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LETTER of the LAW

by JUDON FAMBROUGH

Enforcing Deed Restrictions

The number of homeowner associations (HOAs) has proliferated in Texas, especially in Houston, which holds the distinction of being the largest U.S. city without a comprehensive zoning ordinance. Consequently, in Harris County, deed restrictions serve as the private equivalent of municipal zoning.

The Texas Legislature enacted Section 204 of the Texas Property Code (TPC) specifically to address issues related to Harris County subdivisions. Section 204, discussed in the last edition of the *Letter of the Law*, applies to residential subdivisions located in counties with a population of 2.8 million or more. Harris County is the only Texas county having the required population.

With the number of subdivisions skyrocketing, homeowners living in them question how and if deed restrictions can be enforced. Homeowners must realize that they are contractually giving up certain property rights when they move into a subdivision with deed restrictions. Houston attorneys W. Austin Barsalou, David A. Furlow and Mitchell Ayer answered the following questions at the 22nd Annual Advanced Real Estate Law Course sponsored by the Texas Bar Association.

How should Texas courts interpret and apply deed restrictions? Should the courts follow the Texas statute that requires they be "liberally construed to give effect to their purpose and intent" finding them enforceable if at all possible (Section 202.003[a] of the TPC)? Or should the courts adhere to common law that favors the free and unrestricted use of land (Baker v. Henderson, 153 S.W. 2d 465 [Tex 1941])?

There is no clear answer. The Texas Supreme Court in *Wilmoth v. Wilcox, 734 S.W. 2d 567 (Tex 1987)* spoke in favor of free and unrestricted land use, holding that restrictions must always be strictly, not liberally, construed against the party seeking to enforce them. Only the intent and purposes are to be liberally construed, not the restrictive language.

However, the same court ruled in *Baker v. Henderson,* cited earlier, "if there be any ambiguity in the terms of the restriction or substantial doubt of its meaning, the ambiguity and doubt should be resolved in favor of the free use of the land."

For example, if a deed restriction bans livestock in a subdivision and a homeowner raises a pet Vietnamese pot-bellied pig, has the homeowner violated the restriction?

Case law would say no, because of the ambiguity. The pig is a pet sold at a pet store, not at an auction barn. Furthermore, the term *livestock* is plural and refers to more than one animal.

The statute (Section 202.003[a]) would say the opposite if one assumes the term *livestock* includes four-legged animals with hooves. Other states have held Vietnamese potbellied pigs are not livestock.

In an attempt to resolve the conflict, some courts simply find no conflict exists (*Crispin v. Paragon Homes, 888 S.W. 2d 78 [Houston 1994]*). Perhaps the best approach was pronounced in the unpublished opinion by the Austin Court of Appeals in *Quinn v. Harris (1999)*. Here, the court employed both standards, ruling covenants should be liberally construed to determine the framers' intent. If there is any ambiguity regarding the intent, the covenant should be strictly construed in favor of the free and unrestricted use of the premises. The approach does not conflict with either case precedent or the TPC.

Some attorneys felt the Texas Supreme Court settled the matter in favor of free and unrestricted land use in *Pilarcik v. Emmons, 966 S.W. 2d 474 (Tex 1998)*. The high court ruled that Section 202.003(a) did not supplant traditional Texas common law principles favoring free and unrestricted land use. The debate, however, continues.

Is the enforcement of deed restrictions subject to constitutional challenges? Yes, depending on the type of restriction. In *Shelley v. Kraemer, 334 U.S. 1 (1947)*, the U.S. Supreme Court ruled that the judicial enforcement of a racially based restrictive covenant constitutes state action subject to constitutional analysis. The court held the covenant that banned home sales to blacks unconstitutional. From that point on, any covenant interfering with a right guaranteed by the First Amendment, including freedom of speech and religion, has faced constitutional scrutiny.

Recently, a Harris County District Court ruled that a covenant prohibiting the display of temporary political signs was unconstitutional (*DuBose v. Meyerland Community Improvement Association*). The judge wrote, "The U.S. Constitution does not end where deed restrictions begin."

The DuBose case was reinforced by a new statute passed by the 79th Texas

UPDATE Judge Strikes Again UPDATE

The *Letter of the Law* has reported U.S. Judge C.J. Buchmeyer's attempts to disburse public housing projects throughout the "predominantly white areas" of Dallas. On March 16, 1999, the Fifth Circuit voided one of his efforts with instructions to invent a more race-neutral solution.

