magnitude," and the trial court did not abuse its discretion in denying the dissolution of the injunction.

2. ***Wiese v. Heathlake Community Ass'n, Inc.*, 384 S.W.3d 395 (Tex. App.—Houston [14th Dist.] 2012, no pet.)**
The requirements for obtaining injunctive relief requires a party to "ordinary show (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of irreparable injury; and (4) the absence of an adequate remedy at law." When seeking enforcement of a deed restriction, instead of irreparable injury, the party must only show that the "defendant intends to do an act that would breach the restrictive

covenant." Once an injunction is granted, it "must be specific in its terms to be enforceable, describing in clear and precise detail the acts sought to be restrained…be broad enough to prevent subsequent violations of those already committed, but not so broad as to enjoin a defendant from activities that are a lawful and proper exercise of his rights." Refer to Section IV.J.1 of this article for discussion.

3. ***Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374 (Tex.App.-Dallas 2009, no pet.)**

The Appellants argued that the permanent injunctions rendered by the trial court were vague, overbroad and unsupported by the evidence. Several injunctions were ultimately overruled, reversed and remanded by the court of appeals because the relief granted by the trial court was not supported by the evidence. Refer to IV.J.2 of this article for discussion.

4. ***Letkeman v. Reyes*, 299 S.W.3d 482 (Tex.App.-Amarillo 2009, no pet.)**

The court of appeals found that the trial court had properly issued the permanent injunction. Moving a house onto the property was a substantial breach of the deed restrictions, and the trial court did not abuse its discretion. The other owners did not have to prove any actual harm. Refer to IV.C.1 of this article for discussion.

5. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)**

The elements for injunctive relief include the existence of a wrongful act, imminent harm, irreparable injury and an absence of an adequate remedy at law. "A party must substantially violate a deed restriction before the trial court may issue a permanent injunction." Failure to grant an injunction is reviewed on an abuse of discretion standard. Refer to Section IV.E.5 of this article for discussion.

G. Contempt Actions

(No cases during this timeframe.)

H. Class Action Litigation

1. ***Epernay Community Association, Inc. vs. Saad Shaar*, 349 S.W.3d 738 (Tex.App. – Houston [14th] 2011, no pet.)**

The homeowners association for a neighboring subdivision sought to collect fees from two homeowners in a different subdivision relating to the maintenance of certain recreational areas. The trial court granted declaratory relief in favor of the homeowners. The court of appeals modified the trial court's judgment in part and affirmed in part.

Epernay (Subdivision One) and Epernay Section Two (Subdivision Two) had two separate restrictive covenants. Subdivision One has within it, certain recreational areas. A "Recreational Areas Use Agreement" was filed of record shortly after Subdivision Two's restrictive covenants were filed. In 1980 the two associations for each subdivision entered into an Amended and Restated Recreational Areas Use Agreement which was also recorded that year. In 1981, the Texas Secretary of State ordered the charter of the association for Subdivision Two (Association Two) to be forfeited for failing to file a franchise tax report. Under the Amended and Restated Recreational Areas Use Agreement (1) homeowners in Subdivision Two were required to pay Association One (Association of Subdivision One) an annual fee to provide for the maintenance of the recreation areas; and (2) Association Two transferred to Subdivision One all rights and remedies available to Association Two under the Subdivision Two's restrictive covenants, including the right to collect the annual fee provided for in the Amended Agreement.

Restrictive covenants are subject to general rules of contract construction. *Pilarcik v. Emmons*, 966 S.w.2d 474, 478 (Tex. 1998). The court must try to determine the parties' intentions as expressed in the contract. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). In order to determine the parties' intentions, the court must review the entire agreement in order to give meaning to all of the provisions and to avoid rendering any as meaningless. *MCI Telecoms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). Ambiguity is a question of law for the court to decide. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 188, 121 (Tex. 1996). Differing interpretations is insufficient to assert ambiguity. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). If a contract is in uncertain and doubtful or if its provisions are susceptible to more than one meaning, it may be ambiguous. *Heritage Res., Inc.,* 939 S.W.2d at 121. If the contract can be given a certain or definite meaning, it must be construed by the court. *Am. Mfrs. Mut. Ins. Co.*, 124 S.W.3d at 157. The court ruled that the Amended Agreement was not binding on the owners under the terms of the restrictive covenants. The Association Two restrictive covenants gave Association Two the right to enter into an agreement but only relating to the use by the owners in Subdivision Two of the Recreational Areas. The restrictive covenants further provided that each owner of Subdivision Two would pay and be responsible for the payment of all fees and charges. Also Association Two had the rights and powers conferred upon it to enforce payment of said fees and charges. The court ruled that the Amended Agreement was not within the scope of the restrictive covenants because it required Subdivision Two owners to pay the annual fee to Subdivision One and it further assigned Association Two's right to enforce collection of such fees to Subdivision One.

The next issue the court determined is if the Amended Agreement is not binding upon the owners under the terms of the restrictive covenants, can the provisions of the Amended Agreement be considered valid restrictive covenants binding on the Subdivision Two owners. The court ruled that under the unambiguous language of the restrictive covenants, (1) Subdivision One had no right to enforce or benefit from any provisions in the restrictive covenants; and (2) the only procedure for amending the restrictive covenants required a vote by the membership. The Amended Agreement was a purported amendment to the restrictive covenants but it was not valid as an amendment under the provisions of the restrictive covenants. The court further stated that the Amended Agreement was not a valid amendment to the restrictive covenants under any of the various statutory procedures under which restrictive covenants may be amended.

Association One further challenged the trial court's declaration that the use of the Recreational Areas was a condition precedent to any obligation to pay assessments. The court ruled that even if the Amended Agreement was binding, the owners' use of the Recreational Areas was not a condition precedent to any obligation to pay fees and assessments to use the Recreational Areas. If the owners in Subdivision Two failed to timely pay these fees, their rights of use and enjoyment of the Recreational Areas could be suspended.

Association One also argued that the trial court erred in granting its plea in abatement and to order the owners to join the other owners in Subdivision Two under Tex. Civ. Prac. & Rem. Code Section 37.006(a). When declaratory relief is sought, all persons who have a claim or interest that would be affected by the declaration must be made parties. The court concluded that the owners were not seeking any declaration regarding the rights of other owners in Subdivision Two and the owners did not seek a declaration regarding the validity of the Amended Agreement. In fact, Association One's counterclaims sought declaratory relief regarding all Subdivision Two owners. However, Association One did not join any other Subdivision Two owners, nor did Association One assert joinder of these owners was necessary as to its counterclaims. The court found that the trial court did not abuse its discretion when it denied Association One's plea in abatement.

I. Proper Parties to Litigation

1. ***In re Corcoran*, 401 S.W.3d 136 (Tex.App.—Houston [14th Dist.] 2011, orig. proceeding), *mand. granted*, *In re Corcoran*, 2011 Tex.App. LEXIS 2299 (Tex. App.—Houston [14th Dist.] 2011, no pet.)**

Cynthia and Charles Jones wanted to construct a basketball court and batting cage on their property. They presented the plans and applied for approval through their Architectural Control Committee (ACC). The ACC denied the Joneses. Undeterred, the Joneses appealed to the Atascocita Community Improvement Association, which overruled the ACC's denial and granted the right to build the court.

The Joneses filed suit against their neighbors, Christian and Peggy Corcoran. The Cocorans counterclaimed seeking a declaratory judgment that the association lacked authority to overrule ACC rulings. Pursuant to Rule 37.006(a) of the Texas Rules of Civil Procedure, the Joneses and the association moved for joinder of all other homeowners under the governance of the association, estimated to be between 2,500 and 3,000 owners. The trial court granted the motion. The Corcorans filed a writ of mandamus.

Rule 37.006(a) provides that "[w]hen declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties." Under this rule, the court of appeals analyzed whether the other homeowners had an interest that would be affected by the declaratory relief sought. The court found that "[a]n action for declaratory judgment that is a suit against a homeowner to enforce compliance with a deed restriction does not implicate the rights of other homeowners." In this case, the declaration regarding the association's authority to overrule ACC decisions did not affect the rights of the other homeowners. The court found this suit was to enforce the compliance of a deed restriction, which was between two parties, and therefore, would not affect the rights of all other homeowners.

2. ***Chen v. Breckenridge Estates Homeowners Ass'n., Inc.*, 227 S.W.3d 419 (Tex.App.-Dallas 2007, no pet.)**

Breckenridge Estates Homeowners Association, Inc. filed suit against Steven and Sherry Chen seeking an injunction from the court ordering the Chens to remove an "unapproved and non-conforming structure" from the property. In March of 2003, the trial court granted summary judgment in favor of the association and the Chens appealed.

In October 2004, Steven Chen filed articles of incorporation under the name of Breckenridge Estates Homeowners Association, Inc. and Chen was listed as president. In December 2005, the association filed a motion to enforce the prior summary judgment and the Chens responded claiming that at the time the judgment was rendered, there was no entity by the name of Breckenridge Estates Homeowners Association, Inc. in existence on record with the Secretary of State. In January 2006, the trial court entered an order for the association for costs, attorneys' fees and for the removal of the structure. The January 2006 order listed the association as "Breckenridge Park Estates No. 1 and No. 2 Homeowners Association" and the Chens argue that the trial court erred in substituting one plaintiff for another. Additionally the Chens argue that the court had lost plenary power by that time and thus rendered the enforcement order void.

