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Office of the Attorney General
Attention: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

General Abbott,

I request that you provide your opinion regarding whether or not Texas law requires an affirmative vote of residential subdivision property owners in favor of subdivision Covenants and Restrictions ("C&R") amendments adopted by the original developer in order for the amendments to become effective. If so, what percentage of the property owners must vote in favor of the C&R amendments?

In providing your opinion, I request that you make the following assumptions:

1. The original developer retains the right to adopt amendments to the C&Rs for a residential subdivision;

2. All property owners are members of the subdivision's property owners association ("POA");

3. The property owners are obligated to pay mandatory fees to the POA;

4. The POA pays for property owners to have the right to access and use hospitality amenities in the subdivision owned and operated by the developer or its subsidiaries;

5. The property owners received notice of their obligation to pay fees to the POA in connection with certain hospitality amenities at the time of their purchase of property in the subdivision;

6. All ownership of the hospitality amenities will be transferred to the property owners for their sole use via a newly-formed 501(c)(7) non-profit and tax-exempt country club (the "Club");

7. The developer will amend the C&Rs to require that all property owners become members of the Club with mandatory fees to the Club;

8. The POA will continue to exist and maintain POA assets; and

9. The property owners will pay an amount approximately the same as the amount currently paid to the POA (which will consist of a reduced fee to the POA and a new fee to the Club) for the same or similar services.

Letter Briefing on the Question Posed to the Attorney General

Based on my research into this matter, I believe that Texas law does not require an affirmative vote of residential subdivision property owners in favor of subdivision C&R amendments adopted by the original developer in order for the amendments to become effective. Several Texas cases have addressed a developer's right to amend subsequent to having sold some but not all lots in a subdivision governed by deed restrictions. Pursuant to *Dyegard Land P'Ship v. Hoover*, 39 S.W.3d 300, 313 (Tex. App.—Fort Worth 2001, no pet.), a developer may amend previously-filed declaratory instruments where (a) the declaratory instrument creating the original restrictions establishes the developer's right to amend and the method of amendment; (b) the right to amend contemplates only those changes contemplating a correction, improvement, or reformation of the agreement rather than a complete destruction of it; and (c) the amendment must not be illegal or against public policy. *See also Wilchester West Concerned Homeowners LDEF, Inc. v. Wilchester West Fund, Inc.*, 177 S.W.3d 552, 562 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Baldwin v. Barbon Corp.*, 773 S.W.2d 681, 685-86 (Tex. App.—San Antonio 1989, writ denied).

Here, the original C&Rs filed in 1990 granted the Board of Directors for the POA the right to amend the C&Rs. In 1996, the Board of Directors amended the C&Rs to reflect the developer's retention of the right to amend the C&Rs (thus transferring this right from the Board of Directors back to the original developer). Since that time, the developer – which remains the owner of a substantial number of lots in the development – has held the right to amend the C&Rs. *See Hoover*, 39 S.W.3d at 314 (citing *Baldwin* to hold that a developer which continues to own lots in a subdivision may unilaterally reserve the right to amend the deed restrictions and to reject the argument that a developer's unilateral right to amend such restrictions constituted an insufficient method for amendment).

Likewise, the proposed amendment to the C&Rs is a textbook example of an improvement or reformation of the original agreement. Prior to purchasing property in the subdivision, each property owner, who automatically became a POA member upon his or her purchase, received notice of the obligation to pay POA fees, part of which would be utilized to support certain amenities in the subdivision currently owned and operated by the developer. In connection with the proposed change to the C&Rs, these hospitality amenities will be transferred to the property owners for their sole use as the Club, and the C&Rs will be amended to require each property owner to pay mandatory fees as Club members.[1] The fees to be paid by the property owners for membership in both the POA and the Club will remain roughly the same as the current fees paid for POA membership. In essence, the proposed

[1] It is a fairly commonplace arrangement in Texas for covenants and restrictions to include club membership as part of ownership in a subdivision. *See, e.g., Am. Golf Corp. v. Colburn*, 65 S.W.3d 277, 278-79 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (residents in the Walden on Lake Houston Subdivision were subject to covenants, conditions, and restrictions making them mandatory members of the on-site country club); *Homsey v. Univ. Gardens Racquet Club*, 730 S.W.2d 763, 764 (Tex. App.—El Paso 1987, writ ref'd n.r.e.) (subdivision owners automatically became "Class A members" of a local club as part of their ownership). In the present situation, such membership will be achieved through an amendment to the C&Rs rather than being a part of the original deed restrictions (as occurred in *Colburn* and *Homsey*).

amendment to the C&Rs simply alters the nature of the relationship between the property owners and the hospitality amenities. Rather than the POA assessing fees on its members that are paid to the developer for their use of the hospitality amenities, the property owners will become members of the Club owning the same amenities and pay comparable dues as part of such membership. Such an amendment is a reformation of previous arrangement, provides the property owners with ownership in the Club, and in no way destroys the nature of the original deed restrictions.

Finally, there is no indication under any Texas statutes or case law that the proposed amendment to the C&Rs is illegal or against public policy.

Based on the reasons identified and case law cited above, I believe that Texas law does not require an affirmative vote of residential subdivision property owners in favor of subdivision C&R amendments adopted by the original developer in order for the amendments to become effective. Specifically, the amendment of the C&Rs can be accomplished through the unilateral action of the developer.

Very truly yours,

Phil Garrett
Palo Pinto County Attorney