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Private Land Restrictions in Texas: A Need for Greater Legislative Control Symposium - Selected Topics on Land Use Law - Comment.

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COMMENTS

Private Land Restrictions in Texas: A Need for Greater Legislative Control

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I. INTRODUCTION

Private restrictions on land use, though not favored, are common and will be upheld by Texas courts provided they are clearly intended by the parties, are lawful, and reasonable.[1] The Texas Legislature, however, recently passed a bill authorizing the Board of Regents of the University of Texas System to waive its reversionary interest in Mahnke and Bracken-

1. *See* Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981); Chandler v. Darwin, 281 S.W.2d 363, 367 (Tex. Civ. App.—Dallas 1955, no writ); *see also* Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees,* 27 TEXAS L. REV. 158, 179 (1949) (courts will enforce conditions when written with unequivocal language).

ridge Parks in San Antonio.[2] Governor White vetoed the bill on the ground that it violated the Texas Constitution.[3] The purpose of the bill was to allow the City of San Antonio to circumvent a restriction forbidding the sale of alcohol in the parks.[4] In light of this abortive attempt to void these restrictions, this comment will explore the various types of restrictions, their burdens, effects, and validity, as well as their acceptable limits in light of changing conditions and the needs of society.

One of the most respected rights citizens enjoy under the Texas Constitution is the right to hold, use, and dispose of land as they wish, provided they comply with the law.[5] Inherent in this constitutional right is the freedom to create and place restrictions on land,[6] with the only real qualification beyond lawfulness being that the restraint may not violate public

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2. *See* Tex. H.B. 1415, 68th Leg. (1983).

3. TEX. CONST. art. III, § 51 (1876, amended 1968) states:

> The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other coporations whatsoever; provided, however, the Legislature may grant aid to indigent and disabled Confederate soldiers and sailors under such regulations and limitations as may be deemed by the Legislature as expedient, and to their widows in indigent circumstances under such regulations and limitations as may be deemed by the Legislature as expedient; provided that the provisions of this section shall not be construed so as to prevent the grant in cases of public calamity.

Id.

Although not discussed in the veto proclamation, the Governor's office stated that the veto was also made in an effort to avoid discouraging potential donors from giving to the public, as well as to uphold the principle that "a deal is a deal." *See* House Study Group on H.B. 1415, 68th Leg., Reg. Sess. (1983) (transcript available at St. Mary's Law Journal office).

4. *See* Deed from San Antonio Water Works Company to City of San Antonio recorded at Volume 185 Page 183 Bexar County Deed Records (1899). The pertinent part of the deed reads as follows:

> That it shall never permit any beer or intoxicating liquor of any kind to be sold, given away or drank within or upon any part of said premises, nor shall it ever permit said premises or any part thereof, to be used or occupied for any illegal purposes whatsoever . . . . If either of the foregoing conditions be broken at any time and said city upon complaint thereof being made in writing to its governing body, whether such body be called the City Council, or any other name, does not promptly repair the breach then the title to said premises shall at once pass from said city and vest in the State of Texas for the benefit of the University of Texas, and the said City shall at once surrender possession of said premises to the State of Texas.

Id.

5. *See* TEX. CONST. art. I, § 19; *see also* City of Wink v. Griffith Amusement Co., 129 Tex. 40, 49, 100 S.W.2d 695, 700 (1936) (right of property is right to use and enjoy in lawful manner); Bielecki v. City of Port Arthur, 12 S.W.2d 976, 978 (Tex. Comm'n App. 1929, opinion adopted) (denial of right to use property as one sees fit, denial of constitutional right).

6. *See* 4 G. THOMPSON, THE MODERN LAW OF REAL PROPERTY § 1882 (1979).

policy.[7] Unlike governmental restrictions, this freedom to restrict land use gives citizens the ability to control land in a manner which they, and not the legislature, deem to be socially preferable; whereas, governmental restrictions through public zoning or building codes may not be as advantageous to the individual nor as stable.[8]

II. SPECIFIC TYPES OF RESTRICTIONS

A. *Fees Simple Determinable and Conditions Subsequent*

This individual ability to restrict the use of land may be achieved through the use of various restrictions such as the fee simple determinable,[9] fee simple subject to a condition subsequent,[10] or covenants running with the land.[11] A deed which conveys a fee simple determinable contains a condition which must not be breached by the grantee.[12] After the con-

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7. *See* Haven v. Wallace, 160 S.W.2d 619, 622 (Ky. 1942); *see also* 4 G. THOMPSON, THE MODERN LAW OF REAL PROPERTY § 1882 (1979); Simes, *Restricting Land Use in California By Right of Entry and Possibilities of Reverter,* 13 HASTINGS L.J. 293, 297 (1962) (restrictions may not violate public policy).

8. *See generally* Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area,* 1958 WIS. L. REV. 612, 614 (public zoning and building codes subject to whims of legislatures; private restrictions comply with wishes of parties); Comment, *Solar Energy and Restrictive Covenants: The Conflict Between Public Policy and Private Zoning,* 67 CALIF. L. REV. 350, 359 (1979) (deed covenants a manner by which people agree to order affairs.). *But see* Chaffin, *Reverters, Rights of Entry and Executory Interests: Semantic Confusion and the Tying Up of Land,* 31 FORDHAM L. REV. 303, 321 (1962). The author states that with today's highly industrialized conditions, land use "may be regulated most effectively, not by 'dead hand' control but by zoning, land use planning, urban redevelopment and similar public controls." *Id.* at 321.

9. *See* Smith v. Bynum, 558 S.W.2d 99, 101 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (determinable or base fee recognized in Texas); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (characteristic of determinable fee is automatic termination of estate); *see also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 95 (1962) (fee simple determinable expires upon occurrence or non occurrence of stated event).

10. *See* Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (condition subsequent recognized, requires reentry for termination of estate). Section 24 of the Restatement of Property defines condition subsequent as "that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event, the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised." RESTATEMENT OF PROPERTY § 24 (1936). *See* 2 R. POWELL, THE LAW OF REAL PROPERTY § 188 (1982).

11. *See* Billington v. Riffe, 492 S.W.2d 343, 345-46 (Tex. Civ. App.—Amarillo 1973, no writ) (listing requirements for covenants as touch and concern, privity, intent and must be *in esse* or name assigns); 7 G. THOMPSON, THE MODERN LAW OF REAL PROPERTY § 3150 (1979) (defining covenant as an agreement to do or not to do some act).

12. *See, e.g.,* James v. Dalhart Consol. Indep. School Dist., 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ) (estate may terminate on occurrence of contingency);

veyance, the grantor retains a possibility of reverter, but the grantee has fee simple determinable title and all benefits attaching to the land, as long as he complies with the condition.[13] If, however, the condition is breached, the grantee's interest in the land is automatically forfeited, and the possibility of reverter takes effect by immediately revesting title in the grantor.[14]

Although a fee simple subject to a condition subsequent is very similar to a determinable fee, there are several distinctions. The most significant distinction is that in a conveyance with a condition subsequent, the grantor retains a right of reentry rather than a possibility of reverter.[15] For a forefeiture to occur under a condition subsequent, the grantor must, in order to avoid the presumption of a waiver, exercise his right of reentry by bringing a suit for recovery within a reasonable time.[16] If a grantor decides to exercise his right of reentry in a timely manner, it is not necessary that the grantee be informed of the grantor's intentions.[17]

Although fees simple determinable and conditions subsequent may have

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Big Lake Oil Co. v. Reagan County, 217 S.W.2d 171, 173 (Tex. Civ. App.—El Paso 1948, writ ref'd) (determinable fee may be terminated under law creating conveyance); Cragin v. Frost Nat'l Bank, 164 S.W.2d 24, 28 (Tex. Civ. App.—San Antonio 1942, writ ref'd) (fee with qualification which is determined when qualification at end).

13. *See* James v. Dalhart Consol. Indep. School Dist. 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ) (possibility of reverter in grantor though whole estate is in grantee); Cragin v. Frost Nat'l Bank, 164 S.W.2d 24, 28 (Tex. Civ. App.—San Antonio 1942, writ ref'd) (grantee has same rights as though he had fee simple).

14. *See* Smith v. Bynum, 558 S.W.2d 99, 101 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (determinable or base fee recognized in Texas); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.— Amarillo 1976, no writ) (when condition breached, estate terminates without need of reentry); Wampler v. Harrington, 261 S.W.2d 883, 891 (Tex. Civ. App.—Texarkana 1953, writ ref'd n.r.e.) (that deed may have limitation long recognized); James v. Dalhart Consol. Indep. School Dist., 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ); (determinable fee remains forever or terminates upon happening of contingency); Cragin v. Frost Nat'l Bank, 164 S.W.2d 24, 28 (Tex. Civ. App.—San Antonio 1942, writ ref'd) (recognizing conditional fee).

15. *See* City of Dallas v. Etheridge, 152 Tex. 9, 14, 253 S.W.2d 640, 643 (1952) (grantor's remedy upon breach not automatic forfeiture, but trespass to try title); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (condition subsequent's breach gives right of reentry); *see also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 36 (1962) (estate continues until grantor exercises option); 2 R. POWELL, THE LAW OF REAL PROPERTY § 188 (1982) (difference is automatic ending in one instance and option to end estate in the other instance).

16. *See, e.g.,* Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 891 (Tex. 1962) (waiver presumed after reasonable time period); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (reentry must be exercised within reasonable time); Wisdom v. Minchen, 154 S.W.2d 330, 336 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.) (grantor must act promptly or waive his right).

