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DISTRICT 18

FILE # ML-46589-10
I.D. # 46589

RQ-0918-GA

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
Attn; Opinion Committee

Re: Request for Opinion on Enforceability of Certain Restrictive Covenants

Dear Attorney General Abbott:

I respectfully request an opinion on the validity and enforceability of certain types of restrictive covenants and the proper interpretation of the Texas Constitution and Chapters 202 and 209 of the Property Code. I find these questions to be ones of public interest. My questions are as follows:

If a restrictive covenant requires that the owner of a lot subject to the restriction pay membership fees to a for-profit club, without requiring that such fees be used for the benefit of the burdened property and without limiting club membership to owners of restricted property, does that restrictive covenant fail to run with the land making it a personal covenant that cannot be enforced against subsequent purchasers?

If a restrictive covenant requires that a fee be paid by a new buyer each time the restricted property is sold and that such fee be paid to a for-profit club, without requiring that such fee be used for the benefit of the burdened property, does that restrictive covenant fail to touch and concern the land making it a personal covenant that cannot be enforced against subsequent purchasers?

Does Texas Constitution Article XVI, Section 50, prevent foreclosure of a homestead property based on a violation of a personal covenant that does not touch and concern land?

Does Texas Constitution Article XVI, Section 50, prevent foreclosure of a homestead based on a failure to pay a fee not identified or described in any instrument as a lien obligation before the property became a homestead?

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Do the enforcement and penalty provisions in Chapter 202 of the Texas Property Code apply to violations of the bylaws or rules of a private for-profit club?

Is a restrictive covenant that imposes an uncapped fee on each new buyer due upon each subsequent transfer of the burdened property an unreasonable restraint on alienation?

Are restrictive covenants that require a membership fee paid to a private third-party for which there is no mechanism for the owner of the burdened property to get notice of, have control over use of, or limit increases in that membership fee invalid as an illegal monopoly, an unfair restraint on trade, or a violation of the Texas Property Code's protections for homeowners?

Although this request is not limited to a particular restrictive covenant, described below is an illustrative situation involving property in Fort Bend County to which these questions are particularly relevant. To assist you in responding to this request, I provide the following background and briefing:

Background

Weston Lakes is a private gated community with a 24-hour guard at a controlled access entrance. Weston Lakes' lots were first sold to the public in the spring of 1985. The original owner and developer was United Financial Corporation, and the original Declaration of Covenants, Conditions, and Restrictions (CCRs) required that all property owners must obtain and maintain a social membership in Weston Lakes Country Club (WLCC). The CCRs also provide that transfers of lots in Weston Lakes are subject to the WLCC By-Laws. The WLCC Rules Regulations and Bylaws (WLCC By-Laws) provide that the WLCC Board of Directors set initiation fees, membership fees, monthly minimums for food and golf usage, and other fees. The WLCC By-Laws also provide that a fee to be paid by the buyer of any lot in Weston Lakes to WLCC is set at forty percent (40%) of the current initiation fee for the membership at issue (Buyer's Fee).[1]

The CCRs allow the POA to create a lien on the property in the Subdivision and assign the lien to WLCC, a private corporation, for dues not paid. WLCC, as a Texas corporation, is not a part of the Weston Lakes Property Owners Association (POA). The WLCC, including its golf course, is located within the Weston Lakes private gated community.

Originally, WLCC was a for-profit, private country club marketed as available only to those who owned property in the Weston Lakes subdivision. It is organized for the purpose of

[1] Based upon the calculation of Buyer's Fee, also called transfer fees, established by the WLCC By-Laws, a WLCC golfing membership initiation fee is valued at $18,000 for Weston Lakes sections of the subdivision ($7200/0.40 = $18,000) while Oxbow and Fairway Villas sections of the subdivisions are valued at $8,750 ($3500/0.40 = $8,750). WLCC publishes Buyer's Fees for residents and initiation fees for non-residents. WLCC charges non-residents an initiation fee of only $250.

