Deed Restrictions in Texas:
How to Determine Voting Rights and Amendment Procedures

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Do your deed restrictions allow one vote per lot or one vote per owner? When can you amend them? The present conflict at Northwest Regional Airport illuminates how property owners can answer these two important questions. The background facts are so bizarre that nobody would believe they could really happen if they weren't in the public record. Your circumstances could be just as unique. A review of litigation history across Texas reveals that there is no such thing as a typical case. Fortunately, the rules of construction are clear. Texas courts will uphold a wide variety of voting rights and amendment procedures based entirely on the language used. At Northwest Regional Airport, the language used in the various deed restrictions allows the property owners to amend the restrictions at any time on a one vote per owner basis regardless of the number of lots owned.

I. Background

In 1969, Edna Gardner Whyte, a 67-year-old American aviation pioneer, bought a 24.2-acre cotton field located three miles northwest of Roanoke, Texas between I-35W and US Hwy 377. She built a 2,200-foot runway on it and named the airport Aero Valley. A few months later she bought another 10 acres on the west side of the runway and built four rows of T-hangars to rent to aircraft owners. For the next nine years she used hangar rents to operate the airport and earned a living as a flight instructor.

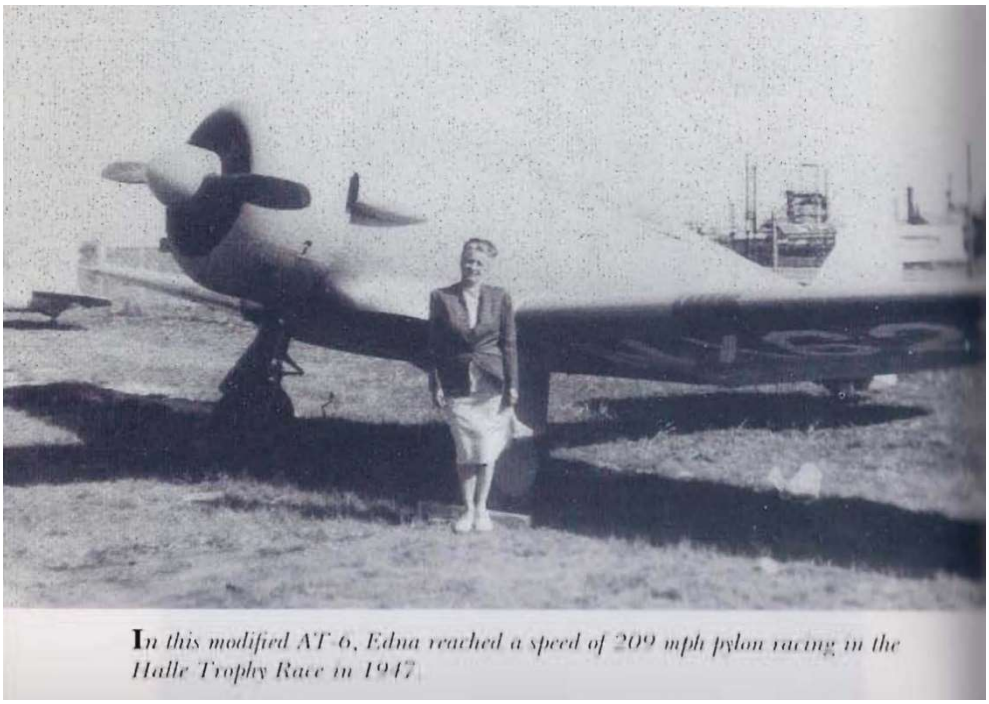
Edna first soloed in 1928 and immediately found that she had a passion for flying. Because of her gender, however, neither the military nor the airlines would take her on as a pilot. There was certainly nothing wrong with her credentials. She had participated in dozens of air races and won many of them during the heyday of that era (Figure 2). She had accumulated thousands of hours of flight time in dozens of different aircraft. Her problem was not her flying skills or experience but the mere fact that she was a woman (Figure 1).

Edna Marvel Gardner in the 1930s.