17. *See* Pasadena Police Officers' Ass'n v. City of Pasadena, 497 S.W.2d 388, 394 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

beneficial aspects at their creation, the possibilities of reverter and rights of reentry are assignable, devisable, and inheritable,[18] rendering such estates highly susceptible to continuing after their benefits have ceased.[19] Another characteristic shared by possibilities of reverter and rights of reentry is that they are not subject to the Rule Against Perpetuities,[20] and thus may continue indefinitely.[21] Consequently, they effectively hinder the alienability of the land which they restrict.[22]

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18. *See* Perry v. Smith, 231 S.W. 340, 343 (Tex. Comm'n App. 1921, judgmt adopted) (rights of entry may be exercised by heirs or assigns); Bagby v. Bredthauer, 627 S.W.2d 190, 197 (Tex. App.—Austin 1981, no writ) (determinable fee may be conveyed or descend by inheritance); Missouri-Kansas-Texas R.R. Co. v. Taub, 345 S.W.2d 442, 444 (Tex. Civ. App.—Houston 1961, no writ) (right of entry may be used by grantor, heirs, successors, or others); Gottwald v. Warlick, 125 S.W.2d 1060, 1061 (Tex. Civ. App.—San Antonio 1939, no writ) (reversionary interst assignable); Diamond v. Rotan, 124 S.W. 196, 200 (Tex. Civ. App.—1909, writ ref'd) (possibility of reverter may be inherited); *see also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 101 (1962). Moynihan states that modern decisions tend to uphold the free transferability and alienability of a possibility of reverter. *See id.* at 101.

19. *See* Bagby v. Bredthauer, 627 S.W.2d 190, 196-97 (Tex. App.—Austin 1981, no writ) (possibility of reverter valid under Rule Against Perpetuities, may be conveyed or descend and remains the same); James v. Dalhart Consol. Indep. School Dist., 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ) (determinable fee may be indefinite or end upon occurrence of event); C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 102 (1962) (may last indefinitely). *See generally* Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees,* 27 TEXAS L. REV. 158, 159 (1949) (restrictions which may continue after purpose has ceased are better eliminated); Comment, *Right of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248, 251 (1940) (conditions subsequent often of no value to subsequent purchasers).

20. *See* TEX. CONST. art. I, § 26. Section 26 of article I provides: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this state." *Id.; see* 4A G. THOMPSON, THE MODERN LAW OF REAL PROPERTY § 2019, at 643-44 (1979). Thompson defines the rule to be: "viewed as of the effective date of the instrument if there is any possibility that the interest will not vest within any ascertainable lives in being plus twenty-one years in gross, plus two possibly three periods of gestation then such interest is void ab initio." *Id.* at 643-44. Another conditional interest which, however, is subject to the Rule Against Perpetuities is the executory limitation, which provides that the reversionary interest shall go to a third party rather than the grantor. *See* Hunt v. Carroll, 157 S.W.2d 429, 436-37 (Tex. Civ. App.—Beaumont 1941), *writ dism'd,* 140 Tex. 424, 168 S.W.2d 238 (1943).

21. *See* James v. Dalhart Consol. Indep. School Dist. 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ) (determinable fee may continue forever); *see also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 102 (1962) (possibilities of reverter of unlimited, indefinite duration); 5 R. POWELL, THE LAW OF REAL PROPERTY § 769(1), at 72-57 (1982) (possibility of reverter and right of reentry vested for perpetuity purpose). *But see* Bagby v. Bredthauer, 627 S.W.2d 190, 196 (Tex. App.—Austin 1981, no writ) (conditions subsequent may fall under Rule Against Perpetuities).

22. *See* Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees,* 27 TEXAS L. REV. 158 , 163 (1949) (practical effect is to limit alienability); Comment, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54

B. *Restrictive Covenants*

Another method of controlling land use available to private individuals is the use of restrictive covenants running with the land.[23] It has been stated in one case that the primary difference between a covenant and a condition is the remedy available for breach, the remedy for breach of covenants being damages, while the remedy for breach of conditions is usually forfeiture.[24] For a covenant to run with the land, several requirements must be met including: 1) intent of the original parties that subsequent parties be bound; 2) privity of estate between the parties; 3) a requirement that the covenant touch and concern the land; and 4) that the covenant be *in esse* or assigns be named.[25] If these requirements are not met, the covenant is considered personal and does not run with the land.[26]

The rigid requirements for covenants running with the land originated in early English law and, according to some, do not adequately deal with present day needs.[27] As a result, the doctrine of equitable servitudes arose which includes covenants running in equity and those which are termed personal,[28] and relieved parties from the harsh requirement of privity of estate.[29] Texas courts recognize the doctrine of equitable servitudes and

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HARV. L. REV. 248, 253 (1940) (conditions inhibit development of land); Comment, *Stale Future Interests: Can Texas Pass a Constitutional Reverter Act?*, 9 ST. MARY'S L.J. 525, 526 (1978) (effect of possibility of reverter extended because of alienability).

23. *See* 16 Tex. Jur. 3D *Covenants* § 8 (1981).

24. *See* Dilbeck v. Gaynier, 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

25. *See, e.g.,* Clear Lake Apts. v. Clear Lake Utils., 537 S.W.2d 48, 51 (Tex. Civ. App.—Houston [14th Dist.] 1976) (must have privity), *modified,* 549 S.W.2d 385 (Tex. 1977); Billington v. Riffe, 492 S.W.2d 343, 345-46 (Tex. Civ. App.—Amarillo 1973, no writ) (must touch and concern; privity; intent; must be *in esse* or name assigns); Panhandle & S.F. Ry. Co. v. Wiggins, 161 S.W.2d 501, 504-05 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.) (touch and concern; privity of estate; if assignee not named, must be *in esse). See generally* Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law,* 27 TEXAS L. REV. 419, 420 (1949) (discusses covenants in general; history and beginnings).

26. *See* Billington v. Riffe, 492 S.W.2d 343, 346 (Tex. Civ. App.—Amarillo 1973, no writ).

27. *See* Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area,* 1958 WIS. L. REV. 612, 612 (covenant doctrine not able to meet needs of modern community); Comment, *Covenants Running With the Land: Viable Doctrine or Common Law Relic?,* 7 HOFSTRA L. REV. 139, 176-77 (1978) (equitable servitudes arise because covenants cannot react to changing world).

28. *Compare* Collum v. Nehoff, 507 S.W.2d 920, 922-23 (Tex. Civ. App.—Dallas 1974, no writ) (grantee took with notice of unrecorded restriction; covenant enforceable in equity) *with* Monk v. Danna, 110 S.W.2d 84, 86 (Tex. Civ. App.—Dallas 1937, writ dism'd) (benefit of restrictive covenant contained in deed ran to grantor and burdened land in gross; enforceable by grantor, successor, or assign).

29. *See, e.g.,* Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area,* 1958 WIS. L. REV. 612, 613 (courts of equity will enforce covenant of party who had

will generally uphold them if the parties took with notice and if the party attempting to enforce the restrictions can show a general scheme of development.[30] A slight variation of the equitable servitude doctrine is the negative reciprocal easement.[31] When a grantor conveys lots with restrictions for the benefit of land which he has retained, and in a manner evidencing a general scheme of development, the burdens imposed on the lots conveyed will, by operation of law, be reciprocally placed upon his retained land.[32]

III. ENFORCEMENT OF RESTRICTIONS

Creation of restrictions would be meaningless without adequate methods of enforcement, but the methods of enforcement vary depending upon the restriction involved. When the restriction is a fee simple determinable, the holder of the possibility of reverter's remedy is automatic forfeiture; therefore, no specific action is required for enforcement.[33] On the other hand, the proper method of enforcement for one holding a right of reentry is generally held to be a suit in trespass to try title.[34] The right of enforce-

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notice); Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 TEXAS L. REV. 419, 420 (1949) (equity courts more lenient in finding covenants); Comment, *Covenants Running With the Land: Viable Doctrine or Common Law Relic?*, 7 HOFSTRA L. REV. 139, 176 (1978) (major distinction between covenants and equitable servitudes is privity requirement).

30. *See* Collum v. Nehoff, 507 S.W.2d 922, 922-23 (Tex. Civ. App.—Dallas 1974, no writ); Ortiz v. Jeter, 479 S.W.2d 752, 758 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); McCart v. Cain, 416 S.W.2d 463, 465 (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.); Alexander Schroeder Lumber Co. v. Corona, 288 S.W.2d 829, 832 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.), *see also* Williams, *Restrictions on the Use of Land: Covenants Running with The Land at Law,* 27 TEXAS L. REV. 419, 438 (1949) (primary requirement is notice).

31. *See* Sanborn v. McLean, 206 N.W. 496, 497 (Mich. 1925). The court set forth the following requirements for a negative reciprocal easement:

> If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold.

Id. at 497.

32. *See, e.g.,* Wiley v. Schorr, 594 S.W.2d 484, 487 (Tex. Civ. App.—San Antonio 1979, no writ) (if neighborhood scheme is to be binding it must be universal); Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.) (setting forth general requirements of negative reciprocal easement); Klein v. Palmer, 151 S.W.2d 652, 654 (Tex. Civ. App.—Galveston 1941, no writ) (uniform plan which grantees may enforce because mutual negative easements created).

33. *See* Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (breach terminates estate automatically with no need for reentry); *see also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 95 (1962) (fee simple determinable expires upon occurrence or non-occurrence of stated event).

34. *See* City of Dallas v. Etheridge, 152 Tex. 9, 14, 253 S.W.2d 640, 643 (1952) (trespass

ment of either a possibility of reverter or of a right of reentry belongs to the owner of the interest, which may be the original grantor, his heirs, assigns, or devisees.[35]

The rules for enforcing restrictive covenants, unlike those for conditions which are relatively simple because of the limited number of parties involved,[36] can become a bit more complex because of the greater number of people who might be involved.[37] As a general rule, a party intended to benefit from the restriction will be entitled to enforce the restriction.[38] It is also generally held that a restriction will be enforced by injunction simply by showing that a violation is threatened.[39] In the case of a restriction which meets the requirements of a covenant running with the land at law,

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to try title is proper remedy); Olivas v. Zambrano, 543 S.W.2d 180, 182 (Tex. Civ. App.—El Paso 1976, no writ) (suit to recover land is reentry); Stewart v. Mobley, 500 S.W.2d 246, 249 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (right of reentry exercised by filing suit for title).

