

CAUSE NO. 12-0860

WOODCREEK PROPERTY OWNERS  
ASSOCIATION OF HAYS COUNTY, INC.

Plaintiff/Counter-Defendant,

v.

WIMBERLEY SPRINGS PARTNERS,  
LTD. AND WIMBERLEY SPRINGS  
COMMUNITY ASSOCIATION, INC.

Defendants/Counter-Plaintiffs.

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IN THE DISTRICT COURT

HAYS COUNTY, TEXAS

428<sup>TH</sup> JUDICIAL DISTRICT

**ADVISORY OPINION**

Pursuant to the Court's Order signed November 28, 2012, came on to be considered by the undersigned, as an ADR matter under Chapter 154 of the Texas Civil Practice and Remedies Code, the Motion for Partial Summary Judgment filed by the Woodcreek Property Owners Association of Hays County, Inc. ("WPOA"). The undersigned has considered the Motion, the evidence submitted with the motion and the response to the motion, the responses, amended responses, additional briefing and requests for declaratory relief and/or Rule 166a(e) relief made by Defendant/Counter-plaintiff, Wimberley Springs Partners, Ltd. ("Wimberley Springs"), the objections to evidence made by the WPOA, the arguments of counsel, the pleadings of the parties and other documents on file in this case. The undersigned is of the opinion and recommends that the WPOA's Motion for Partial Summary Judgment should be denied, that declaratory relief and/or Rule 166a(e) relief should be granted and that the objections to evidence made by the WPOA should be overruled.

Plaintiff WPOA has filed a Motion for Partial Summary Judgment requesting that "this Court grant its Motion for Partial Summary Judgment declaring that the election conduct[ed] by or on behalf of the Defendants was improperly conducted...." All parties have argued the effect

of Section 209.0041(h) of the Texas Property Code on this election, which took place in March and April, 2012. WPOA argues that the proper interpretation of this statute would require the “requisite percentage approval [here 67%] of all property owners in the WPOA to approve amendments to restrictions.”<sup>1</sup> On the other hand, Wimberley Springs argues that only the property owners within the “single subdivision, ‘Woodcreek, Section Eleven (11)’ [may vote] to amend their deed restrictions.”<sup>2</sup>

The issue of whether “Woodcreek” should be considered as a whole, single, entire development or subdivision (as argued by WPOA) and the extent of the rights of property owners in each individual subdivision within the overall development to make decisions concerning their own property (as argued by Wimberley Springs) has existed from the beginning of the development of Woodcreek over forty years ago. This tension is reflected in such matters as the deed restrictions applicable to each subdivision, the Articles of Incorporation of the WPOA, the numerous disputes between the developer (and its successors) and the WPOA, the numerous disputes between individual subdivisions and the WPOA, the lawsuits between various parties, and the 2008 settlement agreement between the parties to this case. This issue permeates the entire forty-plus year history of this development. This lawsuit will not end this overall dispute, and is but one step along the way. It is an important step, however, for through this lawsuit the relative relationships between the various affected entities and parties may be established.

**1. The Election.** In March and April, 2012, an election was conducted among the property owners of Woodcreek, Section Eleven (11). By this election the property owners of Woodcreek, Section Eleven (11) voted to amend their deed restrictions, withdraw from the

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<sup>1</sup> WPOA Reply, p. 1.

<sup>2</sup> Wimberley Springs Amended Response, p. 1.

WPOA, and join the Wimberley Springs Community Association (WSCA). It is undisputed that in this election more than 67% of the property owners of Woodcreek, Section Eleven (11) voted in favor of this amendment. It is also undisputed that only property owners in Woodcreek, Section Eleven (11) voted in the election, and that the election did not result in the approval of more than 67% of the property owners in the entire WPOA area. The issue before the undersigned is whether Section 209.0041(h) of the Texas Property Code requires that the property owners in the entire WPOA area must vote on the amendments to the deed restrictions applicable to the property within Woodcreek, Section Eleven (11), or whether only the property owners of Woodcreek, Section Eleven (11) are entitled to vote on the proposed amendments to their deed restrictions.

**2. Status of Woodcreek, Section Eleven (11).** Wimberley Springs argues that Woodcreek, Section 11 is a residential subdivision, and that all property within its boundary is governed by the terms of the Declaration and Restrictive Covenants (deed restrictions) that established it. On the other hand, WPOA argues that Woodcreek, Section 11 is not, as a matter of law, a subdivision but rather it is merely “a section” within a larger subdivision known as the Woodcreek subdivision, or in the alternative, that a fact issue exists as to its status.