providing a return on investment to its stockholders. The WLCC By-Laws state, "Members have no ownership or proprietary interest in the physical assets, real property, profits/losses or operations of the club." The Board of Directors of WLCC may suspend or terminate the membership of any member the Board deems to have behaved not in the best interest of the club. However, the dues shall continue to accrue to be paid to WLCC upon reinstatement or the transfer of membership upon the sale of the member's property. WLCC By-laws do not place any restrictions upon increases in dues and fees. WLCC's Board of Directors, at its sole discretion, has the right to establish membership fees. No mandated member has ever been a member of WLCC's Board of Directors. According to the 2008 Texas Franchise Tax Public Information Report, Michael Surface, declarant/developer of the Weston Lakes subdivision, is the sole owner, sole director, and sole executive of WLCC. All initiation fees, Buyer's Fees, and monthly membership fees are paid to WLCC.

The POA was turned over from the original developer's successor (Sierra) to the property owners in March 1998 through a settlement agreement between The Preservation Committee and Sierra. The POA owns the streets and the common areas within the subdivision. Within days before the property owners obtained control of the POA, Sierra granted itself access easements enabling it to bring "daily green fee" guests to WLCC and the golf course over the private streets.

A petition was filed in Fort Bend County by individuals against defendant WLCC. This suit was turned over to the POA and eventually culminated in a Settlement Agreement which addressed Sierra paying the POA $150,000 for reparation of the lakes, the changing of WLCC By-Laws and policies, opening the club and golf course to guests not accompanied by members, the illegal transfer of funds out of the POA, excessive legal fee charges to the POA, among other claims. The POA and various individuals signed releases and the law suit was dismissed with prejudice.

The Settlement Agreement empowered WLCC to sell "outside" (non-resident) memberships by stating, "WLCC agrees that its dues and fee structure shall remain reasonably comparable to other private country clubs with reasonably similar facilities. However, nothing herein shall be construed as to mandate or limit WLCC's discretion to set a specific amount for dues and fees."

WLCC may or may not provide any level of services at their sole discretion. WLCC differentiates pricing not only between non-resident and resident members but also between resident members.

Weston Lakes' Buyer's Fees for the original lots are $7,200 for Golf Membership and monthly dues before taxes are $285. The Buyer's Fee for a lot with only a social membership is $1,700 and monthly dues are $74. These costs do not represent fair market value which is defined as an estimate of the market value, based on what a knowledgeable, willing, and unpressured buyer would probably pay to a knowledgeable, willing, and unpressured seller.

Initiation fees for non-resident golf memberships are $250 and then there are various levels of monthly membership dues before taxes ranging from $140 to $290. Therefore, because

non-resident members have a free choice to buy, or not to buy, various types of golf memberships in WLCC, the fair market value of a golfing membership is $250, not the Buyer's Fee value required of Weston Lakes' owners. Social club memberships are not marketed to non-residents.

A builder, other than the declarant/developer, that purchases a lot in Weston Lakes for the purpose of building a home is required to pay a "social membership" Buyer's Fee. The builder in this example must also pay monthly dues. Then when the property is sold, the resident must again pay the Buyer's Fee.

Weston Lakes Subdivision is completely platted and has approximately 1450 lots. The developer owns approximately 100 lots which are subject to WLCC initiation fees, leaving close to 1350 lots subject to membership in WLCC. The owner of multiple lots must maintain a membership for each lot.

Effective May 20, 2008, the community officially became the incorporated city of Weston Lakes.

> **If a restrictive covenant requires that the owner of a lot subject to the restriction pay membership fees to a for-profit club, without requiring that such fees be used for the benefit of the burdened property and without limiting club membership to owners of restricted property, does that restrictive covenant fail to run with the land making it a personal covenant that cannot be enforced against subsequent purchasers?**

Texas law recognizes both real and personal covenants, and the primary difference between the two is that a real covenant runs with the land and binds the heirs and assigns of the covenanting parties, but a personal covenant does not.[2] *Montford v. Trek Resources, Inc.*, 198 S.W.3d 344, 355 (Tex. App—Eastland 2006, no pet.); *Tarrant Appraisal Dist. v. Colonial Country* Club, 767 S.W.2d 230, 235 (Tex. App.—Fort Worth 1989, writ denied). For a covenant

