

MEMO CONCERNING THE DECLARATION
AND BY LAWS OF GREAT OAKS SUBDIVISION

Enforceability - threshold question

There are three requirements to be met for covenants contained in a deed or other written instrument to be enforceable against a remote grantee:

- 1) the covenant must touch and concern the land;
- 2) there must be privity of estate; and
- 3) there must be notice.

Whether a covenant touches and concerns the land is a question to be determined on a case by case basis; consequently, it is difficult for counsel to give a definite test that can be applied with any degree of certainty. The question whether a covenant touches and concerns the land is answered affirmatively when the covenants imposed upon the land are for the purpose of establishing a general plan or scheme of development, and the intention of the declarant is to dispense land use benefits for remote grantees - that is, parties taking a parcel of land subsequent to the instrument creating the covenants. Most covenants today will be held to touch and concern the land. The covenants, conditions, and restrictions restricting and regulating the Great Oaks subdivision evidence an original intent of the developer to establish a general plan or scheme of development; therefore, it is safe to say that the covenants touch and concern the land. This will not become a problem unless, in a law suit concerning the violation of restrictions, a party raises this issue as a defense to the enforcement of the restrictive covenants.

Privity of estate: This simply encompasses an unbroken chain of ownership from the original developer to the remote grantees. Once again the courts look to the intent of the original declarant. The plain intent of the developers of the Great Oaks Subdivision is to make remote grantees subject to the covenants, conditions, and restrictions and to allow the owners of the parcels in the subdivision the power to enforce them against other owners within the subdivision.

Notice: This requirement is met when the Covenants, Conditions and Restrictions are recorded with a proper legal description in the county where the property is located. It appears, on the face of the instrument, the declarations contain a legal description that is sufficient to give notice to the remote grantees of the Covenants, Conditions and Restrictions encumbering their properties. The Home Owner's Association should have in its records a copy of the recorded Declaration with the recording data marked thereon.

There are certain general rules of interpretation that must be followed when reading the Declaration:

1) The Covenants, Conditions and Restrictions will be strictly construed against the Declarant and in favor of the grantees, i.e., the owners of parcels.

2) The intent of the declarant will be the determining factor, but that intent will be determined from the face of the instrument.

3) The covenants will be interpreted so that they will conform to public policy and to the law of the jurisdiction in which the land is located.

4) The common law rules for the interpretation of contracts will be applied to the interpretation of the Declaration.

The important rule to keep in mind is that the courts will narrowly construe the Covenants, Conditions and Restrictions to allow for the greatest freedom of land use for the grantee, i.e., the owner.

Amendment of the Declaration (Generally) - Amendment may occur in its simplest form by the Board of Directors utilizing its power to adopt and publish rules and regulations governing the use of the common areas. Art. VII, Section 1(a). The only limitation upon this power is that the rules and regulations must be reasonable to effect the general purpose of the declaration.

Power of amendment of the amount of the assessment is set out in Art VII, section 2(C)(1). This is a broad power of the Board, but it is one that is a duty, also; and it is a duty that is encumbered with specific rules set out in the Bylaws Art VII, section 2(C).

Amendments (Specifically) - The Bylaws may be amended by a majority of a quorum of the members at a regular or special meeting. A quorum is defined in the Bylaws to be one-tenth (1/10) of the votes. Article III, section 4, Quorum.

The Declaration controls when there is a conflict between the Bylaws and the Declaration. The Declaration speaks to amendment at paragraph 28 Architectural Committee and at paragraph 42 Amendment. The Architectural Committee is distinct from the Architectural Control Committee. The Architectural Committee was specifically constituted and contained the unrestricted right to amend the Declaration, Declaration paragraph 28; further, the Architectural Committee is abolished upon the "formation and Activation" of the Property Owners Association" All rights, duties, and responsibilities of the Architectural Committee, except the right to amend these restrictions pass to the Property Owners Association.

