ZONING & PLATTING COMMISSION

~~MINUTES~~ Handouts

MAY 6, 2014

C5

I. Limitation of Comments in Opposition to Proposed Re-subdivision

--Comments are to be construed only in opposition to the proposed re-subdivision and in no way should be construed or interpreted to indicate any defamatory statement pertaining to the land owner of record or to the property subject to this hearing. The terms "subject land owner" and "applicant" refer to Mr. Roy Whitaker. The terms "subject parcel", "the property", and "the property subject to this application" refer to Lot 3, Block D of Balcones Oaks Section II, or 7305 Kapok Lane.

II. Arguments to Deny Application of Re-subdivision

1. Overview—This application appears to be the result of a purchase of a parcel of land for an amount greater than the market value or appraised value.
   -The subject parcel was on the appraisal rolls for $50,000 as were many of the parcels in the neighborhood. Recently, the appraised value was increased to $75,000. Despite these appraised values, it is my understanding the subject owner purchased the parcel in question for approximately $170,000. In order to render the purchase a profitable venture, the land owner has requested a re-subdivision of the existing parcel in order to place two dwellings or duplexes on the property. If the re-subdivision is permitted, the land owner has the potential for recovering his purchase price and the potential for earning a profit. However, approval of this application and construction of the intended structures appears to violate the covenants and restrictions applicable to all property owners in this subdivision, the zoning ordinances applicable to the City of Austin, and the Texas Property Code. Furthermore, if this application is approved, the construction of the intended structures has the potential to adversely affect the values of the neighboring properties as well as nearby properties, including my own.

2. Deed Restrictions
   In 1977, the Balcones Oaks Corporation, as developer of the subdivision, established restrictions on all of the lots within the subdivision including the property subject to this proposed re-subdivision. According to the deed records, these restrictions apply to all subsequent owners of each lot, and each owner and subsequent owner agree to abide by the terms of the restrictions. The applicant's deed references these restrictions. Most notably, some of the purposes of the restrictions are to "protect owners of lots against improper use of surrounding lots; to preserve so far as practicable the natural beauty of said property; to guard against the erection of poorly designed or proportioned structures…to encourage and secure the erection of attractive improvements on each lot with appropriate

locations; to prevent haphazard and inharmonious improvements of lots…and in general to provide for development of the highest quality to enhance the value of investments made by owners."

a. Approval of the proposed application will violate the deed restrictions because approval will not protect the owners of improper use of the surrounding lots, preserve the natural beauty, guard against poorly proportioned structures, and will not prevent inharmonious improvements of the lot. Approval of the application will be, in my opinion, disharmonious to the surrounding properties because none of the other properties on Kapok Lane or within 500 feet are re-subdivided and have two structures built next to single structure properties. In my opinion, the proposed construction will look like two structures crammed into a lot between every other structure and will look crowded and out of place.

b. Within the deed restrictions, under subparagraph A, "No building shall be erected, altered, placed or permitted to remain on any lot other than one single family dwelling…" Approval of the proposed application will violate the deed restrictions because the application seeks to construct "single family or duplex sites". In addition, the proposed re-subdivision appears to be an attempt to circumvent the deed restrictions because only one single family dwelling can be placed on a lot. Of course, the applicant could attempt to amend the deed restrictions, but he appears to need a majority vote of all the owners affected by the restrictions, and that method would be more involved than proposing a re-subdivision.

c. The Texas Property Code, §202.003, states "A dedicatory instrument or restrictive covenant may not be construed to prevent the use of property as a family home. However, any restrictive covenant that applies to property used as a family home shall be liberally construed to give effect to its purposes and intent except to the extent that the construction would restrict the use as a family home. My comments in opposition are only directed at the proposed re-subdivision and not in the construction of a single family dwelling on the subject property in its current state. As such, the above restrictions should be liberally construed to protect the property owners who are bound by the restrictions, not prevent the applicant from constructing a dwelling in accordance with the restrictions, but not enable the applicant to circumvent the restrictions with the proposed application.

d. Nuisance—The deed restrictions state "No noxious or offensive activities shall be carried on or upon any lot, not shall anything be done thereon which may be or may become an annoyance to the neighborhood, or which is opposed to the purpose of these restrictions." Approval of applicant's proposed re-subdivision will be an annoyance to several neighbors on Kapok Lane as well as other property owners within the neighborhood because it will dilute the purpose and intent of the restrictions applicable to all property owners and may result in lowered property values.

3. Zoning
   a. The subject property is zoned with the classification "SF-2" which is for a single-family residence, standard lot. The subject property is not zoned for a duplex, nor is a duplex permissible. As a result, applicant's proposal should be denied.
   b. Austin Code of Ordinances. §25-2-3 define SINGLE-FAMILY RESIDENTIAL use is the use of a site for only one dwelling unit, other than a mobile home. Using the site for more than one dwelling unit or a duplex appears to violate this section of the Code.

4. Cases

   Should the proposed application be approved, applicant does not appear to be in a position to continue the proposed construction because the burden of proof required for showing violations of the deed restrictions is lowered. To obtain injunctive relief, a party must ordinarily 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. *Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845, 849 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). When the basis for suit is the enforcement of a deed restriction, instead of showing proof of irreparable injury, the party seeking relief need only demonstrate that the defendant intends to do an act that would breach the restrictive covenant. *Id.*

   Restrictive covenants are subject to the general rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex.1998). When construing a restrictive covenant, courts focus on ascertaining and giving effect to the intent of its drafters, using the language of the instrument as their guide. *Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 925 (Tex.App.-Houston [1st Dist.] 2010, no pet.). Courts examine the covenant as a whole in light of the circumstances present when it was written, affording words and phrases their

commonly accepted meanings. *Pilarcik*, 966 S.W.2d at 478; *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657–58 (Tex.1987).

Covenants restricting the free use of land are not favored at common law, but they will be enforced if clearly worded and confined to a lawful purpose. *Wilmoth*, 734 S.W.2d at 657. Under the common law, if any doubts arise from the terms of a covenant, such doubts must be resolved in favor of the free and unrestricted use of land. *Id.* Courts may not enlarge, extend, stretch, or change the words of the restriction by construction. *Id.* If the covenant contains any ambiguity, it must be strictly construed against the party seeking to enforce it. *Id.*

In 1987, the legislature amended the Texas Property Code to provide that all restrictive covenants in instruments governing certain residential developments, regardless of the date on which they were created, must be liberally construed to give effect to their purpose and intent. See Act of May 23, 1987, 70th Leg., R.S., ch. 712, § 1, 1987 Tex. Gen. Laws 2585, 2585 (current version at Tex. Prop.Code Ann. §§ 202.002(a), 202.003(a) (Vernon 2007)).

In *Hooper v. Lottman*, 171 S.W. 270 (Tex.Civ.App.-El Paso 1914, no writ), the court stated the rule for restrictive covenants as follows:

> "[T]he 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 the 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.

Id. at 272; see *Evans v. Pollock*, 796 S.W.2d 465, 466 (Tex.1990) (Texas Supreme Court described Hooper as "[t]he leading Texas case" in this area);

Applicant was aware restrictions, covenants, conditions, etc., were on the subject property at the time of purchase, and such is acknowledged in the deed to the property.

Finally, the San Antonio Court of Appeals ruled on a case with facts very similar to those in the proposed application. In *Lehmann v. Wallace*, 510 S.W.2d 675 (Tex.Civ.App.-San Antonio 1974, writ refused n.r.e.), the court found that while the deed restrictions did not prohibit re-subdivision of an existing lot, the restrictions imposed a requirement that each lot have only one single family dwelling.

In 1967, Lehmann and Monroe created a subdivision with 35 lots. On April 14, 1967, Lehmann and Monroe sold Tracts 13, 14, & 15 to Mr. & Mrs. Wallace with covenants, restrictions and conditions. On December 15, 1970, Lehmann and Monroe, in violation of the restrictions re-subdivided Tract No. 12 and conveyed it (Tract 12-a) to Mr. & Mrs. Richardson. On the same day, the two sellers also conveyed the other one-half of Tract 12 (Tract 12-b) to the Richardsons. The Richardsons constructed a residence on Tract 12-b and were contemplating building another residence on the other half of Tract 12 (Tract 12-a). The trial court found the conveyance by Lehmann and Monroe to the Richardsons was an attempt to re-subdivide tracts in the subdivision in violation of the subdivision restriction stating lot owners could not construct more than one primary residence on any one total tract in the subdivision.