In its opinion, the court of appeals noted the difference between misnomer and misidentification. "A misnomer does not invalidate a judgment as between parties where the record and the judgment together point out with certainty, the persons and subject matter to be bound" and "the Chens never indicated that there was any confusion as to what entity was suing them and they never challenged the identity of the Breckenridge Estates Homeowners Association, Inc." The court found, at most, a misnomer occurred in this case.

3. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)**
The association claimed the trial court did not have jurisdiction to grant a declaratory judgment because not all of the homeowners were joined in the suit. Precedent in *Brooks v. Northglen*, *Simpson v. Afton Oaks*, and *Wilchester West LDEF, Inc. v. Wilchester West Fund, Inc*. determined that there was nothing that prevented the trial court from granting complete relief without the joinder of all of the homeowners. Additionally, the association could have asked the trial court to abate the case, join the homeowners or grant special exceptions. The association did not. Refer to Section IV.E.5 of this article for discussion.

4. ***Allegro Isle Condo. Ass'n. v. Casa Allegro Corp*., 28 S.W.3d 676 (Tex.App.-Corpus Christi 2000, no pet.)**
The association sued Casa Allegro Corp. for erecting a fence across an alleged easement that allowed ingress and egress along a portion of a circular drive. The trial court refused to render a declaratory judgment in this case without joining the mortgagees of the owners of property in the association.

The court of appeals found that the trial court had not abused its discretion when it refused to render judgment without the involvement of the mortgagees. The evidence presented showed the inability to exit was inconvenient and a safety hazard, and that this situation could affect property values. The court specifically stated it did not hold that it would have been reversible error for the trial court to proceed to judgment without the mortgagees. Rather, the evidence supported the trial court's decision, and the court of appeals had no grounds by which to overrule it.

J. Res Judicata

(No cases during this timeframe.)

K. Notice

1. ***Manana LLC v. Summit Elec. Supply Co., Inc.*, 316 S.W.3d 241 (Tex.App.—Dallas 2010, pet. denied)**
In 2006, Summit Electric Supply Co., Inc. conveyed Semira Rezaie two tracts of land that were deed restricted (the first deed). The first deed contained deed restrictions, including a restriction that the property could not be used for purposes of sexually oriented business. Immediately after receiving the first deed, Rezaie conveyed the property to Jerry Spencer in a second deed. This second deed failed to include the restriction against sexually oriented businesses. On August 7, 2006, Spencer filed and recorded the second deed. On August 25, 2006, Rezaie filed and recorded the first deed. Thereafter, Spencer rented the property to Manana, LLC, who posted a notice in front of the property stating it intended to operate a sexually oriented business.

Summit filed suit against Manna and Spencer seeking declaratory judgment and attorney's fees. The trial court granted summary judgment in favor of Summit. Manana and Spencer appealed.

On appeal, Spencer and Manana argued that the deed restriction was unenforceable against them because it was not filed in the real property records at the time Rezaie conveyed the property to Spencer and because Spencer did not have actual knowledge of the deed restriction. The court rejected this argument by relying on the Texas Supreme Court Case of *Cooksey v. Snider*, 682 S.W.2d 252 (Tex. 1984). In *Cooksey* the court held a purchaser is charged with notice of the terms of deeds that form an essential link in the chain of ownership. The court found that the holding in

Cooksey applied regardless of whether the purchaser read the prior deeds or had any actual knowledge of their contents. In light of *Cooksey*, the court found that the restriction against sexually oriented businesses was contained in the first deed. Additionally, the court found the first deed was an essential link in the chain of ownership. Therefore, Spencer and Manana were bound by that restriction regardless of Rezaie's or Spencer's actual knowledge of the restriction and regardless of the fact that first deed was recorded after the Spencer purchased the property.

L. Ratification
(No cases during this timeframe.)

M. Rights of Mineral Owner After Estate Severed
(No cases during this timeframe.)

N. Tortious Interference with Contract
(No cases during this timeframe.)

O. Covenants Not to Compete
(No cases during this timeframe.)

P. Property Rights
(No cases during this timeframe.)

Q. By A City
(No cases during this timeframe.)

R. Civil Penalties

1. ***Sanchez v. Southampton Civic Club, Inc.*, 367 S.W.3d 429 (Tex.App.—Houston [14th Dist.] 2012, no pet.)**
There was no abuse of discretion in the trial court's refusal to award civil damages under Tex. Prop. Code §202.004 when there was no evidence of Sanchez "knowingly, intentionally and deliberately disregard[ing] the restrictive covenants…" Refer to Section IV.M.2 of this article for discussion.

2. ***Uptegraph v. Sandalwood Civic Club*, No. 01-07-00764-CV, 2010 WL 457468 (Tex.App.-Houston [1st Dist.] 2010, no pet.)**
A showing of actual harm is not a prerequisite for a court to assess the $200 per day the violation under Tex. Prop. Code §202.004(c). Refer to Section IV.M.3 of this article for discussion.

S. As Easements

1. ***Sanchez v. Southampton Civic Club, Inc.*, 367 S.W.3d 429 (Tex.App.—Houston [14th Dist.] 2012, no pet.)**
The court of appeals found that the covenants were broad enough to allow various easements, including those that can be "laid," "erected," or more and garbage collection is a proper public utility use.

The court also determined that the appellant's fence and landscaping were a violation of the deed restrictions which provide that "no permanent improvements or buildings shall ever be erected [on the three-foot strip of land at issue] which will interfere with the use of said easement…" Because the fencing and landscaping are permanent improvements that interfere with trash collection, they were in violation of the restrictions. Refer to Section IV.M.2 of this article for discussion.

T. Rights of Mineral Owner After Estate Severed

1. ***Veterans Land Bd. of the State of Tex. v. Lesley*, 281 S.W.3d 602 (Tex.App.-Eastland 2009, pet. denied)**
The court of appeals held that there was no affirmative duty to lease the minerals. The court analyzed *In re Bass*, which "establishes that no breach of fiduciary duty can occur until the executive exercises the executive rights" and "a breach occurs if (1) the executive exercises the executive rights, (2) the executive acquires benefits from the minerals for himself by exercising the executive rights, and (3) the executive fails to acquire every benefit for the non-executive mineral owners that he acquired for himself." The court further held that appellee did not exercise the executive rights by creating and recording the declaration. In fact, the court stated that the recording of restrictions prohibiting mineral development shows that appellee was not intending to exercise the executive rights and thus no duty arose. Appellees argued that appellee breached the notice requirements in the deeds when it didn't notify them of the recording of the declaration. The court noted that appellee was not a party to the original deeds and would thus only be bound by its notice requirement if the covenant was one that ran with the land. Because the court determined that the notice requirement did not burden the land and it was a personal covenant and did not run with the land.

U. Assignments

1. ***Epernay Community Association, Inc. vs. Saad Shaar*, 349 S.W.3d 738 (Tex.App. – Houston [14th] 2011, no pet.)**
Under an Amended and Restated Recreational Areas Use Agreement (1) homeowners in Subdivision Two were required to pay Association One (Association of Subdivision One) an annual fee to provide for the maintenance of the recreation areas; and (2) Association Two transferred to Subdivision One all

rights and remedies available to Association Two under the Subdivision Two's restrictive covenants, including the right to collect the annual fee provided for in the Amended Agreement. The court of appeals treated the Amended Agreement as amendment to the restrictive covenants as opposed to an assignment, which it held not to be valid as an amendment to the restrictive covenants. The court ruled that under the unambiguous language of the restrictive covenants, (1) Subdivision One had no right to enforce or benefit from any provisions in the restrictive covenants; and (2) the only procedure for amending the restrictive covenants required a vote by the membership. Refer to Section VI.H.1 of this article for discussion.

VII. DEFENSES TO ENFORCEMENT OF RESTRICTIONS

A. Abandonment, Waiver and Laches

1. *Moran vs. Memorial Point Property Owners Ass'n, Inc.*, 410 S.W.3d 397 (Tex.App.—Houston [14th] 2013, no pet.)

The subdivision contained approximately 500 properties, about 110 of which were developed. Using only the evidence of relevant violations (5), the violations represented 1.00% of the entire subdivision and 4.55% of the developed properties. Even if the court limited it to appellant's block (1 out of 36 lots) the rate of just 2.78% did not support waiver. The court of appeals found that "Texas courts have found that violation rates of 1.9% to 8.9% were not sufficient to support waiver and abandonment." Refer to Section IV.M.1 of this article for discussion.

2. *Uptegraph v. Sandalwood Civic Club*, No. 01-07-00764-CV, 2010 WL 457468 (Tex.App.-Houston [1st Dist.] 2010, no pet.)