Buchmeyer ruled that the one-acre zoning requirement and the restriction against multifamily housing perpetuate racial segregation. He ordered Sunnyvale to take affirmative action to encourage the development of multifamily housing. (*Dews v. The Town of Sunnyvale, U.S. Dist. Ct. for N. Dist. of TX, No. 3:88-CV-1604-R, 7/31/2000*).

Legislature effective Sept. 1, 2005. The statute addresses how and under what circumstances an HOA may regulate the placement of political signs.

The new law, found in Section 202.009 of the Property Code, divides the regulations into two categories: things that cannot be prohibited by HOAs and things that are discretionary.

In the first category, HOAs cannot adopt or enforce restrictive covenants that prohibit owners from displaying signs on their property that advertise a political candidate or ballot item for an election. The signs may appear on the property anytime 90 days before the election and ten days thereafter.

In the second category, the HOAs may require the signs to be ground-mounted and no more than one sign per candidate or per ballot item. The HOAs may prohibit signs that:

- contain roofing material, siding, paving material, flora, balloons or lights or any other similar building, landscaping or nonstandard decorative component;
- attach to plant material, traffic control devices, lights, trailers, vehicles or other existing structures or objects;
- include the painting of architectural surfaces;
- threaten public health and safety;
- exceed four feet by six feet;
- violate the law;
- incorporate language, graphics or any display that offends an ordinary person; or
- distract motorists with music, sounds, streamers or other means.

The statute does not provide any penalties for violating the prohibitions, but it does allow HOAs to remove signs that violate their discretionary requirements.

Some attorneys argue that the enforcement of a deed restriction is a private contractual matter between homeowners and the association and not a constitutional issue. In some cases, this may be true. However, the more subdivisions look and act like small towns, the more courts are apt to view them as quasi-municipalities and apply more rigid, constitutional standards when enforcing deed restrictions.

Can homeowner associations (HOAs) enforce a deed restriction banning the display of the U.S. flag? Probably not. Based on the Shelley case cited earlier, a federal court in Florida held that such a restriction, when judicially enforced, violated the right of free speech *(Gerber v. Longboat Harbor N. Condominium, 75 F. Supp 1339 [1990]).*

Likewise, a federal court in Pennsylvania upheld a homeowner's use of an American flag in a private residence for decorative, nonpolitical purposes. The flag represented free speech protected by the First Amendment (*Commonwealth of Pa. V. Bricker, 666 A. 2d 257 [1995]*).

Can HOAs enforce a deed restriction banning for-sale signs? Probably not. The U.S. Supreme Court emphasized the importance of residential speech in *Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977)* when it ruled a zoning ordinance banning for-sale or any other type of signs unconstitutional.

In *City of Ladue v. Gilleo, 510 U.S. 809 (1994)*, the U.S. Supreme Court upheld a homeowner's right to political expression on a yard sign. The township cannot constitutionally enact an ordinance banning its citizens from engaging in expressive speech on signs in their front yards, despite the city's argument that the ordinance preserved scenic, aesthetic and property values. The U.S. Supreme Court has, however, upheld bans on offsite commercial signs and signs posted for a fee.

Although these cases involve zoning ordinances, they give homeowners grounds for arguing deed restrictions banning for-sale signs violate their constitutionally guaranteed right of commercial free speech under the First and 14th Amendments.

Can HOAs collect attorney's fees from homeowners violating a restriction? Yes. According to TPC Section 5.006, "In an action based on a breach of restrictive covenant pertaining to real property, the court shall allow to a prevailing party who asserted the action reasonable attorney's fees in addition to party's costs and claim."

Homeowners who successfully defend an enforcement action may collect attorney's fees as well. In *DuBose v. Meyerland Community Improvement Association* (cited earlier), the judge awarded the defending homeowners $33,250 in reasonable and necessary trial court attorney's fees, as well as appellate fees.

In addition, Section 204.010(a)(11) of the TPC allows HOAs in Harris County reimbursement for actual attorney's fees and other reasonable costs when a restriction, bylaw or rule is violated, providing notice and an opportunity to be heard are given. Section 204.010(a)(12) permits HOAs to charge costs to an owner's assessment account and collect the costs in any manner provided in the deed restrictions for the assessment's collection.

