PRESERVING THE RESIDENTIAL NEIGHBORHOOD: 
THE ENFORCEMENT OF RESTRICTIVE COVENANTS

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Introduction

In this time of increasing technological change where the nation’s economy has and is moving from one of large manufacturing companies to an economy based on smaller service providers, the trend to operate a business from the home is increasing. The home-based business trend conflicts with property use restrictions that are fairly common to residential subdivisions. On the other hand, there are several factors that tend to promote in-home businesses. These factors include corporate "restructurings" resulting in mid-level management individuals who are available for "consulting", changes in technology that permit "tele-commuting, the growth of two career families and their need for convenient child-care. These developments result in people setting up service and retail businesses from their home. The resulting conflicts over violations of restrictive covenants against operating a business in a residential subdivision is worthy of consideration. When most of the residential restrictions were written, developers were attempting to preserve the residential environment of the neighborhood. This paper reviews current positions of law in Texas as to the restrictive covenant as it applies to the excluding business from the residential neighborhood, its enforceability, interpretations, and defenses.

Deed Restrictions Run With Land

Texas has long recognized the freedom to contract. Texas courts generally enforce rights of parties to contract as they see fit with regard to property provided they do not contravene the public policies of this state and their contract is otherwise not illegal.¹ This right originates from

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¹ Curlee v. Walker, 244 S.W. 497 (Texas 1922)
the principle set forth in *Davis v. Agnew* that a covenant in a deed is valid as long as supported by consideration.²

The shift in population after World War II to the urban areas of Texas generally resulted in the development of numerous "residential neighborhoods." Developers in an attempt to maintain the residential character of their residential projects frequently created restrictions denying persons the right to engage in business or commercial activities. The restrictions might be enumerated in the conveyance, recited on the plat which was recorded and used as the basis for the description in the conveyance, or recorded as a separate declaration of restrictions. The manner of making these restrictions raises the question of whether the restrictions were personal or run with the land. The question of whether the restrictions are personal is generally one of the intent of the parties, as determined from the language of the restriction as found in the conveyance.

Those seeking to enforce a restriction has the burden of showing that the restriction was for the benefit of their property. In *Brehmer v. City of Kerrville* the owners of certain property in Kerrville were seeking to have a zoning of their property as residential declared invalid and rezoned as limited commercial.³ Owners of adjoining property intervened. The neighbors wanted the court to rule that certain covenants contained in the deed from Brehmer's predecessor were restrictions against using the property for business purposes that were enforceable by the adjoining property owners.

The covenants as recited by the court said "No part of the property hereinafter described shall be used for business purposes * * *; and further provided that in the event that appellant or his their or assigns should breach or violate any of the conditions above mentioned * * * the said described and conveyed property is to re vest in Grantor, J.L. Pampell, his heirs and assign, * * *" J.L. Pampell had released and quit-claimed all reversionary rights, Title, and interest to the owner. The court then found that the language in the deed was on its face a personal restriction

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² *Davis v. Agnew*, 2 S.W. 376
³ *Brehmer v. City of Kerrville*, 322 S.W.2d 393 (Tex. Civ. App. -San Antonio 1959)
in favor of J.L. Pampell and his heirs and assigns and that unless the adjoining property owners could show a general scheme or plan of restriction and development the adjoining property owners could not rely on the restrictions in owners deed from J.L. Pampell.⁴

The court wrote that "In every case where parties seek to enforce a restrictive covenant, the burden of proof is on them to establish that the covenant was imposed on the land for the benefit of land owned by them. It is well established that in the absence of proof that a restriction was imposed for the benefit of other land, it is construed as a personal covenant merely with the grantor."⁵

The general scheme or plan of development as determinative of when the restrictions were not personal but enforceable by other adjoining property owners was stated as a general rule by the Supreme Court in Curlee v. Walker. "* * * where there is a general plan or scheme adopted by the owner of a tract, for the development of the property by which it is divided into streets and lots, and which contemplates a restriction as to the use to which lots may be put, or the character and location of improvements thereon, to be secured by a covenant embodying the restrictions to be inserted in the deeds to purchasers, and it appears from the language of the deed itself, construed in 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 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