When lot owners acquiesce in "substantial violations within a restricted area, said acquiescence can amount to an abandonment of the covenant or a waiver of the right to enforce it." Abandonment is established when a party proves that "the violations are so great as to lead the mind of the average man to reasonably conclude that the restriction in question has been abandoned." In analyzing whether or not abandonment has occurred, courts consider "'the number, nature, and severity of the then existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant."' (quoting *Tanglewood Home Assoc., Inc. v. Henke*, 728 S.W.2d 39, 43-44 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.; quoting *New Jerusalem Baptist Church, Inc. v. City of Houston*, 598 S.W.2d 666, 669 (Tex.Civ.App.-Houston [14th Dist.] 1980, no writ.) Two houses violating a minimum setback line does not establish waiver or abandonment as Texas courts have found violation rates between 1.9% and 8.9% not sufficient to support waiver and abandonment. Refer to Section IV.M.3 of this article for discussion.

3. *Ski Masters of Tex. v. Heinemeyer*, 269 S.W.3d 662 (Tex.App.–San Antonio 2008, no pet.)

The court of appeals explained that "abandonment occurs when there are 'substantial violations within the restricted area.'" Ski Masters had the burden to prove that "the violations were 'so great as to lead the mind of the average man to reasonably conclude that the restriction…had been abandoned and its enforcement waived.'" *Oilfield v. City of Houston*, 15 S.W.3d 219, 226-27 (Tex.App.-Houston [14th Dist] 2000, pet. denied). Three property owners testified that no property was being used for purposes other than residential. Refer to Section II.A.2 of this article for discussion.

B. Changed Conditions

1. *Davis v. Canyon Creek Estates Homeowners Ass'n.*, 350 S.W.3d 301 (Tex. App.—San Antonio 2011, pet. denied)

In 1957, the subdivision of Valley View Heights adopted and recorded certain restrictive covenants. These covenants mandated all lots "shall be used for residence purposes only," and all covenants "run with the land." Years later, Edward and Rosuara Davis and Elare Partners, Ltd.—owned by the Davises—collectively purchased Lots 6, 7, and 8 (Lots) in the subdivision. In 2005, the Davises and Elare listed the Lots for sale, but potential buyers' interests waned upon discovering the Lots were restricted to residential purposes.

Luis Davis, the son of the Davises, filed suit against the Subdivision's homeowners association. Davis sought a declaration that the subdivision should no longer be restricted to residential purposes. The trial court granted the association's motion for partial summary judgment. On appeal, the court remanded the case to the trial court to dispose of the remaining issues. On remand, the trial court granted the association's motion for summary judgment and awarded attorneys' fees based on anticipatory breach of the covenants. Davis appealed.

To begin, the court of appeals identified the applicable law for nullifying or voiding restrictive covenants. First, the party seeking to nullify or modify a restriction must prove: (1) covenants have been abandoned or the right to enforce a covenant has been waived; or (2) the condition of the restricted area, or the surrounding area, has changed so much that it is no longer possible to secure to a substantial degree the benefits the covenant was intended to create. Second, to justify the voidance of a restriction due to changes in conditions, the changes must be "radical and grand." Third, in considering whether a radical change has occurred, the court looks to six factors: (1) the size of the restricted area; (2) the location the restricted area with respect to the area of the changes; (3) the type of changes; (4) the character and conduct of the party and predecessors seeking the voidance; (5) the purpose of the restrictions; (6) the unexpired term of the restrictions. Fourth, it is well settled Texas law that a landowner cannot rely on "changed conditions" to void a restriction if the changes had already occurred by the time the landowner acquires the property.

Attempting to satisfy the above law, Davis argued that radical changes had occurred because on the road adjacent to the Lots, motorists had consistently exceeded the speed limit, run over his mailbox, crashed into trees on the Lots, and collided with other motorists. In addition, Davis claims the commercial business "exploded" after his purchase of the property. The court recognized the determination of what is or is not a "radical change" and thus, applied a case-by-case analysis. Relying on *Hemphill v. Cayce*, 197 S.W.2d 137 (Tex. Civ. App.—Fort Worth 1946, no writ), the court held Texas law states "increased commercial growth and increases in traffic and congestion in streets . . . are alone insufficient to warrant nullification of a residential restriction." Under this reasoning, the court affirmed the trial court.

Lastly, the court considered the trial court's award of attorneys' fees based on Davis' anticipatory breach of the covenants entitling the association to attorneys' fees under Tex. Prop. Code §5.006 which allows attorneys' fees to the prevailing party "in an action based on breach of a restrictive covenant…" The court held that in order for there to be an anticipatory breach there "must be an unconditional declaration of an intention not to perform the contract" and "[t]he repudiation must be distinct, positive, unequivocal, and absolute refusal to perform the contract in the future." By seeking to removal the residential restriction, Davis, in no way, anticipatorily breached the restriction and was, instead, evidence that Davis acknowledged existence of the restriction. Thus, the attorneys' fees award was reversed.

C. Statute of Limitations

1. ***Girsh v. St. John*, 218 S.W.3d 921 (Tex.App.-Beaumont 2007, no pet.)**

The statute of limitations in deed restriction cases is four years. The limit is measured from the time the breach of the restrictions occurred. For the "discovery rule" to apply, "the nature of the injury must be inherently undiscoverable and that the injury itself must be objectively verifiable." The court of appeals determined that the nature (or category, rather than this specific incident) of the injury was inherently discoverable with reasonable diligence. A full-sized, mobile home in a populated, residential subdivision would have been discovered with reasonable diligence, despite the "presence of indigenous flora spontaneously growing nearby." Refer to Section VI.A.6 of this article for discussion.

D. Estoppel

1. ***Jamison v. Allen*, 377 S.W.3d 819 (Tex.App.—Dallas 2012, no pet.)**

The court of appeals concluded that the term "exterior walls" includes gables. Therefore, quasi-estoppel prevented the appellees from arguing that the appellants used unapproved materials on the "exterior walls" because the appellees used the same material on their gables. Refer to Section IV.S.1 of this article for discussion.

E. Arbitrary, Capricious or Discriminatory Actions

1. ***Uptegraph v. Sandalwood Civic Club*, No. 01-07-00764-CV, 2010 WL 457468 (Tex.App.-Houston [1st Dist.] 2010, no pet.)**

The civic club properly interpreted unambiguous restrictions and was reasonable in its denial of an exception to the restrictions. Refer to Section IV.M.3 of this article for discussion.

F. Failure to Timely File Suit

(No cases during this timeframe.)

VIII. ATTORNEY'S FEES

A. Trial Court's Abuse of Discretion

1. ***Schwartzott v. Maravilla Owners Ass'n, Inc.*, 390 S.W.3d 15 (Tex.App.—Houston [14th] 2012, pet. denied)**

Joseph and Jamie Schwartzott owned a unit in the Maravilla Condominiums, which were governed by the Maravilla Owners Association, Inc. The association filed suit against the Schwartzotts to recover unpaid assessments, late fees, attorney fees, collection costs, and prejudgment and postjudgment interest. Part of the attorney's fee included $593, which was calculated upon ten percent of the principal amount owed by the

Schwartzotts. Also, an additional $682.50 was included for defending a different lawsuit against the association filed by the Schwartzotts.

On summary judgment, the trial court ruled in favor of the association and awarded attorney's fees. Also, the trial court granted "any additional attorney's fees or costs of collection incurred after [judgment] until the judgment is paid." The Schwartzotts appealed.

On appeal the Schwartzotts raised three issues. First, the Schwartzotts argued the attorney's fees for the $593 was based on a flat fee not mentioned in the condominium's declaration and which the association unilaterally chose to impose. Pointing to the Texas Supreme Court case of *Arthur Andersen & Co. v. Perty Equip. Corp.*, the court of appeals noted that a plaintiff must prove attorney's fees are both reasonable and necessary. With no contradicting authority, the court found the association could recover a combination of flat fees and hourly billing rates when an expert testified to these fees' reasonableness and necessity.

Second, the Schwartzotts complained the $682.50 was improper. The $682.50 was for work on a different case and the association failed to show how these attorney's fees were reasonable and necessary for the collection of the unpaid assessments. Accordingly, the court deleted these attorney's fees.

Third, the Schwartzotts challenged the award of "any additional attorney's fees" from judgment until collection. The court agreed with the Schwartzotts. To begin, the judgment failed to state the attorney's fees had to be reasonable. Next, Texas law requires a party seeking attorney's fees prove their reasonableness. Here, the judgment was a blanket award of fees without any proof of reasonableness. For these reasons, Schwartzotts' challenge was sustained.

2. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)**

A trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to guiding rules or principles, or misapplies the law to the established facts. The award of attorney's fees under the Declaratory Judgment Act was reviewed for abuse of discretion. The court of appeals could not find a reason to reverse the declaratory judgment, so the Declaratory Judgment Act was a reasonable basis for awarding attorney's fees to the Lindens. Refer to Section IV.E.5 of this article for discussion.

B. Tex. Prop. Code §5.006

1. ***Davis v. Canyon Creek Estates Homeowners Ass'n.*, 350 S.W.3d 301 (Tex.App.—San Antonio 2011, pet. denied)**

In order to prevail on an award of attorneys' fees based on anticipatory breach of covenants under Tex. Prop. Code §5.006, which allows attorneys' fees to the prevailing party "in an action based on breach of a restrictive covenant…", the breach "must be an unconditional declaration of an intention not to perform the contract" and "[t]he repudiation must be distinct, positive, unequivocal, and absolute refusal to perform the contract in the future." Filing a lawsuit to challenge a restriction does not, on its face, meet that burden. Refer to Section VII.B.1 of this article for discussion.