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[2] Certain personal covenants and equitable servitudes may be binding on subsequent purchasers. Personal covenants may be binding on subsequent purchasers if there is notice of the restrictive covenant AND the restriction concerns land or its use. *Tarrant Appraisal Dist. v. Colonial Country Club*, 767 S.W.2d 230, 235 (Tex. App.—Fort Worth 1989, writ denied). The Austin Court of Appeals clarified the relationship of personal covenants and equitable servitudes, in stating that "personal covenants *may* be enforceable as equitable servitudes so long as all the requirements are met, chiefly notice to the successor to the burdened land." *Reagan Nat'l Adver. of Austin, Inc. v. Capital Outdoors, Inc.*, 96 S.W.3d 490, 495 (Tex. App.—Austin 2002, vacated without opinion). There are two more requirements needed to establish an equitable servitudes binding on subsequent purchasers:

(1) the successor to the burdened land took its interest with notice of the restriction,
(2) the covenant limits the use of the burdened land, and
(3) the covenant benefits the land of the party seeking to enforce it.

Id. (citations omitted). Because the second requirement is nearly identical to the touch and concern test to determine whether a restriction runs with the land, there is no reason to analyze the law of equitable servitudes or successor-binding personal covenants that restrict land use.

to run with the land, the covenant must include the following four elements: (1) it touches and concerns the land, (2) it relates to a thing in existence or specifically binds the parties and their assigns, (3) it is intended by the original parties to run with the land, and (4) the successor to the burden has notice. *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex.1987).

Covenants touch upon the land when they burden or restrict use of the land. *Veteran Land Bd. v. Lesley*, 281 S.W.3d 602, 621 (Tex. App.—Eastland 2009, pet. granted). Courts have found covenants that touch upon the land where a covenant requires payment of assessments to repair and improve common areas and recreational facilities of a subdivision, restricts future uses of land, or burdens the land through a promise to provide water from wells on the land. *Inwood*, 736 S.W.2d at 635 (covenant to pay maintenance assessments); *Voice of the Cornerstone Church Corp. v. Pizza Prop. Ptnrs.*, 160 S.W.3d 657, (Tex. App.—Austin 2005, no pet.) (restriction of land to commercial or light industrial uses "burdened the property itself"); *Rolling Lands Invs., L.C. v. Northwest Airport Mgmt., L.P.*, 111 S.W.3d 187, 200 (Tex. App.—Texarkana 2003, pet. denied) (covenant prohibiting the sell of fuel from tract touched land "because it limits the use to which the land can be put"); *Tarrant Appraisal*, 767 S.W.2d at 235 (land limited to recreational, park, or open-space use); *Montford*, 198 S.W.3d at 355-56 (obligation to provide well water from land); *Wimberly v. Lone Star Gas Co.*, 818 S.W.2d. 868, (Tex. App.—Fort Worth 1991, pet. denied) (contract to sell well water from seller's property for use by a compressor station plant on buyer's property).

The restrictive covenants that have been found to touch and concern land contrast greatly from covenants that do not and are thus personal covenants. In *Veterans Land Board*, a deed required the buyer of property interests to provide copies of all mineral leases entered into on the property. *Veterans Land Bd.*, 281 S.W.3d at 621. This obligation was held to not touch and concern the land. *Id.* at 622. Instead these were mere notice requirements and did not burden or restrict the promisor's mineral or surface estate rights. *Id.* It is important to note that this covenant was unambiguously stated in the first buyer's deed, thus in the chain of title of the grantee of the original buyer, yet the grantee was not bound by the covenant because it did not touch the land was thus, personal to the original buyer.

Another example of a personal covenant is found in the case of *Martindale v. Gulf Oil Corp*, 345 S.W.2d 810 (Tex. App.—Beaumont 1961, writ ref'd n.r.e.). Gulf Oil entered into a contract with a filling station owner that required the owner to purchase oil from Gulf for a period of ten years. Several years into the agreement, a new station was built and Gulf installed pumps, tanks, and other equipment at the station. Several years after that, the son of the original owner inherited the land and challenged the obligation. The Beaumont Court held that it was a personal covenant and the son was not bound and his full knowledge of the obligation had no effect on its characterization as a personal covenant. *Id.* at 813.