In Lehmann v. Wallace a court considered the question of when neighbors have the right to enforce restrictive covenants against a non-conforming landowner.⁷ The court noted that a

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⁶ Curlee v. Walker, 244 S.W. 497 (Texas 1922), p 498
general building plan was one of the most common methods of imposing building restrictions and that the plan could be established in a variety of ways including express covenant, filed maps or plats, or "by parol representations made in sales brochures, maps, advertising, and oral statements on which the purchaser relied making his purchase." That court further held that the test for the existence of a general plan or scheme of building was the intent that the restrictive covenant was for the benefit of the purchasers of lots in the tract. The intent was to be determined by whether the representations were made to induce person into purchasing the lots paying higher prices because of the restrictions.

**Reciprocal Negative Easements**

The courts have gone even further in recognizing that a restriction can be imposed upon property under a doctrine as set forth in *Evans v. Pollock* of the implied reciprocal negative easement. The Supreme Court therein sets forth the theory of implied reciprocal negative easement doctrine as the approved rule in Texas. The doctrine arises when a property owner subdivides property into lots selling a substantial number of them with restrictions that further a general scheme of development. The owner thereafter sells lots without express restrictions to a grantee with notice of the restrictions of the other lots. The lots without express restrictions are burden with a negative reciprocal easement that may not be used in violation of those other easements. In *Evans*, the court holds that the question that must be factually resolved is what property is in the general plan or scheme. This may be only a portion of the original development of the grantor. Texas courts strictly construe land use restrictions against the grantor. Courts construe the covenants to favor the grantee and the free use of the property as in *Edwards v. Southhampton*. The interpretation of the language of restriction must adhere to that which is clearly stated and not be added to, enlarged, or reduced in any manner.

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9 *Evans v. Pollock*, 796 S.W.2d 465 (Tx. 1990)  
Restrictive Covenants

In Short v. Maisen the plaintiffs sought to have the defendant enjoined from the continuing of construction of a building and the engaging in or maintaining of commercial activity on his premises. The restriction in question declared "These tracts are for residential purposes and no commercial enterprises of any kind will be permitted." It appears that the restrictions further specified that one permanent residence, barns and other outbuildings were permitted. The facts accepted by the court showed that the defendant was at the time suit was commenced in the process of building on the back of his lot a steel framed building to be covered with steel siding for the avowed purpose of conducting an automobile repair business. The trial court entered an injunction against the defendant Short " from any and all construction on the building * * * and further the defendant is enjoined from engaging in any commercial activities upon the said premises." The appeals court found that the restriction against commercial enterprises was limited to the activities of the defendant and not the structure which was being built. Their holding stated " the restrictive covenants must be considered and enforced as written, and they cannot be enlarged or changed by construction." The appeals court therefore upheld the enjoining of the engaging in commercial enterprises but set aside the order as to the completion of the building.

Restrictions on Single Family Units

The court on appeal in Shaver v. Hunter was faced with the issue of the clear intent and purpose of a covenant which provided that all lots were to be used for residential purposes stating " residence shall be construed to be a single family dwelling." Plaintiffs is this case sought to

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enjoin defendant from continuing the arrangement where he leased his house to a company that used it to provide a home for 3 severely handicapped single women. The defendant argued that the structure was in compliance with the restriction for a single family dwelling and that it was being used as a residence as opposed to a business or commercial activity. The court stated that the term "single family dwelling" was to be construed in its ordinary sense defining the purpose instead of just the type of structure. The court was further urged to consider this living arrangement (a caretaker and 3 single women) as a single family unit. In overruling this contention the court sets forth the position that restrictions to a single family residence has been limited to a "nuclear family" or an extended family. The nuclear family consisting of only the parent, children, and domestic servants; while the extended family also included persons related by blood such as grandparents, or sisters.17