2. ***Haas v. Ashford Hollow Cmty Improvement Ass'n, Inc.*, 209 S.W.3d 875 (Tex.App.– Houston [14th Dist.] 2006, no pet.)**

As far as the reasonableness of the attorney's fees awarded, the court of appeals ruled them reasonable under the factors listed in Tex. Prop. Code §5.006(b) since it was unusual for a defendant to challenge jurisdiction and proceed to trial, especially when the defendant has admitted the assessments, interest, late charges and reasonable attorney's fees are secured by a lien on the property. The court also noted that the matters about jurisdiction and §209.008(a) were unusual, and they had to perform extensive legal analysis on these issues. Refer to Section V.A.3 of this article for discussion.

C. Tex. Prop. Code §82.161(b)

1. ***Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878 (Tex.App.—Dallas 2011, no pet.)**

Jerry Huffman Custom Builder, L.L.C. built an office condominium complex. The complex was governed by the Plano Parkway Office Owners Association. Both, Dr. Mary Kirwan and Dr. JoJo Cheung were directors on the board of the association. Additionally, Kirwan and Cheung each owned an office unit in the complex. Eventually, Bever Properties, L.L.C. purchased an office unit at the complex. Shortly thereafter, Bever Properties expressed its desire to construct prominent signage for the business at the complex. Kirwan, Cheung, and the association disputed Bever's desire to do so.

Bever sued alleging the purchase of the office unit was based, in part, upon assurances that prominent signage for businesses could be placed at the complex and that the association failed to disclose information otherwise. Bever asserted various claims, including fraud in a real estate transaction and breach of fiduciary duty. The association also filed suit against Bever seeking an injunction, which suit was consolidated with this case. Kirwan filed a counterclaim seeking attorney's fees. After cross-motion summary judgments, the trial court granted the association, Kirwan, and Cheung's motion and awarded attorney's fees. Bever appealed.

First, Bever argued that the association, Huffman, Kirwan and Cheung conspired against it. The elements for civil conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Times Herald Printing Co. V. A.H. Belo Corp*., 820 S.W.2d 206 216 (Tex.App.-Houston [14th Dist.] 1991, no writ). The association, Huffman, Kirwan and Cheung only suggested that ultimate control of the condominium complex was with the association. However, Huffman, Kirwan and Cheung failed to address the conspiracy claims. Further, the association did not address the conspiracy claim, including the allegations that the association, Kirwan, Cheung, and a nonparty (who owned property adjacent to the condominium), presented a fraudulent document to the City of Plano in a failed attempt to induce the arrest of Bever's property managers as well as the City of Plano's denial of the sign permit sought by Bever. Finally, the affidavit of Bever's President claimed that Bever failed to have a sign because Kirwan and Cheung refused to meet with them and conspired with Huffman to prevent approval of it. The court of appeals found that there was enough evidence to produce a genuine issue of material fact regarding the conspiracy claims.

Second, the court reviewed the breach of fiduciary duty claims. Bever contended Kirwan and Cheung owed Bever duties of honesty, fidelity, and loyalty, and duties against self-dealing. The court in turn looked to Tex. Prop. Code §82.103(a), which states, "[e]ach officer or member of the board [of the unit owners' association] is liable as a fiduciary of the unit owners." Bever pled various allegations evidencing breach of fiduciary duties by Kirwan and Cheung. These included the following actions by Kirwan and Cheung: (1) acting in disregard of the declaration; (2) allowing subtenants in violation of the declaration; (3) allowing Kirwan to be delinquent in payment of assessments; (3) entering into contract in contravention of the declaration; and (4) self-serving and other illegal actions. However, Kirwan and Cheung failed to address these allegations. Rather they simply responded by making the assertion that Bever knew the ultimate control of the complex was in the hands of the association. The court found this statement alone was insufficient to disprove an essential element for breach of fiduciary duty. Thus, the court found the trial court erred in granting summary judgment on these claims.

Third, the court reviewed the summary judgment evidence regarding fraud and negligent misrepresentation. Fraud must be shown by "a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which cause injury." *Formosa Plastics Corp. USA v. Pesidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). The elements for negligent misrepresentation are: (1) the representation is made by a defendant in the course of this business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interest*, 991 S.W.2d 787, 791 (Tex.1999). Although Bever failed to produce evidence regarding these claims against the association, Cheung, or Kirwan; Bever did provide sufficient evidence against Huffman. An affidavit pointed to several instances throughout the condominium construction process in which Huffman and its representatives told Bever that the complex would not be restricted by the same guidelines as other Huffman properties, and the sign would only be regulated by the City of Plano. The affidavit further stated that the sales agreement was signed with the understanding that the sign would require a permit from the City and there would be no restrictive covenants regarding signage. Again, the court found enough evidence existed to reverse the trial court's summary judgment on the fraud and negligent misrepresentation claims against Huffman.

Fourth, the court reviewed the fraud in a real estate transaction claim against the association and Cheung. Tex. Bus. & Com. Code §27.01 states a person commits statutory fraud if: (1) that person makes a false representation of a past or existing material fact in a real estate transaction to another person for the purpose of inducing the making a contract; and (2) the false representation is relied on by the person entering the contract. In this case, the court noted that it had been conclusively shown that Bever spoke with Cheung well after Bever purchased its office unit. Bever further claimed that Huffman represented that Bever, Kirwan, and Cheung would form the association if one was needed. However, the court noted that the association was not formed until after the execution of the sales agreement. Therefore, the court concluded it was impossible for Bever to rely on any communications from Cheung or the association prior to purchasing its office unit.

Fifth, the court reviewed the summary judgment granted to Huffman on their DTPA claims. Based on the evidence discussed under the fraud and negligent misrepresentation claims, the court found that summary judgment was improper with regards to the DTPA claims against Huffman. Bever further pled that the parties engaged in unconscionable action. Because the motion for summary judgment failed to address this as a distinct claim, the court reversed the trial court's summary judgment in favor of the association, Huffman, Kirwan and Cheung. Similarly, the court found that the association's, Huffman's, Kirwan's, and Cheung's motions for summary judgment did not support summary judgment in their favor on Bever's claims for conspiracy to defraud and in favor of the association and Cheung on their conspiracy to violate the DTPA.

Sixth, the court addressed the trial court's award of attorney's fees. Tex. Civ. Prac. & Remedies Code §38.001(8) allows recovery of attorney's fees for claims arising from an oral or written contract. The court found that because none of the parties sued Bever for breach of contract, recovery of attorney's fees under Chapter 38 was in error. Further, the court found that because Huffman was neither a condominium unit owner nor a party to the declaration, the declaration did not support a basis for Huffman asserting a claim for breach of contract.

Seventh, the court turned to see if the declaration of the association allowed recovery of attorney's fees. Kirwan and Cheung alleged paragraph 3.11 did allow recovery because it stated, "[f]ailure to comply with [the Declaration] shall be grounds for an action to recover sums due for damages or for injunctive relief, or both . . ." The court found this language was insufficient to support an award of attorney's fees.

The court reviewed Tex. Prop. Code §82.161 as the final basis for recovery of attorney's fees. §82.161 requires the party recovering the attorney's fees actually bring the claim, not just defend the claim. The association was not the prevailing party because the injunction was denied. In addition, because the court reversed the summary judgments on several grounds which were in favor of the association, Huffman, Kirwan and Cheung, the court reversed and remanded the issue of attorney's fees to the trial court for reconsideration.

2. ***<u>Bundren v. Holly Oaks Townhomes Ass'n, Inc.</u>*, <u>347 S.W.3d 421 (Tex.App.—Dallas 2011, pet. denied)</u>**

Expert witness fees and expenses were not "costs of litigation" under Tex. Prop. Code §82.161.

Tex. Prop. Code §82.161 allows for recovery of "reasonable" fees by the prevailing party. This precluded recovery of all attorney's fees. Refer to Section V.N.1 of this article for discussion.

3. ***<u>Dilston House Condo. Ass'n. v. White</u>*, <u>230 S.W.3d 714 (Tex.App.-Houston[14th Dist.] 2007, no pet.)</u>**

White, a condominium owner, sued the association under breach of contract and negligence theories for violation of the declaration, by-laws and regulations. The association failed to designate an attorney as an expert on fees. The association cross-examined White's attorney regarding attorney's fees, but the association did not present any other evidence of attorney's fees. The trial court denied both White's claims and the association's claims for attorney's fees. The association moved for reconsideration and to modify the judgment arguing that it was entitled to reasonable attorney's fees and costs under §82.161(b) of the TUCA. The trial court denied the motion and the association appealed.

The court of appeals affirmed the trial court's judgment because the party requesting the fees must show that they are reasonable, even when the award of attorney's fees is mandatory under a statute. In this case, the association failed to meet the burden of proof.