Effective Jan. 1, 2002, however, the Texas Legislature passed a new law, found in Chapter 209 of the Property Code, that limits, and in some cases prohibits, HOAs from collecting attorney fees. The statute allows HOAs the right to collect reimbursements for reasonable attorney fees and other reasonable costs for enforcing restrictions, rules or bylaws or for collecting amounts due the association. However, the HOA must send the owner prior written notice that attorney fees and costs will be charged if the delinquency or violation continues beyond a certain date.

If the association pursues the collection of attorney fees, it must provide a copy of all invoices and other costs related to the matter when requested by the owner. If attorney fees, costs and other amounts are collected, they must be deposited into an account maintained at a financial institution in the name of the association or its managing agent. Only members of the board or its managing agent may be signatories on the account.

A homeowner is never liable for attorney fees in two circumstances. Both are tied to the required notice and right to cure under Sections 209.006 and 209.007. First, if notice is required and the owner requests a hearing, the owner is not liable for any attorney fees incurred by the association before the conclusion of the hearing. Second, if a hearing is not requested, the owner is not liable for any attorney fees incurred during the 30 days following the receipt of the notice.

Are there limits on the amount attorneys may charge for enforcing deed restrictions or sending letters to collect delinquent assessments? Little case law addresses the determination of reasonable attorney fees. However, in *Innwood North Homeowner's Association, Inc. v. Wilkes, 813 S.W. 2d 156 (1998)*, the trial court reduced the plaintiff's attorney's fees from $1,486 to $500. On appeal, the association asserted the trial court abused its discretion. The appeals court ruled the trial court had discretion to reduce fees if they are found to be unreasonable or incredible. A similar reduction in fees occurred in *Fonmeadow Property Owner's Association, Inc. v. Franklin, 817 S.W. 2d 104 (1991)*.

Trial courts have not favored exorbitant attorney fees.

Assuming an attorney charges a fair and reasonable fee to enforce a deed restriction, can the association foreclose on the home to recover the fee? The association can foreclose on a home for nonpayment of assessment fees (*Innwood North Homeowner's Association, Inc. v. Harris, 736 S.W.*

2d 632 [Tex 1987]). However, it is unclear if the same rule applies to homeowners who pay the delinquent assessment and ignore the attorney's fees.

A little-known Texas Attorney General's Opinion, No. 97-019 (March 13, 1997), addressed the issue. The opinion focused on TPC Section 204.010(a)(11) permitting Harris County subdivisions to collect reasonable attorney fees for deed restriction violations.

Basically, the opinion concluded that an amendment to the deed restriction permitting the collection of attorney fees cannot be enforced by foreclosure if it creates a new lien **after** the property becomes a homestead. If the amendment represents a change or modification of an existing fee lien predating the homestead claim, it can be foreclosed.

According to the opinion, foreclosure is permitted under Section 204.010 (11) for attorney's fees if the:

- costs relate to a violation of the restrictions, bylaws or rules,
- charges are reasonable,
- the lien for the costs attaches to the property before it becomes a homestead and
- the lien for the costs runs with the land.

"A claim for costs arising merely by virtue of an action taken by a board of a property owner's association under TPC Section 204.010(a)(11) does not create a lien that would precede homestead rights dating from before the board's actions."

Section 209.009 of the Texas Property Code **absolutely forbids** HOAs from foreclosing on an assessment lien if the lien arises from a fine levied by the HOA or to collect attorney fees in any way solely associated with the fine.

Likewise, the same statute limits attorney fees when the HOA pursues nonjudicial foreclosure for the nonpayment of assessments. If the documents or restrictions governing the establishment, maintenance or operation of the subdivision permit nonjudicial foreclosure, then the association may include, as part of HOA's proceeds from the foreclosure sale, the greater of $2,500 or one-third of the actual costs and assessments, excluding attorney fees. Actual costs may include courts costs and interest if the law or restrictive covenants permit. Excess proceeds from a foreclosure sale go to the owner.

Can HOAs enforce a deed restriction banning antennas and dishes? Possibly, under limited circumstances. The Telecommunications Act of 1996 gave the Federal Communication Commission authority to issue regulations to prevent any restrictions that impair reception of video programming services. Primarily, the federal regulations preempt deed restrictions that impair the installation, maintenance or use of antennas less than one meter in diameter designed to receive direct broadcast services or multipoint distribution services. Also covered are television antennas of any size.