Figure 1

After acquiring 58 more acres of land and agreeing to include another 14 acres of property within airport boundaries owned by others, Edna quadrupled the size of the airport to 96 acres. By 1978, Edna had established the airport's boundaries, formed Aero Valley Development Company ("AVDCO") with two partners, and began developing the airport under a general development plan. She also finally moved into her dream home with a taxiway from her front door to the runway. AVDCO recorded deed restrictions that established a seven-member Architectural

Control Committee ("ACC") elected by the property owners to govern the airport, harmonize development, and keep the airport maintained. AVDCO sold lots in fee simple with runway access and use provided by non-exclusive appurtenant easements. Every airport property owner had a corresponding duty to pay airport maintenance fees as assessed and collected by the ACC. There was nothing voluntary about complying with the deed restrictions and paying maintenance fees. [1] Even the owners of the 14 acres of land that Edna agreed to include within airport boundaries had runway access and use easements that required payment of maintenance fees into the ACC's account.[2]



In this modified AT-6, Edna reached a speed of 209 mph pylon racing in the Halle Trophy Race in 1947.

Figure 2

A. A 33-Year Period of Crisis and Conflict Begins

Charles Glen Hyde arrived on the scene in 1979. He had just separated from the United States Marine Corp as a fighter pilot, call sign "Crazy." Hyde created Hyde-Way, Inc. and began acquiring airport property by borrowing money from AVDCO, several banks, and several individuals who were also helping Edna develop the airport. In 1980 and now 78 years old, Edna sold the runway-taxiway and ramp area tracts to Gene Varner subject to the AVDCO deed restrictions. Edna reserved an appurtenant easement in these tracts and retained an 8.31-acre tract on the southeast side of the runway that was part of her first 24.2 acres.[3] She later sold the

[1] "The [ACC] *shall* … act as a governing body with legal authority to make whatever rulings . . . deemed necessary to protect the best interests of the property owners." Vol. 922, pg. 478, ¶ 2. "A monthly fee … *shall* be paid by each property owner to provide for proper maintenance of common areas…. These covenants and restrictions are to run with the land and *shall* be binding upon all parties." Vol. 1002, pg. 363, 364 (emphasis added).
[2] *See e.g.,* Vol. 1109, pg. 537, 538.
[3] Vol. 1014, pg. 46, Deed Records of Denton County, Tex.

8.31 acres to Varner also subject to her reserved easement in the runway-taxiway and ramp area tracts and to the AVDCO deed restrictions.[4] This area is now called the SE Development. Whyte financed Varner's purchases and secured the debt with a deed of trust.

Less than two years later Hyde assumed Varner's warranty deed and deed of trust subject to all easements and AVDCO deed restrictions. In early 1983 Hyde then borrowed more money and acquired a large 119.6-acre tract on the northwest corner of the airport. Whyte and her two partners in AVDCO had no plans to include any of this property within airport boundaries for two reasons. First, they already had plenty of land to develop the airport to its full capacity. Second, getting to the runway from any part of it required airplanes to taxi across Cleveland-Gibbs Road, a county road. Despite these facts, Hyde platted four phases of roughly 14 acres each that would potentially add up to 500 more aircraft to the airport. He called it the Northwest Development.

Based on the lawsuits that followed, Whyte must have told Hyde that he had no right to include these properties within airport boundaries because their development would grossly exceed the scope of the easements already granted. She also did not want to deal with all the problems associated with airplanes crossing a county road. Hyde ignored her and began selling

Figure 3 – Aero Valley Airport 1979

[4] Vol. 1018, pg. 501, 502, Deed Records of Denton County, Tex.

lots and building hangars anyway without Whyte's consent or the consent of any of the other easement holders. Now in her 80s, Whyte sued Hyde to challenge his right to grant runway access from the Northwest Development.[5]

Hyde not only ignored Whyte and the rights of all other easement holders, but his "runway/taxiway license fee" also contradicted the runway access and use easement that all lots in the Southeast Development already had. He included this so-called license as part of his own deed restrictions in purchasers' closing documents even though the deed often explicitly included the easement and all the rights and responsibilities associated with it. For example, in a warranty deed from Gene Varner to L&R Flight, Co., the first page refers to the lot sold and then describes the easement as follows:

> TOGETHER WITH a non-exclusive easement for vehicular access and airport and taxiway purposes including all necessary and desirable appurtenances along, over, under, across and upon the [runway, taxiway, and ramp area tracts] … together with the right and obligation of improving, reconstructing, repairing and inspecting as may from time to time be necessary and the right to remove or prevent the construction on said tracts of all buildings, structures or other obstructions which may endanger or interfere with the safety or convenient use of said runway or taxiway.[6]

Despite this unambiguous grant of an easement, Hyde's deed restrictions contradict it in every respect.[7] Hyde has repeated this process of injecting his deed restrictions and license agreement in closing documents for over 30 years.