35. *See* Perry v. Smith, 231 S.W. 340, 343 (Tex. Comm'n App. 1921, judgmt adopted) (rights of entry may be exercised by heirs or assigns); Missouri-Kansas-Texas R.R. Co. v. Taub, 345 S.W.2d 442, 444 (Tex. Civ. App.—Houston 1961, no writ) (right of entry may be used by grantor, heirs, succesors or others); Gottwald v. Warlick, 125 S.W.2d 1060, 1061 (Tex. Civ. App.—San Antonio 1939, no writ) (reversionary interest assignable); Diamond v. Rotan, 124 S.W. 196, 200 (Tex. Civ. App.—1909, writ ref'd) (possibility of reverter may be inherited).

36. *Cf., e.g.,* City of Dallas v. Etheridge, 152 Tex. 9, 14, 253 S.W.2d 640, 643 (1952) (grantor's remedy trespass to try title); Missouri-Kansas-Texas R.R. Co. v. Taub, 345 S.W.2d 442, 444 (Tex. Civ. App.—Houston 1961, no writ) (right of reentry available to grantor, heirs or successors); Widsom v. Minchen, 154 S.W.2d 330, 336 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.) (grantor must act promptly).

37. *See, e.g.,* Curlee v. Walker, 112 Tex. 40, 43-44, 244 S.W. 497, 498 (1922) (restrictions creating general scheme enforceable by all purchasers); Witte v. Sebastian, 278 S.W.2d 200, 202 (Tex. Civ. App.—Amarillo 1953, no writ) (grantees may enforce against other grantees); Womack v. Dean, 266 S.W.2d 540, 542 (Tex. Civ. App.—Texarkana 1954, no writ) (original grantor may enforce restrictions if general scheme); Scaling v. Sutton, 167 S.W.2d 275, 279 (Tex. Civ. App.—Fort Worth 1943, writ ref'd w.o.m.) (all parties interested in covenant may enforce it).

38. *See, e.g.,* Calvary Temple v. Taylor, 288 S.W.2d 868, 870 (Tex. Civ. App.—Galveston 1956, no writ) (equitable suit maintainable by beneficiary of restriction); Aull v. Kraft, 286 S.W.2d 460, 461 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.) (well settled that equitable suit is remedy for one intended to benefit); Walker v. Dorris, 206 S.W.2d 620, 622 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) (restriction may be enforced by one with right to benefit); Hooper v. Lottman, 171 S.W. 270, 271 (Tex. Civ. App.—El Paso 1914, no writ) (right to enforce depends on intent of parties).

39. *See* Wooten v. Clark, 276 S.W.2d 391, 394 (Tex. Civ. App.—Austin 1955, no writ) (injunctive relief available if violation threatened or imminent); Briggs v. Hendriks, 197 S.W.2d 511, 512 (Tex. Civ. App.—Galveston 1946, no writ) (lot owner entitled to injunction upon threat of violation); Anderson v. Rowland, 44 S.W. 911, 914 (Tex. Civ. App. 1898, no writ) (mere fact of intent to violate sufficient for injunction). *But see* Spradley v. Whitehall, 314 S.W.2d 615, 618 (Tex. Civ. App.—Fort Worth 1958, no writ) (plaintiff must show that he has or will suffer damage).

all parties to the covenant, both current and subsequent, will have the right of enforcement.[40] An equitable servitude may be enforced by one grantee against another grantee if the party against whom enforcement is sought had notice of the restrictions, and there exists a general scheme of development, regardless of the fact that all deeds do not contain the restriction.[41] On the other hand, a personal covenant, one which does not touch and concern the land, has been held to be enforceable only between the original parties despite language which attempts to bind successors and assigns.[42] Under the negative reciprocal easement theory, a grantee may enforce the restriction against another grantee or against the grantor.[43] Although rights of enforcement appear to be fairly broad, grantees in one subdivision will not have standing to enforce restrictions placed on another distinct subdivision.[44] On the other hand, a grantee will not lose his right of enforcement through an effort to release restrictions unless all parties to the restriction join in the release.[45]

IV. TERMINATION OF RESTRICTIONS

As with enforcement, the rules regarding termination of conditions and

40. *Cf.* Billington v. Riffe, 492 S.W.2d 343, 345-46 (Tex. Civ. App.—Amarillo 1973, no writ) (intent of parties to bind subsequent parties enforceable if requirements of covenant met); Panhandle & S.F. Ry. Co. v. Wiggins, 161 S.W.2d 501, 504-05 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.) (if *in esse* or assigns named, subsequent parties bound).

41. *See, e.g.,* McCart v. Cain, 416 S.W.2d 463, 465 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.) (party seeking enforcement failed to show general scheme and no deed restrictions of record); Allen v. Winner, 389 S.W.2d 599, 601 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (defendant had notice; recorded restrictions evidenced general scheme; fact that some lots not restricted does not vitiate scheme); Hooper v. Lottman, 171 S.W. 270, 271 (Tex. Civ. App.—El Paso 1914, no writ) (although not all lots restricted, if general plan exists and has been relied on, it will be enforced).

42. *See* Blasser v. Cass, 158 Tex. 560, 562-63, 314 S.W.2d 807, 809 (1958) (landlord agrees to pay commission to agent for obtaining leases; not enforceable against landlord's successor despite contrary language); Dauley v. First Nat'l Bank, 565 S.W.2d 346, 348 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.) (covenant to pay commission not enforceable against subsequent party).

43. *See* Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.) (burden on land reciprocally placed on grantor's retained land); Klein v. Palmer, 151 S.W.2d 652, 654 (Tex. Civ. App.—Galveston 1941, no writ) (uniform plan where grantees may enforce because mutual negative easements created).

44. *See, e.g.,* Nelson v. Flache, 487 S.W.2d 843, 846 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (property owners in one subdivision have no standing to enforce against other subdivision); Jobe v. Watkins, 458 S.W.2d 945, 948 (Tex. Civ. App.—Fort Worth 1970, no writ) (owners in one section of addition have no standing against another distinct section); Moody v. City of Univ. Park, 278 S.W.2d 912, 923 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) (property owners in subdivision have no standing against members of another separate division).

45. *See* Amason v. Woodman, 498 S.W.2d 142, 143 (Tex. 1973).

covenants vary according to the type of restriction involved. A possiblity of reverter, for example, is not subject to termination unless the grantor releases his interest or unless the condition violates some rule of public policy.[46] A right of reentry, on the other hand, may be terminated if the grantor fails to exercise his option promptly. In such a case he may be held to have waived his right of reentry.[47] If the grantor fails to act promptly the applicable statutes of limitation may also bar his action to recover title.[48] The very nature of a determinable fee precludes waiver as an operation of law,[49] but the grantor's interest may be terminated if the grantee has met the requirements for adverse possession.[50]

As in the case of right of reentry, if a violation of a restrictive covenant is allowed to continue beyond a reasonable time, an abandonment of the covenant, or a waiver of one's right to enforce it will be presumed.[51] Mere acquiescence to minor or trivial violations, however, will not amount to a waiver of enforcement rights, as long as the covenant remains of some value.[52] Another manner in which a covenant may be removed is when the conditions in the restricted area have changed so much so as to no

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46. *See* Bien v. McPhaul, 357 S.W.2d 420, 425 (Tex. Civ. App.—Amarillo 1962, no writ) (may impose conditions as you wish so long as they do not violate public policy); *cf.* James v. Dalhart Consol. Indep. School Dist., 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ) (determinable fee may continue forever); Gottwald v. Warlick, 125 S.W.2d 1060, 1061 (Tex. Civ. App.—San Antonio 1939, no writ) (reversionary interest assignable); *see also* Comment, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248, 272 (1940) (there can be no waiver by grantor).

47. *See, e.g.,* Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 891 (Tex. 1962) (waiver presumed after reasonable time period); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (reentry must be exercised within reasonable time); Wisdom v. Minchen, 154 S.W.2d 330, 336 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.) (grantor must act promptly or waive his right).

48. *See* City of Dallas v. Etheridge, 152 Tex. 9, 14, 253 S.W.2d 640, 643 (1952); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ).

49. *See* Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ); *see also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY § 6 (1962). "The basic difference, therefore, between the fee simple determinable and the fee simple on condition subsequent is that the former automatically expires by force . . . when the stated contingency occurs. . . ." *Id.* at 36. *See generally* Comment, *Rights of Entry and Possibilities of Reverters as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248, 272 (1940) (there can be no waiver by grantor).

50. *See* 4 G. THOMPSON, THE MODERN LAW OF REAL PROPERTY § 1871, at 544 (1979).

51. *See* Cowling v. Colligan, 158 Tex. 458, 462, 312 S.W.2d 943, 945 (1958); Witmer v. McCarty, 566 S.W.2d 102, 104 (Tex. Civ. App.—Beaumont 1978, no writ); Martin v. Moore, 562 S.W.2d 274, 277-78 (Tex. Civ. App.—Austin 1978, no writ); Stephenson v. Perlitz, 537 S.W.2d 287, 288 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

52. *See, e.g.,* Stewart v. Welsh, 142 Tex. 314, 318, 178 S.W.2d 506, 508 (1944) (failure to complain of trivial violation not waiver of rights); Witmer v. McCarty, 566 S.W.2d 102, 104 (Tex. Civ. App.—Beaumont 1978, no writ) (failure to object to trivial violation does not preclude objection to material violation); Garden Oaks Bd. of Trustees v. Gibbs, 489 S.W.2d

longer allow the benefit to continue.[53] In determining whether an abandonment, or waiver has occurred, or whether conditions have changed to the required extent, many factors are taken into account.[54] One court has stated, however, that when considering whether or not to cancel or void restrictions, a court "must assume that the premises will be devoted to the most noxious permissible use" if the restrictions are to be terminated.[55] From the last statement one can see that although courts are willing to strike down restrictions when justice calls for such action, they are not willing to frustrate the intent of the parties to the restriction.[56]

The removal or termination of restrictive covenants is not limited to waiver, abandonment, and changed conditions. A restrictive covenant may also be terminated as a result of an eminent domain proceeding if the restriction impairs the government's authority to condemn.[57] A party burdened by a covenant may also seek a judgment as to the validity of the covenant through an action for declaratory judgment,[58] or the restriction may be removed through an action to remove cloud on title.[59]

133, 135 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.) (ten violations not waiver where subdivision is almost two-hundred lots).