The deed restriction described in this opinion request amounts to a personal covenant. The obligation requires all subdivision property owners to purchase a membership in a for-profit and private country club. This restriction does not "limit the use to which the land can be put," as described in *Rolling Land.* See 111 S.W.3d at 200. In addition, membership is not tied in any way to lot ownership other than the restrictive covenant because the private club has members who are not lot owners. The mandatory club membership is akin to the requirement in *Veterans*

Land Board that the property owner provide copies of leases to the original grantor and assigns when the owner entered into a lease on the property. It is a restriction and burden for sure, but it is a restriction on the lot owner and a burden on his or her pocketbook, not a restriction on property uses or a burden on the actual land.

Finally, personal covenants that do not run with the land cannot be enforced against subsequent purchasers because they do not bind future purchasers. See *Veterans Land Bd.*, 281 S.W.3d at 621. Simply providing notice of the personal covenant does not cure the limitation of enforceability on future purchasers. See *Tarrant Appraisal*, 767 S.W.2d at 235 ("Personal covenants bind only the actual parties to the covenant and those who purchase the land with notice of the restrictive covenant, if the restrictions concern land or its use.").

If a restrictive covenant requires that a fee be paid by a new buyer each time the restricted property is sold and that such fee be paid to a for-profit club, without requiring that such fee be used for the benefit of the burdened property, does that restrictive covenant fail to touch and concern the land making it a personal covenant that cannot be enforced against subsequent purchasers?

Given the well-established touch and concern requirement discussed in detail above, the WLCC Buyer's Fee also fails to touch and concern the land in the same way as the membership fees. The requirement of payment by a purchaser of a Weston Lakes subdivision lot is not related to a restriction or burden on use or enjoyment of that lot. It is a personal monetary obligation on the original buyer, and therefore, cannot be enforced on any subsequent purchaser.

Does Texas Constitution Article XVI, Section 50, prevent foreclosure of a homestead property based on a violation of a personal covenant that does not touch and concern land?

Section 50 of Article 16 of the Texas Constitution protects homestead property from forced sale for the payment of all debts except for certain types of debts. Tex. Const. art. XVI, § 50. Please assume that the lien at issue to this question is not a type listed as excepted by Section 50. The Constitution states,

> No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section, whether such mortgage, trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married.

Id. § 50(c).

A contractual lien that attaches to the property before the property is used as a homestead does not trigger the Constitutional homestead protection. *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex.1987); (citing *Gage v. Neblett*, 57 Tex. 374, 378 (1882)). In *Inwood*, the Texas Supreme Court held that a restrictive covenant that (1) required the payment

of a maintenance fee to a homeowner association and (2) attached prior to the use of the property as a homestead, created an enforceable lien.[3] The Supreme Court stated that the "case revolves around when the lien attached on the property....if the lien attached prior to the claimed homestead right *and the lien is an obligation that would run with the land*, there would be a right to foreclose." *Id.* at 365 (emphasis added).

The contractual lien at issue was created by the subdivision's declaration of covenants, which were recorded in the county property records before any individual lots were sold. *Id.* at 633-34. Thus the Court turned to the question of whether the covenant at issue ran with the land, and the Court determined that it did. *Id.* at 365. As discussed above, the Court held that the obligation to pay maintenance assessments for the purpose of improving and repairing common areas and recreation facilities of the Inwood subdivision touched and concerned the land. *Id.*

Thus, Section 50 of Article 16 of the Texas Constitution, as interpreted by the Texas Supreme Court, prevents the foreclosure of a homestead property based on a lien obligation that fails to run with the land. Further this protection prevents foreclosure irrespective of the fact that the execution and recording of the document containing the lien predate the use of the property as a homestead. Further, a lien attempting to secure an obligation that does not run with the land is invalid according to Section 50 of Article 16 of the Texas Constitution.