There are at least four monumental problems with this. First, the purchaser had no need for a license to access and use the runway, yet Hyde told purchasers he would not allow runway access without it. Hyde later used physical force to prevent property owners from exercising their runway access rights if he decided to revoke their "license." Second, Hyde knew that the AVDCO deed restrictions already applied to the property and he had no authority to apply his. Third, in some cases Hyde never owned the property and thus had no authority to apply his deed restrictions on it even if the AVDCO restrictions did not apply.[8] Finally, although the AVDCO deed restrictions could be amended, Hyde made no attempt to do so.

The situation in the Northwest Development is unique relative to all other airport properties because neither AVDCO nor Edna Whyte had previously owned it or granted runway access easements to it. Several trial courts and one appellate court have held, however, that

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[5] *Whyte v. Hyde*, Case No. 84-6674-C (211th Dist. Ct., Denton County, Tex. Dec. 11, 1984) ("The suit specifically involves and challenges the rights of [Hyde] to grant access to said airport from a 119.6 acre tract…."); Lis Pendens recorded at Vol. 1536, pg. 176, Deed Records of Denton County, Tex.

[6] Warranty Deed from Gene Varner to L&R Flight, Co., Vol. 1234, pg. 574, Deed Records of Denton County, Tex.; Warranty Deed from Gene Varner to Ollen T. Odum, Vol. 1234, pg. 509, Deed Records of Denton County, Tex.

[7] *Id*. at Exhibit "D".

[8] *Id*.

Hyde's license agreement is really an easement because it runs with the land, is irrevocable, and transfers to subsequent purchasers.[9] None of these are characteristics of a license.

Hyde's license agreement promises to use the license funds exclusively for airport maintenance and creates a reasonable expectation that the license fund is capable of doing so. Yet in its entire 33-year history, Hyde has never kept that promise. Many property owners have continued to pay the fee because of Hyde's history of violent behavior and blocking runway access.[10] History reveals that fear has been the driving factor in Hyde's tenure, not the expectation of a bargain for mutual benefit.

By late 1983, Hyde began missing loan payments and by 1986 he had defaulted on numerous loans. Hyde attempted to dupe his creditors by conveying the runway-taxiway tracts and several other airport properties to IR3T, Inc., a Nevada corporation Hyde created solely for that purpose. Hyde was its only shareholder. In court records, Hyde claimed IR3T was a mining company and he merely leased the airport on a month-to-month verbal tenancy.[11] First Interstate Bank of Dallas (now Wells Fargo Bank) saw Hyde's ploy for what it was and sued him for fraud. On February 6, 1987, the bank secured a $1,679,600 judgment against him.[12] To satisfy the judgment, Hyde had to convey the properties back to Hyde-Way, Inc. and then convey to the bank all lots within the other three phases of the Northwest Development, along with many other airport properties. The settlement also required Hyde to convey appurtenant easements for runway access and use from all lots the bank acquired.[13]

To satisfy his debt to Whyte, in late 1983 Hyde conveyed nine hangar tracts to her located in Northwest Development Phase 1.[14] Whyte now had no choice but to accept Phase 1 of the Northwest Development within airport boundaries or her nine hangars would be all but worthless. All nine of these hangars automatically acquired the right to access and use the runway because Whyte had reserved an easement in the runway-taxiway tracts and ramp area. After Hyde acquired these tracts in late 1982, Whyte conveyed a quitclaim deed to Hyde to relinquish her right to *assign* her reserved easement to others.[15] She still retained the right to convey easements from land she owned or would ever own in the future within airport boundaries. Because her reserved easement attached to the land immediately upon Varner's acceptance of the deed, any of her grantees or tenants would automatically acquire the right to access and use the runway. She later rescinded and nullified this quitclaim deed when she sued Hyde for fraud in 1984.[16]

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[9] *Walchshauser v. Hyde*, 890 S.W.2d 171 (Tex. App.—Fort Worth 1995, writ denied); *Hawk v. Hyde*, Case No. 2012-20229-158 (442nd Dist. Ct., Denton County, Tex. filed April 5, 2012) ("Lot 25E nonetheless has an easement for use of the runway and taxiway under the lot's 1995 Warranty Deed … as it passed from Charles Glen Hyde and Hyde-Way, Inc. to Wayne Williams and, later, to Hawk.")