53. *See* Cowling v. Colligan, 158 Tex. 458, 460, 312 S.W.2d 943, 945 (1958); Underwood v. Webb, 544 S.W.2d 187, 190 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); Stephenson v. Perlitz, 537 S.W.2d 287, 288 (Tex. Civ. App.—Beaumont 1976, no writ).

54. *See* Simon v. Henrichson, 394 S.W.2d 249, 254 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

> The factors which would permit relief from restrictive covenants depend on a number of things (1) including the size of the restrictive area, (2) its location with respect to whether the change has occurred, (3) the type of change that has taken place, (4) the character and conduct of the parties or their predecessors in title, (5) the purpose for which the restrictions were imposed, (6) to some extent the unexpired terms of the restrictions.

Id. at 254.

55. *See* Lebo v. Johnson, 349 S.W.2d 744, 746 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.).

56. *See, e.g.,* Dilbeck v. Gaynier, 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) (determine and give effect to intent of parties); Bailey v. Mullens, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.) (cardinal rule to effectuate intent); James v. Dalhart Consol. Indep. School Dist. 254 S.W.2d 826, 830 (Tex. Civ. App.—Amarillo 1952, no writ) (dominant purpose to determine intent).

57. *See* Wynne v. City of Houston, 115 Tex. 255, 258, 281 S.W. 544, 544 (1926); Lebo v. Johnson, 349 S.W.2d 744, 750 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.); Farmer v. Thompson, 289 S.W.2d 351, 354 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.); City of River Oaks v. Moore, 272 S.W.2d 389, 391 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

58. *See* Anderson v. McRae, 495 S.W.2d 351, 357 (Tex. Civ. App.—Texarkana 1973, no writ); McGuire v. Davis, 483 S.W.2d 553, 555 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.).

59. *See* Jones v. Young, 541 S.W.2d 200, 201 (Tex. Civ. App.—Houston [14th Dist.]

V. Public Policy and its Effect on Restrictions

Although conditions subsequent and covenants may be declared void due to abandonment, waiver, or changed conditions, they and possibilities of reverter are also subject to termination when a court determines that the restriction is violative of public policy.[60] Although public policy is often referred to, it is a fairly nebulous concept.[61] Because of its very nature, public policy can, and does, change depending on circumstances which arise.[62] As far as determining what public policy is, courts generally defer to the legislature.[63] Determining public policy is a difficult task, and one which courts undertake only as a last resort.[64] Nonetheless, there are cer-

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1976, no writ); Simon v. Henrichson, 394 S.W.2d 249, 252 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

60. *See, e.g.,* Curlee v. Walker, 112 Tex. 40, 43, 244 S.W. 497, 498 (1922) (parties have right to make property contracts, as long as not illegal or against public policy); Nelson v. Flache, 487 S.W.2d 843, 845 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (may create building plan by imposing restrictions not violative of public policy); Bien v. McPhaul, 357 S.W.2d 420, 425 (Tex. Civ. App.—Amarillo 1962, no writ) (may impose conditions as you wish so long as do not violate public policy). One author states that conditions conflicting with public policy or prohibiting an act which the public has some concern with are void. *See* 4 G. Thompson, The Modern Law of Real Property § 1882, at 612 (1979).

61. *See* Brouder, *Illegal Conditions and Limitations: Miscellaneous Provisions,* 1 Okla. L. Rev. 237, 237 (1948). "The phrase 'public policy' is very vague, and we are not sure that we clearly understand what is meant by it, as propounding a rule for judicial action in deciding the right of property." *See id.* at 237 (quoting Magee v. O'Neill, 19 S.C. 170, 185 (1883)); *see also* Winfield, *Public Policy in the English Common Law,* 42 Harv. L. Rev. 76, 77 (1928) (discussing general nature of public policy.) Public policy has been defined in many ways, including the following: "principles under which freedom of contract or private dealing is restricted by law for the good of the community." 72 C.J.S. *Policy* 212 (1951). "That principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good, may be termed the policy of the law, or public policy in relation to the administration of the law." 19 J. Merrill, American and English Encyclopedia of Law 565 (1892).

62. *See* Winfield, *Public Policy in the English Common Law,* 42 Harv. L. Rev. 76, 93 (1928) (author states that public policy is, by necessity, variable).

63. *See, e.g.,* State v. City of Dallas, 319 S.W.2d 767, 774 (Tex. Civ. App.—Austin 1958) (legislature has responsibility and authority to make public policy), *aff'd,* 160 Tex. 348, 331 S.W.2d 737 (1960); City of Lubbock v. Stubbs, 278 S.W.2d 519, 523 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.) ("court has no right to question legislative policy"); Grimes v. Bosque County, 240 S.W.2d 511, 515 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.) (legislature fixes public policy).

64. *See* 2 R. Devlin, The Law of Real Property and Deeds § 991b (1911). The author discusses public policy and concludes that even though allowing restrictions is not profitable in a business sense, if the condition or restiction is "made in good faith, and stipulates for nothing that is malum in se or malum prohibitum," the court should not declare it void as against public policy unless the court is certain that there will be a substantial benefit to the public in doing so. *See id.* at 1872-74; *see also* Winfield, *Public Policy in the English Common Law*, 42 Harv. L. Rev. 76, 91 (1928) (describing public policy as "an unruly horse . . . has proved to be a rather obtrusive, not to say blundering, steed in law

tain types of restrictions which courts will not hesitate to strike down as being against public policy. For instance, those involving racial discrimination[65] and those which hinder the government's power to condemn are said to violate public policy.[66] On the other hand, Texas courts have specifically held that restrictions limiting lots to permanent family or residential uses are not void per se,[67] nor are restrictions against the sale of alcohol violative of public policy.[68] Furthermore, at least two courts have held that when construing restrictions which may hinder the grantee from acquiring outright title, it is the policy of Texas law to attempt to vest an estate in the grantee as soon as possible.[69] One of the most obvious manifestations of public policy is the Rule Against Perpetuitites.[70] The Rule results from the public policy demand that the desires of a current landowner to control the land indefinitely be balanced with the desire of a future owner to have the use such owner presently enjoys.[71] While it has been said that the purpose of the Rule Against Perpetuities is to prevent the too remote vesting of estates,[72] the reasoning behind such thought is

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reports"); Comment, *Solar Energy and Restrictive Covenants: The Conflict Between Public Policy and Private Zoning,* 67 CALIF. L. REV. 350, 363-70 (1979) (discussing reluctance of courts to apply public policy because of its difficulty and lack of uniformity).

65. *See, e.g.,* Shelley v. Kraemer, 334 U.S. 1, 13-14, (1948) (although private racial restrictions were not illegal, judicial approval violated equal protection); Hurd v. Hodge, 334 U.S. 24, 34-35 (1948) (racial restrictions denied enforcement on public policy grounds); Harrison v. Tucker, 342 S.W.2d 383, 384 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.) (refusal to enforce racial restriction).

66. *See* Wynne v. City of Houston, 115 Tex. 255, 261, 281 S.W. 544, 544 (1926); Lebo v. Johnson, 349 S.W.2d 744, 750 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.); Farmer v. Thompson, 289 S.W.2d 351, 354 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.); City of River Oaks v. Moore, 272 S.W.2d 389, 391 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

67. *See* Moore v. Smith, 443 S.W.2d 552, 556 (Tex. 1969); Chandler v. Darwin, 281 S.W.2d 363, 367 (Tex. Civ. App.—Dallas 1955, no writ).

68. *See* Klein v. Palmer, 151 S.W.2d 652, 654 (Tex. Civ. App.—Galveston 1941, no writ).

69. *See* Hedick v. Lone Star Steel Co., 277 S.W.2d 925, 929 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.); Bryson v. Connecticut Gen. Life Ins. Co., 196 S.W.2d 532, 538 (Tex. Civ. App.—Austin 1946, writ ref'd).

70. *See* TEX. CONST. art. I § 26; *see also* Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir. 1936) (Rule Against Perpetuities springs from public policy), *cert. denied,* 299 U.S. 561 (1936); Hancock v. Butler, 21 Tex. 804, 813 (1858) (Rule founded in sound policy); Ellis v. Andrews, 324 S.W.2d 917, 920 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.) (deferred vesting denounced by the law).

71. *See* Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir. 1936) (purpose of Rule to prevent fettering property), *cert. denied,* 299 U.S. 561 (1936); *see also* RESTATEMENT (SECOND) OF PROPERTY Part I at 8 (1983) (Rule provides adjustment of interests between current and subsequent parties); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1117, at 13 (2d ed. 1956) (law balances between will of present and future owner).

72. *See* State v. Reece, 374 S.W.2d 686, 688 (Tex. Civ. App.—Houston 1964, no writ).

that, absent such a restriction, property will be isolated from commerce, thereby rendering it inalienable.[73] Rights of reentry and possibilities of reverter are not subject to the Rule because they are considered vested estates.[74] Covenants, though not considered estates, are likewise not subject to the Rule Against Perpetuities.[75] The resulting anomaly is that under current Texas law the purpose of the Rule, to avoid restrictions of indefinite and unlimited duration, is frustrated by an appropriately phrased conveyance.[76] In order to rectify this situation, some type of legislation needs to be enacted which will either bring these restrictions within the Rule or which will regulate them to a greater degree than they are presently regulated.

VI. RULES OF CONSTRUCTION

All of the methods discussed above for terminating a restriction, when asserted by a burdened party, will result in application of certain general rules of construction.[77] Texas courts abhor a forfeiture and will employ any reasonable interpretation to avoid such an occurrence.[78] In construing

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An estate is vested when there is a person in being who would have an immediate right to possession upon the termination of the precedent estate. A contingent estate is one where the person to whom, or the event limiting the estate is uncertain. *See* Hunt v. Carroll, 157 S.W.2d 429, 436 (Tex. Civ. App.—Beaumont 1941), *writ dism'd,* 140 Tex. 424, 168 S.W.2d 238 (1943).