The association also argued that the trial court may take judicial notice of the factors the court should consider when awarding attorney's fees. However, the association failed to ask the trial court to do so. Furthermore, the association cannot seek attorney's fees under §82.161(b) and invoke §§38.003 and 38.004 of the Tex. Civ. Prac. & Rem. Code for the court to take judicial notice of attorney's fees. These sections of the Tex. Civ. Prac. & Rem. Code only apply to causes of action listed in Tex. Civ. Prac. & Rem. Code §38.001.

D. Segregation of Attorney's Fees

(No cases during this timeframe.)

E. Attorney's Fees Involving FCC Antenna Regulations

(No cases during this timeframe.)

F. Contingent Fee Arrangement Does Not

Preclude Recovery
(No cases during this timeframe.)

G. Declaratory Judgment Act

1. ***La Ventana Ranch Owners' Ass'n, Inc. v. Davis*, 363 S.W.3d 632 (Tex.App.—Austin 2011, pet. denied)**
Under the Uniform Declaratory Judgment Act the trial court "may award costs and reasonable and necessary attorney's fees as are equtiable and just." Whether the fees are "reasonable and necessary is an issue of fact to be determined by the fact-finder" with the "expert testimony of an interested witness, standing alone," being "sufficient to support the reasonableness and necessity of a fees award." Refer to Section IV.E.2 of this article for discussion.

2. ***Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)**
Whether a party is entitled to an award of attorney's fees under a particular statute is reviewed *de novo*. The award of attorney's fees under the Declaratory Judgment Act was reviewed for abuse of discretion. The court of appeals could not find a reason to reverse the declaratory judgment, so the Declaratory Judgment Act was a reasonable basis for awarding attorney's fees to the Lindens. Refer to Section IV.E.5 of this article for discussion.

H. Tex. Civ. Prac. & Rem. Code §38.001(8)

1. ***Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878 (Tex.App.—Dallas 2011, no pet.)**
Because none of the parties sued appellant for breach of contract, recovery of attorney's fees under Chapter 38 of the Tex. Prop. Code was in error. Further, the developer was neither a condominium unit owner nor a party to the declaration; therefore, the declaration did not support a basis for developer asserting a claim for breach of contract. Refer to Section VIII.C.1 of this article for discussion.

I. Tex. Prop. Code §82.113

1. ***Bundren v. Holly Oaks Townhomes Ass'n, Inc.*, 347 S.W.3d 421 (Tex.App.—Dallas 2011, pet. denied)**
Expert witness fees and expenses were not "litigation costs" under Tex. Prop. Code §82.113.

Although Tex. Prop. Code §82.113 defined "assessment" to include "attorney's fees," the declaration defined "assessment" to include "costs incurred in their collection, including reasonably attorney's fees." This precluded recovery of all attorney's fees. Refer to Section V.N.1 of this article for discussion.

IX. AMENDMENT/TERMINATION OF RESTRICTIONS

A. Procedure Set Forth in Restrictions for Amendment Prevails Over Texas Property Code
(No cases during this timeframe.)

B. By Developer

1. ***Marzo Club, LLC v. Columbia Lakes Homeowners Ass'n.*, 325 S.W.3d 791 (Tex.App.—Houston [14th Dist.] 2010, no pet.)**
Successor developers receive developer rights only as to the property that was specifically conveyed to them and can only alter the designation of the reserves conveyed to them, not the reserves conveyed to anyone else. Refer to Section VI.B.9 of this article for discussion.

C. Approval Necessary

1. ***Gillebaard v. Bayview Acres Ass'n, Inc.*, 263 S.W.3d 342 (Tex.App.-Houston [1st Dist.] 2007, no pet.)**
Amendments to existing an existing declaration to create a property owners' association under §204.006 and to amend existing restrictions under §204.005 may not be done simultaneously. The owners must first seek to amend the existing restrictions for the "sole" purpose of providing for the creation of a property owners' association before said association may circulate a new petition to add or modify the deed restrictions in any other way. Refer to Section III.C.1 of this article for discussion.

D. By One Section of Development
(No cases during this timeframe.)

E. Effect of Amendment
(No cases during this timeframe.)

F. Variances
(No cases during this timeframe.)

X. ASSOCIATION AND DIRECTORS' LIABILITY

A. Deceptive Trade Practices Act

1. ***Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878 (Tex.App.—Dallas 2011, no pet.)**

The court reviewed the summary judgment granted to appellee on their DTPA claims. Based on the evidence discussed under the fraud and negligent misrepresentation claims, the court found that summary judgment was improper with regards to the DTPA claims against appellee. Appellant further pled that the parties engaged in unconscionable action. Because the motion for summary judgment failed to address this as a distinct claim, the court reversed the trial court's summary judgment in favor of the association. Refer to Section VIII.C.1 of this article for discussion.

B. Towing

(No cases during this timeframe.)

C. Lis Pendens

(No cases during this timeframe.)

D. Association Liable as Transferee of Property

(No cases during this timeframe.)

E. Security

(No cases during this timeframe.)

F. Fiduciary

1. ***Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878 (Tex.App.—Dallas 2011, no pet.)**

A general assertion that appellant knew the ultimate control of the complex was in the hands of the association, alone, was insufficient to disprove an essential element for breach of fiduciary duty. Refer to Section VIII.C.1 of this article for discussion.

2. ***La Ventana Ranch Owners' Ass'n, Inc. v. Davis*, 363 S.W.3d 632 (Tex.App.—Austin 2011, pet. denied)**

Fiduciary duties can arise as a matter of law in certain formal relationships or informally from a "moral, social, domestic, or purely personal relationship of trust and confidence." Looking to Texas Supreme Court case of *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962), informal fiduciary duties cannot be established where parties did not testify to facts "other than their own subjective feelings." The court of appeals found that here the members of an architectural control committee did not have a fiduciary duty to the members of the association. Refer to Section IV.E.2 of this article for discussion.

3. ***Priddy v. Rawson*, 282 S.W.3d 588 (Tex.App.-Houston [14th Dist.] 2009, pet. denied)**

The court of appeals found that the current board members had acted with ordinary care when they had, in good faith, relied on information prepared by previous boards to determine the rate of assessment for the declarant's successor.

For a breach of fiduciary duty claim, "a plaintiff must show (1) a fiduciary relationship between the plaintiff and the defendant; (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of defendant's breach." The court also acknowledged that there are circumstances under which a fiduciary duty arises without a formal relationship. Specifically, the court stated that in order to enforce a fiduciary duty that arose from an informal relationship, "the relationship of trust and confidence must exist prior to and apart from, the agreement that is the basis of the suit." Refer to Section V.I.1 of this article for discussion.

G. Smoke Detectors

1. ***Brown v. Hearthwood II Owners Ass'n, Inc.*, 201 S.W.3d 153 (Tex.App.-Houston [14th Dist.] 2006, pet. denied)**

Residents and/or guests of the Hearthwood II Condominiums (Appellants) brought suit against the association for injuries sustained as a result of evacuating the building during a fire. Appellants claimed that the association's negligence, breach of contract and malice were responsible for the injuries sustained and for exemplary damages, physical anguish, mental anguish and emotional distress. Specifically, the Appellants claimed that the faulty wiring in the breaker box for one of the units caused the fire and additionally the smoke detectors and fire alarm were not properly working to warn the residents of the fire.

The association moved for summary judgment on all claims because the Texas Smoke Detector Statute provides the "exclusive remedy for tenants who receive injuries resulting from a fire." Additionally, the association moved for summary judgment on the negligence and malice claims based on its argument that as a homeowners association it owed the residents no duty of care. The trial court granted the association's summary judgment and the residents appealed.

On appeal, the association argued that the Appellants' claims with regard to the smoke detectors were barred because Texas Smoke Detector Statute only applies to relationships between landlords and tenants. The court of appeals found that the association presented no evidence as to whether or not the Appellants were residents and because this argument was an affirmative defense, the association bore the burden to produce this evidence. Therefore the court of appeals could not sustain the summary judgment. Secondly, the association argued that as a homeowners association it owed no duty of care to the Appellants. Again, the court of appeals found that the association presented no evidence supporting this argument. In its opinion, the court of appeals said the association's "global, unsupported, conclusory statements" do not conclusively establish that no duty existed.

With regard to the breach of contract cause of action, the court found that association presented no evidence that there was no contract between the association and Appellants and did not conclusively negate any element of the claim. The court of appeals affirmed the trial court's judgment as to Appellants' claims of malice, exemplary damages, physical anguish, mental anguish and emotional distress as Appellants raised no argument as to the trial court's judgment and reversed and remanded this case for further proceedings on the remaining claims.

H. Ultra Vires

(No cases during this timeframe.)

I. Derivative Actions

(No cases during this timeframe.)

J. Premises Liability

1. ***Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879 (Tex. 2009)**

Coy Gillenwater, a renter of a condominium unit at Fort Brown Condoshares, sued the association under the theory of premises liability for injuries he sustained while visiting the association's pool. Gillenwater was lowering himself into a pool-side chair when the tip of his right ring finger was severed by an alleged broken weld on the frame of the chair. The trial court granted the association's no-evidence summary judgment and Gillenwater appealed. The court of appeals reversed and the Texas Supreme Court reversed the judgment of the court of appeals and rendered a take-nothing judgment in favor of the association.