Does Texas Constitution Article XVI, Section 50, prevent foreclosure of a homestead based on a failure to pay a fee not identified or described in any instrument as a lien obligation before the property became a homestead?

Setting aside the previous discussion of the touch and concern requirement to create a covenant that runs with the land, this question seeks your determination of the application of Section 50 of Article 16 of the Texas Constitution to the following situation:

- a restrictive covenant is executed and recorded before a property becomes a homestead;
- the restrictive covenant requires that the owner of the restricted property join a for-profit, private club and follow the for-profit, private club's rules[4];

[3] Tex. Atty. Gen. LO 97-019 describes the *Inwood* opinion as determining that "the critical issue is when the lien attaches on the property and whether the lien is the result of a covenant that runs with the land."

[4] For example, Riverwood Sec. 2, CCR, Section 6.01(e) states,

> A transfer of said ... Country Club Membership upon the sale of the Owner's Lot shall be subject to the Rules and Regulations of the WLCC. Each Owner of a Lot ... is deemed to covenant and agree to pay directly to WLCC ... a monthly Social Membership charge ("Country Club Charge"). As provided above, the Country Club Charge, together with such interest thereon and costs of collection thereof, as provided for in the Bylaws of the WLCC, shall be a charge on the Lots and shall be a continuing lien ... upon the Lots against which each Country Club Charge is made.

- the for-profit, private club's rules require that a fee be paid to it every time the restricted property is sold and that such fee must be paid by the new buyer of the property ("Buyer's Fee");

- the restrictive covenant does not contain language creating a lien for the Buyer's Fee, though it includes language creating a lien for payment of club membership fees[5];

- the for-profit, private club's rules do not contain language creating a lien for the Buyer's Fee;

- the property is purchased and purchaser uses the property as his homestead.

"Creation of a contractual lien depends only on evidence apparent from the language of the agreement that the parties intended to create a lien."[6] *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 634 (Tex.1987). It seems clear that the exception to the Constitution's homestead protection as recognized by the Supreme Court requires that a lien be created and not merely a debt.

It is important to note that Attorney General Letter Opinion 97-019 has a protective and expansive view of the Constitution's Homestead Protection, limiting a POA to only those fees for which a lien was created prior to the use as a homestead. Tex. Atty. Gen. LO 97-019 (1997).

Do the enforcement and penalty provisions in Chapter 202 of the Texas Property Code apply to violations of the bylaws or rules of a private club?

Chapter 202 governs construction and enforcement of restrictive covenants in Texas, regardless of when the restrictions were created. See Tex. Prop. Code § 202.002. Section 202.004 provides that a "court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation." *Id.* § 202.004(c). A restrictive covenant is defined as "any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative." *Id.* § 202.001.

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[5] See Footnote 3.

[6] The language of the declaration in *Inwood* was described as follows by the Court:

> [E]ach person receiving a deed for a lot in the subdivision "is deemed to covenant and agree to pay the Association the following: (a) annual assessment or charges; and (b) special assessments for capital improvements." These assessments, plus interest and costs of collection, were designated to be "a charge on the land and shall be secured by a continuing Vendor's Lien upon the Lot against which such assessments or charges are made."

Id. at 633.

A dedicatory instrument is defined as

> each governing instrument covering the establishment, maintenance, and operation of a residential subdivision, planned unit development, condominium or townhouse regime, or any similar planned development. The term includes a declaration or similar instrument subjecting real property to restrictive covenants, bylaws, or similar instruments governing the administration or operation of a property owners' association, to properly adopted rules and regulations of the property owners' association, or to all lawful amendments to the covenants, bylaws, instruments, rules, or regulations.

Id.

Given these definitions, the bylaws or rules of a private club cannot be enforced under Section 202.004(c) because that section applies only to restrictive covenants found in dedicatory instruments. Club bylaws and rules cannot be a dedicatory instrument because they do not govern the establishment, maintenance, AND operation of a subdivision. Thus any fee imposed solely by a for-profit, private club's bylaws or rules is not a restrictive covenant enforceable under Section 202.004(c).