73. *See* Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir. 1936) (remote vesting isolates property and removes it from commerce), *cert. denied,* 299 U.S. 561 (1936); Kettler v. Atkinson, 383 S.W.2d 557, 560 (Tex. 1964) (purpose of Rule to prevent removal of property from commerce); Ellis v. Andrews, 324 S.W.2d 917, 920 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.) (deferred vesting for long period of time denounced by law).

74. *See* Bagby v. Bredthauer, 627 S.W.2d 190, 196-97 (Tex. App.—Austin 1981, no writ) (possibility of reverter valid under Rule Against Perpetuities); *see also* 5 R. POWELL, THE LAW OF REAL PROPERTY § 769(1), at 72-57 (1981) (possiblity of reverter and right of entry vested for perpetuity purpose).

75. *See* Cornett v. City of Houston, 404 S.W.2d 602, 605 (Tex. Civ. App.—Houston 1966, no writ) (covenants and restrictions in deed valid under Rule Against Perpetuities).

76. *See* Hunt v. Carroll, 157 S.W.2d 429, 437 (Tex. Civ. App.—Beaumont 1941) (once estate vested it is immaterial how long it may last), *writ dism'd,* 140 Tex. 424, 168 S.W.2d 238 (1943); *cf.* Cornett v. City of Houston, 404 S.W.2d 602, 605 (Tex. Civ. App.—Houston 1966, no writ) (covenants in deeds valid under Rule Against Perpetuities).

77. *See, e.g.,* Wade v. Magee, 641 S.W.2d 321, 322 (Tex. App.—El Paso 1982, no writ) (construction strict); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (construction must favor least burden on grantee); Bailey v. Mullens, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.) (cardinal rule to give effect to intent).

78. *See, e.g.,* Texas Elec. Ry. Co. v. Neale, 151 Tex. 526, 535, 252 S.W.2d 451, 456 (1952) (forfeiture not favored, if reasonable, restriction construed as covenant); Sisk v. Randon, 123 Tex. 326, 331, 70 S.W.2d 689, 692 (1934) (construed language as covenant to avoid forfeiture); Zapata v. Torres, 464 S.W.2d 926, 929 (Tex. Civ. App.—Dallas 1971, no

an obvious restriction, courts tend to prefer covenants over conditions subsequent, while a fee simple determinable, because of its tendency to produce forfeitures, is the least favored.[79] The first and most important step in the construction process is determining the intent of the parties.[80] If the court believes that there is any question of intent, it will apply a strict construction[81] against the grantor[82] thus favoring the free and unrestricted use of the property.[83] Because ascertaining intent is the primary goal of

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writ) (holding deed restrictions to be covenant rather than condition); Dilbeck v. Gaynier, 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) (courts will not declare forfeiture unless compelled); Hedick v. Lone Star Steel Co., 277 S.W.2d 925, 929 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.) (law disfavors forfeiture, will construe to avoid such).

79. *See* Sirtex Oil Indus., Inc. v. Erigan, 403 S.W.2d 784, 787 (Tex. 1966) (because of harshness, conditions not favored); Hearne v. Bradshaw, 158 Tex. 453, 456, 312 S.W.2d 948, 951 (1958) (condition will be construed as covenant if possible); Hedick v. Lone Star Steel Co., 277 S.W.2d 925, 929 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.) (covenants favored over condition subsequent which is favored over limitation); City of Wichita Falls v. Bruner, 165 S.W.2d 480, 484 (Tex. Civ. App.—Fort Worth 1942, writ ref'd) (covenants favored over conditions if reasonable). *See generally* Williams, *Restrictions on the Use of Land: Conditions Subsequent And Determinable Fees,* 27 TEXAS L. REV. 158, 160-68 (1949) (author describes conditions subsequent and determinable fees as most rigorous restrictions and suggests they offer "gambler's chance" of regaining the land); Comment, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248, 250 (1941). The author expresses his disdain for conditions subsequent by referring to them as "Janus-faced conveyancing devices: They are half restriction and half estate." *Id.* at 250. The author also refers to determinable fees as the most harsh conveyancing device in that they most easily cause forfeitures. *See id.* at 271-72.

80. *See* Dilbeck v. Gaynier, 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) (determine and give effect to intent); Bailey v. Mullens, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.) (cardinal rule to give effect to intent); Hedick v. Lone Star Steel Co., 277 S.W.2d 925, 928 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.) (intent must be ascertained and effectuated); James v. Dalhart Consol. Indep. School Dist., 254 S.W.2d 826, 830 (Tex. Civ. App.—Amarillo 1952, no writ) (dominant purpose to determine intent).

81. *See* Baker v. Henderson, 137 Tex. 266, 276, 153 S.W.2d 465, 470 (1941) (restrictive portions of deed construed strictly); Davis v. Skipper, 125 Tex. 364, 370, 83 S.W.2d 318, 321 (1935) (restrictions must be strictly construed); Wade v. Magee, 641 S.W.2d 321, 322 (Tex. App.—El Paso 1982, no writ) (covenants strictly construed); Turner v. England, 628 S.W.2d 213, 214 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (well settled strict construction); Gilbert v. Shenandoah Valley Improvement Assoc., 592 S.W.2d 28, 29 (Tex. Civ. App.—Beaumont 1979, no writ) (strict construction of all real estate restrictions).

82. *See, e.g.,* McDonald v. Painter, 441 S.W.2d 179, 183 (Tex. 1969) (construed strictly against grantor); Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 890 (Tex. 1962) (doubts resolved favoring less onerous burden on grantee); Baker v. Henderson, 137 Tex. 266, 276, 153 S.W.2d 465, 470 (1941) (favor grantee, construe against grantor).

83. *See* Southampton Civic Club v. Couch, 159 Tex. 464, 468, 322 S.W.2d 516, 518 (1958) (doubts resolved to favor unrestricted use); Baker v. Henderson, 137 Tex. 266, 276, 153 S.W.2d 465, 470 (1941) (doubts resolved to favor freer use); Davis v Skipper, 125 Tex. 364, 370, 83 S.W.2d 318, 321 (1935) (favoring free and unrestricted construction); Wade v.

the court, however, the conveyance must not be so strictly construed as to defeat the plain and clear intent of the parties.[84] It is also generally held that construction of the restriction is to be made with reference to the entire instrument of conveyance.[85] If the decision is to enforce what appears to be a clearly intended restriction, the restriction will be enforced as written and not extended by unwarranted implications.[86]

VII. Application of Construction Rules

A discussion of several recent Texas cases, dealing with both conditional restrictions and restrictive covenants, will demonstrate the principles and goals which guide the courts in their efforts to construe restrictions. A discussion of the cases which follow will show that covenants tend to be more self-limiting than conditions for the reason that they are subject to the continued acquiescence of the parties involved.[87] In *Crawford v. Boyd,*[88] the

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Magee, 641 S.W.2d 321, 322 (Tex. App.—El Paso 1982, no writ) (favor free use); Turner v. England, 628 S.W.2d 213, 214 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (free and unrestricted use favored); Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.) (construction favoring free use).

84. *See, e.g.,* Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981) (clear intent to be enforced); Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 890 (Tex. 1962) (cardinal rule determining intent); Shaver v. Hunter, 626 S.W.2d 574, 576 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.) (strict contruction should not defeat plain intent). *See generally* Comment, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248, 260 (1941) (when intent clear, judicial aversion for restrictions prevented from taking effect).

85. *See, e.g.,* Dallas Joint Stock Land Bank v. Harrison, 138 Tex. 84, 92, 156 S.W.2d 963, 967 (1941) (look to whole of instrument in ascertaining intent); Bailey v. Mullens, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.) (intent determined from entire instrument); Sebastian Indep. School Dist. v. Ballenger, 297 S.W.2d 238, 240 (Tex. Civ. App.—San Antonio 1956, no writ) (look to entire conveyancing device).

86. *See, e.g.,* Gilbert v. Shenandoah Valley Improvement Assoc., 592 S.W.2d 28, 29 (Tex. Civ. App.—Beaumont 1979, no writ) (enforced as written, not enlarged by construction); Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.) (restrictions arising by implication must be necessary); Wald v. West MacGregor Protective Assoc., 332 S.W.2d 338, 343 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.) (cannot change restriction by construction). *But see* Catalina Square Improvement Comm. v. Metz, 630 S.W.2d 324, 327 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (court will give effect to that which is necessarily implied); H.E. Butt Grocery Co. v. Justice, 484 S.W.2d 628, 631 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.). In *Justice* the court refused to allow the defendant to use a lot for parking for his grocery store. The lot was restricted against the building of a grocery store, and although defendant was merely using the lot as a parking area for his grocery, the court concluded that the restriction necessarily implied any use connected with a grocery store. *See id.* at 631.

87. *Compare* Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 891-92 (Tex. 1962) (grantor's assignee held not to have waived right of reentry despite failure to exercise it within seven years) *with* Stephenson v. Perlitz, 537 S.W.2d 287, 288 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) (acquiescence by property owners to substantial violations

Fort Worth Court of Civil Appeals held that the defendant did not violate deed restrictions forbidding the use of trailer homes on particular lots when he placed a mobile home on his lot, tied it to the ground with cables, and connected it to a septic tank.[89] The court reasoned that a trailer home as used in the restriction referred to a mobile vehicle.[90] Furthermore, the court interpreted the restriction's purpose as the avoidance of the influx of transients into a residential area.[91] Because the defendant's trailer was tied to the ground, and had been purchased without axles or wheels, the court determined that the trailer did not violate the purpose of the covenant since by its nature, the trailer did not fall within the meaning given to a trailer home.[92] The decision in *Crawford* is representative of the reasoning involved in construing restrictions,[93] since the court gave effect to the apparent intent of the parties by not enforcing the restriction.[94] Therefore, the court's primary obligation in construing restrictions was fulfilled.[95]

In *Lassiter v. Bliss,*[96] a case involving facts similar to those in *Crawford,* the Supreme Court of Texas held that a restriction forbidding any trailer or temporary quarters to be used as a home in the subdivision precluded the defendant from placing a mobile home on his lot in spite of the fact

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of covenants deemed waiver of enforcement rights), *and* Comment, *Solar Energy and Restrictive Covenants: The Conflict Between Public Policy and Private Zoning,* 67 CALIF. L. REV. 350, 359 (1979) (deed covenants a manner by which people agree to order affairs).

