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via email on *mike@thurman-phillips.com*
Michael B. Thurman
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Subject: Key Allegro Canal and Property Owners' Assoc. Proposed Amendments

Dear Mike:

As you know, I represent a group of owners in the Key Allegro subdivision spearheaded by Chris Kappmeyer. Following your kind provision of additional documents we requested, and then the meeting of June 15, 2020, my clients have asked me to set out their legal position. The positions set out here would form the basis for any negotiations going forward or legal proceedings.

1. The 2017 amended restrictions are void.

My clients believe the 2017 Declaration is void because it was not adopted by 2/3 of the owners, merely by a vote of the board of directors. This conclusion follows from the language of the 1962 restrictions and ¶ 209.0041 of the Property Code.

Initially, I note that you provided documents indicating that a voluntary property owners formed in 1969 subsequently merged with the "Key Allegro Canal Owners Association" formed in 1962. My client takes no issue with the merger of a voluntary HOA with one of the entities referred to in the 1962 restrictions. However, that still begs the issue what powers the 1962 entity were given.

The original declaration from 1962 has the following relevant provisions:

> All restrictions and covenants herein set forth shall continue in force and be binding for [25 years]. At the expiration of [25 years], such restrictions and covenants shall automatically be extended [for 10 year periods], unless nullified by the then owners of a majority of the property in such subdivision by the execution and acknowledgment of an appropriate instrument in the Deed Records of Aransas County, Texas.
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> It is recognized, that in view of the unusual nature of the subdivision herein contemplated, it is particularly important that rules and regulations be maintained from time to time in order to maintain and preserve the subdivision in accordance with the best interests of the owners of property herein. The Architectural Control Committee is therefore authorized to make additional rules and regulations with respect to such lots, the activities being conducted thereon, the improvements to be constructed thereon, and the use thereof, not inconsistent with the provisions hereof, as it may deem appropriate, and the same shall be enforced in the same manner as provided herein. The said Committee is also authorized when it deems it appropriate and for the best

interests of the owner of such property to alter or vary the provisions hereof by an instrument duly executed and acknowledged by the members of the Committee, but should the owners of a majority of the property covered hereby, computed on a square-foot basis, deem any such change not in the best interests of the owners of such property, they may nullify and veto such proposed change by an instrument executed and acknowledged by the owners of such a majority of such property an instrument filed in the Deed Records of Aransas County, Texas, within thirty (30) days of the time such instrument altering the restrictions is filed by said Committee.

* * *

The KEY ALLEGRO CANAL OWNERS ASSOCIATION shall have the privilege of curing any default [of any owner who does not maintain his or her portion of the canal] and any reasonable expense incurred in so doing shall be paid by the owner of such property.

It is also important to note that the 1962 restrictions conspicuously lack the following:

- An amendment clause, even though they contain a "nullification" clause;

- Any restrictions on leasing even though leasing was plainly contemplated because the drafter limited the size of "for rent" signs. *See* Zgabay v. NBRC Prop. Owners Ass'n, No. 03-14-00660-CV, 2015 WL 5097116, at *2 (Tex. App. – Austin Aug. 28, 2015, pet. denied) (rent-sign provision "informs the meaning of 'single family residential use' in that we know that leasing of homes was contemplated by the drafters and is permissible under the covenants").

- Assessment, lien, and foreclosure authority.

Separately, Section 209.0041 of the Property Code provides as follows:

Sec. 209.0041. ADOPTION OR AMENDMENT OF CERTAIN DEDICATORY INSTRUMENTS.

. . .

(b) This section applies to a residential subdivision in which property owners are subject to mandatory membership in a property owners' association.

. . .

(e) This section applies to a dedicatory instrument regardless of the date on which the dedicatory instrument was created.

(f) This section supersedes any contrary requirement in a dedicatory instrument.

(g) To the extent of any conflict with another provision of this title, this section prevails.

(h) Except as provided by Subsection (h-1) or (h-2), a declaration may be amended only by a vote of 67 percent of the total votes allocated to property

owners entitled to vote on the amendment of the declaration, in addition to any governmental approval required by law.

(h-1) If the declaration contains a lower percentage than prescribed by Subsection (h), the percentage in the declaration controls.

(h-2) If the declaration is silent as to voting rights for an amendment, the declaration may be amended by a vote of owners owning 67 percent of the lots subject to the declaration.

(i) A bylaw may not be amended to conflict with the declaration.