Homeowners associations may impose reasonable restrictions for camouflaging antennas and support masts so long as reception is not impaired. However, what is reasonable according to case law tends to be fact-specific without general guidelines.

The Procuring Cause and Earning A Commission

Earning a brokerage commission is key for the economic survival of a real estate licensee. Until recently, licensees had to fulfill four, possibly five, requirements for this to occur. With the passage of H.B. 1052, better known as the Broker's and Appraiser's Commercial Lien Statute, the rules may have changed for commercial brokers.

To earn a commission in any transaction, the broker or agent must meet the following four requirements.

First, the person securing the buyer must have a real estate license at the time of procurement but not necessarily at closing.

Second, the written promise or agreement for the sale or purchase of property must be signed by the party charged with paying the commission and must contain:

- the name of the licensee to whom the commission is payable,
- the amount of commission or the basis for computing the commission and
- a description of the real estate to be conveyed or purchased.

These requirements may, and possibly should, be included in the listing agreement as well as in the sales contract. However, the written requirements need exist only at closing, not necessarily when the services are rendered. Oral evidence cannot substitute for the written agreement.

Third, when the sales contract is signed, the licensee must notify the purchaser in writing of the need for an abstract opinion or title insurance. The Texas Real Estate Commission's promulgated forms contain the notification.

Fourth, the licensee's performance of services must be rendered during the tenure of the listing agreement. Generally, the listing agreement contains a safety or protection clause that extends the licensee's right to a commission for sales occurring after the agreement expires. The sale must be to a party contacted by the broker during the listing period. The length of the period is negotiable but generally lasts 30 to 90 days.

The fifth element for some transactions requires the licensee to be the procuring cause of the sale. To some extent, the type of listing agreement influences this requirement. Three types of listing agreements are used in Texas: nonexclusive or open, exclusive agency and exclusive right of sale. Under the nonexclusive listing, the seller may retain more than one licensee. The listing obligates the seller to pay a commission to the licensee who is the "procuring cause" of the sale. No commission is due if the seller is the procuring cause.

The exclusive agency listing arrangement allows the seller to retain only one licensee. Again, no commission is due if the seller is the procuring cause.

Finally, the exclusive-right-of-sale listing agreement entitles the listing broker or agent to a commission even though the seller or some other licensee procures the sale. Generally, the commission is split between the listing broker or agent and the selling broker or agent who procures the buyer, especially when the listing is placed on the Multiple Listing Service. Agents prefer this type of listing because it ensures them of at least part of the commission.

Under the nonexclusive and the exclusive agency listing agreements, the licensee who is the procuring cause gets the commission. Under the exclusive right of sale, the broker or agent who procures the buyer gets to split the commission with the listing broker or agent. But how do Texas courts define the procuring cause?

A Texas court of civil appeals in 1928 drafted the definition used most frequently today (*Settegast v. Timmons, 6 S.W. 2d 425*). It states, "the cause that in a natural and continued sequence, unbroken by any new independent intervening cause,

produces the event, and without which the result would not have occurred."

Although the *Settegast* definition is the one most widely used, other Texas courts have drafted their own. For instance, in *Metal Structures Corp. v. Begham, 347 S.W. 2d 270 (1961)*, the appellate court defined the term as "the principal and immediate cause of the sale accomplished. It need not be the sole cause, and an agent is said to be the procuring cause of a sale when his acts have so contributed to bringing about a sale that but for his acts the sale would not have been accomplished."

Likewise, in 1971, a Texas civil court of appeals, in *Zeller v. Chipman, 475 S.W. 2d 755*, upheld the following definition used by the trial court: "such act or acts, if any, in bringing the buyers and sellers together in connection with the sale of property in question which so far constructed to bringing about the sale that but for such act or acts . . . the sale would not have been consummated."

The definitions and the wording used in the definitions raise more questions than they answer. For example, can there be two or more procuring causes? The definition used in *Begham* alludes to the fact that it need not be the sole cause. So far, however, the Texas appellate courts search for the sole producing cause, not a joint procuring cause.