Perhaps to protect the value of their purchase, the Wallaces, who purchased Tracts 13, 14 & 15, sued Lehmann and Monroe to prevent them from re-subdividing lots. The appellate court noted:

> "Where the owners of a tract subdivide it and sell distinct parcels thereof to separate grantees, imposing restrictions upon its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either upon the theory that there is a mutuality of covenants and consideration, or upon the ground that mutual negative equitable easements are created. Where parcels are sold with reference to such a uniform plan to persons having notice thereon, the grantees may enforce the restrictions within this rule,

irrespective of the order of the several conveyances and irrespective of whether the covenants run with the land."

See *Wallace*, 510 S.W.2d 675 at 681 quoting *Monk v. Danna*, 110 S.W.2d 84 (Tex.Civ.App.—Dallas 1937, writ dism'd).

Lehmann and Monroe argued the restrictive covenants at issue are binding only upon the grantee of a deed to a respective tract and do not bind the developer, and that the developer is free to subdivide the lots and change the size of lots that he owns. The court disagreed and said "It is manifestly unfair and contrary to the intent of the parties. If the purchaser could not re-subdivide his tract and could build only one primary residence, and the developer could re-subdivide any tract that he owns into two, three, four or as many lots as he desires, with each lot being entitled to build one primary residence thereon, the effect would be to violate and destroy the general scheme of development which was for the mutual benefit of all the parties." *Id.* at 683.

Applying this case's holding to our own facts, we have the deed restrictions running with the properties for all owners in the Balcones Oaks, Section II subdivision. Similar to Lehmann and Monroe, to allow one developer (applicant) to re-subdivide a tract he owns would be manifestly unfair and violate and destroy the general scheme of development at the expense of the remaining property owners.

III. Conclusion

I oppose applicant's proposal to re-subdivide Lot 3, Block D of Balcones Oaks Section II because re-subdivision appears to violate Austin Zoning Ordinances, the restrictions and covenants placed on all property owners within the Balcones Oaks subdivision, and the cases supporting the sanctity of restrictions and covenants that inure to the benefits of all property owners within the subdivision.

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THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

I-73-6925

This declaration of restrictions made this 21st day of October, 1977, by Balcones Oaks Corporation, a Texas Corporation, acting herein by and through the undersigned, hereinafter called "Developer".

W I T N E S S E T H:

WHEREAS, Developer is the sole owner of all lots in Balcones Oaks II, a Subdivision in Travis County, Texas, as shown by the map or plat thereof of record in Book 75, Page 373 Plat Records of Travis County, Texas, to which plat and its record reference is here made for all purposes, and desires to encumber said lots with the covenants, conditions, restrictions, reservations, and charges hereinafter set forth, which shall inure to the benefit and pass with said property, each and every parcel thereof, and shall apply to and find the successors in interest and any other owner thereof.

NOW, THEREFORE, Developer, the sole owner in fee simple of Balcones Oaks II, hereby declares that all lots in said subdivision shall be held, transferred, sold, and conveyed, subject to the following covenants, conditions, restrictions, reservations, and charges, hereby specifying and agreeing that this declaration and the provisions hereof shall be and do constitute covenants to run with the land and shall be binding on Developer, its successors and assigns, and all subsequent owners of each lot, and the owners, by acceptance of their deeds, for themselves, their heirs, executors, administrators, successors and assigns, covenant and agree to abide by the terms and conditions of this declaration, hereby amending the restrictive covenants previously impressed upon the subject property:

I.

PROPERTY SUBJECT TO THE DECLARATION - 1-73-6926

The property which shall be held, transferred, sold, and conveyed, subject to the covenants, conditions, restriction, reservations, and charges hereinafter set forth is described as follows:

All of the lots in Balcones Oaks II, a Subdivision in Travis County, Texas, as shown by the map or plat thereof recorded in Book 75, Page 373, Plat Records of Travis County, Texas, to which plat and its record reference is here made.

II.

COVENANTS, CONDITIONS, RESTRICTIONS, RESERVATIONS, AND CHARGES

The property described in Section I hereof is encumbered by the covenants, conditions, restrictions, reservations, and charges hereinafter set forth to insure the best and highest use and the most appropriate development and improvement of each lot for residential purposes within said subdivision; to protect owners of lots against improper use of surrounding lots; to preserve so far as practicable the natural beauty of said property; to guard against the erection of poorly designed or proportioned structures of improper or unsuitable materials, to encourage and secure the erection of attractive improvements on each lot with appropriate locations; to prevent haphazard and inharmonious improvements of lots; to secure and maintain proper setbacks from streets and adequate free space; and in general to provide for development of the highest quality to enhance the value of investments made by owners.

A. Land Use and Building Types: No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one single family dwelling not to exceed two and one-half stories in height, except that a separate garage building, servants' quarters of one-story, or a one-story guest house not to exceed 600 square feet of floor area will be permitted, provided that such structure or structures are attached to the main residence by a common wall or by a covered passageway. No building shall remain uncompleted for more than one year after construction has been commenced.

1-73-6927

B. Dwelling Size: Single-story dwellings erected on any lot shall have not less than 1,500 square feet of finished, heated living space. Dwellings containing more than one story shall have not less than 2000 square feet of finished, heated living space.

C. Masonry: Each dwelling shall have not less than 50% of its exterior walls of masonry construction; provided, however, the Architectural Control Committee may waive this requirement in whole or in part, but any such waiver must be in writing.

D. Architectural Control: No building shall be erected, placed or altered on any lot until a copy of the construction plans and specifications and a plan showing the location of the structure and all driveways and sidewalks have been delivered to and approved by the Architectural Control Committee, hereinafter called "Committee", as to quality of workmanship and materials, harmony of external design with existing structures, and as to locations with respect to topography and finished grade elevation. A copy of the construction plans and specifications and a plan showing the location of the structure and all driveways and sidewalks, if approved, shall remain in the possession of said Committee until this subdivision has been built out in its entirety. The Committee's approval or disapproval as required in these covenants shall be in writing. The decision of the Committee shall be rendered at the earliest practicable date but in no event later than twenty (20) working days subsequent to initial receipt of plans and specifications and location plan. A copy of the plans and specifications and location plan shall be delivered to the Architectural Control Committee at the office of the Balcones Oaks Corporation, Austin, Texas, not less than twenty-five (25) days prior to the date construction is commenced. In the event the committee, or its designated representative, fails to approve or disapprove within twenty (20) days after plans and specifications 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 and the related covenants shall be deemed to have been fully complied with.

E. Easements and Setbacks: Easements reserved and setback requirements are those set forth on the recorded plat. Easements for installation and maintenance of utilities and drainage facilities and public walkways and fences are reserved as shown on the recorded plat. Within these easements no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of utilities. The easement area of each lot and all improvements in it shall be maintained continuously by the owner of the lot, except for those improvements for which a public authority or utility company is responsible. No fence, wall or hedge shall be erected or placed forward of a point 25 feet from the nearest road right of way as shown on the recorded plat.

F. Nuisances: No noxious or offensive activities shall be carried on or upon any lot, nor shall anything be done thereon which may be or may become an annoyance to the neighborhood, or which is opposed to the purpose of these restrictions.

G. Temporary Structures or Emplacements: No structure or placement of a temporary character, mobile home, motor home, recreational vehicle, boat, bus, trailer, derelict, junk or racing vehicle, or any vehicle without a current license plate, basement, or tent, shack, shed, barn, or other outbuilding that is larger than eight (8) feet by ten (10) feet in width and eight (8) feet in height shall be erected, placed, driven, altered or permitted to remain on any lot at any time, either temporary or permanent, without the prior written consent of the Architectural Control Committee. All boats, travel trailers, and motor homes shall be parked behind the forward setback building line. No boat, travel trailer or motor home shall be parked in the streets of this subdivision nor in the driveways forward of the front setback building line. No residential building may be moved upon any lot in this addition. The use of an outside tool or storage shed must be so designed as to preclude visible and objectionable sighting from the frontal streetside elevation.

H. Signs: No signs of any kind shall be displayed for public view on any lot, except one sign of not more than five square feet advertising the property for sale or rent, or signs used by builers to advertise the property for sale.

I. Oil and Mining Operations: No oil drilling, oil development operations, oil refining, quarrying, or mining operations of any character shall be permitted upon any lot.

J. Livestock and Poultry: No animals, livestock or poultry of any kind shall be raised, bred, or kept on any lot, except any owner may keep not more than two dogs, two cats, or two other household pets.

K. Garbage and Refuse: No lot shall be used or maintained as a dumping ground for trash, garbage or other waste and the same shall not be kept, except in sanitary containers.