Is a restrictive covenant that imposes an uncapped fee on each new buyer due upon each subsequent transfer of the burdened property an unreasonable restraint on alienation?

Texas law disfavors the tying up of property. *Mattern v. Herzog*, 367 S.W.2d 312 (Tex. 1963); *Proctor v. Foxmeyer Drug Co.*, 884 S.W.2d 853, 862 (Tex. App.—Dallas 1994, no writ). Unreasonable restraints on alienation are void and unenforceable. *Metro. Sav. & Loan Assoc. v. Nabours*, 652 S.W.2d 820, 824 (Tex. App.—Tyler 1983, writ dismissed). In *Metropolitan Savings*, the court struck a due on sale clause that required the buyers to obtain the consent of the mortgagee prior to any sale and, if no consent was given, assessed a prepayment fee of a set calculation. *Id.* at 824. This clause was an unreasonable restraint on alienation. The court noted that there were no limits on the negotiation required of the property owners wanting to sell and the mortgagee was free to raise the interest rate or shorten the payment period of a new mortgage. *Id.* at 823. These amounted to a quantum of restraint deserving of cancellation. *Id.*

While the scope of an Attorney General opinion is limited with regard to determining the facts necessary for contract construction, it seems clear that no factual interpretation is required to determine that Texas law voids a covenant that imposes, upon every transfer of a burdened property, a fee that is not fixed or based on a fixed calculation or rate and is subject to a unilateral increase by the party to whom the fee will be owed. The factual question of whether the fee, as it is set today, is a reasonable fee is immaterial to the validity of the clause at issue. Using the example of WLCC, it could decide tomorrow to increase its fee to $50,000 under its contract language. As a matter of law an unlimited fee due upon transfer is an unreasonable restraint on alienation in Texas.

Are restrictive covenants that require a membership fee paid to a private third-party for which there is no mechanism for the owner of the burdened property to get notice of, have control over use of, or limit increases in that membership fee invalid as an illegal monopoly, an unfair restraint on trade, or a violation of the Texas Property Code's protections for homeowners?

Property owners in Weston Lakes are required to maintain a virtually perpetual membership in WLCC, a private, for-profit corporation. These property owners have no control over the use of their membership fees. They have no right to a minimum level of services in exchange for those membership fees. They have no right to even know how those membership fees are used. WLCC has no restrictions on the amount of fees it charges and has the right to a lien on the property of any Weston Lakes property owner who fails to pay membership dues.

Illegal Monopoly and Restraint on Trade

Texas law disfavors monopolies and unfair restraints on trade. The Texas Constitution bars monopolies, perpetuities, and conspiracies in restraint of trade. Tex. Const. art. I, § 26 ("Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed...."); Tex. Bus. & Comm Code § 15.05 (a) ("Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.") and (b) ("It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce."). A monopoly "is established if two elements are proven: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development of a superior product, business acumen, or historical accident." *Caller Times Publ'g Co. v. Triad Comm., Inc.*, 826 S.W.2d 576, 580 (Tex. 1992) (citation omitted).

The Office of the Attorney General takes special notice of the use of monopolistic power like that employed by WLCC. The Attorney General is fighting on behalf of all Texans in the federal government's transformation of "an essentially voluntary private transaction into a compulsory activity mandated by law."[7] WLCC's actions are similar. WLCC's possession of monopoly power in the relevant market is unquestioned. The property owners in the Weston Lakes subdivision are required to purchase memberships in WLCC and have no control over what services are provided or the cost of those services. With regard to the second element, WLCC has created a nearly permanent income stream that has no relation to the market value of its product, business acumen, or historical accident.

WLCC's price structure deserves special note. In the *Caller Times* case, the Supreme Court held that one may establish the second element through predatory pricing. *Id.* However, there is a twist in the case of WLCC because it charges wildly disproportionate membership fees to residents.[8] Memberships for non-Weston Lakes owners are only a fraction of the membership

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[7] See Letter regarding Potential Constitutional Problems with H.R. 3590, Attorney General Greg Abbott to Senators Hutchinson and Cornyn, page 3 (Jan. 5, 2010).