The deposition of the condominium's manager revealed that the condominium association was responsible for maintaining the outdoor lawn equipment in safe repair; that he was aware that the combination of salt water and chlorine in the air could have a corrosive effect on the chairs; that because of that knowledge, he had employees of the association inspect the chairs for damage six times a week; the condition of the chair that caused the injury after the injury occurred and the fact that hairline cracks were discovered in other chairs on the premises and subsequently repaired.

Gillenwater argues that this testimony proves the broken welds were visible to the naked eye and that it is "reasonable to infer the dangerous condition was present and seen by employees when the chairs were washed" due to the fact that the cracks did not appear overnight. The court of appeals disagreed finding that the testimony had no bearing on whether or not broken welds were visible to the naked eye prior to injury.

Citing *CMH Homes, Inc. v. Daenen*, the court noted that "an owner or occupier is not liable for deterioration of its premises unless it knew of or by reasonable inspection would have discovered the deterioration."

The court held, reversing the judgment of the court of appeals, that Gillenwater presented no evidence indicating that the association actually knew the chair had become dangerous or that it failed to reasonably inspect the chairs.

2. ***Towers of Towne Lake Condo. Ass'n v. Rouhani*, 296 S.W.3d 290 (Tex.App.-Austin 2009, no pet.)**

Rouhani broke her right arm when she slipped on a stamped concrete pool deck that had six coats of latex enamel paint. Eventually, the bone died from a lack of blood supply, and she was unable to continue her dental practice. As an undisputed invitee, she sued the association on the basis of premises liability-the association had actual or constructive knowledge of the condition; the condition was an unreasonable risk; and the association failed to exercise ordinary care to reduce the risk; that failure was the proximate cause of her injury. A jury found for Rouhani and awarded over $1.6 million to her.

In a challenge to legal sufficiency of the evidence, the court of appeals will review evidence in the light most favorable to the judgment and only sustain if there is a complete absence of evidence of a vital fact; the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; evidence offered to prove a vital fact is no more than a mere scintilla; or evidence conclusively establishes the opposite of a vital fact.

The association challenges the legal sufficiency of the evidence regarding duty because it claims there was no evidence of actual or constructive knowledge. It also challenges the legal sufficiency of the evidence regarding the injury alleging that there was no evidence that the condition of the pool deck caused the fall and, therefore, the injury. The court of appeals found the warnings on the label on the paint and the technical data sheet state, "Caution: All floor enamels may become slippery when wet." Clean sand or an anti-slip aggregate could have been added to the paint, according to the label and the data sheet, respectively. It is common knowledge that the deck around a pool will usually become wet when the pool is used. This counters the association's proposition that the deck, when dry, is not a dangerous condition and that Rouhani did not present evidence that the area she slipped on was wet. However, Rouhani testified at trial that she got up from her chair because she felt a splash of water. The court of appeals determined it was reasonable to infer that some of the water fell on the pool deck. The court of appeals also determined that the expert opinion regarding the paint was based on an inspection of the pool deck and a review of the paint that was used to coat the pool deck. The evidence is still sufficient, even without the expert testimony. In addition to Rouhani's testimony regarding the wet conditions near the pool, Rouhani's sister testified that she inspected the area the next day and found that it was slick.

The association challenges the expert witness's testimony regarding lost future earnings as legally insufficient to support damages because it was conclusory or speculative. The court reviewed the evidence in the light most favorable to the judgment. The association did not object at trial, so any complaint about the methods, technique or data was waived. The record showed that the expert's opinion on lost future earnings was based on a review of the evidence and reasonable economic assumptions.

The association also asserts that the trial court erred by refusing to submit jury instruction on unavoidable accident which is "an event not proximately caused by the negligence of any party to it." *Reinhart v. Young*, 906 S.W.2d 471, 472 (Tex.1995). The court of appeals reviewed this issue for abuse of discretion. The trial court has more latitude with jury instructions than jury questions, but the jury instruction must be supported by the evidence. The court determined that the court did not abuse its discretion because the Supreme Court has ruled jury instructions are permissible, but not mandatory. Furthermore, the court determines that even if the association had been entitled to a jury instruction, the lack of instruction did not cause any harm.

K. Fraud

1. ***Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878 (Tex.App.—Dallas 2011, no pet.)**

An affidavit pointed to several instances throughout the condominium construction process in which developer and its representatives told appellant that the complex would not be restricted by the same guidelines as other developer properties, and the sign would only be regulated by the city. The affidavit further stated that the sales agreement was signed with the understanding that the sign would require a permit from the city and there would be no restrictive covenants regarding signage. The court of appeals found enough evidence existed to reverse the trial court's summary judgment on the fraud claims against developer. Refer to Section VIII.C.1 of this article for discussion.

L. Fraud in Real Estate

1. ***Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878 (Tex.App.—Dallas 2011, no pet.)**

The court of appeals noted that it had been conclusively shown that appellant spoke with a director defendant well after appellant purchased its office unit. Appellant further claimed that developer represented that the owners would form the association if one was needed. However, the court noted that the association was not formed until after the execution of the sales agreement. Therefore, the court concluded it was impossible for appellant to rely on any communications from a director or the association prior to purchasing its office unit. Refer to Section VIII.C.1 of this article for discussion.

M. Negligent Misrepresentation

1. ***Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878 (Tex.App.—Dallas 2011, no pet.)**

An affidavit pointed to several instances throughout the condominium construction process in which developer and its representatives told appellant that the complex would not be restricted by the same guidelines as other developer properties, and the sign would only be regulated by the city. The affidavit further stated that the sales agreement was signed with the understanding that the sign would require a permit from the city and there would be no restrictive covenants regarding signage. The court of appeals found enough evidence existed to reverse the trial court's summary judgment on the negligent misrepresentation claims against developer. Refer to Section VIII.C.1 of this article for discussion.

N. Civil Conspiracy

***1. Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878**

(Tex.App.—Dallas 2011, no pet.)
Appellant alleged: (1) the association, directors and a nonparty (who owned property adjacent to the condominium), presented a fraudulent document to the city in a failed attempt to induce the arrest of appellants property managers as well as the city's denial of the sign permit sought by appellant; and (2) it failed to have a sign because the directors refused to meet with them and conspired with developer to prevent approval of it. These allegations presented enough evidence to produce a genuine issue of material fact regarding the conspiracy claims. Refer to Section VIII.C.1 of this article for discussion.

O. Immunity

1. *Hall vs. Bean*, 416 S.W.3d 490 (Tex.App.—Houston [14th] 2013, no pet.)

After Hurricane Ike hit the Sands of Kahala Beach subdivision, the City of Galveston received a grant from FEMA and the state of Texas to purchase properties located in specified, heavily damaged areas. As part of the grant, property acquired with the funds was required to be maintained as open space in perpetuity and no future federal disaster assistance would be available for land purchased with grant funds.

Homeowners tried to sell their properties to the City but the officers of the subdivision's homeowners association sought a temporary injunction so the City would not purchase the properties without a release from the association, which the officers refused to give. The homeowners counterclaimed against the officers alleging breach of fiduciary duty and tortious interference with their right to sell their real property.

The officers of the association filed a summary judgment based on statutory immunity under the federal Volunteer Protection Act (42 U.S.C Section 14503(a)) (federal Act) and Tex. Bus. Org. Code §22.235(a). The homeowners' response to the summary judgment claimed the officers were not entitled to immunity because they had intentionally harmed the homeowners and because they had not acted in good faith, with ordinary care and in a manner reasonably believed to be in the best interest of the association. The trial court granted the officers' motion.

The homeowners appealed arguing the trial court erred in granting the summary judgment because there were genuine issues of material fact as to whether the officers were entitled to immunity. The court of appeals reversed and remanded because it believed the statements in officers' summary judgment affidavits were conclusory and not supported by the underlying facts. Therefore, the officers could not establish that they were entitled to judgment as matter of law.

Under Chapter 22 of the Tex. Bus. Org. Code, the court reviewed affidavits and each affidavit contained the following language:

> All decisions I made as an officer were made in good faith, and I exercised ordinary care and sough the input of other board members before making any decisions that are being challenged in this litigation. I believe that all the decisions I have made as an officer were in the best interest of the Association."

Under the Federal Act, the court made same finding as a result of the following language contained in each affidavit:

> While volunteering as a Board member for the Association, I did not take any action intending to cause any injury or harm to the [homeowners], nor did I commit criminal misconduct, act in a grossly negligent manner, or engage in reckless misconduct, or flagrant indifference to the rights or safety of others, specifically in regards to [the homeowners].

The court said none of the affidavits provide any underlying facts to support the assertions in this paragraph and therefore the statements are merely conclusory. Therefore, the affidavits failed as summary judgment evidence.

P. Removal of Director from Office

1. *Matzel v. Stonecrest Ranch Prop. Owners' Ass'n*, 305 S.W.3d 368 (Tex.App.—Houston [14th Dist.] 2010, no pet.)