L. Utility Services: All buildings constructed on any lot shall be connected to City of Austin utility services.

M. Water Supply: No individual water supply system shall be permitted on any lot.

N. Sewage Disposal: No individual sewage disposal system shall be permitted on any lot.

III.

SIDEWALKS

The owner of each lot shall construct sidewalks as required by the City of Austin or any other political subdivision in the State of Texas or where such lot is shown by the plat of record as requiring a sidewalk to be built thereon.

IV.

TERM

These covenants are to run with the land and shall be binding on parties and all persons claiming under them for a period of twenty-five years from date hereof, at which time said covenants shall be automatically extended for successive periods of ten years each, unless by a vote of a majority of the then owners of the lots encumbered by this declaration, it is agreed to change said declaration in whole or in part.

1-73-6930

V.

ENFORCEMENT

If the owner of any lot, or their heirs, executors, administrators, successors, assigns, or tenants shall violate or attempt to violate any of the covenants set forth in this declaration, it shall be lawful for any person or persons owning any lot encumbered by this declaration, or Developer to prosecute any proceedings against the person or persons violating or attempting to violate any such covenant. The failure of the owner or tenant to perform his obligations hereunder would result in irreparable damage to the Developer and other owners of lots in Balcones Oaks II, thus the breach of any provision of this declaration may not only give rise to an action for damages at law, but also may be enjoined by an action for specific performance in equity in any court of competent jurisdiction. In the event enforcement actions are instituted and the enforcing party recovers, then in addition to the remedies specificed above, court costs and reasonable attorney's fees shall be assessed against the violator.

IV.

SEVERANCE

In the event any of the foregoing covenants, conditions, restrictions, reservations, or charges is held invalid or unenforceable by a court of competent jurisdiction, it shall not affect the validity and enforceability of the other covenants, conditions, restrictions, reservations, or charges. If one of the foregoing is subject to more than one interpretation, the interpretation which more clearly reflects the intent hereof shall be enforced.

VII.

NUMBER AND GENDER

The singular shall be treated as the plural and vice versa if such treatment is necessary to interpret this declaration. Likewise, if either the feminine, masculine, or neuter gender shall be any of the other genders, it shall be so treated.

EXECUTED This 28th day of October 1977.

BALCONES OAKS II

BY Howard K Schackelford
Howard Schackelford

BY Doris M. Schackelford
Doris Schackelford

 6128 1552

THE STATE OF TEXAS I
I
COUNTY OF TRAVIS I

I-73-6931

BEFORE ME, the undersigned authority, on this day personally appeared Howard Shackelford, and Doris Shackelford, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and in the capacities therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 28th day of October, 1977.

NOTARY SEAL

Sharon L. McMillen
Notary Public in and for
Travis County, Texas

FILED
Apr 6 2 02 PM 1978
Doris Shackelford
COUNTY CLERK
TRAVIS COUNTY, TEXAS

STATE OF TEXAS COUNTY OF TRAVIS
I hereby certify that this instrument was FILED on the date and at the time stamped hereon by me; and was duly RECORDED, in the Volume and Page of the named RECORDS of Travis County, Texas, as Stamped hereon by me, on

APR 6 1978

Doris Shackelford
COUNTY CLERK
TRAVIS COUNTY, TEXAS

6128 1553

Planning and Development Review Department
P.O. Box 1088, Austin, Texas 78767
One Texas Center, 505 Barton Springs Road
Telephone: (512) 974-6370 Fax: (512) 974-2423

DA-2014-0233

Site Development Exemption Request

Site Address: 7305 Kapok Ln
Project Name: Balcones Oaks Sec 2
Legal Description: Lots 1&2 Block D Balcones Oaks Sec 2 Addition

Zoning: 85-101 Watershed: Bull Creek Flood Plain? ☐ Yes ■ No
Existing Land Use(s): Single Family
Proposed Land Use(s): Single Family

Brief /General Description of the Development being sought:

Lot 3 is being subdivided into 2 lots for redevelopment to single family or duplex sites
Drainage Improvements

Attach a detailed description of the proposed development in a memorandum or letter and a site plat or survey plan that graphically indicates, but is not limited to,:

- ✓ **existing trees**
- ✓ **buildings**
- ✓ **parking areas**
- ✓ **roadways/streets**
- ✓ **all areas of impervious cover levels (existing & proposed)**
- ✓ **erosion controls (i.e.: silt fencing, tree protection)**
- ✓ **limits of construction**
- ✓ **type of construction**
- ✓ **location of construction**
- ✓ **accessible parking**
- ✓ **access route**
- ✓ **on-site sewage (septic) systems and drain fields**

I, Andrew Evans, P.E., do hereby certify that I am the
(PRINT NAME)
☐ owner ■ owner's agent *(to act as the owner's agent, written authorization from the owner must be provided)* of this described property, and in this capacity, submit this request for exemption from the site plan submittal requirements pursuant to Chapter 25-5-2 of the Austin City Code.

Furthermore, I certify and acknowledge that:

1. Although the proposed development does not require a formal site plan approval, it may require, prior to beginning any site work, the approval of the subdivision or issuance of a building, remodel, and/or demolition permit;
2. Although the proposed development complies with all applicable zoning regulations, it does not prohibit enforcement of restrictive covenants and/or deed restrictions;
3. The approval of this exemption request does not constitute authorization to violate any provisions of the Austin City Code or other applicable requirements, which includes the use or occupancy of the improvement.
4. The approval notice with paid receipt shall be clearly posted on-site and protected from the elements at all times.

for Andrew Evans
Signature of Requester Date: 3/14/14

Address: ATS Engineers Inspectors and Surveyors, 912 S. Capital of Texas Hwy, Ste. 450, Austin, Texas 78746
Telephone: 512-238-6995

Please indicate how you wish to receive a copy of the results of the review:
☐ FAX: 512-238-6996 ■ E-mail Address: *Please provide e-mail address on other side of form*

ELECTRONICALLY RECORDED 2012148321

TRV 4 PGS

NTX-1181161

GENERAL WARRANTY DEED

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

DMS
D.K.L. PAA September
DATE: ~~August~~ 4, 2012

GRANTOR: Doris M. Shackelford, a single person

GRANTOR'S MAILING ADDRESS: PO Box 750096 Houston, Tx 77275-0096

GRANTEE: Roy Whitaker, a singel person

GRANTEE'S MAILING ADDRESS: 1403 W. 39½ St.

CONSIDERATION:

Cash and other valuable consideration.

PROPERTY (including any improvements):

Lot 3, Block D, of BALCONES OAKS SECTION II, a subdivision in Travis County, Texas, as further described at Book 75, Page 373, of the Plat Records of Travis County, Texas.

RESERVATIONS FROM AND EXCEPTIONS TO CONVEYANCE AND WARRANTY:

This conveyance is made and accepted subject to all restrictions, covenants, conditions, rights-of-way, assessments, outstanding royalty and mineral reservations and easements, if any, affecting the above described property that are valid, existing and properly of record as of the date hereof and subject, further, to taxes for the year 2012 and subsequent years.

Grantor, for the consideration and subject to the reservations from and exceptions to conveyance and warranty, grants, sells and conveys to Grantee the property, together with all and singular the rights and appurtenances thereto in anywise belonging, to have and hold it to Grantee, Grantee's heirs, executors, administrators, successors, or assigns forever. Grantor binds Grantor and Grantor's heirs, executors, administrators, successors and assigns to warrant and forever defend all and singular the property to Grantee and Grantee's heirs, executors, administrators, successors and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the reservations from and exceptions to conveyance and warranty.

When the context requires, singular nouns and pronouns include the plural.

Doris M. Shackelford by David K. Shackelford, as Agent and Attorney-in-Fact

Doris M. Shackelford, by David K. Shackelford, as Agent and Attorney-in-Fact

Acknowledgement

State of Texas
County of Travis

This instrument was acknowledged before me on the 4th day of September, 2012, by David K. Shackelford, as Agent and Attorney-in-Fact on behalf of Doris M. Shackelford.

DONICA WILLIAMS
NOTARY PUBLIC,
STATE OF TEXAS
My Commission Expires
June 7, 2013

Notary Public, State of Texas

After Recording Return To:

_____

_____

_____

Dal161-fw

FILED AND RECORDED
OFFICIAL PUBLIC RECORDS

DANA DEBEAUVOIR, COUNTY CLERK
TRAVIS COUNTY, TEXAS
September 05 2012 02:37 PM
FEE: $ 28.00 **2012148321**

ELECTRONICALLY RECORDED 2012148321

TRV 4 PGS

NTX-1181161

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Dated
D.K.L. Pro September
DATE: ~~August~~ 4, 2012

GRANTOR: Doris M. Shackelford, a single person

GRANTOR'S MAILING ADDRESS: PO Box 750096 Houston, Tx 77275-0096

GRANTEE: Roy Whitaker, a singel person

GRANTEE'S MAILING ADDRESS: 1403 W. 39½ St.