[8] This brief assumes that the golf membership initiation fee charged to non-residents of $250 is the fair market value of joining a club like the WLCC and, thus, the amount charged to residents is the fee that is out of proportion. However, if the initiation fee of $250 is below the fair market value of the cost to join

fee charged to residents. There is no difference in the facility and golfing product offered to residents versus non-residents. The only difference is the fact that Weston Lakes property owners' fees are mandated and, consequently, guaranteed. This is an affront to the free market system so favored by the Texas Constitution and the Texas Legislature.

This inequitable pricing acts as an unfair restraint on trade. In analyzing "whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition," one should consider all the circumstances. *State v. Coca Cola Bottling Co.*, 697 S.W.2d 677, 681 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (reviewing and affirming the constitutionality of Section 15.05 of the Texas Business and Commerce Code). Reasonableness is determined by looking at the effect of the restraint on the relevant market. *Id.* Here the relevant market is golf club and social club goods and services in the geographic vicinity of Weston Lakes. The effect on that market is clear; WLCC has a guaranteed clientele for its social club goods and services, at least guaranteed for several decades, and likely for much longer given the significant hurdle to amend the restrictions. The housing market in the geographical vicinity is also negatively affected for Weston Lakes owners. Because non-residents can purchase golf memberships for initiation fees of only $250, nearby properties outside Weston Lakes subdivision, who can make free market decisions to join WLCC or not, are worth more than properties burdened by the WLCC restrictions.

Texas Property Code Protections

In 2001, the Texas Legislature passed the Texas Residential Property Owners Protection Act.[9] The Act defines a property owners' association as one that, among other things, "manages or regulates the residential subdivision for the benefit of the owners of the property in the residential subdivision." Tex. Prop. Code § 209.002(7). The Act contains several protections for owners of property burdened by restrictive covenants requiring the payment of membership dues to a homeowners' association. *Id.* § 209.003. The Act requires associations to make their books and records reasonably available to its members. *Id.* § 209.005.

The Weston Lakes Country Club is not a homeowners' association. It is not required to manage or operate its club in a way that benefits the owners of the property in the subdivision. WLCC owes a duty only to its shareholders to provide a return on their investment. Weston Lakes' property owners have no right to review WLCC's books and records and have no input into management decisions. Property owners have no control over the dues WLCC sets; the Settlement Agreement states that "nothing herein shall be construed as to mandate or limit WLCC's discretion to set a specific amount for dues and fees."[10]

Other protections for property owners from their homeowners' association are missing when restrictive covenants require the payment of dues to for-profit entities. This arrangement allows a developer to completely ignore the protections afforded by both Chapter 209 and Chapter 202 of the Texas Property Code. Chapter 202 allows for a court determination that a

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a club like WLCC, then WLCC may be engaging in predatory pricing, financed by its almost perpetual income stream from its compelled customers.

[9] Acts 2001, 77th Leg., ch. 926, § 1, eff. Jan. 1, 2002.

[10] Settlement Agreement, Section VIII.

property owners association has exercised its discretionary authority in an arbitrary, capricious, or discriminatory way. Tex. Prop. Code § 202.004. In addition to the statutory protections, a property owner unhappy with his/her association's management of the subdivision, may attend association meetings to voice concerns or can run for a position on the association board. These protections are not available to the Weston Lakes property owners. Indeed, there is no limitation or requirement on the use of the monthly membership fees that WLCC collects from approximately 1350 lots in Weston Lakes other than the Settlement Agreement's statement that WLCC's dues will be reasonably comparable to clubs with reasonably similar facilities.[11] WLCC could increase its profits, which would be in harmony with its fiduciary duty to its shareholders, by reducing services at the club and those in Weston Lakes would have no recourse. WLCC often restricts the members' use of the golf course and facilities so that it can rent it to non-members for events like outside golf tournaments and wedding receptions. In general, the dining facility is closed to members except for certain holidays or other special events. Basically, WLCC's food and beverage service is limited to the grill.