Because of the language contained in the Declarations quoted above, there is an apparent conflict between the Declaration and the By-Laws. The resolution of this conflict would take more time and space than is now available to counsel, given the need to research this question. However, paragraph 43 of the Declaration gives the Board of Directors a limited right of amendment. This limited right is to approve minor deviations from the provisions of the Declaration. This right is vested in the Board; requires no "actual amendment"; and can be exercised when, in the opinion of the Board, such deviation will be beneficial to other owners of lots in the subdivision.

It is the opinion of counsel that what is a "minor deviation" is a question left open to interpretation by the courts. Keep in mind that the restrictive covenants are construed strictly in favor of the grantee and against the declarant. This alone will have a chilling effect upon the amendmnt powers of the Board. Further research is necessary, and each proposed amendment should be submitted to Counsel for a preliminary analysis of the rights and liabilities of the Board.

All powers of the Architectural Committee pass to the Board, as previously indicated, supra; therefore, whenever the Architectural Committee had the discretion to review plans, materials, and modifications to a property or structure on the property, and approve or disapprove them, that discretionary power passes to the Board. By-Laws, Article X, Committees, empowers the Board to create committees, and specifically an Architectural Control Committee. This is distinguished from the Architectural Committee in that: the Architectural Committee was originally established in the Declaration; was specifically constituted; and ceased to exist upon the activation of the Property Owners Association. Pursuant to the Declaration, Paragraph 29, read in conjunction with the By-Laws, Article X, Committees, the Architectural Control Committee should be created by a resolution of the Board wherein its powers, duties, and jurisdiction should be established.

The Architecture Committee's broad powers transferred to the Board may be delegated to the Architectural Control Committee, with the limitations aforementioned. These powers will allow the Architectural Control Committee to establish criteria for approval of construction and materials, among others. The question will always be: did the Architectural Control Committee apply reasonable criteria in a uniform method.

A question does arise under the Declaration concerning the enforceability of the Covenants, Conditions and Restrictions contained in the Declaration. At least one Texas Court has held that if a declarant reserves the unlimited right at any time to change the restrictive covenants, then no common plan or scheme arises which the courts can enforce. This question also requires additional research and consultation with the Board.

One final note, the individual Directors on the Board owe a fiduciary duty to the Association to pursue the business of the Association in a diligent manner. Texas Courts have held directors liable for failure to diligently pursue the collection of assessments. In the present case, the Board should be diligent in setting the amount of the assessment as set out in the Declaration and By-Laws. At least one Court has found that the failure of the Board to establish a reserve fund breached the Directors' duty to the Home Owners Association.

Respectfully submitted,

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BY-LAWS OF GREAT OAKS PROPERTY OWNERS ASSOCIATION

ARTICLE I

Name and Location

The name of the association is Great Oaks Property Owners Association, hereinafter referred to as the "Association." The principal office of the association shall be located in Natalia, Texas, but meetings of members and directors will be held within the County of Medina, as designated by the Board of Directors.

ARTICLE II

Definitions

SECTION 1. "Association" shall mean and refer to Great Oaks Property Owners Association, its successors and assigns.

SECTION 2. "Property" shall mean and refer to that which is described in the Subdivision Restrictions of Great Oaks Subdivision, Phases I, II and III, which subdivisions are recorded in Book 7, Pages 74-78, Book 7, Pages 96-100, and Book 7, Pages 139-142, respectively, Plat Records of Medina County, and such additions thereto as may hereafter be brought within the jurisdiction of the Association.

SECTION 3. "Common Area" shall mean all real property owned or to be owned by the Association for the common use and enjoyment of the Owners.

SECTION 4. "Parcel" shall mean and refer to any plot of land shown upon any recorded subdivision map of the Properties with the exception of the Common Area.

SECTION 5. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of the fee simple title to any parcel which is a part of the Properties, including any lessees occupying a parcel or any part thereof and purchasers under a contract of sale, but excluding those having such interest merely as security for the performance of an obligation. "Sellers under a contract of sale shall not be considered 'owners' so long as any such contract of sale remains in effect and is not terminated (except by complete fulfillment of the obligations thereunder)."