In its briefing, WPOA points to two sources to support its argument: the affidavit of Merry Merian, President of WPOA<sup>3</sup>, and the 1986 settlement agreement between WPOA and the Federal Savings and Loan Insurance Corporation, as Receiver<sup>4</sup>. On page 10 of its reply, WPOA states:

While the WSP may be able to raise a fact question on that issue, please see, for example, the following:

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<sup>3</sup> WPOA Motion for Partial Summary Judgment, Exhibit I.

<sup>4</sup> WPOA Motion for Partial Summary Judgment, Exhibit D to Exhibit I.

- Exhibit 1, paragraph 4 to the WPOA Motion (Merry Merian Affidavit) pointing out that the subdivision known as “Woodcreek” is made up of different sections (including Section 11).
- Exhibit 1, paragraph 7 and Exhibit D, to the WPOA Motion. This a recorded settlement agreement reached by WSP’s predecessors in interest which establishes the WPOA as the POA for “the ‘Woodcreek’ subdivision, a residential development in Hays County, Texas [see page 1, first recital paragraph / page 8, paragraph 6, item (i)] and which confirms that all lots are part of the “Woodcreek subdivision” [see page 7, paragraph 5, first sentence]

The foregoing are just examples of the reality that Section 11 is not a standalone subdivision in “Woodcreek.”<sup>5</sup>

The documents submitted in this case clearly show that the status of Woodcreek, Section 11 can, and should be, decided as a matter of law, and there is not a fact question as to this issue.

Section 209.002(9) of the Texas Property Code contains the following definition of a subdivision:

(9) "Residential subdivision" or "subdivision" means a subdivision, planned unit development, townhouse regime, or similar planned development in which all land has been divided into two or more parts and is subject to restrictions that:

- (A) limit a majority of the land subject to the dedicatory instruments, excluding streets, common areas, and public areas, to residential use for single-family homes, townhomes, or duplexes only;
- (B) are recorded in the real property records of the county in which the residential subdivision is located; and
- (C) require membership in a property owners' association that has authority to impose regular or special assessments on the property in the subdivision.

As a matter of law, Woodcreek, Section 11 meets this statutory definition of “subdivision.” It was originally created by a plat filed of record in Volume 1, Page 234 of the Plat Records of Hays County, Texas. It consists of “a subdivision... in which all land has been divided into two or more parts....” The subdivided land “is subject to restriction” by virtue of the “Reservations, Restrictions and Covenants” that applied to all property within Woodcreek,

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<sup>5</sup> WPOA Reply Brief, page 10.



Section 11 that were filed on July 23, 1973 at Volume 260, pages 550-566 of the Deed Records of Hays County, Texas. These restrictions:

- (A) limit a majority of the land subject to the dedicatory instruments ... to residential use for single-family homes, townhomes, or duplexes only;
- (B) are recorded in the real property records of the county in which the residential subdivision is located; and
- (C) require membership in a property owners' association that has authority to impose regular or special assessments on the property in the subdivision.

On the other hand, there is no plat filed that subdivides land into a subdivision named "Woodcreek" or "Woodcreek North." Nor is there a set of restrictions applicable to either of these. On the contrary, there are numerous subdivisions within the overall Woodcreek development. Each one of these subdivisions was established by individual filed plats that subdivide land, and each has separate (similar, but not identical) sets of restrictions that are applicable only to that individual subdivision.<sup>6</sup>

The Merian affidavit, the 1986 settlement agreement, and the argument of counsel cannot and do not change the legal effect of the filed plat of Woodcreek, Section 11, nor the 1973 Declaration that constitutes the restrictive covenants for all lots within the "land described and platted into that certain subdivision known as Woodcreek, Section Eleven (11)."<sup>7</sup> Nor do these cause Woodcreek to be created as a subdivision. Simply saying that something exists does not necessarily cause it to exist.

It is the opinion of the undersigned that, as matter of law, Woodcreek, Section 11 is a residential subdivision as defined by the Texas Property Code.

**3. Status of WPOA.** The Plaintiff in this case is the Woodcreek Property Owners' Association of Hays County, Inc. It is a Texas non-profit corporation. Membership in

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<sup>6</sup> The undersigned has reviewed all the material provided and can find no indication that either "Woodcreek" or "Woodcreek North" refers to an actual subdivision, as defined in the statute. It appears that these terms are references to an overall development that consists of numerous individual subdivisions.