A restrictive covenant requiring private club membership differs greatly from homeowner association dues upheld by courts. Compare the similarities in the membership dues the Texas Supreme Court held to be valid with the WLPOA membership dues and then contrast with the WLCC membership dues. The Court stated that the "covenant to pay maintenance assessments for the purpose of repairing and improving the common areas and recreational facilities of Inwood North touches and concerns the land." *Inwood*, 736 S.W.2d at 635. The Court described the covenant and the property interest at issue in some length, several excerpts of which follows:

> The concept of **community association** and mandatory membership is an inherent property interest.
>
> The obligation to pay association dues and **the corresponding right to demand that maximum services be provided** within the association's budget are characteristics of that property interest.
>
> That no owner has to pay any **more than a pro rata share** is an essential characteristic of the property interest.
>
> We see no distinction in pro rata fee simple **ownership of common elements** and in pro rata common **ownership in an association**, mandated by the declarations, which owns the common elements.
>
> The purchase of a lot in Inwood Homes carries with the purchase, as an inherent part of the property interest, the obligation to pay association fees for maintenance and **ownership of common facilities and services**.
>
> [The remedy of foreclosure] is generally the only method by which other **owners will not be forced to pay more than their fair share or be forced to accept reduced services**.

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[11] Settlement Agreement, Section VIII.

Id. at 635-36 (emphasis added).

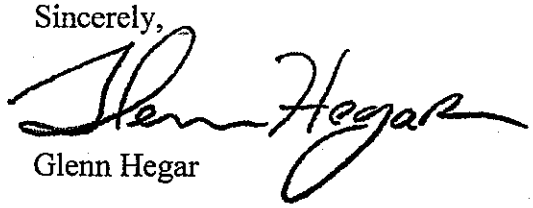
The assessment described in *Inwood* tracks the Maintenance Charge assessed by the Weston Lakes Property Owners Association (WLPOA). WLPOA is a non-profit corporation and lot owners make up its Board of Trustees.[12] The restrictive covenants require membership of all lot owners and subject each to the Maintenance Charge.[13] The covenants provide significant detail on the basis of the charge, including specifics regarding determination of the amount of the charge, due dates, when late fees will be added and the rate of interest thereon, and the inclusion of street lighting charges as a direct pass through.[14] In a section entitled, "Purpose of the Maintenance Charge," the covenants state that it "shall be used exclusively for the purpose of promoting the recreation, health, safety, and welfare of the [lot owners and WLPOA property]," as well as for satisfying the WLPOA's duties as outlined elsewhere in the restrictions.[15] This section of the covenants provides many examples of the types of expenses that may be paid out of the Maintenance Charge and establishes that the WLPOA has discretion to spend it on expenses that it believes "will tend to maintain the property values in the Subdivision."[16] The covenants also give each lot owner a beneficial interest of use and enjoyment in and to the Common Areas," with defined, limited exceptions to that right to use.[17]

In contrast, the covenants do not provide any guaranteed right to the use and enjoyment of WLCC property or club access. The covenants provide no restriction of any kind on WLCC's use of club charges, no requirement that club charges be spent in a way that would tend to maintain property values in the subdivision, no basis for calculation of the charge, no limitation on charge increases, no guaranteed services, no WLPOA or lot owner input on club charges, services, or access.

The protections for property owners created by Chapter 209 are subverted if a declarant/developer can simply avoid the protections afforded by Chapter 209 by creating a private entity for himself to involuntarily collect his nearly perpetual income stream from all the present and future owners in the development.

Please advise if you require any clarification or additional information from my office in order to properly evaluate this request and issue your opinion. Thank you for your attention to this matter.

Sincerely,



Glenn Hegar

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[12] See, for example, Riverwood Forest at Weston Lakes, Section 2, CCRs, § 5.02.
[13] See, for example, Riverwood Forest at Weston Lakes, Section 2, CCRs, § 5.01 & 6.01.
[14] See, for example, Riverwood Forest at Weston Lakes, Section 2, CCRs, § 6.02.
[15] See, for example, Riverwood Forest at Weston Lakes, Section 2, CCRs, § 6.06.
[16] See *id.*
[17] See, for example, Riverwood Forest at Weston Lakes, Section 2, CCRs, § 5.04.