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When the context requires, singular nouns and pronouns include the plural.

Doris M. Shackelford by David K. Shackelford, as Agent and Attorney-in-Fact

Doris M. Shackelford, by David K. Shackelford, as Agent and Attorney-in-Fact

Acknowledgement

State of Texas
County of Travis

This instrument was acknowledged before me on the 4th day of September, 2012, by David K. Shackelford, as Agent and Attorney-in-Fact on behalf of Doris M. Shackelford.

DONICA WILLIAMS
NOTARY PUBLIC,
STATE OF TEXAS
My Commission Expires
June 7, 2013

Notary Public, State of Texas

After Recording Return To:

_____

_____

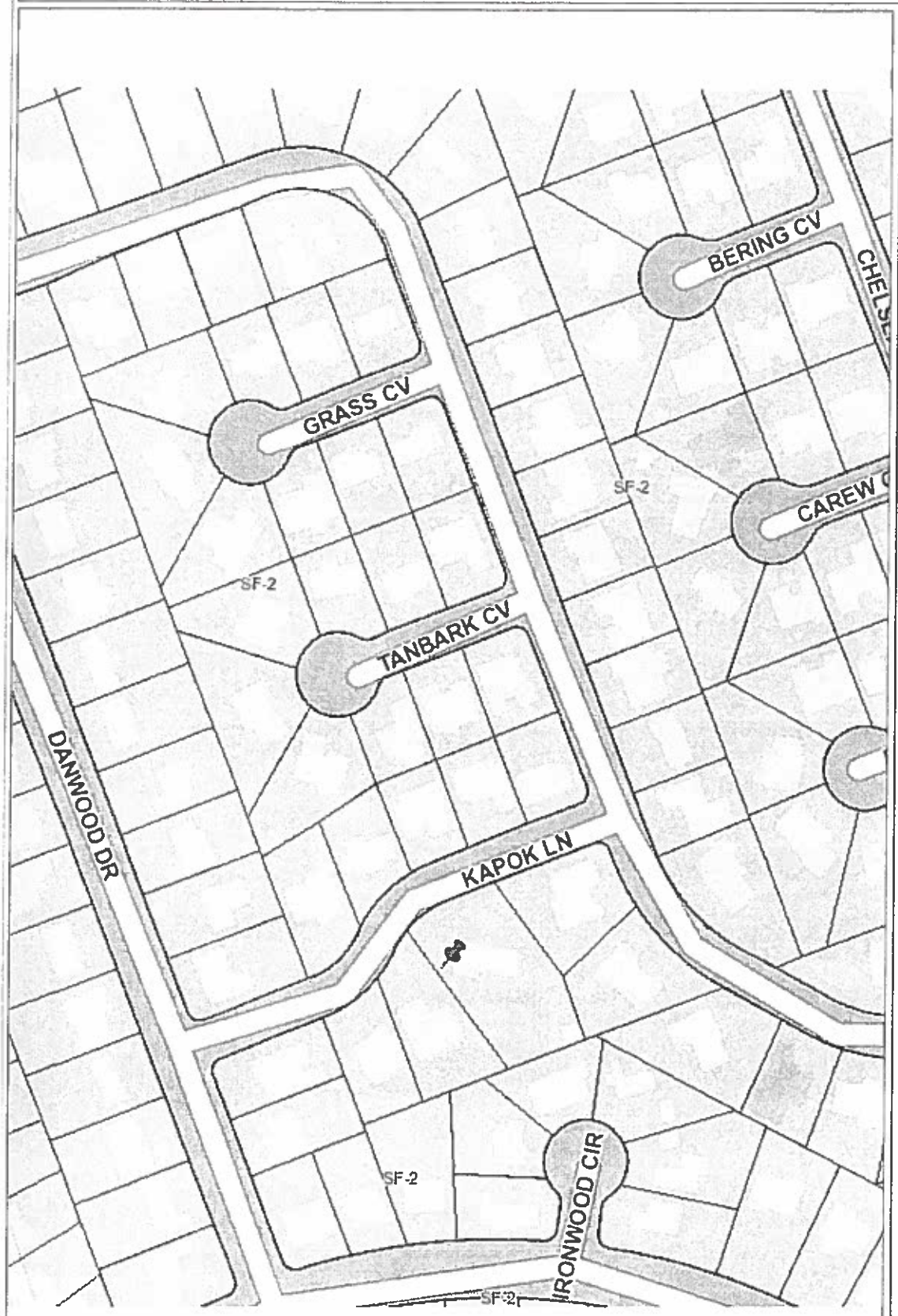
_____

Dal161-fw

FILED AND RECORDED
OFFICIAL PUBLIC RECORDS

DANA DEBEAUVOIR, COUNTY CLERK
TRAVIS COUNTY, TEXAS
September 05 2012 02:37 PM
FEE: $ 28.00 **2012148321**

CITY OF AUSTIN DEVELOPMENT WEB MAP



Legend

- Lot Lines
- Streets
- Building Footprints
- Named Creeks
- Lakes and Rivers
- Parks
- County

Land Use Year 2010

- Water (940)
- Utilities (870)
- Unknown (999)
- Undeveloped (900)
- Transportation (800)
- Streets and Roads (8
- Single Family (100) O
- Resource Extraction (
- Open Space (700)
- Office (400)
- Multi-family (200)
- Mobile Homes (113)
- Large-lot Single Famil
- Industrial (500)
- Commercial (300)
- Civic (600)

Neighborhood Plan Status

- Non-neighborhood Pla
- Future Planning Areas
- Suspended (4)

ZONING USE SUMMARY TABLE (LAND DEVELOPMENT CODE)

P = Permitted Use C = Conditional Use Permit -- = Not Permitted

RESIDENTIAL USES	LA	RR	SF-1	SF-2	SF-3	SF-4A	SF-4B	SF-5	SF-6	MF-1	MF-2	MF-3	MF-4	MF-5	MF-6	MH	NO	LO	GO	CR	LR	GR	L	CBD	DMU	WILO	CS	CS-1	CH	IP	MI	LI	R&D	DR	AV	AG	PUD	P
Bed & Breakfast (Group 1)	--	--	P	P	P	--	--	P	P	P	P	P	P	P	P	--	P	P	P	P	P	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	--
Bed & Breakfast (Group 2)	--	--	--	--	--	--	--	P	P	P	P	P	P	P	P	--	P	P	P	P	P	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	--
Condominium Residential	--	--	--	--	--	--	--	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	C	P	P	--	--	--	P	--	--	--	--	--	--	--	--
Conservation Single Family Residential	--	--	P	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Duplex Residential	--	--	--	--	P	--	--	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	--	P	P	--	--	--	--	--	--	--	--	--	--	--	--
Group Residential	--	--	--	--	--	--	--	--	--	--	--	C	P	P	P	--	--	--	--	--	--	--	C	P	P	--	--	--	P	--	--	--	--	--	--	--	--
Mobile Home Residential	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Multifamily Residential	--	--	--	--	--	--	--	--	--	P	P	P	P	P	P	--	--	--	--	--	--	--	C	P	P	--	--	--	P	--	--	--	--	--	--	--	--
Retirement Housing (Small Site)	--	--	--	--	P	--	--	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Retirement Housing (Large Site)	--	--	--	--	--	--	--	C	C	C	C	C	C	C	C	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Single-Family Attached Residential	--	--	--	--	P	--	--	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Single-Family Residential	P	P	P	P	P	--	--	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	--	P	P	--	--	--	--	--	--	--	1	P	--	C	3	4
Small Lot Single-Family Residential	--	--	--	--	--	P	P	P	P	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Townhouse Residential	--	--	--	--	--	--	--	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	C	P	P	--	--	--	P	--	--	--	--	--	--	--	--
Two-Family Residential	--	--	--	--	P	--	--	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	--	P	P	--	--	--	--	--	--	--	--	--	--	--	--
Short -Term Rental [13]	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	--	--	--	--	--	--	--	--	P	P	--	--	--	--	--	--	--	--	--	--	P	--