Based on the above, several conclusions follow:

- The 1962 restrictions allow a majority of owners to "nullify all restrictions and covenants" without affording them the power to amend, vary, or alter existing provisions or to add new provisions.
- There is no amendment clause, and relatedly no clause which sets out a percentage required for amendment.
- The ACC can adopt rules and regulations consistent with the 1962 restrictions.
- The ACC can "alter or vary" the 1962 restrictions, but nothing provides it can write new restrictions.
- Because there is no amendment clause which sets out any percentage of owners required for amendment, § 209.0041 fills in the gap: 67% of the owners is required to amend the 1962 restrictions.

The documents we have been provided indicate that in late 2016, the KAPCOA board of directors alone adopted the 2017 restrictions and recorded them. The 2017 restrictions expressly "amended" the 1962 restrictions and did not purport to "nullify" the prior restrictions. They do, indeed, incorporate many of them verbatim. The 2017 restrictions also add numerous new provisions and empower the KAPCOA in various new ways, including the power to impose liens and foreclose on homes.

Strictly on the basis of the documents and Chapter 209, my clients believe that the 2017 restrictions are void and that the 1962 restrictions remain in force. Further, that 2/3 of the owners is required to amend the 1962 restrictions. Finally, that any bootstrapping from the 2017 amendment in the adoption of future amendments is necessarily void. Accordingly, the guide for future amendments, changes, additions, varying, or altering of the 1962 restrictions is the 1962 restrictions themselves as supplemented by Chapter 209.

It is my understanding that your client asserts that a majority of a quorum of owners under the bylaws is sufficient to adopt amendments. The logic appears to be that because the board alone can amend the restrictions, the board can permit a majority of a quorum to do so. However, the foregoing analysis shows that nothing less than 2/3 of the owners is necessary to amend the 1962 restrictions. Your client may object that even if our analysis were accepted, the "nullification" clause is really

an amendment clause, meaning a simple majority of owners suffices. However, that is not a textual argument, and in any event, as shown in the next section, Texas law favors the removal of restrictions in ways that do not apply to the imposition of new ones. Therefore, my clients reject any contention that anything less than 2/3 of the owners can amend the 1962 restrictions.

2. Existing owners cannot be subjected to new restrictions not envisioned by the 1962 restrictions.

Can a majority of owners subject a minority to new restrictions which effectively take away rights? Rather than set out the entire analysis here, I attach a memorandum of law I recently submitted in another lawsuit I recently tried. Knowledge of that memorandum is assumed for purposes here.

The association wishes to adopt new restrictions. This letter acknowledges that 2/3 of the owners can do so. However, there is an important limitation on that: new restrictions which my clients could not reasonably have anticipated based on the 1962 restrictions cannot be enforced against my clients if they object. My clients believe they cannot be subjected to liens and foreclosure, to take just one example. The issue whether an HOA not authorized to act in various ways by the 1962 restrictions can exercise certain powers is to some extent academic and to some extent unsettled law, so my clients prefer not to wade into that issue here because my clients are more concerned with substantive rights. Importantly, concerning the canal, my memorandum in the *Chu* case points out the Texas cases which allow a majority to formalize a means for assessing owners to maintain and repair common elements. That is based on the view that everyone buys a property with knowledge that common elements cannot be allowed to fall into disrepair. Without waiving this issue, my clients are not currently taking the position that an HOA or ACC cannot expressly be given the power, through an amendment, to assess and spend the money required to maintain the canal.

Given the above, it is important that, if your clients wish to bring my clients within the purview of new restrictions, that my clients not be frozen out as a minority. It is my clients' position that they are only bound by new restrictions to which they agree to be bound, even if their successors-in-title would be bound by the new restrictions. If your client attempted to enforce new restrictions against my clients, your client can expect the same sort of challenge as in *Chu*.

At the June 15 meeting, there was confusion and disagreement what the law says. My clients have now given your client the courtesy of explaining the basis for our legal positions. Your client may well disagree. However, my clients' position offers a clear path forward in cooperation with your client: an amendment to the 1962 restrictions which achieves overwhelming support, including that of my clients. To your client's complaint that years of work have gone into the new proposed restrictions, my client points out that your client's board, without *any* owner vote, recorded restrictions in 2017 which impose onerous restrictions to which my clients would never have assented. I strongly doubt a court would uphold the 2017 restrictions, so it is incumbent on your client now to fix the confusion its 2017 restrictions engender before an expensive fight starts up.

Sincerely,
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J. Patrick Sutton