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ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

April 5, 2017

Brett Funderburg
Canyon Creek Home Owners Association

via e-mail: brettf@yahoo.com

Re: Legal Opinion concerning the enforceability of restrictive covenants prohibiting owners from parking automobiles on public streets.

Dear Mr. Funderburg:

Canyon Creek Home Owners Association (the “**Association**”) has requested the undersigned to provide it with a legal opinion concerning whether the restrictive covenant in the Association’s Declaration that restricts owners from parking automobiles on public streets is enforceable. The short answer is that a restriction prohibiting parking on a public street is enforceable, however, there may be some practical issues with the enforcement of the applicable restriction based on its particular language. The following is a more comprehensive explanation.

Section 3.15 of the Second Restatement of Canyon Creek Master Declaration of Covenants, Conditions and Restrictions, recorded at Volume 13149, Page 1023, Real Property Records of Travis County, Texas (the “**Declaration**”) provides in pertinent part that the “[n]o automobiles or other vehicles may be parked overnight on any roadway within the Property.” Section 1.24 of the Declaration defines the term Property to mean the real property which is subject to the terms of the Declaration, to wit: Canyon Creek Sections One, 17, 17B, 18, 19A, 19B, 20, 21, 26, 27 and 33, subdivisions in Travis County, Texas according to the map or plat thereof recorded in Volume 85, Page 150B-151B; Volume 92, Pages 210-211; Volume 93, Pages 138-139; Volume 97, Pages 239-240; Volume 89, Pages 73-74; Volume 91, Pages 219-221; Volume 12396, Pages 662-664; Volume 98, Pages 163-165; Volume 90, Pages 94-95; Volume 90, Pages 324-325, and Volume 93, Pages 398-399 (respectively), Plat Records of Travis County, Texas (the “**Canyon Creek Subdivisions**”).

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The roads within the Canyon Creek Subdivisions are publicly maintained roads that are open to the public. Accordingly, Section 3.15 of the Declaration prohibits the owners of property in the Canyon Creek Subdivisions from parking automobiles overnight on public roads, and the Association has requested this firm provide it with a legal opinion as to whether such a restriction is enforceable.

Although covenants restricting the free use of property are not favored, it is well established under Texas law that when restrictions are confined to a lawful purpose, are within reasonable bounds, and the language employed is clear and unambiguous, such covenants will be enforced as written. *Davis v. Huey*, 620 S.W.2d 561, 565–567 (Tex.1981). However, if a covenant is ambiguous, meaning that it is subject to more than one reasonable interpretation, then the trial court will have to interpret such provision under one of two prevailing standards.

The first standard is generally referred to as the “strict construction” rule and it was established by the Texas Supreme Court more than 100 years ago. Under the strict construction rule, if a covenant is subject to more than one reasonable interpretation, then the court will strictly construe the covenant against the party seeking to enforce it by interpreting the covenant under the least restrictive of the reasonable interpretations. *Baker v. Henderson*, 153 S.W.2d 465, 470 (Tex. 1941); *Southampton Civic Club v. Couch*, 322 S.W.2d 516, 518 (Tex. 1959); *MacDonald v. Painter*, 441 S.W.2d 179 (Tex. 1969).

The second standard is generally referred to as the “liberal interpretation” rule and it was established by the Texas Legislature by the enactment of Section 202.003 of the Texas Property Code in 1987. Section 202.003 provides that a “restrictive covenant shall be liberally construed to give effect to its purposes and intent.” Tex. Prop. Code § 202.003(a). Since the general purpose and intent of restrictive covenants is to preserve the value and peaceful enjoyment of real property from acts or omissions by neighboring property owners, many courts of appeals have construed Section 202.003 as vesting the court with the authority to interpret an ambiguous restrictive covenant under the more restrictive of the reasonable interpretations.

Despite the obvious contrast between the strict construction and liberal interpretation rules, the courts of appeals in Texas are split on which is the prevailing standard today, and the Texas Supreme Court has noted, but not yet resolved, such conflict. *See Uptegraph v. Sandalwood Civic Club*, 313 S.W.3d 918, 926 (Tex. App.—Houston [1st Dist.] 2010, no pet.). My general position and advice to property owners associations is that until the Texas Supreme Court resolves the conflict as to which rule actually applies, property owners associations should interpret restrictive covenants under the strict construction standard because there is no dispute as to the enforcement of a restrictive covenant under such rule.

Applying such rules to the interpretation of Section 3.15 of the Declaration, Section 3.15 clearly prohibits the parking of vehicles on the roads overnight within the Canyon Creek Subdivisions. To the extent such roads may be public roads is of no consequence, and Section 3.15 is an enforceable restriction on the parking of vehicles by owners on such roads.

Notwithstanding, there may be an ambiguity with the language incorporated in Section 3.15 that could complicate its enforcement. Specifically, Section 3.15 prohibits the parking of any automobile or other vehicle *overnight* on any roadway within the Canyon Creek Subdivisions. The term *overnight* is not defined by the Declaration and will be assigned its plain and ordinary meaning by a court in order to determine the intended meaning of such term and whether it is subject to more than one reasonable interpretation. The plain meaning of a work can generally be found in a dictionary and Dictionary.com defines the term *overnight* as meaning “for or during the night.”

“For” or “during” can have two different meanings in the context of a parking restrictive covenant. Unfortunately, no Texas appellate court has addressed how the term “overnight” should be interpreted in the context of a restrictive covenant and there is very little guidance to be derived from interpretation of such term in other context. The Texas Transportation Code creates an offense for overnight parking of commercial motor vehicles in certain residential subdivisions, and though the code does not specifically define “overnight” it indicates that commercial vehicles should not be parked “after 10 p.m. and before 6 a.m.”. Tex. Transp. Code Ann. § 545.307 (West). By contrast, the 3rd U.S. Circuit Court of Appeals interpreted an “overnight stay” for the purpose of determining qualifying coverage under the Family and Medical Leave Act as “a substantial period of time from one calendar day to the next, as measured by the individual’s time of admission and discharge.” *Bonkowski v. Oberg Indus., Inc.*, 787 F.3d 190, 206 (3rd Cir. 2015). A Texas court interpreting Section 3.15 could reasonable find that “overnight” is intended to mean that an owner cannot leave their vehicle parked on a roadway for a certain contiguous amount of time or that vehicles cannot be parked on the roadway at any point during a specific window of time.

If a court were to interpret the term “overnight” under the strict construction standard, the court would be compelled to interpret such provision in a manner yielding the least restrictive use of the roadway possible, which would most likely be interpreted as prohibiting an owner from parking his or her vehicle on a roadway for a contiguous, set amount of time, rather than parking a vehicle on the roadway at any point during the night.

Please let me know if you have any questions after reviewing this opinion or if I can be of further assistance.

Sincerely,



Gregory S. Cagle