COMMERCIAL USES	LA	RR	SF-1	SF-2	SF-3	SF-4A	SF-4B	SF-5	SF-6	MF-1	MF-2	MF-3	MF-4	MF-5	MF-6	MH	NO	LO	GO	CR	LR	GR	L	CBD	DMU	WILO	CS	CS-1	CH	IP	MI	LI	R&D	DR	AV	AG	PUD	P
Administrative and Business Offices	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	P	--	P	P	C	P	P	P	P	P	P	P	P	P	1	--	2	--	3	4
Agricultural Sales and Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	P	P	P	P	1	--	--	--	3	4
Alternative Financial Servics [12]	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	P	--	--	C	--	P	--	--	--	--	--	--	--	--	--	--	--
Art Gallery	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	1	--	--	--	3	4
Art Workshop	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	P	P	P	P	C	P	P	P	P	P	P	P	P	P	1	--	--	--	3	4
Automotive Rentals	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	C	C	C	--	P	P	P	P	P	P	1	--	2	--	3	4
Automotive Repair Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	C	C	C	--	P	P	P	P	P	P	1	--	2	--	3	4
Automotive Sales	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	C	C	C	--	P	P	P	P	P	P	1	--	--	--	3	4
Automotive Washing (of any type)	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	C	C	C	--	P	P	P	--	P	P	1	--	2	--	3	4
Bail Bond Services [10]	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	PC	--	PC	PC	--	PC	PC	PC	PC	PC	PC	--	--	--	--	--	--
Building Maintenance Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	P	P	P	P	P	1	--	--	--	3	4
Business or Trade School	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	--	--	P	C	P	P	C	P	P	P	P	P	P	1	--	--	--	3	4
Business Support Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	--	--	P	C	P	P	P	P	P	P	P	P	P	1	--	--	--	3	4
Campground	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	--	--	--	--	--	--	P	P	P	--	--	P	1	--	--	--	3	4
Carriage Stable	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	--	--	--	--	--	--	--	--	--	C	--	P	--	--
Cocktail Lounge	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	P	C	--	--	C	C	--	--	--	--	--	--	--	--	--
Commercial Blood Plasma Center	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P5	P5	P5	--	--	--	--	--	--	--	--	--
Commercial Off-Street Parking	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	C	C	C	--	P	P	P	--	P	P	1	--	2	--	3	4
Communications Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	--	--	P	C	P	P	P	P	P	P	P	P	P	1	--	2	--	3	4
Construction Sales and Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	P	P	P	P	P	P	1	--	--	--	3	4
Consumer Convenience Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	P	P	C	P	P	--	P	P	P	--	P	1	--	2	--	3	4
Consumer Repair Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	C	P	P	--	P	P	P	--	--	--	--	--	--	--	--	--
Convenience Storage	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	P	P	P	P	P	P	1	--	--	--	3	4
Drop-Off Recycling Collection Facility	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P6	--	--	--	--	P	P	P	--	P	P	--	--	--	--	--	P4
Electronic Prototype Assembly [15]	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	CP	CP	P	P	P	P	P	P	--	--	--	--	--	--
Electronic Testing [16]	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	CP	CP	P	P	--	P	P	P	--	--	--	--	--	--
Equipment Repair Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	P	P	P	--	P	P	1	--	--	--	3	4
Equipment Sales	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	P	--	P	P	1	--	--	--	3	4
Exterminating Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	--	P	P	C	P	P	P	P	--	P	1	--	--	--	3	4
Financial Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	C	P	P	--	P	P	P	P	P	1	--	2	--	3	4
Food Preparation	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	P	P	P	P	P	P	P	P	P	P	1	--	2	--	3	4
Food Sales	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	C	P	P	--	P	P	P	--	P	1	--	2	--	3	4
Funeral Services	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	--	P	P	--	P	P	P	--	--	P	1	--	--	--	3	4
General Retail Sales (Convenience)	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	P	C	P	P	--	P	P	P	--	P	1	--	2	--	3	4
General Retail Sales (General)	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	11	P	C	P	P	--	P	P	P	--	P	1	--	2	--	3	4
Hotel-Motel	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	--	P	C	P	P	--	P	P	P	--	P	1	--	2	--	3	4
Indoor Entertainment	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	--	P	C	P	P	--	P	P	P	P	P	1	--	2	--	3	4
Indoor Sports and Recreation	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	C	--	P	C	P	P	--	P	P	P	P	P	1	--	2	--	3	4

1-Refers to 25-2-602 (13-2-225); 2-Refers to 25-2-622 (13-2-226); 3-Refers to Subchapter B, Art. 2, Div 5; 4 Refers to 25-2-624 (13-2-227); 5-Refers to 25-2-803 (13-2-233); 6-Subject to 25-2-805 (13-2-224); 7-Subject to 25-2-839 (13-2-235 & 13-2-273); 8-Refers to 25-2-842; 9-Refers to 25-2-863; 10-Suject to 25-2-177 & 25-2-650; 11-Subject to 25-2-587 (D); 12-Subject to 25-2-816; 13-Permitted in MU and V combining districts, subject to 25-2, Subchapter E, Art. 4, Subsec. 4.2.1.C; 14-Refers to 25-6-501; 15-Refers to 25-2-817; 16-Refers to 25-2-811.
PC - Permitted in the district, but under some circumstances may be conditional; CP - Conditional in the district, but under some circumstances may be permitted

Sec. 202.003. CONSTRUCTION OF RESTRICTIVE COVENANTS. (a) A restrictive covenant shall be liberally construed to give effect to its purposes and intent.

(b) In this subsection, "family home" is a residential home that meets the definition of and requirements applicable to a family home under the Community Homes for Disabled Persons Location Act (Article 1011n, Vernon's Texas Civil Statutes). A dedicatory instrument or restrictive covenant may not be construed to prevent the use of property as a family home. However, any restrictive covenant that applies to property used as a family home shall be liberally construed to give effect to its purposes and intent except to the extent that the construction would restrict the use as a family home.

Added by Acts 1987, 70th Leg., ch. 712, Sec. 1, eff. June 18, 1987.

§ 25-2-32 ZONING DISTRICTS AND MAP CODES.

(A) This section provides the City's zoning districts and the corresponding zoning map codes. A zoning district may be referred to by its map code.

(B) Residential base districts and map codes are as follows:

(1) Lake Austin residence LA

(2) rural residence RR

(3) single-family residence large lot SF-1

(4) single-family residence standard lot SF-2

(5) family residence SF-3

...

§ 25-2-3 RESIDENTIAL USES DESCRIBED.

(A) Residential uses include the occupancy of living accommodations on a nontransient basis. Residential uses exclude institutional living arrangements providing 24-hour skilled nursing or medical care and those providing forced residence, including mental hospitals and prisons.

(B) Residential use classifications are described as follows:

(1) BED AND BREAKFAST RESIDENTIAL use is the use of a residential structure to provide rooms for temporary lodging for overnight guests on a paying basis.

(2) CONDOMINIUM RESIDENTIAL use is the use of a site for attached or detached condominiums, as defined in the Texas Property Code.

(3) CONSERVATION SINGLE FAMILY RESIDENTIAL use is the use of a site for multiple detached dwelling units with each dwelling unit located on an individual lot and the remainder of the site being jointly-owned and preserved as open space.

(4) DUPLEX RESIDENTIAL use is the use of a site for two dwelling units within a single building, other than a mobile home.

(5) GROUP RESIDENTIAL use is the use of a site for occupancy by a group of more than six persons who are not a family, on a weekly or longer basis. This use includes fraternity and sorority houses, dormitories, residence halls, and boarding houses.

(6) MOBILE HOME RESIDENTIAL use is the use of a site for occupancy of mobile homes on a weekly or longer basis. This use includes mobile home parks and mobile home subdivisions.

(7) MULTIFAMILY RESIDENTIAL use is the use of a site for three or more dwelling units, within one or more buildings, and includes condominium residential use.

(8) RETIREMENT HOUSING (LARGE SITE) use is the use of a site for more than 12 dwelling units designed and marketed specifically for the elderly, the physically handicapped, or both.

(9) RETIREMENT HOUSING (SMALL SITE) use is the use of a site for 3 to 12 dwelling units designed and marketed specifically for the elderly, the physically handicapped, or both.

(10) SHORT-TERM RENTAL use is the rental of a residential dwelling unit or accessory building, other than a unit or building associated with a group residential use, on a temporary or transient basis in accordance with Article 4, Division 1, Subpart C (*Requirements for Short-Term Rental Uses*) of this chapter. The use does not include an extension for less than 30 consecutive days of a previously existing rental agreement of 30 consecutive days or more. The use does not include a rental between parties to the sale of that residential dwelling unit.