88. 453 S.W.2d 232 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

89. *See id.* at 235. The restriction specifically stated:

> "[T]railer homes are permitted on lots approved for trailers, being 33 through 54, both inclusive and trailers may not be older than 1955 models . . . . All other lots shall be residence lots only and no trailer homes shall be permitted thereon, except as provided in restriction two hereinabove, except lots 33 through 54, inclusive, may be permitted for trailers, not other than 1955 models as set out in the restriction No. two hereinabove."

Id. at 233.

90. *See id.* at 235.

91. *See id.* at 233.

92. *See id.* at 235.

93. *See, e.g.,* Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981) (clear intent should be effectuated); Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 890 (Tex. 1962) (cardinal rule determination of intent); Shaver v. Hunter, 626 S.W.2d 574, 576 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.) (strict construction should not preclude enforcement of clear intent).

94. *See* Crawford v. Boyd, 453 S.W.2d 232, 235 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

95. *See, e.g.,* Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 890 (Tex. 1962) (cardinal rule is to determine parties' intentions); Bailey v. Mullens, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.) (first rule to effectuate intent); James v. Dalhart Consol. Indep. School Dist., 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ) (primary goal to determine intent).

96. 559 S.W.2d 353 (Tex. 1977).

that it had no wheels and had been connected to the water system.[97] Justice McGee cited *Bullock v. Kattner*[98] for the proposition that a mobile home with no wheels, placed on blocks, and connected to lights and water still constitutes a trailer as a matter of law.[99] The court distinguished *Crawford* by stating that Boyd's trailer was built to specifications, without wheels or axles, and placed on a concrete foundation.[100] The court attempted to ascertain the intent of the parties in making the restriction [101] and determined that their intent was to prohibit mobile homes from use as residences under any circumstances.[102] Although the majority based its decision upon an analysis of the parties' intent, a strong dissent by Justice Johnson maintained that the majority failed in this determination.[103] The basis of Justice Johnson's dissent involved the definition of the word "trailer" as used in the restriction.[104]

A more recent case involving a mobile home, *Currey v. Roark,*[105] required interpretation of a restriction that required a minimum amount of square feet for residential construction and that such residence be built of at least "eighty percent brick, tile, or concrete."[106] In deciding that the defendant's mobile home was prohibited by the restriction,[107] the court sought to determine the intended purpose of the restriction and placed a great deal of emphasis on the parties' choice of the word "construct."[108] These cases involving mobile homes indicate the Texas courts' emphasis

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97. *See id.* at 355.

98. 502 S.W.2d 828 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

99. *See* Lassiter v. Bliss, 559 S.W.2d 353, 355 (Tex. 1977).

100. *See id.* at 356-57.

101. *See id.* at 357-58.

102. *See id.* at 357.

103. *See id.* at 359 (Johnson, J., dissenting).

104. *See id.* at 360-63. Justice Johnson points out that the restriction was made in 1948 and at that time "trailer" meant something entirely different than what is today called a mobile home. Johnson argued that as a mobile home "is a structure physically, functionally, and socially distinct from the trailer of the 1940's," there could be no possible inference that the intent of the parties in 1948 had been to bar this type of mobile home. The dissent also points out that mobile homes are now usually designed for permanent residential use, as opposed to the transient type of use associated with the trailers of the 1940s. *See id.* at 360-63.

105. 635 S.W.2d 641 (Tex. Civ. App.—Amarillo 1982, no writ).

106. *See id.* at 642.

107. *See id.* at 642. The wheels, axle and tongue were not removed from the mobile home, but defendant planned to connect it to electrical, sewer, and telephone service as well as tying it to the ground. *See id.* at 643.

108. *See id.* at 643. The court held that as the restriction did not specifically define "construct" as used, they would apply its most common meaning. The court determined that "construct" implied some degree of permanency and the fact that defendants exhibited a desire to connect it to utility services and tie it down gives it a degree of permanency, thereby bringing it within the restriction. *See id.* at 643-44.

upon determining the intent of the parties whenever possible, and if possible, effectuating that intent.[109]

Although the court will strive to determine the intent of the parties, if the restriction is vague, ambiguous, or does not specifically forbid that which the plaintiff is seeking to prohibit, courts will not hesitate to apply a strict construction in favor of the grantee.[110] For example, in *Turner v. England*[111] the court held that a tennis court was not within the meaning of the term "structure" as used in the restriction.[112] Another example of this tendency to construe vague restrictive provisions strictly can be found in *Wade v. Magee.*[113] In *Wade* the defendant owned the upper portion of one "lot" and the entire lot next door, which was situated on a corner.[114] The plaintiff claimed that the upper portion of the first "lot" owned by the defendant had become a part of the corner "lot" and the defendant's building of a carport on the first "lot" constituted a violation of the restrictive covenant requiring that garages and carports built on corner lots have a side or rear entrance.[115] The court followed the construction of "lot" used by the court in *Wall v. Ayrshire Corp.,*[116] and accordingly, the defendant was not enjoined from completing construction.[117] A very recent case, *Baskin v. Jeffers,*[118] involved construction of a restriction limiting "lots" to single family residences.[119] In *Baskin* an area of land was platted, showing

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109. *See, e.g.,* Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 890 (Tex. 1962) (cardinal rule to determine intent); Bailey v. Mullens, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio, 1958, writ ref'd n.r.e.) (first rule to effectuate intent); James v. Dalhart Consol. Indep. School Dist., 254 S.W.2d 826, 829 (Tex. Civ. App.—Amarillo 1952, no writ) (primary goal to determine intent).

110. *See, e.g.,* McDonald v. Painter, 441 S.W.2d 179, 183 (Tex. 1969) (construed strictly against grantor); Baker v. Henderson, 137 Tex. 266, 276, 153 S.W.2d 465, 470 (1941) (favor grantee, construe against grantor); Field v. Shaw, 535 S.W.2d 3, 6 (Tex. Civ. App.—Amarillo 1976, no writ) (construction favoring least burden on grantee).

111. 628 S.W.2d 213 (Tex. App.—Eastland 1982, writ ref'd n.r.e.).

112. *See id.* at 216. The restriction provided that "[n]o building, fence or other structure shall be constructed on any building site nearer to the front lot line or nearer to the side street line than the minimum setback required by the building line shown on the recorded plat." *See id.* at 214. The court held that as restrictions must be strictly construed against the grantor they would narrowly construe the term "structure" thereby concluding that it did not include a tennis court. *See id.* at 216.

113. 641 S.W.2d 321 (Tex. App.—El Paso 1982, no writ).

114. *See id.* at 322.

115. *See id.*

116. 352 S.W.2d 496 (Tex. Civ. App.—Houston 1961, no writ). The definition of "lot" is "a fractional part of a block limited by the fixed boundaries on an approved recorded plat." *See* Wade v. Magee, 641 S.W.2d 321, 322 (Tex. App.—El Paso 1982, no writ) (quoting Wall v. Ayrshire Corp., 352 S.W.2d 496, 501 (Tex. Civ. App.—Houston 1961, no writ).

117. *See id.* at 322.

118. Baskin v. Jeffers, 653 S.W.2d 480 (Tex. App.—Beaumont 1983, no writ).

119. *See id.* at 481.

lots, lakes, and raw acreage marked by broken lines.[120] The appellant desired to build townhouses containing no space between them on the raw acreage areas.[121] The appellees sought an injunction, claiming that appellant's action violated the single-family requirement.[122] The court applied a strict construction to the term "lot" and held that the broken lines marking the boundaries of the raw acreage were not definite enough to form a "lot" within the meaning adopted in *Wall;* therefore, no violation existed.[123]

Another example of the hesitancy courts exhibit towards enforcing ambiguous restrictions can be found in *Davis v. Huey,*[124] which involved a restriction requiring approval by an architectural committee of any plans for construction or modification of lots.[125] In *Davis,* the Supreme Court of Texas declared that the "majority view" on this issue holds that an architectural committee's broad discretionary powers will be upheld as long as it does not act unreasonably or in bad faith.[126] According to the court, "other cases" have taken the view that such a committee may not impose conditions any more restrictive than those which are specifically mentioned in the covenant itself.[127] After briefly discussing these two positions, the court held that requirements of this type are enforceable only as long as they provide adequate notice of the particular restrictions which are to be enforced.[128] A recent case applying the *Davis* rule, *Catalina Square Improvement Committee v. Metz,*[129] held that a committee should not be given the power to disapprove any change other than a substantial one, and when the provisions are ambiguous, unless there is a showing that substantial harm will result to the general scheme of the area, a violation should not be declared for a technicality such as a failure to seek

120. *See id.* at 482.

121. *See id.* at 482.

122. *See id.* at 482.

123. *See id.* at 482. In another case, Gilbert v. Shenandoah Valley Improvement Assoc., 592 S.W.2d 28 (Tex. Civ. App.—Beaumont 1979, no writ), the plaintiffs claimed that the defendant, by renting eighteen of the nineteen homes he had built, was in violation of covenants forbidding anything other than single family residences. The court held that as the restriction did not specifically prohibit renting, and because the homes were being used as single family residences, there was no violation. *See id.* at 29.

124. 620 S.W.2d 561 (Tex. 1981).

125. *See id.* at 562.

126. *See id.* at 566.

127. *See id.* at 566.

128. *See id.* at 566.