The court in *Couch v. Southampton* considered the definition of an appropriate family unit in an action whereby the plaintiffs were seeking an injunction against the defendants who were maintaining roomers in their homes.18 It seems that certain owners in the Southampton subdivision, which is in close proximity to Rice University, in the city of Houston were taking in students as roomers. Plaintiffs in this cause complained that such was a violation of the restrictions relating to the operation of businesses or apartments. The restrictions contained two clauses that the court set forth in their opinion. The first set forth a restriction against certain enumerated business and types of institutions and concluded with a general prohibition of any noxious interest, trade or business. The second restrictive clause was a prohibition "That no part of said property shall ever be used for the purpose of wholesale or retail business of any kind excepting such portions as may be especially designated by the First Party * * * No apartment house or duplex will be permitted in the addition; the object of this provision being to prohibit multiple housing throughout the entire Addition."19 The contention by the plaintiffs that the restrictions constituted a requirement for single family residence was answered negatively by the

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court on the basis that "the grantor selects his own language and the policy of the law frowns upon forfeitures, conditions, and limitations and favors utmost freedom of titles." 20 The second contention that the renting of rooms to students constituted apartments, or multiple housing was answered by the court by defining the phrase multiple housing. The court took the position that in the context of the restriction the term multiple housing meant more than one household. Since the evidence in the present case reflected that the owners were maintaining the property as their residence and the roomers were only using rooms under the control of the owners that a single household continued to exist. The plaintiffs additional contention that the defendants had gone into the "room rental business" was denied by the court while holding that an owner might go into the room rental business, but the facts as presented in this case showed only property owners occupying the premises as their residence and renting rooms "incidental and accessory to such use". 21

Restrictions on Commercial Activity

When the court has been confronted with the issue of what constitutes a violation of restrictions by business activity it has examined the nature of the business activity, if the activity is a type prohibited under the restrictions, or whether the activity is substantial.

The question of whether the type of activity was a type prohibited under the restrictions was examined in *Hicks v. Loveless*. 22 Loveless moved some equipment weighing over 21,000 pounds from a machine-shop to an out-building on the back of his lot. He described his activity as building precision machine parts for three customers. His contact with these customers was initially by telephone. Later, he would follow up by visiting their place of business for plans and specifications. He would then make the part in his out-building and deliver the part in his truck. He employed no helpers. The restriction that Hicks complained of Loveless violating as set forth by the court prohibited "business or commercial pursuits, whether retail or wholesale * * * on

22 Hicks v. Loveless, 714 S.W.2d 30 (Tex Civ.App. -Dallas 1986)
the premises of any lot."23 The trial court concluded as a finding of fact that the activity was not a business or commercial pursuit and therefore not a violation of the restriction. The appeals court in its decision found that the language was an attempt to define business as broadly as possible in the restriction. The court declared that business had been defined as "any particular employment, occupation, or profession followed as a means of livelihood; in this sense, the word has been defined in general as a calling, employment, trade, or avocation."24 The court in overruling the trial court found as a matter of law that Loveless was engaged in activity which was of a business or commercial pursuit.

The fact that an activity is carried on in the residence or its garage does not prevent the court from finding the activity as violative of the restrictions. The court found in Fowler v. Brown that the conversion of a garage and other changes to her residence for the operation of a florist shop with a 90% phone and 10% walk-in business was a violation of the restriction that limited her use to residential purposes only25. Similarly in Vacaro v. Rougoeu where the defendant attempted to open a beauty parlor in a portion of a garage even though there was no outward change in the appearance of the structure the court found that it was violative of a requirement that the property be used as a single family dwelling.26 The limitation on use of the property has also arisen over a doctors using a house for the caring on of his medical practice.