(11) SINGLE-FAMILY ATTACHED RESIDENTIAL use is the use of a site for two dwelling units, each located on a separate lot, that are constructed with common or abutting walls or connected by a carport, garage, or other structural element.

(12) SINGLE-FAMILY RESIDENTIAL use is the use of a site for only one dwelling unit, other than a mobile home.

(13) SMALL LOT SINGLE-FAMILY RESIDENTIAL use is the use of a small lot for only one detached dwelling unit, other than a mobile home.

(14) TOWNHOUSE RESIDENTIAL use is the use of a site for townhouses.

(15) TWO-FAMILY RESIDENTIAL use is the use of a lot for two dwelling units, each in a separate building, other than a mobile home.

Source: Section 13-2-2; Ord. 990225-70; Ord. 990520-38; Ord. 031211-11; Ord. 041118-57; Ord. 20100819-064; Ord. 20120802-122.

510 S.W.2d 675
(Cite as: 510 S.W.2d 675)

H

Court of Civil Appeals of Texas,
San Antonio.
G. E. LEHMANN et al., Appellants,
v.
H. C. WALLACE et ux., and Parker P. Hanna et ux., Appellees.

No. 15262.
April 24, 1974.
Rehearing Denied May 22, 1974.

Suit by owners of subdivision lots against subdivision developers and owners of one lot for declaratory judgment that only one primary residence could be constructed on any one tract in subdivision and for injunctive relief enjoining construction of more than one residence on a tract. The Second 38th District Court, Kerr County, Marvin Blackburn, Jr., J., rendered judgment for plaintiffs, and defendants appealed. The Court of Civil Appeals, Klingeman, J., held that restrictive covenant that only one primary residence could be erected on a subdivision lot was binding on all lot purchasers and their grantees and on developers who signed agreement that such restriction would be included in deeds to lots and that defendants waived right to assert statute of frauds as affirmative defense by not affirmatively pleading it.

Affirmed.

West Headnotes

|1| Covenants 108 ⚿49

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k49 k. Nature and Operation in General. Most Cited Cases

Restrictive clauses in instruments concerning real estate must be construed strictly, favoring grantee and against grantor, and all doubts should be resolved in favor of free and unrestricted use of premises.

|2| Covenants 108 ⚿21

108 Covenants
108II Construction and Operation
108II(A) Covenants in General
108k21 k. General Rules of Construction. Most Cited Cases

Mere filing of a map which depicts lots, but which has no declaration thereon restricting size of lots, is not a prohibition upon resubdividing into smaller lots.

|3| Covenants 108 ⚿8

108 Covenants
108I Requisites and Validity
108I(B) Implied Covenants
108k8 k. Nature and Grounds in General. Most Cited Cases
(Formerly 107k8)

There is no implied covenant as to size of or against further subdivision of remaining lots shown on a map with reference to which the conveyance is made.

|4| Covenants 108 ⚿79(3)

108 Covenants

108II Construction and Operation
108II(D) Covenants Running with the Land
108k77 Persons Entitled to Enforce Real Covenants
108k79 Grantees and Assignees in General
108k79(3) k. Covenants as to Use of Real Property. Most Cited Cases
(Formerly 108k20)

Common test of existence of a general building or neighborhood scheme is an intent that protection of restrictive covenant inure to benefit of purchasers of lots in tract; such an intent arises from representations as to restrictions made for purpose of inducing purchasers of lots to pay higher prices because of restrictions.

[5] Covenants 108 ⚿79(3)

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k77 Persons Entitled to Enforce Real Covenants
108k79 Grantees and Assignees in General
108k79(3) k. Covenants as to Use of Real Property. Most Cited Cases
(Formerly 108k79(1))

Covenants 108 ⚿84

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k84 k. Persons Liable on Real Covenants. Most Cited Cases

Where owners of a tract subdivide it and sell distinct parcels thereof to separate grantees, imposing restrictions upon its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either upon theory that there is a mutuality of covenants and consideration, or upon ground that mutual negative equitable easements are created; where parcels are sold with reference to such a uniform plan to persons having notice thereof, grantees may enforce restrictions within this rule, irrespective of order of the several conveyances and whether covenants run with land.

[6] Covenants 108 ⚿84

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k84 k. Persons Liable on Real Covenants. Most Cited Cases

Where subdivision developers represented to purchasers of subdivision lots that only one primary residence could be constructed on any subdivision tract, signed agreement to attach such restriction in subsequent deeds to tracts and placed such restriction in deeds to several purchasers of lots and purpose of restriction was to make subdivision more attractive for residential purposes and to enhance value of tracts, restrictive covenant was binding both on purchasers and grantees of all 35 lots shown on subdivision map to purchasers and on developers and limited them to building only one residence on each of the 35 tracts.

[7] Covenants 108 ⚿1

108 Covenants
108I Requisites and Validity
108I(A) Express Covenants
108k1 k. Nature and Essentials in General. Most Cited Cases

One of ways to establish a general scheme or plan of development is by a reciprocal covenant whereby

510 S.W.2d 675
(Cite as: 510 S.W.2d 675)

grantor agrees to insert like covenants and agreements in all deeds out of the common development.

|8| Frauds, Statute Of 185 ⚿152(2)

185 Frauds, Statute Of
185X Pleading
185k151 Pleading Statute as Defense
185k152 Necessity
185k152(2) k. Waiver by Failure to Plead. Most Cited Cases

Defendants who filed only general denial and did not affirmatively plead statute of frauds as defense to action to enforce restrictive covenant prohibiting construction of more than one residence on a subdivision tract waived right to assert statute of frauds as a defense to action. Rules of Civil Procedure, rule 94.

|9| Frauds, Statute Of 185 ⚿103(1)

185 Frauds, Statute Of
185VIII Requisites and Sufficiency of Writing
185k103 Nature and Form of Memorandum in General
185k103(1) k. In General. Most Cited Cases

Refusal, in action to enforce restrictive covenant that only one primary residence could be constructed on a subdivision lot, to apply statute of frauds to restriction was not error, where all the instruments upon which plaintiffs relied to show such restriction were in writing.

*677 Lavern D. Harris, Ronald R. Winfrey, Kerrville, for appellants.

Edward G. Marion, Jr., Gordon L. Hollon, Joseph W. Burkett, Jr., Kerrville, for appellees.

KLINGEMAN, Justice.

This is a suit for declaratory judgment and injunctive relief brought by H. C. Wallace and wife, Emalene, and Parker P. Hanna and wife, Mary, against appellants herein, G. E. Lehmann, Gordon H. Monroe, Walter R. Richardson and wife, Opal, and Glen Oaks Building Board, in which suit appellees ask the court to find and declare the relative rights, duties and liabilities of the parties and to interpret and construe the restrictions and deeds conveying property in an area referred to as Glen Oaks No. One, a subdivision near Kerrville, in Kerr County, Texas, and to enjoin the violation of such restrictions. Trial was to the court without a jury, and judgment was entered by the trial court construing the restrictions favorably to appellees and perpetually enjoining appellants from violating such restrictions and specifically that portion of such restrictions which state that not more than one primary residence shall be constructed on any one tract in Glen Oaks. The trial court made extensive findings of fact and conclusions of law.[FN1]

FN1. The pertinent portions of such findings of fact may be summarized as follows:

(a) Defendants, G. E. Lehmann and Gordon H. Monroe, made a subdivision known as Glen Oaks No. One out of a larger tract of land owned by them; on April 25, 1967, such defendants had a plat of Glen Oaks No. One prepared, which plat designated a total of 35 lots in said subdivision; that such defendants sold properties in Glen Oaks No. One in reference to said plat and the purpose of said plat was to subdivide said property;

(b) On April 14, 1967, defendants, G. E. Lehmann and Gordon H. Monroe, conveyed to H. C. Wallace and wife, Emalene Wallace, Tracts 13, 14 and 15 in Glen Oaks No. One by warranty deed, with attached restrictions; that said restrictions state that the purpose thereof is to carry not a general plan of development of Glen Oaks, maintain the suita-

bility of Glen Oaks for private residential purposes, and to carry out a general plan for the protection, benefit, use, recreation and convenience of each and every purchaser of a tract or parcel of land in Glen Oaks and to enhance the value of said tracts; the restrictions further provide, among other things, that not more than one primary residence shall be constructed on any one tract in Glen Oaks.