[10] *Hyde v. Davis*, Case No. 2-08-313-CV (Tex. App.—Fort Worth 2009, pet. denied).

[11] *Hann v. State*, 771 S.W.2d 731, 733 (Tex. App.—Fort Worth 1989, writ denied).

[12] Doc. No. 25570 found at Vol. 2142, page 207 Deed Records of Denton County, Texas.

[13] Subsequent owners had to pay Hyde's license fee under his deed restrictions but only if the owner used the hangar for flight operations.

[14] Vol. 1297, pg. 151, Deed Records of Denton County, Texas.

[15] Vol. 1297, pg. 179, Deed Records of Denton County, Texas.

[16] Case No. 84-6674-C.

Figure 2 – Northwest Regional Airport 1996

Hyde either refused to acknowledge Whyte's easement or he did not understand it. He believes he has the right under Texas Penal Code §§ 9.41–9.42 to use whatever force is necessary, including deadly force, to prevent "trespassers" from using "his" runway. In 1987, one of Whyte's tenants, George W. Hann, had just landed and was taxiing back to his hangar. Hyde detained him and had him arrested for trespass. The trial court convicted Hann, fined him $500, and sentenced him to 30 days in jail. The Fort Worth Court of Appeals reversed and acquitted, holding that Hann could not be a trespasser because a rational jury could not have found beyond a reasonable doubt that Hann's entry on Hyde's property was without effective consent.[17] This same tragedy has played out multiple times in multiple scenarios with multiple property owners. For those who decided to fight, Hyde has lost in court every time.

Hyde's restrictions mirrored many aspects of the AVDCO deed restrictions but contradicted them in the most crucial respects. Instead of harmonizing his restrictions with the representative form of governance already established under the AVDCO restrictions, he asserted the exclusive right to govern and maintain the airport and determine who had runway access. As anyone could see, this was not going to turn out well.

The airport now had two groups of property owners with contradictory rights and duties. Hyde attempted to convince those with easements and who were already under the AVDCO deed

[17]*Hann*, 771 S.W.2d at 733.

restrictions to sign his license agreement. Hyde pretended that the AVDCO deed restrictions did not exist. He told the easement holders that they could contribute to airport maintenance through his "voluntary assessment program." A few owners fell for Hyde's scam but others didn't.

Carl Walchshauser was one of those who didn't. Once again, Hyde forcibly interfered with Carl's runway access rights and Carl sued. And once again the case had to go to the appellate level before getting the correct answer. "Carl Walchshauser has an easement for egress and ingress … including the right to move aircraft" … and "Glen Hyde and Hyde-Way, Inc. are not entitled to any fee with regard to that easement."[18]

In 1985 the property owners formed the Aero Valley Property Owners Association ("Association") as a nonprofit corporation organized "to acquire and maintain property and facilities for the use, enjoyment, and benefit" of those served by the corporation. Membership was voluntary. In 1990 Hyde convinced the Association's board of directors to amend the bylaws to make participation in his "voluntary assessment program" a prerequisite to being eligible to serve on the Association's board of directors. He had also changed the name of the airport to Northwest Regional Airport. The Association's board of directors adopted these amendments by "a majority of the Directors in office" because the Association *had no members with voting rights*.

By the late 1980s, Hyde's ignorance of or refusal to acknowledge the relationship between dominant and servient estates triggered a tidal wave of litigation that continues today. Property owners have had to sue Hyde on average about once every two and a half years to protect their runway access rights. Hyde has lost on that issue every time. Moreover, four trial courts have held that Hyde's license agreement is really an easement but he denies that fact by claiming Denton County judges and lawyers are all corrupt. The personal and monetary costs of Hyde's mismanagement and deceptive practices have been staggering.