SECTION 6. "Declarant" shall mean and refer to Great Oaks Venture, its successors and assigns, if such successors or assigns should acquire more than one undeveloped parcel from the Declarant for the purpose of development.

SECTION 7. "Restrictions" shall mean and refer to the Restrictions of Great Oaks Subdivision, Phases I, II and III, recorded in the Official Public Records of Medina County, Texas, in Vol. 46, Pages

395-402, Vol. 59, Pages 607-614, and Vol. 82, Pages 735-742, respectively, and are incorporated herein by reference.

SECTION 8. "Member" shall mean and refer to those persons who are Owners.

ARTICLE III

Meeting of Members

SECTION 1. Annual Meetings. The regular annual meeting of the members shall be held on the first Saturday in August of each year hereafter, at the hour of 10 a.m. If the day for the annual meeting of the members is a legal holiday, the meeting will be held at the same hour on the first Saturday following which is not a legal holiday.

SECTION 2. Special Meetings. Special meetings of the members may be called at any time by the president or by the Board of Directors, or upon written request of one-tenth (1/10) of the members who are entitled to vote.

SECTION 3. Notice of Meetings. Written notice of each meeting of the members shall be given by, or at the direction of, the secretary or person authorized to call the meeting, by mailing a copy of such notice, postage prepaid, at least fifteen (15) days before such meeting to each member entitled to vote thereat, addressed to the member's address last appearing on the books of the Association, or supplied by such members to the Association for the purpose of notice. Such notice shall specify the place, day and hour of the meeting, and in the case of a special meeting, the purpose of the meeting.

SECTION 4. Quorum. The presence at the meeting of members entitled to cast, or of proxies entitled to cast, one-tenth (1/10) of the votes shall constitute a quorum for any action except as otherwise provided in the Subdivision Restrictions or these By-Laws. If, however, such quorum shall not be present or represented at any meeting, the members entitled to vote thereat shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum as aforesaid shall be present or be represented.

SECTION 5. Proxies. At all meetings of members, each member may vote in person or by proxy in form similar to Exhibit "A" attached hereto. All proxies shall be in writing and filed with the secretary. Every proxy shall be revocable and shall automatically cease upon conveyance by the member of his parcel.

SECTION 6. Voting. Each member of the Association shall be entitled to one vote for each parcel owned. When more than one person holds an interest in any parcel, all such persons shall be members. The

vote for such parcel shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any parcel.

ARTICLE IV

Board of Directors

SECTION 1. Number. The affairs of this Association shall be managed by a Board of seven (7) directors, who will be members of the Association.

SECTION 2. Term of Office. At the first annual meeting, two (2) directors will be elected for a term of one (1) year, two (2) directors will be elected for a term of two (2) years, and three (3) directors will be elected for a term of three (3) years. At the second annual meeting and at each annual meeting thereafter, called for the purpose of electing directors, directors shall be elected for a term of three (3) years.

SECTION 3. Removal. Any director may be removed from the Board, only by a majority vote of the quorum of the Association. In the event of death, resignation or removal of a director, his successor shall be selected by the remaining members of the Board and shall serve for the unexpired term of his predecessor.

SECTION 4. Compensation. No director shall receive compensation for any service he may render to the Association. However, any director may be reimbursed for his actual expenses incurred and properly accounted for in the performance of his duties, with prior approval of the Board.

SECTION 5. Action Taken Without a Meeting. The directors shall have the right to take any action in the absence of a meeting which they could take at a meeting by obtaining the written approval of all the directors. Any action so approved shall have the same effect as though taken at a meeting of the directors.

ARTICLE V

Nomination and Election of Directors by Members

SECTION 1. Nomination. Nomination to the Board of Directors shall be made by a Nominating Committee. Nominations may also be made from the floor at the annual meeting. The Nominating Committee shall consist of a Chairman, who shall be a member of the Board of Directors, and two or more members of the Association. The Nominating Committee will be appointed by the Board of Directors prior to each annual meeting of the Members, to serve from the close of such annual meeting until the close of the next annual meeting and such appointment shall be announced at each annual meeting. The Nominating Committee shall make as many nominations for election to

the Board of Directors as it shall in its discretion determine, but not less than the number of vacancies that are to be filled. Such nominations may be made from among members of the Association.