(c) On April 14, 1967, G. E. Lehmann and Gordon H. Monroe also executed an affidavit to H. C. Wallace et ux., in which they covenanted and agreed to attach, include and incorporate in each and every conveyance made after such date of any tract of the property presently known as Glen Oaks No. One, the identical restrictions, covenants and conditions as are set out and incorporated in such instrument and in the deed from Gordon H. Monroe et al. to H. C. Wallace et ux. Said affidavit further provides that the covenants, restrictions and conditions therein made are to run with each tract of land comprising Glen Oaks No. One and are binding on the heirs, successors and assigns of all and each of the undersigned and all persons claiming under them;

(d) That the defendants, Lehmann and Monroe, on December 16, 1970, in violation of said restrictions re-subdivided Tract No. 12 and conveyed to W. R. Richardson et ux. one-half of Tract No. 12, designated as Tract 12—a; and on the same day, such defendants also conveyed to W. R. Richardson et ux. the other one-half of Tract 12, designated as Tract 12—B; that defendants Richardson et ux. constructed a residence on Tract 12—B and are contemplating building another residence on the other half of Tract 12, designated as Tract 12—A; that the conveyance by defendants Lehmann and Monroe to defendant Richardson et ux. represents an attempt to re-subdivide tracts in Glen Oaks No. One in violation of the subdivision restriction; that defendants Lehmann and Monroe specifically represented to Wallace and other purchasers in Glen Oaks No. One that they could not construct more than one primary residence on any one total tract in said subdivision; that the defendants, Lehmann and Monroe, by ways of private advertising, a copy of which was introduced into evidence, represented that houses built in Glen Oaks area must be at least 1200 square feet, and that only one residence was to be placed on a tract; that the defendants had Tract 12 resubdivided so that they could circumvent the restrictions and construct two residences on Tract 12.

(e) That on the 11th day of June, 1969, plaintiff Parker E. Hanna and wife, Mary E. Hanna, purchased Tract 34 in said subdivision subject to the restrictions here involved; that the defendant G. E. Lehmann, during the trial stated that he still deems that he has the right to re-subdivide as many tracts in the Glen Oaks subdivision as he desires; that one of the purposes of such subdivision was to stop any re-subdivision of said tracts in said subdivision, which was accomplished by putting in the provision that there could not be more than one primary residence per tract; that defendant Monroe testified at the trial that no more than one primary residence had been constructed on any of the 35 tracts as set out in the map of said subdivision.

In its conclusions of law, the court found, among other things: (a) the restrictive covenants here involved and as contained in the deed from Lehmann and Monroe to H. C. Wallace et ux. and as contained in the affi-

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davit are valid and enforceable restrictions; (b) that the defendants are bound by such restrictions and covenants together with all property owners owning property in said subdivision; (c) that such restrictive covenants are imposed for the benefit of the grantors, and of all of the property owners of Glen Oaks No. One; (d) that the material provisions of these restrictive covenants evidence a general plan or scheme for the development of the subdivision; (e) that Glen Oaks consists of only 35 tracts as platted, and that said restrictions expressly require only one primary residence for residence purposes per platted tract; (f) that plaintiff should have a declaratory judgment declaring that not more than one primary residence shall be constructed on any one tract in Glen Oaks No. One, a subdivision consisting of 35 tracts only.

*678 By three points of error, appellants assert that the trial court erred: (1) in holding that the **restrictions** in question in this suit, as contained in the **deeds** in the chain of title to appellees' property and an agreement to appellees (Wallaces) prohibits **resubdivision** of the tracts other than as shown in a map shown as Plaintiffs' Exhibit No. 2; (2) in construing the **restrictions** in question as prohibiting re-subdivision and prohibiting the construction of but one primary residence on each of the 35 tracts or parcels of land shown on the map marked Plaintiffs' Exhibit No. 2; (3) in failing to hold that any **restriction**, plan or scheme of development or use of land, in order to be enforceable, must be in writing.

Plaintiffs are the owners of lots or tracts in Glen Oaks No. One, a subdivision near Kerrville, Texas. Defendants W. R. Richardson and wife, Opal Richardson, are the owners of a tract or tracts in said subdivision, plaintiffs asserting that they own only one tract, Tract No. 12, and defendants asserting that they own two tracts, Tract No. 12—a and Tract No. 12—B. Defendants G. E. Lehmann and Gordon H. Monroe are the developers of Glen Oaks No. One, which subdivision was carved and cut out of a larger tract owned by said developers. Defendant Glen Oaks Building Board is composed of G. E. Lehmann and Gordon H. Monroe.

On April 14, 1967, defendants Lehmann and Monroe conveyed to plaintiff H. C. Wallace and wife, Emalene Wallace, Tracts Nos. 13, 14 and 15 in Glen Oaks No. One, which tracts are also described by metes and bounds. The deeds of conveyance to the Wallaces have attached restrictions thereto which state that in order to carry out a General scheme of development of Glen Oaks (emphasis added), maintain the suitability of Glen Oaks for private residential purposes, and to carry out a general plan for the protection, benefit, use, recreation and convenience of each and every purchaser of a tract of land therein and to enhance the value of said tracts of land in Glen Oaks, said deed is subject to the covenants therein. Among other things, said restrictions provide that 'not more than one primary residence shall be constructed on any one tract in Glen Oaks.' Said restrictions further provide *679 that such covenants, restrictions and conditions are to run with the land and are to be enforceable by injunction and any other remedy provided by law, by said Building Board or any person who shall own any tract or parcel of land in Glen Oaks.

On the same date, Lehmann and Monroe, individually and acting for the Glen Oaks Building Board, executed an affidavit and agreement to H. C. Wallace and wife in which they covenanted and agreed to attach, include and incorporate in each and every conveyance made after such date of any tract of land out of the property presently known as Glen Oaks No. One, consisting of approximately 35 tracts, the identical restrictive covenants and conditions as are incorporated in this instrument and in the deed executed by the undersigned to H. C. Wallace and wife, Emalene Wallace. Said instrument further provides that the covenants, restrictions and conditions therein are

to run with each tract of land and are binding on the undersigned, their heirs and assigns and all persons claiming under them.

A map or plat of Glen Oaks No. One was introduced into evidence as Plaintiffs' Exhibit No. 2, which plat shows a total of 35 lots or tracts in said subdivision, including Tracts Nos. 13, 14 and 15. The plat is certified to by a surveyor and in addition to showing each tract number, shows the size of each tract, both by acreage and by distances and calls. This plat is not filed of record.

On December 16, 1970, several months after the conveyance to the Wallaces, Lehmann and Monroe conveyed to W. R. Richardson and wife, Opal Richardson, a tract designated as Tract 12—A, which is also described by metes and bounds, and which is one-half of Tract No. 12 shown on the map or plat aforesaid and, on the same date, also conveyed to the Richardsons a tract designated as Tract 12—B, which is the other one-half of Tract 12.

Sometime thereafter, the Richardsons constructed a residence on Tract 12—B, and there is evidence that they told plaintiffs Wallace and Hanna that they were going to construct another residence on Tract 12—a; that they had a right to do so because these were two separate tracts.

Plaintiffs Parker P. Hanna and wife purchased Tract No. 34 from Charles E. Boyd and wife, who had purchased such tract from Lehmann and Monroe, both of which deeds contained a copy of the restrictions here involved.

H. C. Wallace testified that during the negotiations for the purchase of the property, Lehmann and Monroe told him that regardless of the size of the tract, only one residence could be built on any one tract, and there is testimony that other purchasers were also told the same thing.

There is testimony that not all the deeds in such subdivision have the map relied on by plaintiffs attached thereto, but appellants concede in their brief that 73 per cent of the deeds executed by Lehmann and Monroe up to the time of the trial had maps like Plaintiffs' Exhibit No. 2 attached to such deeds.

Defendant Monroe testified at the time of the trial that no more than one primary residence had been constructed on any one of the 35 tracts as shown in Plaintiffs' Exhibit No. 2.

Appellants' basic contentions are that (a) the map or plat relied on by appellees in only a planning map and was never recorded, (b) such map or plat was ineffective to prevent appellants from re-subdividing or changing the size of lots held by them, (c) that although many of the deeds refer to a tract by tract number, they were actually sold by metes and bounds descriptions, (d) that the restrictive covenants are binding on and limit only the grantee of a particular deed, and do not apply to the grantor or subdivider; (e) that in any event, the restrictive covenants were not violated because only one residence had been built or is being contemplated to be built on the lots in question, to-wit: one on *680 Lot 12—A and one on Lot 12—B; (f) that the trial court erred in refusing to apply the statute of frauds to the restrictions in question.