<sup>7</sup> 1973 Declaration, page 1.

the corporation is limited to persons or entities who are record owners of property in “any named, numbered or lettered section of those developments known locally as WOODCREEK, EAGLE ROCK and/or BROOKMEADOW in Hays County, Texas....”<sup>8</sup>

The property within the stated developments is divided into numerous subdivisions (“over 25,” according to the affidavit of Merry Merian<sup>9</sup>). Each of these subdivisions has been subdivided from raw land into parcels by a separate subdividing plat and the subdivided lots within each of these separate subdivisions are subject to an individual set of deed restrictions pursuant to separate restrictive covenants. These restrictive covenants appear to be similar, but they are not identical. A partial list of the various subdivisions within the overall Woodcreek development, together to references to the plats that created such subdivisions and the restrictive covenants that govern the property within each subdivision is attached to the 1986 Settlement Agreement between WPOA and the Federal Savings and Loan Insurance Corporation (FSLIC), as Receiver.<sup>10</sup>

This 1986 Settlement Agreement contains a recital that “the [WPOA] was established pursuant to certain deed restrictions (the “Deed Restrictions”) more particularly described on Exhibit ‘A’....”<sup>11</sup> At that time the FSLIC owned 972 lots within Woodcreek, the WPOA had obtained a judgment in state court for the maintenance fees on those lots, the FSLIC had challenged that judgment in federal court, and the Settlement Agreement resolved those lawsuits and dispute.<sup>12</sup> In this Settlement Agreement the WPOA agreed it would not object to the sale of

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<sup>8</sup> Article VIII of the Articles of Incorporation of the WPOA, attached as Exhibit A to the Merian affidavit.

<sup>9</sup> WPOA Motion for Partial Summary Judgment, Exhibit 1, paragraph 4, although Ms. Merian refers to them as “sections.”

<sup>10</sup> WPOA Motion for Partial Summary Judgment, Exhibit D to Exhibit 1, referred to herein as “the 1986 Settlement Agreement.”

<sup>11</sup> Id.

<sup>12</sup> Id. There are numerous recitals in the Settlement Agreement stating that Woodcreek is a “subdivision”, and that it consisted of numerous “sections.” As stated above, these recitals do not change the legal status of the individual subdivisions.

the Receiver's interest in the property to a prospective purchaser, and to the designation of that prospective purchaser as the "developer" under the various sets of deed restrictions, "provided the buyer shall ... acknowledge that the [WPOA] is the property owners' association contemplated by the Deed Restrictions...." <sup>13</sup>

It appears that, at least by the time of the Settlement Agreement, the WPOA had become, and was acknowledged as, the "property owners association" for many, if not all, of the subdivisions of the Woodcreek development, including Woodcreek, Section 11.

**4. The Right To Amend the Declaration.** The 1973 restrictive covenants applicable to the property located in Woodcreek, Section 11 contain a provision allowing for amendments to the deed restrictions. Article IX of the Declaration is entitled Amendments, and provides:

Any or all of the covenants herein may be annulled, amended or modified at any time by the recommendation of the Architectural Control Authority, or its successors, and ratified by a vote of two-thirds (2/3) of the lot owners in the Subdivision. All such lot owners shall be given thirty (30) days notice in writing of any proposed amendment before same is adopted. There shall be no annulment, amendment or modification of these covenants without the prior recommendation of the Architectural Control Authority.<sup>14</sup>

As stated above, a vote has occurred amending the Woodcreek, Section 11 restrictive covenants. The question before the Court is whether the 2011 enactment of Section 209.0041(h) changed the 1973 declaration governing the property within Woodcreek, Section 11 to require the vote to be among all members of the WPOA or just those members of the WPOA who reside in Woodcreek, Section 11. The statute provides:

Except as otherwise provided by this subsection, a declaration may be amended only by a vote of 67 percent of the total votes allocated to property owners in the property owners' association, in

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<sup>13</sup> 1986 Settlement Agreement, paragraph 6.

<sup>14</sup> The issue of the recommendation or approval of the amendment by the Architectural Control Authority is not presented in the WPOA's Motion for Partial Summary Judgment. The only question before the Court at this time is the proper interpretation of TEX. PROP. CODE § 209.0041(h) as it applies to the facts of this case.

addition to any government approval required by law. If the declaration contains a lower percentage, the percentage in the declaration controls.<sup>15</sup>

Another way of stating the issue is whether the provisions of the 1973 declaration stating that the vote is to be among the “lot owners in the Subdivision” have been modified or expanded by the 2011 statute to require a vote among all lot owners in the entire WPOA. It is the opinion of the undersigned that the statute did not, and constitutionally could not, make this change to the amendment process set forth in the deed restrictions for the Woodcreek, Section 11 subdivision.