The Broker's and Appraiser's Commercial Lien Statute found in Chapter 62 of the Texas Property Code, effective August 30, 1999, appears to have eliminated any need for the broker to be the procuring cause of the sale under any type of listing agreement. The key element, according to the statute, is determining when the commission is due and payable.

Case Notes and Comments

Duty to Disclose

The Texas Deceptive Trade Practices Act (DTPA) imposes a duty on both the seller and licensee to disclose information about property.

Take the following test on current law.

T F The seller and the real estate licensees must disclose everything they *know* about a property that would influence a buyer's decision to purchase.

T F Real estate licensees must disclose everything they *should have known* about a property that would influence a buyer's decision to purchase.

T F An effective "as-is" sale eliminates a seller's and licensee's duty to disclose anything about the property.

T F To be liable under the Texas Deceptive Trade Practices Act (DTPA), the seller or licensee must actually know the statement is false or misleading at the time it is made. Negligent misrepresentation is allowed.

If you answered more than one question true, you may need to review Texas case law.

The answer to the first question is true. The Texas Business and Commerce Code Section 17.46 (b) (23), better known as the DTPA, is breached by failing to disclose information if known at the time and intended to lure the consumer into a transaction he or she would not have otherwise entered.

The answer to the second question is false. As just recited in the DTPA, only known information must be disclosed. In Ozuna v. Delaney Realty, Inc., 600 S.W.2d 780 (Tex. 1980) the plaintiff-homeowner sued the broker for failing to disclose information the broker should have known about the tendency of the house to flood. While the controlling issue in the case focused on another matter, the court held the evidence insufficient to breach the DTPA. No other Texas cases have dealt with the issue.

The answer to the third question is false. An "as-is" sale does not relieve the seller **or broker from disclosing known defects. See** *Prudential Insur. Co. v. Jefferson Associated, Ltd., 896 S.W.2d 156 (Tex. 1995)* as discussed in Volume 13, No. 3 of *Letter of the Law*. One requirement laid down by the Texas Supreme Court in that case for an effective "as-is" sale is for the seller or broker to disclose all known defects about the property.

The answer to the last question is likewise false. As stated by the court in *Eagle Properties, Ltd. V. Scharbauer, 807 S.W.2d 714 (1990),* the defendant may be liable under the DTPA even if the defendant did not know that the representations were false or did not intend to deceive anyone. The key is not the intent but whether to statement was false or misleading.

Premise Liability: Should Have Known

While licensees are not required to disclose facts they should have known about property they sell, property owners can be held liable for premise defects they should have known about. This issue was addressed in *Threlkeld v. Total Petroleum, Inc., No 99-40469, 5/5/00.*

The plaintiff alleges that he slipped and fell on the defendant's restroom floor. The defendant argued no liability because he did not know about the water on the floor. The appellate court affirmed the judgment against the defendant.

To receive damages against a store owner in a slip-and-fall case, the plaintiff must prove all of the following facts.

- The owner had actual or constructive knowledge of the condition.
- The condition posed an unreasonable risk or harm.
- The owner did not exercise reasonable care to reduce or eliminate the risk.
- The owner's failure to exercise reasonable care was the proximate cause of the plaintiff's injuries.

The owner's constructive knowledge of the condition can be established in one of the three following ways.

- The owner or employee caused the harmful condition.
- The owner or employee saw or was told of the harmful condition prior to the injury.
- The harmful condition was present for so long that it should have been discovered by the exercise of reasonable care.

Here, the court allowed recovery because the plaintiff established that it was more likely than not the dangerous condition existed long enough to give the owner a reasonable opportunity to discover the condition. The store owner should have known and was thus liable.

A similar fact situation was raised in *Wal-Mart Stores v. Garcia, San Antonio, No. 04-99-00344-CV, 8/16/2000.* Here the jury awarded the plaintiff $75,000 in damages for slipping on a jalapeno. Because the jalapeno still had juice in it, Wal-Mart argued the jalapeno had not been on the floor long enough to give them constructive knowledge of its presence.

On appeal, the court disagreed. "The evidence, in the present case shows 'more likely than not' that the jalapeno had been on the floor for several minutes – a period of time in which Wal-Mart employees, by their testimony, should have cleaned the jalapeno from the floor."

Breach of Fiduciary Duty

Real estate licensees owe a fiduciary duty to their principals. Among other things, this requires the licensee to act with the utmost good faith and to protect and preserve the client's best interest.