SECTION 2. Election. Election of the Board of Directors shall be subject to the provisions of SECTION 6 of ARTICLE III hereof. Election to the Board of Directors shall be by secret written ballot at the annual meeting or any meeting called for the purpose of electing directors. A written ballot for the election of directors, signed by any members entitled to vote for directors, together with a signed written proxy authorizing the Secretary of the Association and such ballot shall be counted toward the election of directors as if such member had attended the election meeting and had voted in person. In voting for directors, the members or their proxies may cast, in respect to each vacancy, as many votes as they are entitled to exercise under the provisions of SECTION 6 of ARTICLE III. The persons receiving the largest number of votes shall be elected. Cumulative voting is not permitted.

ARTICLE VI

Meeting of Directors

SECTION 1. Regular Meetings. Regular meeting of the Board of Directors shall be held monthly without notice, at such place and hour as may be fixed from time to time by resolution of the Board. Should said meeting fall upon a legal holiday, then that meeting shall be held at the same time on the next day which is not a legal holiday.

SECTION 2. Special Meetings. Special meetings of the Board of Directors shall be held when called by the president of the Association, or by any two directors, after not less than three (3) days notice to each director, and such determination may be conclusively evidenced in a call, waiver of notice or other communication signed by such directors. The attendance of a director at any meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

SECTION 3. Quorum. A majority of the number of directors shall constitute a quorum for the transaction of business. Every act or decision done or made by a majority of the directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Board.

SECTION 4. Presumption of Assent. A director of the Association who is present at a meeting of the Board of Directors at which action on any corporate matter is taken shall be presumed to have assented to the action unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action

with the person acting as the Secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the Secretary of the Association immediately after the adjournment of the meeting. Such right of dissent shall not apply to a trustee who voted in favor of such action.

ARTICLE VII

Powers and Duties of the Board of Directors

SECTION 1. Powers. The Board of Directors shall have power to:

(a) adopt and publish rules and regulations governing the use of the Common Area and facilities, and the personal conduct of the members and their guests thereon, and to establish penalties for the infraction thereof;

(b) suspend the voting rights and right to use of the recreational facilities of a member during any period in which such member shall be in default in the payment of any assessment levied by the Association. Such rights may also be suspended after notice and hearing, for a period not to exceed sixty (60) days for infraction of published rules and regulations;

(c) exercise for the Association all powers, duties and authority vested in or delegated to this Association and not reserved to the membership by other provisions, or the Subdivision Restrictions;

(d) declare the office of a member of the Board of Directors to be vacant in the event such member shall be absent from three (3) consecutive regular meetings of the Board of Directors; and

(e) employ a manager or such other employees as they deem necessary, and to prescribe their duties, and to hire independent contractors or other professional services as they deem necessary.

SECTION 2. Duties. It shall be the duty of the Board of Directors to:

(a) cause to be kept a complete record of all the acts and affairs and to present a statement thereof to the members at the annual meeting of the members, or at any special meeting when such statement is requested in writing by one-tenth (1/10) of the members who are entitled to vote;

(b) supervise all officers, agents and employees of the Association, and to see that their duties are properly performed;

(c) as more fully provided in the Subdivision Restrictions to supervise and collect the annual maintenance charges against each parcel, and in connection herewith to:

(1) fix the amount of the annual maintenance charge against each parcel at least thirty (30) days in advance of each fiscal year;

(2) send written notice of each maintenance charge to every Owner subject thereto at least thirty (30) days in advance of each fiscal year;

(3) in the discretion of the Board, place a lien against any property for which maintenance charges are not paid within thirty (30) days after due date or to bring an action at law against the owner personally obligated to pay the same; and

(4) issue, or to cause an appropriate office to issue, upon demand by any person, a certificate setting forth whether or not any maintenance charge has been paid. A reasonable charge may be made by the Board for the issuance of these certificates. If a certificate states a maintenance charge has been paid, such certificate shall be conclusive evidence of such payment;

(d) procure and maintain adequate liability and hazard insurance on property owned by the Association;

(e) cause all officers or employees having fiscal responsibilities to be bonded, as it may deem appropriate; and

(f) cause the Common Area to be maintained.