**A. Statutory Construction.** The Code Construction Act, contained in Chapter 311 of the Texas Government Code, aids courts in statutory interpretation. Two sections of that Act have particular relevance here, sections 311.021 and 311.023. These state:

**311.021. INTENTION IN ENACTMENT OF STATUTES**

In enacting a statute, it is presumed that:

- (1) compliance with the constitutions of this state and the United States is intended;
- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;
- (4) a result feasible of execution is intended; and
- (5) public interest is favored over any private interest.

**311.023. STATUTE CONSTRUCTION AIDS**

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble, and emergency provision.

**B. Plain Meaning of the Statute.** The Texas Supreme Court has stated that the intent of the legislature in enacting a statute is the primary objective in interpreting a statute.

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<sup>15</sup> Tex. Prop. Code § 209.0041(h).

In construing statutes our primary objective is to give effect to the Legislature's intent. We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results. We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind.<sup>16</sup>

The statute at issue here describes how "a declaration" may be amended. The term "declaration" is defined as "an instrument filed in the real property records of a county that includes restrictive covenants governing a residential subdivision."<sup>17</sup> In this case, the "declaration" is the instrument filed on July 23, 1973 at Volume 260, pages 550-566 of the Deed Records of Hays County, Texas that governs all property within, and only property within, Woodcreek, Section 11. The statute states that this declaration "may be amended only by a vote of 67 percent of the total votes allocated to property owners in the property owners' association...."

Thus, under this statute, those who are eligible to vote in the decision to amend this declaration must meet two criteria: (1) they must be property owners in the property owners association, and (2) they must have votes allocated to them. The statute does not specifically state where this "allocation" comes from, and each party argues for a different meaning. The Legislature's use of the word "allocated" in Section 209.0041(h) refers back to the word "declaration." It is clear to the undersigned from the plain meaning of the words of this statute that the intent of the legislature was to look to the terms of the declaration that governs the property within a subdivision to determine the allocation of those eligible to vote in an election to amend that declaration. As stated above, the declaration for Woodcreek, Section 11 grants the right to vote to amend their declaration to "the lot owners in the Subdivision." The plain meaning of the statute did not change the allocation and clearly requires that there be a vote of 67 percent

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<sup>16</sup> *Texas Lottery Commission v. First State Bank of Dequeen*, 325 S.W.3d 628, 635 (Tex. 2010).

<sup>17</sup> Tex. Prop. Code § 209.002(3).

of the votes allocated by the declaration to the property owners in the relevant property owners association in order to amend that declaration.

At the time this declaration was made in 1973, there already were numerous subdivisions in the Woodcreek development. While the WPOA was not yet incorporated<sup>18</sup>, the declaration presumably could have allocated the votes to the lot owners in more than one subdivision or to all lot owners in all the subdivisions in the entire development or made some other grant of voter eligibility. It did not. The declaration only grants the right to vote in a decision to amend the deed restrictions for the property in Woodcreek, Section 11 to the property owners of Woodcreek, Section 11. The adoption of Section 209.0041(h) in 2011 did not change that.

**C. The Constitutional Argument.** Wimberley Springs argues that to interpret Section 209.004(h) as suggested by the WPOA would violate the Texas Constitution. As set out above, Section 311.021(1) of the Texas Government Code states as a basic principle of statutory construction that the legislature is presumed to have intended that the statute comply with the Texas and United States constitutions. Courts should interpret legislative enactments to comply with the United States and Texas constitutions, unless it is abundantly clear that the legislature intended such an unconstitutional result.<sup>19</sup> The Court should “adopt the interpretation which protects the statute’s constitutionality.”<sup>20</sup>

It is undisputed that prior to the enactment of Section 209.0041(h), only the property owners of Woodcreek, Section 11 had the right to amend the deed restrictions within their

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<sup>18</sup> The Articles of Incorporation for the WPOA indicate it was incorporated in 1979, six years after the declaration of the deed restrictions for Woodcreek, Section 11.

<sup>19</sup> See, for example, *Brooks v. Northglen Association*, 141 S.W.3d 158, (Tex. 2004), where the Texas Supreme Court states: “A statute is presumptively constitutional. As such, we are obligated to avoid constitutional problems if possible.”