[1] Restrictive clauses in instruments concerning real estate must be construed strictly, favoring the grantee and against the grantor, and all doubts should be resolved in favor of the free and unrestricted use of the premises. Baker v. Henderson, 137 Tex. 266, 153 S.W.2d 465, 470 (1941); Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 270 S.W. 1014, 1017 (1925); Johnson v. Linton, 491 S.W .2d 189, 197 (Tex.Civ.App.—Dallas 1973, no writ).

[2][3] Generally, the mere filing of a map which depicts lots, but which has no declaration thereon

which restricts the size of lots, is not a prohibition upon re-subdividing into smaller lots. MacDonald v. Painter, 441 S.W.2d 179 (Tex.1969); Turner v. Glenn, 220 N.C. 620, 18 S.E.2d 197 (1942). The view taken in most cases is that, in the absence of a general plan of development, there is no implied covenant as to the size of or against further subdivision of the remaining lots shown on a map with reference to which the conveyance is made. 20 Am.Jur.2d, Covenants, Section 174 (1965); 57 A.L.R. 764, Anno.—Implied Covenant—Size of Lots, Section 14 (1928).

It is to be noted that appellees are not relying solely on the map or plat of April 25, 1967 (Plaintiffs' Exhibit No. 2). In addition to such map, they rely on (a) the restrictive covenants, hereinbefore discussed, which are contained not only in the deeds to plaintiffs, the deeds to defendants Walter R. Richardson and wife, Opal Richardson, but in numerous other deeds introduced into record to the various grantees in the subdivision; (b) the agreement and affidavit executed by defendants Lehmann and Monroe on April 14, 1967, to plaintiff Wallace and wife, hereinbefore discussed; (c) evidence that the developers used such plat (Plaintiffs' Exhibit No. 2) to show the properties to prospective purchasers and made sales thereon; (d) evidence of oral representations made by Lehmann and Monroe to plaintiffs and others that they could build only one primary residence on any one tract; (e) the printed advertisement introduced into evidence as Plaintiffs' Exhibit No. 16 that houses built in Glen Oaks must contain at least 1200 square feet, and that only one dwelling was to be placed on a tract.

[4] One of the most common forms of imposing building restrictions is by the establishment of a general building plan of improvements or development covering a tract divided into a number of lots. Such a plan may be established in various ways, such as by express covenant, by implication from a filed map, or by parol representations made in sales brochures, maps, advertising, and oral statements on which the purchaser relied in making his purchase. it is said that the most complete way is by reciprocal covenant, whereby the grantor covenants to insert like covenants in all deeds out of the common development, and that other ways may consist of the grantor selling the lots upon representations to the individual purchasers that like covenants will be inserted in the grantor's deeds to others, for the common benefit, or the grantor pursuing a course of conduct indicating a neighborhood scheme, leading the several purchasers to assume its adoption and adherence to it by such conduct. The most common test of the existence of a general building or neighborhood scheme is an intent that the protection of the restrictive covenant inure to the benefit of the purchasers of the lots in the tract. Such an intent is said to arise from representations as to the restrictions made for the purpose of inducing the purchaser of the several lots to pay higher prices because of the restrictions. Am.Jur.2d, Covenants, Section 175 (1965).

[5] The doctrine has often been announced in this state and by courts the country over that where the owners of a *681 tract subdivide it and sell distinct parcels thereof to separate grantees, imposing restrictions upon its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either upon the theory that there is a mutuality of covenants and consideration, or upon the ground that mutual negative equitable easements are created . Where parcels are sold with reference to such a uniform plan to persons having notice thereon, the grantees may enforce the restrictions within this rule, irrespective of the order of the several conveyances and irrespective of whether the covenants run with the land. Monk v. Danna, 110 S.W.2d 84 (Tex.Civ.App.—Dallas 1937, writ dism'd). The Supreme Court in Curlee v. Walker, 112 Tex. 40, 244 S.W. 497 (1922), had before it a case involving a restriction in which one of the restrictions was that for 10 years from the date of purchase, the purchaser would build only one house on two lots and that not less than two lots per sale were to be sold . This limi-

tation was to be placed in each deed of purchase. The Supreme Court held that this, together with other provisions, made up and created a 'general scheme or plan' under which all the lots in such restricted area were to be sold; that this scheme or plan was advertised in the city of Wichita Falls and each purchaser and especially the parties to this suit, had knowledge of it and bought in contemplation thereof. The Court said 'it is perfectly clear that it is lawful for districts with restrictions of this nature to be created, and also that each purchaser has the right to rely on and to enforce those restrictions.' [FN2]

> FN2. The Supreme Court stated that the correct rules that govern covenants of this character are set out in Hooper v. Lottman, 171 S.W. 270 (Tex.Civ.App.—El Paso 1914, no writ), as follows:
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> 'The most familiar cases in which courts of equity have upheld the right of owners of land to enforce covenants to which they were not parties are those in which it has appeared that a general building scheme or plan for the development of a tract of land has been adopted, designed to make it more attractive for residential purposes by reason of certain restrictions to be imposed on each of the separate lots sold. This forms an inducement to each purchaser to buy, and it may be assumed that he pays an enhanced price for the property purchased. The agreement therefore enters into and becomes a part of the consideration. The buyer submits to a burden upon his own land because of the fact that a like burden imposed on his neighbor's lot will be beneficial to both lots. The covenant or agreement between the original owner and each purchaser is therefore mutual. The equity in this particular class of action is dependent as much on the existence of the general scheme of improvement or development as on the covenant, and restrictions which contemplate a general building plan for the common benefit of purchasers of lots are recognized and enforced by courts of equity at the instance of the original grantor or subsequent purchasers. So 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 the 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.'

[6] The entire record evidences that a general plan or scheme for the development of Glen Oaks No. One had been adopted. Such general plan was for the material benefit of all the parties and inured to the benefit of both the purchasers and the sellers. The intent and purpose of such plan was to make the subdivision more attractive for residential purposes and to enhance the value of the tracts in Glen Oaks. This was an inducement to the purchasers in purchasing property in *682 said subdivision and was relied upon by the purchasers of such property. The covenants and agreements between the original owner and each purchaser was mutual.

[7] One of the contentions of appellant is that the restrictive covenants here are binding only upon the grantee of a deed to a respective tract and do not bind the developer, and that the developer is free to subdivide the lots and change the size of lots that he owns. We find no merit in such contention. It is manifestly unfair and contrary to the intent of the parties. If the purchaser could not re-subdivide his tract and could build only one primary residence, and the developer could re-subdivide any tract that he owns into two, three, four or as many lots as he desires, with each lot being entitled to build one primary residence thereon, the effect would be to violate and destroy the general scheme of development which was for the mutual benefit of all the parties.[FN3]

> FN3. Plaintiffs also rely on the agreement and affidavit made by Lehmann and Monroe on April 14, 1967, to Wallace in which they covenant and agree to place the restrictions here involved in every deed of conveyance thereafter made of properties in Glen Oaks No. One. One of the ways to establish a general scheme or plan of development is by a reciprocal covenant whereby the grantor agrees to insert like covenants and agreements in all deeds out of the common development.

[8] The trial court did not err in refusing to apply the statute of frauds to the restrictions in question. Defendants filed only a general denial and did not affirmatively plead the statute of frauds . Rule 94, Texas Rules of Civil Procedure (1967). Our Supreme Court in First National Bank in Dallas v. Zimmerman, 442 S.W.2d 674 (Tex.1969), sai: '. . . as will be discussed below, Rule 94, Texas Rules of Civil Procedure, requires that if the Statute of Frauds is to be interposed as a defense, it must be affirmatively pleaded. . . . Given this background and the plain and direct wording of Rule 94, it is our opinion that a party waives his right to assert the Statute of Frauds as a defense if he does not plead it. An objection to the evidence will not suffice.'

[9] Moreover, the restrictive covenants here involved: the affidavit and agreement, executed by Lehmann and Monroe on April 14, 1969; and the map exhibited as Plaintiffs' Exhibit No. 2, all of which plaintiffs rely on, are in writing.

The trial court's material findings of fact are sufficiently supported by the record and form a sufficient basis for the judgment entered. All appellants' points of error have been considered and all are overruled.

The judgment of the trial court is affirmed.

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KEYCITE

H Lehmann v. Wallace, 510 S.W.2d 675 (Tex.Civ.App.-San Antonio, Apr 24, 1974) (NO. 15262)

History

Direct History

=> 1 **Lehmann v. Wallace,** 510 S.W.2d 675 (Tex.Civ.App.-San Antonio Apr 24, 1974) (NO. 15262), writ refused n.r.e. (Oct 23, 1974)