Medical Services from the Home

The dispute in Briggs v. Hendricks centered over a doctor's use of one room in his home as a place to meet and examine patients. The home located in the Houston Country Club Place Addition of Houston was on a lot that was restricted to residential use and the restrictions specifically limited business use to only that section of the addition referred to as the business center. The doctor had no other office and displayed a large sign attached to the home with his

23 Op. cit., p. 31
24 Op. cit., p. 34
name and the fact that he specialized in rectal diseases. The court in reviewing the restrictions
found that they exclude business or commercial activity. The court conceded that the practice of
medicine was a means to a livelihood but not a trade or business in the ordinary meaning since it
did not include the activity and noise associated with commercial enterprises. The court went on
further to find that it would probably be impossible for a doctor to been engaged in the practice
of medicine without having patients received in his home. The court ruled in favor of the doctor
operating a practice in his home.²⁷

In Walker v. Dorris, the court ruled against a doctor operating a practice in violation of a
restrictive covenant. This case is distinguished from Briggs v. Hendricks in that Dr. Walker did
not reside in the house. The plaintiffs sought to enjoin the defendant from the operation of his
medical office located in a house adjoining one of the plaintiffs. The restriction in part stated "That no building shall be erected on the premises except a dwelling house and outbuildings
thereon."²⁸ The doctor contended that the restriction did not apply to his practicing of medicine
because the building was constructed as a dwelling house and that in any case the courts had
permitted the use of residences for the practice of medicine in areas where restrictions were
validly in effect limiting the use to residential purposes and excluding businesses. The court
distinguished those other cases from the present one based on the fact that in those cases where
the doctors operation of his practice had not been found to violate the restriction the doctor had
been residing in the dwelling and using only a portion of the property as for his medical practice.
In the present case the defendant admitted that the building was being used exclusively as an
office for the exercise of his medical practice. The court in giving the "dwelling house"
restriction its common interpretation held that it created a residential limitation and that the use
of the premises as a medical facility was not a residential use.²⁹

The Incidental Use Defense

One type of use that the courts have recognized as acceptable even though it may be a technical violation of the restrictions is what they have referred to as "use incidental to its use as a residence". The court explored this concept in Hoyt v. Geist where Mr. Geist was accused of violating the deed restrictions by the operation of an electrical business out of his home. The restriction "all tracts in said addition shall be used for single family private residence only" clearly was designed to protect the residential characteristics of the subdivision by excluding all other activity including business. The facts showed that Mr. Geist was conducting an electrical contracting business on his property. He had a building on his lot that was 30 feet by 60 feet containing a main shop and an area that contained an office and living quarters for visiting children. The shop was used mainly as for his hobbies but occasionally he did work in the shop for the business. Most of his business was carried on at the job sites but he did maintain his business phone and store some materials in his shop. The trial court also found that others in the subdivision had carried on similar activities for several years prior to those complained of by Mr. Geist. In denying the injunction the court held "an injunction will not issue unless there is a substantial violation of the covenant." In this case the court found "The use made of the premises was unobtrusive and resulted neither in appreciable damage to appellants' property or to neighboring residents.

The business use is reasonably incidental to residential use and constitutes a nominal or inconsequential breach of the covenant. The court clearly found that there was a technical violation of the restrictions but that in the absence of damages, inconvenience, or other annoyance to the plaintiff or other property owner in the subdivision an injunction should not issue. The operation of a mail-order business was given the right to continue its operation within limits imposed by the trial court that enjoined the shipping and receiving goods at his home. In Point Lookout West Inc. v. Wharton, Wharton was operating a mail order business from his home.

which the homeowners association asserted was a violation of a restriction limiting the property to residential use only. The trial court denied the plaintiffs petition but ordered the defendant not to expand his business at his home, not to hire additional employees, and to cease using commercial tucking within 90 days. The Court of Appeals found that the order enjoining the plaintiff was inconsistent with its denial of relief to plaintiffs, it being their belief that the trial court must have found that the violations were incidental to Wharton's residential use and therefore set aside the portion which enjoined Wharton. The Supreme Court in reviewing the Court of Appeals decision found it had erred in failing to give full effect to the trial courts judgment by over turning the portion enjoining Wharton from shipping and receiving goods at his residence. The Supreme Court found that where the trial court had found that the ingress and egress of trucks involved an impermissible commercial use of the property the appeals court had erred in setting aside that portion of the order. The Supreme Court left intact that portion of the order which denied the homeowners association an injunction for operation of the business thereby allowing Wharton to continue the mail order business operation from his home. The Supreme Court while not addressing the issue directly seems at least by not striking down the denial of an injunction against the business to recognize that where the business is only incidental to the residential use and not having the commercial appearance it may be permissible in the face of restrictive residential covenants.32