ARTICLE VIII

Officers and Their Duties

SECTION 1. Enumeration of Offices. The officers of this Association shall be a president and vice-president, who shall at all times be members of the Board of Directors, a secretary, and a treasurer, and such other officers as the Board may from time to time by resolution create.

SECTION 2. Election of Officers. The election of officers shall take place at the first meeting of the Board of Directors following each annual meeting of the members.

SECTION 3. Term. The officers of this Association shall be elected annually by the Board and each shall hold office for one (1) year unless he shall sooner resign, or shall be removed or otherwise disqualified to serve.

SECTION 4. Special Appointments. The Board may elect such other officers as the affairs of the Association may require, each of whom shall hold office for such period, have such authority, and perform such duties as the Board may, from time to time, determine.

SECTION 5. Resignation and Removal. Any officer may be removed from office with cause by the Board. Any officer may resign at any time giving written notice to the Board, the president or the secretary. Such resignation shall take effect on the date of receipt of such notice or at any later time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

SECTION 6. Vacancies. A vacancy in any office may be filled by appointment by the Board. The officer appointed to such vacancy shall serve for the remainder of the term of the officer he replaces.

SECTION 7. Multiple offices. The offices of secretary and treasurer may be held by the same person. No person shall simultaneously hold more than one of any of the other offices except in the case of special offices created pursuant to Section 4 of this Article.

SECTION 8. Duties. The duties of the officers are as follows:

(a) President. The president shall preside at all meetings of the Board of Directors; shall see that orders and resolutions of the Board are carried out; shall sign all leases, mortgages, deeds, and other written instruments and shall co-sign all checks, together with the Treasurer, over a dollar amount to be set by the Board. Amounts below the limit can be signed solely by the Treasurer.

(b) Vice-President. The vice-president shall act in the place and stead of the president in the event of his absence, inability or refusal to act, and shall exercise and discharge such other duties as may be required of him by the Board.

(c) Secretary. The secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board and of the members; keep the corporate seal of the Association and affix it on all papers requiring said seal; serve notice of meetings of the Board and of the members; keep appropriate current records showing the members of the Association together with their addresses, and shall perform such other duties as required by the Board.

(d) Treasurer. The treasurer shall receive and deposit in appropriate bank accounts all monies of the Association and shall disburse such funds as directed by resolution of the Board of Directors; shall sign all checks of the Association, however, checks in the amount exceeding that authorized by the Board of Directors must be co-signed by the president; keep proper books of account; cause an annual accounting of the Association books to be made by a

public accountant at the completion of each fiscal year; and shall prepare an annual budget and a statement of income and expenditure to be presented to the membership at its regular annual meeting, and deliver a copy to each of the members.

ARTICLE IX

Officer's and Directors' Services

SECTION 1. Services. No director and unless otherwise determined by the Board of Directors, no officer of this Association shall be required to devote his time or any particular portion of his time or render services of any particular services exclusively to this Association and shall be entirely free to engage, participate and invest in any and all such businesses, enterprises and activities, whether similar or dissimilar to the businesses, enterprises and activities of this Association, without breach of duty to this Association in any event or under any circumstances or conditions.

SECTION 2. Non-Liability of Directors and Officers in Certain Cases. No director or officer shall be liable for his acts as such if he is excused from liability under present or future provision or provisions of the Texas Non-Profit Corporation Act; and in addition, to the fullest extent now or hereafter permitted by the Texas Non-Profit Corporation Act, each officer or director shall in the discharge of any duty imposed or power conferred upon him by the Association, be fully protected, if in the exercise of ordinary care he acted in good faith and in reliance upon the written opinion of an attorney for the Association, the books of account or reports made to the Association by any of its officials or by an independent Certified Public Accountant or by an appraiser selected with reasonable care by the Board of Directors, or in reliance upon other records of the Association.

