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Key Allegro Canal and Property Owners' Assoc.
29 Mazatlan
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Subject: KACPOA Proposed Amendments

To the Board of Directors:

I represent a group of owners in the Key Allegro subdivision spearheaded by Chris Kappmeyer. My clients object to the substance and procedures being proposed for amending the existing restrictive covenants. Their concerns and requests are as follows:

1. Whether the 2017 Amended Declarations are valid.

The Amended and Restated Restrictions for Units I-V recorded in 2017 do not facially indicate that a vote of the required majority of owners *within each section* was accomplished in order for the 2017 restrictions to be adopted for each section. My clients request that they be provided a copy of the prior restrictions – those from the 1960's and 1970's – as well as evidence of the voting in 2017 aimed at amendment. Should you decline to allow my clients access to such records, my clients intend to submit a formal Texas Property Code Chapter 209 request via certified mail and then, if the Association still refuses, seek a court order to obtain them. My clients reserve the right to file suit should a statute of limitations loom.

2. Whether new and unexpected restrictions may be imposed on existing owners.

My clients take the position that any substantial new restrictions which could not reasonably have been anticipated based on the contents of the prior restrictions cannot be enforced against them.

a. Texas law does not allow new and unexpected amendments.

A bedrock principle of Texas law is that if deed restrictions are silent on a topic, the subject matter is not restricted: "No construction, no matter how liberal, can construe a property restriction into existence when the covenant is silent as to that limitation."[1] Thus, on any number of subjects not addressed in the restrictions recorded to date, my clients have unrestricted property rights.

Texas law also limits amendments passed by less than a 100% vote to the relaxing or removal of restrictions.[2] The exception is where the imposition of a new

[1] *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 285 (Tex. 2018).

[2] *See Couch v. S. Methodist Univ.*, 10 S.W.2d 973, 974 (Tex. Comm'n App. 1928, judgm't adopted) (requirements can be dropped by majority; *Scoville v. SpringPark*

restriction extends existing restrictions and was, therefore, reasonably to be expected.[3]

b. Most states align with Texas.

These Texas decisions accord with the vast majority of cases nationwide which have addressed the permitted scope of amendments to deed restrictions, including Washington, Illinois, Nevada, Nebraska, Michigan, North Carolina, Ohio, and Arizona.[4] Only two states, Missouri and Tennessee, allow an amendment to encompass virtually any kind of change to deed restrictions, but Texas has never taken that hardline approach because its decisions have historically disfavored restrictions on the use of land, an approach exemplified by the 2018 *Tarr* decision cited above.

c. The 2017 amendments exceeded the permissible scope.

My understanding is that the original restrictions for each section created and authorized an architectural control committee, apparently for each specific section. Furthermore, the amending clause limited changes to things which "nullify" existing restrictions, consistent with Texas law as set out above.

The 2017 Amendment goes far beyond "nullification" to add many new restrictions. Nothing in the original restrictions, for example, authorizes a broader mandatory property owners' association, much less one empowered to do anything, assess owners, place liens, or foreclose on homes. True, a "Key Allegro Canal Owners Association" was formed in 1962, but its purpose was expressly to "maintain canals, waterways and other quasi-public areas." One searches in vain for references to that association in the prior restrictions. The 2017 Amended Declarations create an HOA from whole cloth.

Moreover, the 2017 restrictions effectively consolidate separate sections under one association for all sections. Thus, in addition to the issue whether there was a valid vote to adopt the 2017 Amended Declarations in the first place, the 2017 amendments improperly imposed a new governing structure over the owners and in effect stripped section owners of an independent voice for matters related solely to

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Homeowner's Ass'n, Inc., 784 S.W.2d 498, 504 (Tex. App. – Dallas 1990, writ denied) ("the plain meaning of the term 'amend' is to change, correct or revise"); *accord Baldwin v. Barbon Corp.*, 773 S.W.2d 681, 686 (Tex. App. – San Antonio 1989, writ denied) (restriction which required ranchland to have a house could be removed); *French v. Diamond Hill-Jarvis Civic League,* 724 S.W.2d 921, 924 (Tex. App. – Fort Worth 1987, writ refused n.r.e.) (owners had the power to remove restrictive covenants); *Bryant v. Lake Highlands Dev. Co. of Texas*, 618 S.W.2d 921, 923 (Tex. Civ. App. – Fort Worth 1981, no pet.) (amendment removed undeveloped lots from subdivision, allowing the developer more rights); *Valdes v. Moore*, 476 S.W.2d 936, 938 (Tex. Civ. App. 1972, writ refused n.r.e.).

[3] *See, e.g., Winter v. Bean*, No. 01-00-00417-CV, 2002 WL 188832 (Tex. App. – Houston [1st Dist.] Feb. 7, 2002, no pet.) (re-subdivision of platted lots could be barred); *Sunday Canyon Prop. Owners Ass'n v. Annett*, 978 S.W.2d 654, 656 (Tex. App. – Amarillo 1998, no pet.) (new assessment regime for existing common elements was proper).

[4] *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash. 2d 241, 255–57, 327 P.3d 614, 622 (2014) (leading case barred an amendment prohibiting short-term rentals because the owner could not reasonably have expected such an amendment).

their own sections. The new master association was then given broad powers nowhere even hinted at in the original restrictions, including assessment and foreclosure powers. These radical changes, in my clients' view, exceeded the permissible scope of amendment. It therefore appears, based on the information I have, that the 2017 amended declarations are invalid to the extent they added new restrictions to the section restrictions of the 1960's and 1970's.

d. The proposed 2020 amendments also exceed the permissible scope.

Even if, for the sake of argument, the 2017 amended restrictions are valid, it is my understanding that the 2020 proposed amendments would impose new, unprecedented restrictions yet again, ballooning from 9 pages to some 32 pages of restrictions. Obviously, no one who purchased either before the 2017 restrictions were recorded or after anticipated a more than tripling of the restrictions on their land covering all kinds of new subject matter.

Based on the foregoing, my clients hereby request documentation and clarification from the Board concerning the matters surrounding the 2017 section restrictions. In addition, they apprise the Board that they view the 2017 section restrictions as presumptively invalid based on the information they currently possess, and that they proposed 2020 amendments would likewise be largely invalid because exceeding the proper scope of amendment to existing restrictions.

Sincerely,
DRAFT

J. Patrick Sutton