<sup>20</sup> *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 191 (Tex. App.—Fort Worth 1995, writ denied).

subdivision. This right is a property right,<sup>21</sup> and any interpretation of section 209.0041(h) that would operate to take away that property right would constitute an unconstitutional taking of property under article I, section 17 of the Texas Constitution. The Texas Constitution does not allow that right to be taken without the consent of the owner(s) of the right, or adequate compensation being made, and the Court should not interpret Section 209.041(h) to accomplish such an unconstitutional result.

The WPOA argues, on page 6 of its Reply, that its suggested interpretation would not be unconstitutional because it would not be a “substantial impairment” of the Woodcreek, Section 11 property owners’ rights, or that there is a fact issue on whether the impairment would be substantial. The change to the deed restrictions that WPOA argues for would make all members of the WPOA eligible to vote on the amendment to the deed restrictions for only Woodcreek, Section 11. The summary judgment evidence is that there are over 1,500 members in the WPOA, and less than 100 property owners in Woodcreek, Section 11.<sup>22</sup> Changing the voting population eligible to vote on a property owner’s deed restriction to include over 1,400 property owners outside that property owner’s subdivision is, as a matter of law, a substantial impairment of the property rights of the property owners in Woodcreek, Section 11.

**D. Legislative Intent.** Both parties present argument and summary judgment evidence as to what the legislative intent was with respect to the enactment of Section 209.041(h). In construing a statute the Court may consider at any time (1) the circumstances under which the section was enacted and (2) the legislative history of the section.<sup>23</sup> In the opinion of the undersigned, the construction of Section 209.0041(h) that is urged by the WPOA

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<sup>21</sup> The term “property” as used in the Texas Constitution includes any legal right that the owner may have in connection with that property. See, e.g., *Forest Lawn Lot Owners Ass’n v. State*, 248 S.W.2d 793, 799 (Tex. App.-Dallas 1952), rev’d on other grounds.

<sup>22</sup> Merian affidavit, paragraph 9.

<sup>23</sup> TEX. GOV’T CODE § 311.023(2), (3).

would violate the intent of the Texas legislature when it enacted this statute. It is clear that, in enacting this statute, the legislature was dealing with and focused on the percentage of votes required to change a declaration, not on who would be eligible to vote. Had they intended the change the WPOA argues for, they would have used language that was much clearer. Additionally, there would have been *some* legislative history that this was their intention. In the enactment of this statute, there is none.

**5. Other Contentions.** The parties present other arguments in their briefing. Those addressed above are their principal ones. The undersigned has reviewed and considered all these arguments, and they do not change the undersigned's interpretation of the effect of the 2011 enactment of Article 209.0041 on the 1973 deed restrictions for Woodcreek, Section 11, nor on the validity of the election at issue here. Additionally, the undersigned has reviewed the WPOA's objections to the summary judgment evidence proffered by Wimberley Springs, and is of the opinion that these objections should be overruled.

**6. Conclusion.** The undersigned hereby makes this Advisory Opinion that the Motion for Partial Summary Judgment filed by Plaintiff/Counter-defendant, Woodcreek Property Owners Association of Hays County, Inc. should be DENIED and that its objections to the affidavits of Mr. Winton Porterfield, Ms. Connie Niemann and Mr. Judd Austin offered as evidence with the Response and Additional Brief and Response of Defendant/Counter-plaintiff, Wimberley Springs Partners, Ltd. should be OVERRULED.

With respect to the various requests for declaratory relief sought by Wimberley Springs in response to the WPOA's Motion for Partial Summary Judgment, it is the undersigned's Opinion, on an advisory basis, that:

- a) The 2011 enactment of Section 209.0041(h) of the Texas Property Code does not change the amendment procedure with respect to the declaration for



Woodcreek, Section 11 because its 1973 Deed Restrictions do not require a vote of more than 67 percent of the owners of lots in Woodcreek, Section 11;

b) The 2011 enactment of Section 209.0041(h) of the Texas Property Code does not require Woodcreek, Section 11 to allow voters from other sections in Woodcreek North or the WPOA to participate in a Woodcreek, Section 11 election to amend its deed restrictions; and

c) The election conducted in March and April, 2012 with respect to the deed restrictions for Woodcreek, Section 11, was properly conducted.

It is further the Opinion of the undersigned, on an advisory basis, that pursuant to Tex. R. Civ. Pro. 166a(e) all further proceedings in this lawsuit should be controlled by the above interpretation of the effect of Section 209.0041(h) of the Texas Property Code on the 2012 Woodcreek, Section 11 election that is the basis of this lawsuit.

SIGNED this 11<sup>th</sup> day of December, 2012.

  
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PAUL DAVIS