Home Care Services

Home based child care services raises a different argument in support of using a home for a commercial venture. In *Mills v. Kubena* Mr. & Mrs. Mills tried to justify their child care service under the license they received under the Texas Human Resources Code section 42.002(9) which describes a home-based child care facility.33 Their license entitled them to care for up to 6 children under the age of 14 and an additional 6 of their siblings after school hours. They argued

32 *Point Lookout West Inc. v. Wharton*, 742 S.W.2d 277 (Tex. 1987)
that the policy of the human resources code to protect children in child care facilities in facilities as provided under section 42.002(9) as a registered family home does not violate residential covenants against operating a business. The court rejected their argument and ruled that the defendants have the burden to prove substantial compliance with the restrictions where there has been shown use that is violative in nature. In Mills the defendant placed evidence before the jury raising the issue but failed to submit a special issue in correct form. The court therefore upheld the injunction against the operation of the daycare center as violative of the restrictions.\textsuperscript{34}

\textbf{Defenses to Enforcement Actions}

One answer that seems to arise as a common defense in cases involving the enforcement of restrictions is one that centers around the actions of the plaintiffs or more often their inaction. The defendant frequently raises the defense of waiver, abandonment, or non-enforcement as reason that such restrictions should not be enforced against them in their case. The defense of waiver was attempted to be asserted in the \textit{Delaporte v. Preston Square Inc.} \textsuperscript{35} Delaporte had built a large wall as an addition to his townhome without the prior approval of the architectural control committee's as required in the restrictions. One of Delaporte's contentions was that the Preston Square Homeowners Association had waived it's right to enforce the restrictions because of other violations of additions to townhouses without the architectural control committee's approval. The court found that the evidence while indicating that there were other violations showed them to be trivial and held "because a failure to object to trivial violations of a restrictive covenant does not result in a waiver of the restrictions * * *"\textsuperscript{36} The court also pointed put that the declarations of covenants also provided that a failure to enforce the restrictions against any specific violation did not constitute a waiver of that restriction.

\textsuperscript{34} \textit{Op. cit.}
\textsuperscript{35} \textit{Delaporte v. Preston Square Inc.}, 680 S.W.2d 581 (Tex. Civ. App. -Dallas 1984)
\textsuperscript{36} \textit{Op. Cit.}, p. 565
The argument of waiver was also advanced in the case of *Fowler v. Brown*. Mrs. Fowler attempted to open a florist shop in her garage in contravention of a restriction that all lots in her subdivision were to be used only for residential purposes. She argued that her defense was conclusively established by the proof that other businesses within the subdivision. The court disagreed holding that "A waiver takes place where one dispenses with the performance of something which he has the right to exact, and occurs where one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something, the doing of which is inconsistent with the right or his intention to rely upon it." The court finding that two violations were of a trivial nature would not support her argument of waiver.

**Defense of Abandonment**

The defense of abandonment was argued in *Faubian v. Busch*. Dean Busch brought this action to have the restrictions as applied to his lots declared invalid and based his position on the theory that there was an abandonment of the general scheme. The Busch property was acquired from Jack Spence and was part of the Palo Duro addition of Amarillo. Jack Spence operated a grocery store and a sandwich shop on 2 lots in the subdivision which were the only businesses on any of the 256 lots. The lots of Mr. Busch were acquired from Mr. Spence and were in the area of the businesses but were not developed. There was evidence that some 75% of the property owners had signed a relinquishment of the restrictions but the court found that even if the 75% were relinquished they could not prevent the other lot holders from enforcement. The court then addressed the issue of abandonment saying in part "**abandonment of a general scheme or plan of the development of a particular area, it must be shown that such plan has been violated to such extent as to reasonably lead to the conclusion that it had in fact been abandoned**."  

