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OPINION COMMITTEE

SENATOR GLENN HEGAR
DISTRICT 18

November 20, 2009

FILE # ML-46261-09
I.D. # 46261

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711
Attn: Opinion Committee

RQ-0843-GA

RE: Request for Attorney General's Opinion

Dear General Abbott:

I respectfully request an opinion on the constitutionality of Section 5.017(b) of the Texas Property Code, created by House Bill 2207 of the 80th Legislature, when applied to restrictive covenants that were recorded and in existence prior to such legislation's effective date. 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 the provisions of Section 5.017(b) are particularly relevant.

Background

Section 5.017(b) of the Property Code, as created by House Bill 2207 of the 80th Texas Legislature, provides that a deed restriction or other covenant that requires a transferee of residential real property or such person's heirs, successors or assigns to pay a declarant or other person imposing the deed restriction, or a third party designated by the transferor, a fee in connection with the future transfer of the property is prohibited. Section 5.017(b) goes further to state that a deed restriction or covenant that violates the prohibition contained therein is void. Section 5.017(b) specifically excepts deed restrictions or covenants that require fees to be paid to (i) property owners associations; (ii) an entity organized under Section 501(c)(3) of the Internal Revenue Code; or (iii) a governmental entity. House Bill 2207 provided expressly that the changes to the law made by such legislation apply only to a transfer of property that occurs, or a contract entered into, on or after the effective date of the bill.

Weston Lakes Country Club

Weston Lakes is a 1400 acre single-family residential development in Fort Bend County, Texas, containing not less than twenty-one (21) platted subdivisions with approximately 1500 single-family lots. Weston Lakes was originally developed in 1985. In the midst of the development is the Weston Lakes Country Club ("WLCC"). The WLCC is owned by Weston Lakes Country Club, Inc., and Sierra Golf Corp., both Texas for-profit corporations. WLCC

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includes an eighteen-hole golf course, tennis courts, swimming pool, club house, and dining and meeting facilities. The WLCC has been operating since 1985.

As each separate subdivision in Weston Lakes was platted, it was encumbered with a comprehensive set of covenants, conditions and restrictions (referred to herein as the "CCRs"), which are recorded in the Official Public Records of Fort Bend County, Texas. The CCRs limit the property within the subdivisions to single-family residential use, provide minimum architectural standards for improvements, and contain typical residential use and conduct restrictions. Also, like most residential developments, the CCRs provide for a property owner's association ("POA"), and provide for each Lot owner to pay periodic dues and assessments to the POA.

The CCRs for Weston Lakes also provide that each owner of a lot within Weston Lakes must purchase a membership in the WLCC upon and as a consequence of such person's acquisition of their Lot. By way of example, Section 6.02(g) of the Declaration of Covenants, Conditions and Restrictions - Weston Lakes Section Sixteen, recorded as Document No. 1999064623, Official Public Records of Fort Bend County, Texas, provides that:

Each Owner of a Lot, other than Declarant, has agreed to and shall obtain and maintain a "Social Membership" as the same is defined in the Bylaws of the WLCC during the term of said Owner's ownership of a Lot.

The Social Membership is the most basic membership category. The CCRs provide that a lot owner may elect to purchase an upgraded membership with greater club privileges. Additionally, the CCRs require that Lot owners pay to the WLCC various fees and charges associated with their membership.

In practice, at the time a person acquires a lot in Weston Lakes, he or she is required to obtain at least a Social Membership from WLCC. WLCC charges a fee for such membership in an amount as set by the WLCC Board of Directors from time to time. In addition, each Social Member is required to pay monthly dues to the WLCC, as well as pay for any food, beverages, and merchandise charged to such customer's account at the WLCC, if any.

Thus, the various CCRs in Weston Lakes contain provisions that could arguably fit within the prohibition contained in Section 5.017(b) of the Property Code. There is a deed restriction (the CCRs), which is applicable to the conveyance of residential real property, that requires a transferee (the lot purchaser), to pay a third party (WLCC) designated by a transferor of the property (the transferor could be the original declarant, or the seller of the lot) a fee (the cost to acquire a membership) in connection with the future transfer of the property.

It is clear from the legislative history of HB 2207 that Section 5.017(b) of the Property Code was not intended to address the WLCC and the pre-existing CCRs which require purchase of a WLCC membership. Nonetheless, the language of HB 2207 and its potential impact on the CCRs, as well as other recorded covenants which might fall within its purview have prompted me to seek clarity on this issue.

Accordingly, this letter requests an opinion on the following questions:

First, does HB 2207 apply to restrictive covenants (including the CCRs) which were recorded and in existence prior to its effective date?

Second, if the answer to the first question is in the affirmative, then does Section 5.017(b) as applied to pre-existing, recorded restrictive covenants (including the CCRs), violate the prohibition on retroactive laws and laws impairing the obligation of contracts contained in Article I, Section 16 of the Texas Constitution?

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. Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Glenn Hegar". The signature is written in black ink and is positioned above the printed name.

Glenn Hegar