SECTION 3. Indemnification of Directors and Officers. Each director and each officer or former director or officer of this Association and each person who may have served at its request as a director or officer of another corporation in which it owned shares of capital stock or of which it is a creditor, shall be and hereby is indemnified by the Association against liabilities imposed upon him and expenses actually and reasonably incurred by him in connection with any claim made against him, or the defense of any action, suit or proceeding to or in which he may be or be made a party by reason of his being or having been such director or officer, and against such sums as independent counsel selected by the Board of Directors shall deem reasonable payment made in settlement of any such claim, action, suit or proceeding primarily with a view of avoiding expenses of litigation, provided, however, that no director or officer shall be indemnified with respect to matters as to which he shall be adjudged in such action, suit or proceedings to be liable for negligence or misconduct in performance of duty, or with respect to any matters which shall be settled by the payment of sums which

counsel selected by the Board of Directors shall not deem reasonable payment made primarily with a view to avoiding expenses of litigation, or with respect to matters for which such indemnification would be against public policy. Such right of indemnification shall be in addition to, but shall not exclude, any other rights to which directors or officers may be entitled.

SECTION 4. Income Distributions Prohibited. No part of the income of the Association shall be distributed to the directors or officers.

SECTION 5. Loans to Directors and Officers Prohibited. No loans shall be made by the Association to the directors or officers.

ARTICLE X

Committees

The Association shall appoint an Architectural Control Committee, as provided in Subdivision Restrictions, and a Nominating Committee, as provided in these By-Laws. In addition, the Board of Directors shall appoint other committees as deemed appropriate in carrying out its purposes.

ARTICLE XI

Books, Records and Papers of the Association

The books, records and papers of the Association shall at all times, during reasonable business hours, be subject to inspection by any member. The Subdivision Restrictions, the Articles of Incorporation and the By-Laws of the Association shall be available for inspection by any members at the principal office of the Association, where copies may be purchased at reasonable cost.

~~The Association shall elect an exempt status under I.R.S. Code Sec. 528 and shall meet the requirements pursuant thereto.~~

ARTICLE XII

Maintenance Charge

As more fully provided in the Subdivision Restrictions, each member is obligated to pay to the Association an annual maintenance charge which is secured by a continuing lien upon the property against which the charge is made. Any maintenance charges which are not paid when due shall be delinquent. If the charge is not paid within thirty (30) days after the due date, the charge shall bear interest from the date of delinquency at the rate of ten (10) per cent per annum, and the Association may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien against the property, and interest, costs, and reasonable attorney's fees of any such action shall be added to the amount of such charge. No

Owner may waive or otherwise escape liability for the maintenance charges provided for herein by non-use of the Common Area or abandonment of his Parcel.

ARTICLE XIII

Corporate Seal

The Association shall have a seal in circular form having within its circumference the words: "Great Oaks Property Owners Association."

ARTICLE XIV

Fiscal Year

The fiscal year of the Association shall begin on the first day of January and end on the 31st day of December of every year, except that the first fiscal year shall begin on the date of the first annual meeting.

ARTICLE XV

Amendments

SECTION 1. These By-Laws may be amended, at a regular or special meeting of the members, by a vote of a majority of a quorum of members present in person or by proxy.

SECTION 2. In the case of any conflict between the Subdivision Restrictions and these By-Laws, the Subdivision Restrictions control.

_____, 1988.

CERTIFICATION

I, the undersigned, do hereby certify:

THAT I am the duly elected and acting secretary of the Great Oaks Property Owners Association, a Texas corporation, and,

THAT the foregoing By-Laws constitute the original By-Laws of said Association, as duly adopted at a meeting of the Board of Directors thereof, held on the _____ day of _____, 1988.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Association this _____ day of _____, 1988.

Secretary