Carol Matzel was elected to serve on the board of directors of the Stonecrest Property Owners' Association. During Matzel's absence, the other board members recommended the Architectural Control Committee (ACC) approve a variance application, which the ACC did. Matzel disagreed and sought legal counsel. Her counsel sent a demand letter for the withdrawal of the variance acceptance. The letter stated that Matzel was prepared to seek all remedies available and the board should forward the letter to the association's attorney. Shortly thereafter, the board member Christine Ambrosio circulated a petition calling for a special meeting for Matzel's removal from the board. A special meeting was held for the discussion and voting on Matzel's removal. At the meeting, Ambrosio discussed why she initiated the petition, Matzel spoke, members commented and asked questions, and finally the members voted to remove Matzel.

Matzel filed suit against the association claiming various causes of action. All of the causes of action stemmed from Matzel's argument that the association violated the governing documents of the association by improperly removing her from the board. The trial court granted both the association's traditional and no-evidence summary judgments. Matzel appealed.

On appeal, Matzel argued summary judgment was improper because a fact issue existed as to whether there was cause for her removal. Specifically, the petition and the meeting minutes failed to state a cause. In support, Matzel looked to the bylaws which stated, "[a]ny elected Director may be removed from office for cause . . ." The court of appeals rejected her argument. First, the court held that nothing in the bylaws or case law indicated that the sending of a demand letter to the board on which she sat, and causing the association to incur legal expenses to respond, was not sufficient to constitute cause.

Second, the court observed that the petition explicitly stated its purpose was to call a special meeting "to remove Carol Matzel." Further, the meeting minutes showed that prior to the vote to remove Matzel, Ambrosio told the members *why* she initiated the petition, Matzel addressed the members and the members provided comments. Third, the court did not find that the association's governing documents created a duty to state the cause for her removal in the petition or meeting minutes. Rather, the bylaws only require there exist cause for removal. The court held that that Matzel did not present evidence to raise a genuine issue of material fact that the association has a duty to state a cause for her removal under the association's bylaws or that the association breached a duty owed to her to follow its bylaws by not stating the cause for her removal in the circulated petition or meeting minutes, therefore the trial court's granting of summary judgment was proper.

XI. CERTAIN ASSOCIATION CAUSES OF ACTION

A. Right to Institute, Defend, Intervene In, Settle or Compromise Litigation

1. ***Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n*, 285 S.W.3d 45 (Tex.App.-Houston [1st Dist.] 2009, no pet.**)

The association brought suit on behalf of the homeowners against the developer, Stanford Development Corporation for breach of contract, deceptive trade practices, breach of warranty, fraud, and negligent design, construction and supervision. Stanford filed a motion to compel arbitration based on the arbitration clause in the owners' earnest money contracts. The trial court denied Stanford's motion holding that the association was not bound by the arbitration clause, and Stanford appealed.

The issue on appeal is whether or not the arbitration clause is binding on the association as a non-party and non-signatory to the contract. The court of appeals examined six theories that may bind non-signatories to arbitration agreements: "(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third party beneficiary." Stanford argued under equitable estoppel that the non-signatory association is bound by the arbitration agreement based on the association's reliance on the earnest money contracts for its causes of action against Stanford. The court agreed with Stanford and explained, citing In re FirstMerit Bank, N.A., "when the nonsignatory asserts claims identical to the signatories' contract claims, all claims must be arbitrated."

The court held that because the association brought suit based on the owners' earnest money contracts and on the owners' behalf, it cannot escape the arbitration agreement of the same contract simply because it is a non-party. Additionally, the court held that because the other tort claims are intertwined with the contract claims and because the arbitration clause is broad enough to cover both, all claims must be arbitrated.

The association invoked authority under Tex. Prop. Code Chapters 81 and 82 to bring suit, however because it is bringing suit on behalf of the owners, it too, is bound to arbitration. The court of appeals reversed and remanded.

2. ***Rakowski v. Comm. to Protect Clear Creek Village Homeowners' Rights*, 252 S.W. 3d 673 (Tex.App.-Houston [14th] 2008, pet. denied)**

The court of appeals determined that the Committee did have standing by virtue of being composed of homeowners and, additionally, by the restrictions that provided an owner the right to prosecute deed restriction violations. Refer to Section II.D.1 of this article for discussion.

3. ***Ski Masters of Tex. v. Heinemeyer*, 269 S.W.3d 662 (Tex.App.–San Antonio 2008, no pet.)**

Ordinarily, restrictive covenants are only enforceable by the contracting parties or those in direct privity.

However, citing *Giles v. Cardenas*, the court's opinion stated "where many property owners are interested in a restrictive covenant, any one of them can enforce it." The court of appeals noted that whether or not the Residents have standing to enforce the restrictive covenants depend on two factors, (1)"the existence of a general plan or scheme of development" and (2) "that was part of the inducement for purchasers to obtain land within the restricted are." Refer to Section II.A.2 of this article for discussion.

4. ***EMC Mortgage Corp. v. Window Box Ass'n, Inc.*, 264 S.W.3d 331 (Tex.App.-Waco 2008, pet. denied)**

The court of appeals stated that the general rule is that "only the mortgagor or a party who is in privity with the mortgagor has standing to contest the validity of a foreclosure sale pursuant to the mortgagors deed of trust," however, "when the third party has a property interest, whether legal or equitable, that will be affected by such a sale, the third party has standing to challenge such a sale to the extent its rights will be affected by the sale." Refer to Section V.B.3 of this article for discussion.

5. ***Girsh v. St. John*, 218 S.W.3d 921 (Tex.App.-Beaumont 2007, no pet.)**

The court of appeals determined that plaintiff had standing to sue since she was "entitled to benefit under the terms of a restrictive covenant." Also, the restrictive covenants explicitly stated that property owners in the subdivision may enforce the deed restrictions. Refer to Section VI.A.6 of this article for discussion.

B. Deceptive Trade Practices Act

(No cases during this timeframe.)

C. Condominiums

1. ***Allan v. Nersesova*, 307 S.W.3d 564 (Tex.App.—Dallas 2010, no pet.)**

The court of appeals upheld a downstairs condominium owner's right to sue the upstairs owner for damage caused by a leak from the upstairs unit because this right was provided for in the declaration. Refer to Section IV.A.2 of this article for discussion.

2. ***Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n*, 285 S.W.3d 45 (Tex.App.-Houston [1st Dist.] 2009, no pet.)**

The association invoked authority under Tex. Prop. Code Chapters 81 and 82 to bring suit, however because it is bringing suit on behalf of the owners, it too, is bound to arbitration. Refer to Section XI.A.1 of this article for discussion.

3. ***Schindler v. Baumann*, 272 S.W.3d 795 (Tex.App.-Dallas 2008, pet. denied)**

The court of appeals rejected a condominium owner's right to sue an upstairs neighbor for water damages holding there was no contract between the owners or right to sue in the declaration. Refer to Section VI.A.5 of this article for discussion.

D. Imputed Knowledge

(No cases during this timeframe.)

E. Insurance

1. ***Schwartzott v. Etheridge Prop. Mgmt.*, 403 S.W.3d 488 (Tex.App.—Houston [14th] 2013, no pet.)**

Joseph and Jamie Schwartzott owned a condominium unit at the Maravilla Condominiums, which was governed by the Maravilla Owners Association, Inc. After Hurricane Ike caused damage to their unit, the Schwartzotts filed an insurance claim. The insurance company paid for personal property, but informed the Schwartzotts that money for the structural repairs would go to the association because the association was responsible for repairing the individual units. After receiving the insurance monies, the association began making repairs.

The Schwartzotts filed suit against the association, claiming the association wrongfully exercised control over the insurance monies. The association filed a plea to the jurisdiction claiming the Schwartzotts lacked standing. The trial court granted the motion. The Schwartzotts appealed.

First, the association argued there was no standing based on §82.111 of the Tex. Prop. Code. Subsection (a)(1) states in relevant part, "[t]he association . . . shall maintain . . . property insurance on the insurable common elements insuring risks against all risks of direct physical loss commonly insured against." Subsection (e) states, "a claim for any loss covered by the policy under Subsection (a)[,] . . . The insurance proceeds for that loss shall be payable to . . . the association, and *not to any unit owner* or lienholder." Subsection (f) states, "unit owners and lienholders are not entitled to receive payment of any portion of the [insurance] proceeds unless there is a surplus . . ." The court of appeals rejected this argument. §82.111 only applied to insurance policies maintained by the association. The insurance policy for the Schwartzotts was independent of §82.111, thus Subsections (e) and (f) were inapplicable to support the trial court's finding of lack of standing.

Second, the court examined the association's argument that Section 8.2 of the association's Declaration proved the Schwartzotts' lack of standing. Section 8.2 reads, "[t]he proceeds of any insurance collected shall be made available to the Association for the purpose of repair, restoration or replacement." The court rejected this argument and found there was standing because the Schwartzotts could be aggrieved by how the insurance monies had been used. Also, there was a real controversy regarding the construction of Section 8.2, which could be determined by the judicial declaration sought.

For these reasons, the court found the trial court erred in granting the association's plea to the jurisdiction.