The fiduciary duty prohibits the licensee from acting in a dual capacity without both principals' consent or to secretly acquire the principal's property.

A breach of the fiduciary duty allows the principal to sue the licensee for actual and possibly punitive damages. The Texas Real Estate Commission may revoke the broker's or agent's real estate license.

In addition, another remedy (or penalty) has been recognized by the Texas Supreme Court in *Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999)*. Here the high court permitted fee forfeiture as a remedy for breach of fiduciary duty in the lawyer-client relationship. However, *Arce* applies to any breach of fiduciary case where the plaintiff asks for it. Consequently, real estate practitioners face the possibility of forfeiting a commission in addition to the other remedies if found to be in breach of the fiduciary duty.

For an eye opener on another requirement for earning a commission or losing one, read the next case.

Requirement for Earning Commission?

In a case of first impression, the Texarkana Court of Appeals was asked if the failure to include a termination date on the listing agreement negates the licensee's rights to receive a commission.

To answer the question, the appellate court examined Sections 20(b) and 15(a)(6)(G) of the Texas Real Estate Licensing Act. Section 20(b) lists one of the requirements for a licensee to earn a commission. Primarily, the commission agreement must be in writing and signed by the person obligated to pay the fee. Section 15(a)(6)(G) lists one of the many acts for which a real estate license may be suspended or revoked. This particular section permits a suspension or revocation for failing to include a termination date on the listing agreement.

The court then ruled that the omission of the termination date voided the listing contract. This, in turn, rendered the listing agreement unenforceable, meaning the broker could not collect a commission.

In a dissenting opinion, Judge Ben Z. Gant raised two important points.

First, Section 15(a)(6)(G) provides grounds for suspending or revoking a person's license, not grounds for declaring a listing agreement unenforceable. "Nothing in this section indicates otherwise, and no precedent decided by any court indicates otherwise."

For another, Section 20(b) specifically addresses a requirement for earning a commission. The court confuses the requirements for earning a commission with the grounds for losing a license. The court has basically added the two sections together. A licensee must now meet the requirements of both sections to earn a commission. *Perl v. Patrizi, 2000 WL 675477.*

Notice: This opinion has not been released for publication in the permanent law reports. Until release, it is subject to revision or withdrawal.

Postscript. It will be interesting to see if this case is appealed to the Texas Supreme Court. In all likelihood, it will not be. Carried to its extreme, a seller could avoid paying a commission if the broker violates a prohibition in Section 15(a), which describes grounds for losing a license.

For example, suppose the seller's broker fails to give the buyer a copy of the agency disclosure form on the first face-to-face contact, as required by Section 15C. If the transaction closes, the seller could argue that no commission is due because the broker violated Section 15(a)(x). The section states a person's license may be suspended or revoked for disregarding or violating a provision of the licensing act.

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UPDATE UPDATE UPDATE
Home Equity Loans

The U.S. Fifth Circuit asked the Texas Supreme Court to rectify two apparent conflicting provisions in the new Texas constitutional amendment approving home-equity loans (*Stringer v. Cendant Mortgage Corp., No. 99-1301)*.

One section of the amendment provides that the lender may require the loan proceeds to be applied to another debt not secured by the home (Article XVI, Section 50 [a][6][Q][i]). Another section prohibits it. (Article SVI, Section 50[g][Q][1]).

On June 8, 2000, the Texas Supreme Court ruled that Section 50(a) prevailed. Loan proceeds may be applied to another debt not secured by the home. Notices to this effect may appear in future loan documents.

On another matter, the Texas Supreme Court agreed to hear the case of *Spradlin v. Jim Walter Homes, 9 S.W.3d 473 (Tx.App.-Dallas 2000)*. Spradlin received a loan to build a new home, but the lender did not comply with the requirements for a home-equity loan.

Primarily, the borrower was not given the 12-day "cooling off" period. Also, the contract was signed in a restaurant, not in the offices of a lender, attorney or title company.

Both the trial court and appellate court ruled the new requirements do not apply to contracts for new construction, only contracts for repair or renovation of existing improvements. However, the wording of the 1997 constitutional amendment caused enough confusion for the high court to hear the case. At stake are the validity of many new home construction contracts entered into after the effective date of the amendment.

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