129. 630 S.W.2d 324 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). In *Catalina,* the defendant replaced the roof of his home without getting the prior approval of the committee. It may be of some significance that the committe stated that they would not have disapproved, had he submitted his proposal. *See id.* at 327.

approval.[130]

The construction rules which have been applied in the cases involving the covenants discussed above are the same rules as are applied in cases involving conditions.[131] Courts, however, will seek to find a condition subsequent rather than a determinable fee, in order to avoid a forfeiture.[132] For example, in the case of *Field v. Shaw*[133] the deed in question provided that the land was confined to use for a cotton gin and that "in the event" that any other business should be operated on the premises the land "shall revert to the grantor."[134] To arrive at his determination that the restriction was a condition subsequent rather than a determinable fee, Justice Reynolds stated that no words were employed which usually indicate either a fee simple subject to a condition subsequent or a determinable fee.[135] In spite of the ambiguity, the court proceeded to discuss the grammatical construction of the deed and concluded that, if the classical words used with restrictions were employed within the deed, those of a condition subsequent would be more grammatically proper, while those which usually indicate a determinable fee would not fit with the rest of the language employed in the deed.[136] Other elements which led the court to hold that the defendant's actions did not warrant a forfeiture included the testimony

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130. *See id.* at 328. The court also mentioned the fact that the defendant had made no major changes. *See id.* at 327.

131. *See* Texas Elec. Ry. Co. v. Neale, 151 Tex. 526, 530, 252 S.W.2d 451, 456 (1952) (condition case applying strict construction against grantor); Wade v. Magee, 641 S.W.2d 321, 322 (Tex. App.—El Paso 1982, no writ) (covenant case); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (conditions strictly construed).

132. *See* Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 890 (Tex. 1962) (condition subsequent favored as less onerous on grantee); C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 36 (1962). *See generally* Comment, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248, 271-72 (1940) (author states that determinable fees are most harsh conveyancing device).

133. 535 S.W.2d 3 (Tex. Civ. App.—Amarillo 1976, no writ).

134. *See id.* at 4. The precise wording of the restriction is as follows: "It is further agreed that the land herein conveyed is expressly restricted in use to that of the operation of a cotton gin and that no other business shall ever be operated thereon and in the event this restriction is violated, the land herein conveyed shall revert to the grantor herein." *See id.* at 4.

135. *See id.* at 5. The usual words employed in a fee simple subject to a condition subsequent are, "if," "but if," "on condition that," and "provided however." The "classical" language in a fee simple determinable is "so long as," "until," and "during,". *See id.* at 5.

136. *See id.* at 5-6. Justice Reynolds stated that "the clause retains the same meaning if it is written 'but if this restriction is violated,' or 'and if this restriction is violated,' or 'and provided however in the event this restriction is violated.' " Using the classical words of a fee simple determinable the restriction would read, "so long as this restriction is violated," "until this restriction is violated," or "during this restriction is violated," none of which make any sense. *See id.* at 5-6.

of the plaintiff[137] and the failure of the plaintiff to exercise her right of reentry within the prescribed time.[138]

In another case involving a deed similar to that in *Field,* the Texas Supreme Court, in *Lawyers Trust Company v. City of Houston,* [139] held that since the deed was susceptible to construction as a determinable fee or a condition subsequent, the grantee would be favored; accordingly, the court determined that the deed contained a condition subsequent.[140] Surprisingly, however, the court held that the failure of the plaintiff to exercise his right of reentry until seven years after the breach did not constitute a waiver.[141]

The cases above, dealing with both conditions and covenants, indicate the process used by Texas courts when construing restrictions. If the restriction clearly establishes the intent of the parties, courts feel constrained to give effect to that intent. If, however, the restriction is ambiguous, or does not clearly prohibit a specific activity, courts apply strict construction and will not enforce the restriction to any extent beyond what it deems necessary. A 1932 California case, *Letteau v. Ellis,* [142] took the approach that even a condition subsequent may be voided if conditions have changed to such an extent as to make enforcement inequitable.[143] Texas courts have refused to go this far, and, as a result, restrictions on land, if appropriately phrased may last indefinitely without regard to the desires of present day landowners nor to the presence or absence of beneficial aspects of the restrictions.

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137. *See id.* at 6.

138. *See id.* at 6. The court cited article 5507 as the deciding factor since it provides that an action to recover real estate against one in adverse possession must be instituted no later than three years after its accrual. Here, the plaintiff learned of the breach in 1969 but failed to bring suit until 1973. *See id.* at 6 (citing TEX. REV. STAT. ANN. art. 5507 (Vernon 1958)).

139. 359 S.W.2d 887 (Tex. 1962).

140. *See id.* at 890. The language of the deed is as follows: "If, on or after the expiration of 25 years from date . . . any tract . . . dedicated for parks . . . cease to be used for the purpose or purposes indicated . . . the fee title . . . shall vest and be in W.T. Carter Lumber and Building Company." *Id.* at 888.

141. *See id.* at 891. The court's reasoning was that waiver is a question of intent and the City failed to submit that issue to the jury. The court also held that the City had not been misled in any manner by the grantor's successor, and was, therefore, not injured. *See id.* at 891-92.

142. 10 P.2d 496 (Cal. Dist. Ct. App. 1932).

143. *See id.* at 497.

VIII. Other States' Efforts To Deal with Problems Posed by Restrictions

Restrictions are often advantageous and beneficial at their inception,[144] but they must be carefully scrutinized in order to insure that they do not outlive their utility.[145] The Brackenridge Park situation is an example of how a restriction which arguably no longer serves as a benefit may continue for an indefinite period of time.[146] Other states, in an effort to control an individual's ability to restrict the use of land for an indefinite period of time, have passed statutes placing durational limitations on restrictions and/or requirements that any conditions be of substantial benefit.[147] The majority of these statutes deal specifically with conditions,[148]

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144. *See* Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981) (restrictions add value, encourage purchasers). *See generally* Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area,* 1958 Wis. L. Rev. 612, 613 (one objective of subdividers to establish character of neighborhood and maintain value); Comment, *Covenants Running with the Land: Viable Doctrine or Common Law Relic?,* 7 Hofstra L. Rev. 139, 174 (1979) (restrictions may mean difference between pleasant, well functioning community and disorderly one).

145. *Cf.* Rosson v. Bennet, 294 S.W.2d 660, 662 (Tex. Civ. App.—Waco 1927, no writ) (possibility of reverter does not violate perpetuities, may continue and is a vested right). *See generally* Botts, *Removal of Out Moded Restrictions,* 8 U. Fla. L. Rev. 428, 428 (1955) (changes and advancements make best thought out restrictions obsolete and harmful); Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees,* 27 Texas L. Rev. 158, 159-63 (1948) (restrictions may endure beyond purpose; possibly indefinitely if properly framed); Comment, *Solar Energy and Restrictive Covenants: The Conflict Between Public Policy and Private Zoning,* 67 Calif. L. Rev. 350, 360 (1979) (foresight and information imprecise, restriction plans cannot cope with all future possibilities); Comment, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 Harv. L. Rev. 248, 276 (1940) (changing society may find capricious conditions violative of public policy); Comment, *Stale Future Interests: Can Texas Pass a Constitutional Reverter Act?,* 9 St. Mary's L.J. 525, 537 (1978) (restrictions may result in loss of marketability).

146. *See* Deed from San Antonio Water Works to City of San Antonio, recorded at Vol. 185, p. 183, Bexar County Deed Records (1899). The deed provides that in case of breach, complaint must be made in writing to the City Council and if not promptly repaired the estate shall vest in the State of Texas for the benefit of the University of Texas. The language used is apparently that of a condition subsequent with an executory interest; however, that is open to speculation. Apparently, the Legislature believed this to be a determinable fee, and accordingly attempted to void the provision rather than dealing with it as a condition subsequent or executory interest. However, regardless of the nomenclature, it is still a condition which might be subject to a statute forbidding nominal conditions or providing some type of durational limitation. *See id.*

147. *See* Ariz. Rev. Stat. Ann. § 33-436 (1974) (nominal conditions will be disregarded); Conn. Gen. Stat. Ann. § 45-97 (West 1981) (conditions void after thirty years); Fla. Stat. Ann. § 689.18 (West 1969) (conditions of unlimited duration void as against public policy); Ill. Ann. Stat. ch. 30, § 37e (Smith-Hurd 1969) (possibility of reverter and right of entry valid for forty years at most); Ky. Rev. Stat. Ann. §§ 381.218, .219, .221, .222 (Bobbs-Merrill 1972) (possibility of reverter abolished; thirty year limit on conditions; rights

rather than with covenants, which is probably the result of the realization that covenants, by their nature tend to be self-limiting in the sense that they tend to respond or conform to the desires of the parties.[149] Some state statutes do, however, specifically refer to covenants.[150].

A number of the statutes of other jurisdictions serve primarily as a type of statute of limitations rather than as unqualified prohibitions against restrictions.[151] Other states, however, have gone farther and declared conditions and or covenants void as against public policy either generally or in specific instances.[152] The disadvantage of the statutes which serve as durational limitations is that they do not consider the intent of the parties, nor do they consider whether the conditions or covenants are still beneficial in nature.[153] Those statutes which declare restrictions void as against public policy have the advantage of preventing the implementation of useless conditions; however, they fail to account for the desires of the parties and

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of entry created prior to statute are invalid unless intention to preserve filed); ME. REV. STAT. ANN. tit. 33, § 103 (1978) (fee simple determinable or condition subsequent becomes absolute after thirty years); MASS. ANN. LAWS ch. 260, § 31a (Michie/Law. Co-op. 1980) (must file in registry, information as to nature of possibility of reverter or right of entry); MICH. STAT. ANN. § 26.46 (Callaghan 1974) (nominal conditions disregarded); MINN. STAT. ANN. § 500.20 (West 1983) (covenants and conditions which become nominal will be disregarded); R.I. GEN. LAWS §§ 34-4-21 (1970) & 34-4-24 (Supp. 1982) (covenants and conditions valid for thirty years; must file record of interest); WIS. STAT. ANN. § 700.15 (1981) (nominal conditions disregarded).

148. *See* ARIZ. REV. STAT. ANN. § 33-436 (1974) (nominal conditions disregarded); CONN. GEN. STAT. ANN. § 45-97 (West 1981) (conditions void after thirty years); FLA. STAT. ANN. § 689.18 (West 1969) (conditions of unlimited duration void as against public policy).