F. Easements

1. ***S & G Associated Developers, LLC v. Covington Oaks Condominium Owners Ass'n, Inc.*, 361 S.W.3d 210 (Tex.App.—El Paso 2012, no pet.)**

Covington Oaks Condominiums is a four-phase residential development located on real property that used to be one tract of land owned by the original developer. Over the years Phases I, II, and III were developed and came under the governance of the Covington Oaks Condominium Owners Association. Originally, only one gate and one main road was to serve as the entrance for all four Phases. However, at some point, the original developer lost title to Phase IV and it was severed from the remaining property. Phase IV came under the ownership of Stefanyk Development, Inc. Later, Don Stefanyk and John Garza formed S & G Associated Developers, L.L.C. to build a condominium on the Phase IV land. Phase IV was located in such a position, that it had no access to any public road and therefore required the use of the gate and main road serving Phases I, II, and III.

A dispute arose as to whether Stefanyk and S & G had the right use the gate and main road. In 1995, a settlement agreement was reached which required Stefanyk to build up to six condominium buildings on Phase IV. After construction was complete, Stefanyk and the future residents would be granted access to Phase IV through the main gate and entrance. After several years, Covington Oaks sent a demand to Stefanyk stating that the settlement agreement was never consummated and therefore was no longer valid. Covington Oaks demanded that Stefanyk construct an alternative entrance to Phase IV. A few years later, S & G filed suit against Covington Oaks. The Villareals, who became part owners of Phase IV, intervened in the suit. In 2005, the parties entered into a mediated settlement agreement. In this agreement, Stefanyk was to pay Covington Oaks $15,000. Further, the parties would dismiss all claims and the Villareals would undertake certain actions, if Phase IV was annexed by the members of Covington Oaks within 90 days from the date of the agreement. After the proposed annexation failed and additional issues arose regarding the ownership of Phase IV, the trial court granted Covington Oaks no-evidence and traditional summary judgments so that there was no easement to or from Phase IV.

Stefanyk appealed raising three issues: (1) the trial court erred in granting the no-evidence summary judgment on the easement claims; (2) the trial court erred in granting summary judgment on the breach of contract claim; and (3) the trial court erred in granting a traditional motion for summary judgment.

It is universally accepted when a unified tract is split, circumstances may cause the creation of an easement. In order to determine the sufficiency of the trial court's granting of the summary judgments, the court of appeals looked to the elements of creating an implied easement. The two types of implied easements are by necessity and by prior use. The elements for an easement by necessity are: (1) unity of ownership at severance; and (2) necessity at the time of severance. The elements for easement by prior use are: (1) unity of ownership at severance; (2) apparent and continuous use of the easement at severance; and (3) necessity. Additionally, easements can be created by estoppel when: (1) a representation is made to the promisee; (2) the representation was believed; and (3) the promisee relied on the representation. *Ingham v. O'Block*, 351 S.W.3d 96 (Tex.App.-San Antonio 2011, pet. denied).

Under these elements, the court found the no-evidence and traditional summary judgments were improper to the easement claims. Garza submitted an affidavit that states the only way to connect Phase IV to the main road is through Covington Oaks private entrance and road that connects all four phases. This statement was sufficient to create a fact issue on whether the necessity continues to the present day.

Covington Oaks asserted that there was no evidence that a plat or marketing map showed any easement or that a plat or marketing map was a promise given to S & G on which they relied. A representation on a plat may satisfy the first element of an easement by estoppel. However, the court found that S & G disclaimed any reliance on this method of proof. *Halsell v. Ferguson*, 109 Tex. 144, 202 S.W. 317, 322 (1918). The motion also asserts that there was no evidence that S & G relied on any promise of an easement before taking any action to develop Phase IV. The court recalled that first settlement agreement provided that Stefanyk and Phase IV residents could use the main gate and entrance after the condominium buildings were constructed. Further, Garza's affidavit stated that he thought he had a right to use the road because of S & G's continued use of the road since 1993. Because of this reliance, S & G constructed a condominium building. Finally, the court found that Covington Oaks did not formally indicate an unwillingness to allow S & G to use the main gate and entrance until 2001. Again, the court found enough evidence to raise a fact issue regarding the representations made by Covington Oaks.

Covington Oaks also asserted the affirmative defense of res judicata as one of its grounds for summary judgment. It claimed that the 2005 settlement agreement purported to resolve all of the claims raised in this suit. Covington Oaks stated that "an agreed judgment of dismissal in settlement of a controversy is a judgment on the merits." *Essman v. Gen. Accident Ins. Co. of America*, 961 S.W.2d 572, 574 (Tex.App.-San Antonio 1997, no pet.). Although a correct statement of the law, the court found that this did not apply because the 2005 agreement did not result in an agreed judgment of dismissal. Instead, the case proceeded to summary judgment. Covington Oaks further asserted that the trial court's denial of a temporary injunction in 2003 for its affirmative defense of res judicata. However, the court found that a denial of a temporary injunction is not a final determination on the merits. *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 637 (Tex.App.-Houston [1st Dist.] 2010, pet denied).

Covington Oaks' summary judgment further asserted that Stefanyk failed to meet its burden of establishing necessity for its easement claims. The motion made several unsupported allegations that although a curb cut was placed to provide a driveway to be constructed to connect the building to the main road, Stefanyk's transfer of the property to the Villareals resulted in land locking the property. The court referred to a letter from the Covington Oaks' attorney which recognized the "implied easement held by owners of Phase IV over the narrow strip of land owned by" Covington Oaks which separated Phase IV from the main road. The court also reviewed the affidavit by the Covington Oaks' property manager. The manager claimed that Covington Oaks granted an easement across the narrow strip of land, owned by Covington Oaks. On appeal, Covington Oaks argued that the manager's affidavit established an alternative easement, thereby extinguishing necessity. The court again relied on the fact that necessity is determined at the time of severance and there is no need that necessity continue after severance for an easement by prior use. Once an easement is determined based on necessity, the location cannot change without consent of both parties. Therefore, even if Covington Oaks provided an alternative easement, this did not invalidate S & G's right to any existing implied easement.

Covington Oaks claimed that S & G could not prove easement-by-estoppel. However, the court found that for a traditional motion for summary judgment, the burden rested with Covington Oaks to negate the elements of easement-by-estoppel. The court did discuss the allegations made in the motion which provided evidence of Covington Oaks' constant dispute of S & G's right to use the main road, gate and amenities. However, the court found that statements made by the property manager evidencing this position were insufficient to conclusively disprove an easement-by-estoppel. The court further pointed to the 1995 settlement agreement as well as Garza's affidavit in establishing the fact that Covington Oaks never formally indicated an unwillingness to allow S & G to use the main gate and entrance until 2001.

Regarding the contract claim, S & G argued that Covington Oaks failed to solicit the required vote to annex Phase IV by its members as required by the 2005 settlement agreement. The court disagreed and found that the 2005 settlement agreement suggests that Covington Oaks did not have a duty to solicit and ballot it members to annex Phase IV indefinitely. Instead, the settlement agreement was clear that the vote was to be completed within 90 days. The evidence was clear that Covington Oaks put the issue to a vote with three rounds of balloting. In addition, the minutes of the July 2005 board meeting at which time the Board decided to discontinue proceeding with attempting to annex Phase IV, provided sufficient support to show that Covington Oaks performed its obligation to conduct a vote.

XII. ASSOCIATION BOOKS AND RECORDS

A. Right to Inspect and Copy

1. ***Watson v. Homeowners Ass'n of Heritage Ranch, Inc.*, 346 S.W.3d 258 (Tex.App.—Dallas 2011, no pet.)**

Steve Watson is a member of the non-profit Homeowners Association of Heritage Ranch, Inc. Watson sent the association a written demand to inspect the records of the association pursuant to Tex. Bus. Org. Code §22.351. That section relates to non-profit corporations and states, "[a] member of a corporation, on written demand stating the purpose of the demand, has the right to examine and copy at the member's expense, in person or by agent, accountant, or attorney, at any reasonable time and for a proper purpose, the books and records of the corporation relevant to that purpose." The association permitted Watson to examine and copy some records; however, Watson alleged the association withheld some records.

Watson filed suit seeking a writ of mandamus to permit him to inspect the books and records. Subsequently, the association permitted Watson to review the records two more times. The association then moved for summary judgment on the affirmative defense that the suit was not ripe or moot because the association never denied access to examine and copy its books and records. The trial court granted the summary judgment.

The court of appeals affirmed the trial court. It found that in the communications between the association and Watson, the association never denied him access. Rather, the association allowed Watson to review the books and records multiple times. Further, the association's choice of when Watson reviewed the books and records were reasonable and allowed under the bylaws of the association.

[Editor's Note: Tex. Prop. Code §209.005 now dictates a procedure and time frames for a (non-condominium) residential association to respond to a member's record request.]

2. ***Webb v. Voga*, 316 S.W.3d 809 (Tex.App.—Dallas 2010, no pet.)**

Chapter 207 of the Tex. Prop. Code only requires an association to disclose information to an "owner," which means the "person who owns record title to property in a subdivision." Refer to Section VI.A.3 of this article for discussion.

XIII. ZONING

(No cases during this timeframe.)

A. Priority of Restrictions

(No cases during this timeframe.)

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