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The court ruled as a matter of law that no such abandonment occurred under the facts given. The courts have however refused to enforce restrictions where they have found an abandonment of the general plan or scheme of development to such an extent that the benefits sought under the restrictions no longer secure to the owners that which was envisioned by their adoption.

In *Stout v. Rhodes*, Mr. Stout attempted to enforce a restriction limiting the lots use to this of a private residence. His complaint against Mr. Rhodes was due to his building a four unit apartment behind an existing four unit apartment. The court found that since its beginning the owners of lots in the subdivision had acquiesced to many duplexes, apartments, garage apartments, service stations and other business in the subdivision to the extent that it amounted to an abandonment of the general building plan or scheme.41

**Change of Character of Neighborhood**

A more difficult question was raised in *Simon v. Henrichson* wherein the plaintiff Henrichson brought the action in the form of a declaratory judgment to remove the residential deed restrictions from plaintiffs property. The plaintiffs property was a part of Edge Water addition in Corpus Christi which lies between two street that became major thoroughfares and converge at a point on Corpus Christi Bay. The tract in question was east of the street Alameda drive on block 2 which had never developed in the 27 years of the subdivisions existence except for the business that were built there 24 years before. This mostly due to the fact that the lots in block 2 backed up to salt flats of another bay which were not desirable for residences though restricted as such. The property closest to plaintiffs was restricted as business and developed as such at about the same time. The issue before the court was as to whether the plaintiffs should be allowed the affirmative relief of having the restriction removed. The court acknowledged that the plaintiff has a greater burden to remove a restriction than to defend himself against the

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attempted enforcement of violation of the restrictions.\textsuperscript{42} The court adopted the following language in recognizing the right however to remove restrictions:

Most jurisdictions now recognize a change in character of the neighborhood as a ground for affirmative relief against restrictive covenants. Courts reason that where the change has been so radical as to render perpetuation of the restrictions of no substantial benefit to the dominate estate, they will not uphold restrictive covenants. the court found that considering the evidence that the lots were unsuitable for residential purposes, that the other owners patronized the business without objection for over twenty years, and their use had not materially damaged the scheme of the development the trial court was justified in removing the restrictions.\textsuperscript{43}

\textbf{Conclusion}

Texas has a long history of the allowing of an owner of property to restrict the use of that property when transferring it to subsequent owners. The courts have maintained a policy of very strict interpretation of those covenant of restriction; not allowing any enlargement of the original intent of the grantor. This can be seen in the way the court held various terms to limit the use of property to residential. The restrictions excluding business were likewise given their full and complete meanings. This has not however prevented the court from excepting activities that the court deemed incidental to the normal residential use. The courts have taken that exception in the direction of determining whether the conduct was obtrusive, noxious, or blatantly commercial. This would allow the court to expand this exception by the adoption of some test that would ask whether the activity was such that it was observable or discernible by other parties with an interest to protect. If the "business activity" could not be observed or discerned it would only be incidental use. The adoption of a standard that allows such use seems to be reasonable as it would not change the character of the neighborhood and allow full-time use of the residence for such businesses operated at home. The greater use of computers and other technologies suggest that more opportunities for people to work at home. These technologies generally do not change the quality of the neighborhood. As yet, courts still tend to interpret restrictive covenants against

\textsuperscript{42} Simon v. Henrichson, 394 S.W.2d 249 (Tex. Civ. App. -Corpus Christi 1965)

\textsuperscript{43} Op. cit. p 254
operating a business very strictly and only afford limited defenses to actions brought within the statutory time limits. To date, there has been no Legislative relief for those couples seeking to fulfill society's demand for home-based child care. Would-be entrepreneurs must be discreet in operating home-based businesses or face almost certain injunctive relief if neighbors file a timely action.