149. *Cf.* Currey v. Roark, 635 S.W.2d 641, 642 (Tex. App.—Amarillo 1982, no writ) (prohibition of mobile home within intent of parties in making restrictions); Turner v. England, 628 S.W.2d 213, 216 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (court refused to prohibit tennis court because no showing that parties intended such a prohibition).

150. *See* R.I. GEN. LAWS § 34-4-21 (1970) (covenants and conditions cease to be valid after thirty years). *Compare* MINN. STAT. ANN. § 500.20 (West Supp. 1983) (contains clause against nominal covenants and conditions) *with* MINN. STAT. ANN. § 500.20 (West 1979) (provision against nominal conditions only).

151. *See* CONN. GEN. STAT. ANN. § 45-97 (West 1981) (conditions void for thirty years); ILL. ANN. STAT. ch. 30, § 37e (Smith-Hurd 1969) (conditions valid only for forty years); KY. REV. STAT. ANN. § 381.219 (Bobbs-Merrill 1972) (right of reentry valid only for thirty years); ME. REV. STAT. ANN. tit. 33, § 103 (1978) (thirty-year limit); R.I. GEN. LAWS § 34-4-21 (1970) (thirty year validity).

152. *See* CAL. CIV. CODE § 714 (Deering Supp. 1983) (covenants or conditions which inhibit use of solar energy devices void as against public policy); FLA. STAT. ANN. § 689.18 (West 1969) (reverter or forfeiture provisions void against public policy because unreasonable restraint on alienation).

153. *See* CONN. GEN. STAT. ANN. § 45-97 (West 1981) (conditions valid for thirty years, no provision for determination of value); R.I. GEN. LAWS § 34-4-21 (1970) (thirty year validity regardless of intent or circumstances).

limit individual freedom to use land as one sees fit.[154]

Another type of statute, such as the one employed in Minnesota,[155] provides that any covenant or condition which is nominal and lacks substantial benefit shall be invalid.[156] This statute is positive in that it allows a condition, covenant, or restriction to continue as long as it provides a benefit, rather than automatically terminating the condition after a period of years.[157] Allowing termination only on a showing that no benefit exists is particularly helpful in the case of a covenant which has continued for a number of years and, at the behest of the parties, may continue until their needs or desires are otherwise.[158] A Minnesota decision involving application of this statute has held that this statute serves as notice to all who may desire to restrict land, and that, if applied prospectively, it is not unconstitutional.[159] Even if applied prospectively, however, this statute poses the problem of forcing a court to determine what constitutes a nominal condition as well as deciding a potentially arbitrary issue of whether a substantial benefit may still be derived from the restriction.[160]

The state of Kentucky has gone farther than most states in their efforts to deal with the problems posed by restrictions.[161] The Kentucky Legislature has essentially converted possibilities of reverter into rights of reentry,[162] limited the duration of a right of reentry to thirty years,[163] and provided that an intention to preserve one's right of reentry must have been filed prior to 1965 in order to avoid the effect of the thirty year limitation.[164] Kentucky also has passed a statute which exempts conditions from

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154. *Cf.* CAL. CIV. CODE § 714 (Deering Supp. 1983) (restrictions against solar energy devices void); FLA. STAT. ANN. § 689.18 (West Supp. 1983) (reverter and forfeiture provisions void).

155. MINN. STAT. ANN. § 500.20 (West Supp. 1983). *Accord* ARIZ. REV. STAT. ANN. § 33-436 (1974); MICH. STAT. ANN. § 26.46 (Callaghan 1974).

156. *See* MINN. STAT. ANN. § 500.20 (West. Supp. 1983). Section 500.20 provides in part: "When any covenants, conditions or extensions thereof annexed to a grant . . . shall become, merely nominal, and of no actual and substantial benefit to the party . . . in whose favor they are to be performed, they may be wholly disregarded. . . ." *Id.*

157. *See id.*

158. *Compare* MINN. STAT. ANN. § 500.20 (West. Supp. 1983) (restrictions invalid if nominal) *with* R.I. GEN. LAWS § 34-4-21 (1970) (covenants expire at end of thirty years).

159. *See In re* Turners Crossroad Dev. Co., 277 N.W.2d 364, 373 (Minn. 1979).

160. *See* MINN. STAT. ANN. § 500.20 (West. Supp. 1983) (sets no standard for determining what is nominal or not of substantial benefit).

161. *Compare* KY. REV. STAT. ANN. §§ 381.218, .219, .221 (Bobbs-Merrill 1972) (reduces possibility of reverter to right of reentry; imposes thirty year limitation; requires record of intentions to maintain rights be filed) *with* MINN. STAT. ANN. § 500.20 (West Supp. 1983) (nominal conditions and covenants may be disregarded).

162. KY. REV. STAT. ANN. §§ 381.218 (Bobbs-Merrill 1972).

163. *See id.* § 381.219.

164. *See id.* § 381.221.

the requirements of the earlier mentioned statutes, if the condition is part of a gift for charitable or religious purposes.[165] The most beneficial aspect of these statutes is that they do not deprive a grantor of his rights. They merely change his remedy in case of breach, which would require in Texas that the right of reentry be exercised within a reasonable time.[166] The Kentucky Supreme Court, construing this statute in *Cline v. Johnson County Board of Education,*[167] held that the statute did not impair the constitutional right to contract, and that the economic interests involved in possibilities of reverter were so outweighed by the inconvenience they caused that the requirements of the statute were reasonable.[168] It may be noted, however, that the Kentucky court stated that a possibility of reverter or right of reentry does not come within the constitutional protection of a vested right because they are nothing more than expectancies.[169]

IX. PROPOSAL

In an effort to avoid controversies such as the situation involving Brackenridge Park, Texas should follow those states which have passed statutes regulating land use restrictions. Any statute which Texas might adopt, however, will require a prospective application in order to avoid violating the Texas Constitution.[170] The best way to achieve an effective and equitable law would be to borrow from the better provisions of both the Minnesota statute and the Kentucky statute. An ideal combination of the two statutes would reduce possiblities of reverter to rights of reentry, would require that the holder of such an interest file a record of his intention to preserve his interest, and would void any restriction which is no longer beneficial. Borrowing further from the Kentucky statute would allow a grantor to avoid the requirements of the statute if he were making a gift for

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165. *See id.* § 381.222.

166. *See, e.g.,* Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 891 (Tex. 1962) (waiver presumed after reasonable time); Field v. Shaw, 535 S.W.2d 3, 5 (Tex. Civ. App.—Amarillo 1976, no writ) (reentry must be exercised within reasonable time); Wisdom v. Minchen, 154 S.W.2d 330, 336 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.) (good faith requires that grantor assert his right promptly).

167. 548 S.W.2d 507 (Ky. 1977).

168. *See id.* at 508.

169. *See id.* at 508.

170. TEX. CONST. art. I, § 19. Section 19 of article I provides that "no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land." *Id.; see* Belkin v. Ray, 171 S.W.2d 507, 512 (Tex. Civ. App.—Austin 1943) ("legislature has no authority to enact a law that would change the status of property other than as defined by the Constitution"), *rev'd on other grounds,* 142 Tex. 71, 176 S.W.2d 162 (1943); Siegal v. Warrick, 214 S.W.2d 883, 884 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.) (individual cannot be divested of property without consent).

charitable or religious purposes.[171] An example of an appropriate statute would be similar to the following:

I. Nominal Land Use Restrictions

Subd. 1. When any covenant, condition or restriction annexed to a grant, devise, or conveyance of property shall be determined to be nominal and of no substantial benefit to the party in whose favor they are to be performed they shall become invalid.

Subd. 2. The burden of proof as to whether a condition, covenant, or restriction is nominal and of no substantial benefit shall be on the party claiming such and that party must produce clear and convincing evidence before the restriction shall be declared invalid.

II. Abolition of Possibilities of Reverter

Subd. 1. Any conveyance attempting to create a possibility of reverter shall be construed as a right of reentry. A right of reentry shall require an affirmative act of reentry by the holder of such right within a reasonable time after breach.

Subd. 2. This portion of the statute shall apply to any possibility of reverter in existence at the time of enactment.

III. Gifts for Charitable or Religious Purposes

Conditions or restrictions which arise from charitable or religious purposes shall be exempt from the requirement of this statute.

IV. Termination and Preservation of Interests

Subd. 1. Every possiblity of reverter and right of entry created prior or subsequent to enactment of this law shall be void thirty years after its creation unless within one year after its creation or one year after enactment of this statute, whichever period comes later, the owner of such interest shall file a record of intention to preserve such interest beyond the thirty year limitation.

Subd. 2. Subd. 1 shall not preclude application of Section I subd. 1 to any condition or restriction.

V. Enactment of this statute serves as notice to all parties of their rights.

X. CONCLUSION

It has been the purpose of this paper to show how various restrictions are employed, construed, and terminated under current Texas law. It is obvious that when the intent of the parties to the restriction is clear, restric-

171. *See* KY. REV. STAT. ANN. § 381.222 (Bobbs-Merrill 1972). This type of provision would also deal with the fears expressed by Governor White that the Brackenridge Park bill would discourage potential donors. *See* House Study Group on H.B. 1415, 68th Leg., Reg. Sess. (1983) (transcript available at St. Mary's Law Journal office).

tions will be enforced unless they violate some law or public policy. The use of restrictions gives private citizens the right to control property in the manner which they see as the most desirable without the interference of governmental authorities. To a degree this independence is good. Current Texas law, however, does not adequately deal with situations like those which might arise when a grantor restricts land for an unlimited time with no substantial purpose for the restriction. Regardless of how often a situation of this sort might occur, it is the duty of the legislature to provide a remedy so that the public is not harmed by the ability of one individual to render land inalienable. As was stated in *Letteau v. Ellis,*[172] public policy requires a sacrifice of many individual rights and, athough vested property rights have been slow to respond to this, they also should yield to the common good.[173]

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172. 10 P.2d 496 (Cal. Dist. Ct. App. 1932).
173. *See id.* at 497-98.