With the deterioration of the airport's infrastructure and Hyde's notorious reputation, airport growth stagnated and membership in the Association continued to drop. Hyde's claims to have won all the lawsuits against him did not correspond with the facts. A cloud of confusion began to grow and eventually hung over the entire airport. In 2012, property owner Tim Wade decided to act. Tired of watching his airport go through one legal crisis after another and its infrastructure and facilities disintegrate before his eyes time and again, Tim resurrected the Association, recruited a new board of directors, and began searching for a long-term solution.

B. A Solution Emerges

After two years of research, a solution emerged: property owners needed only to assert their rights as easement holders and amend Hyde's deed restrictions to make them compatible with AVDCO's. Getting everyone under the same rules and contributing equally to the airport's maintenance seemed like a good idea. The board presented this plan to the property owners at the 2015 annual meeting and it received unanimous support.

At a special meeting held on April 23, 2016, the property owners amended the Association's articles of incorporation and bylaws to delegate the ACC's duties to the

[18] *Walchshauser v. Hyde*, 890 S.W.2d 171, 175 (Tex. App.—Fort Worth, 1995, writ denied).

Association's board of directors. By early May 2016, the legal work had been done to integrate the AVDCO and Hyde deed restrictions into one document called the Integrated Deed Restrictions ("IDRs"). The Board then proceeded to get a majority of property owners to sign them. They initially focused their efforts on those claimed to be under Hyde's restrictions because those were the ones responsible for all the contradictions. Get rid of Hyde's license agreement and claims to exclusive governing authority, they reasoned, and the airport would be back in business under the same representative form of governance that was required under the AVDCO restrictions. On May 12, 2016, the Board recorded the signatures of a majority of those formerly under the Hyde restrictions. By October 24, 2016, a majority of property owners under the original AVDCO restrictions had also signed the IDRs. Everyone was now under the same rules and governed by a single authority just as Whyte and her partners had envisioned in 1978.

C. Hyde's Response

Before executing their plan, Hyde told several board members that the only solution was to do exactly what the board eventually accomplished. But instead of supporting their efforts, he claimed that the Board had recorded fraudulent documents, lied about the number of signatures, and held their positions illegally for failure to pay his license fee or participate in his "voluntary assessment program." He then asked a third-party amateur to "audit" the signatures to determine whether a majority of owners had signed the IDRs. Hyde knew that answering this question required knowing not just the total number of property owners but also the number of owners under the AVDCO restrictions and the number of owners he claimed were under his restrictions. When he then claimed that a majority had not signed the IDRs, he knew he was making a false claim because the third party "auditor" had no idea which property owners were under which restrictions. When he couldn't get any traction with that approach, he then claimed the deed restrictions could not be amended for 99 years and voting rights were based on a per lot rather than a per owner basis.

From the Board's perspective, all of Hyde's objections were just noise. The property owners had spoken. The Board was now required to govern the airport and fulfill the duties that property owners had every right to expect. Board members made numerous attempts to get Hyde to work with the Association for mutual benefit. Rather than cooperate and participate in developing a solution, Hyde notified Mitch Whatley, the current president, and Scott Doores, the former president, that counsel had advised him not to communicate with them directly. According to Hyde, these individuals had to go through his attorney to communicate. At that point, the Board knew that litigation was inevitable. So to clear the way for the Association to do its job, the Board filed an action against Hyde and his various corporate entities under the Declaratory Judgment Act.[19] The Association asked the court to declare that (1) the delegation of authority from the ACC to the Board of Directors was valid, (2) both the Hyde and AVDCO restrictions had been amended and integrated by the IDRs, and (3) that the Association had the right to assess and collect fees for airport maintenance and perform the maintenance as required.

[19] *Northwest Regional Airport Property Owners Assoc. v. Hyde*, No. 16-05997-16 (16th Dist. Ct., Denton County, Tex. July 29, 2016).

The Association then filed a motion for summary judgment demonstrating that no material facts were in dispute and the Association is entitled to judgment as a matter of law.

II. AVDCO and Hyde Amendment Provisions

When it comes to voting rights and amendment procedures, both the AVDCO and Hyde deed restrictions are identical.

AVDCO: These covenants and restrictions are to run with the land and shall be binding upon all parties and all persons claiming under them for a period of thirty (30) years from date hereof, after which said time said covenants shall be automatically extended for successive periods of ten (10) years, unless an instrument signed by a majority of the then record owners of the property has been recorded, agreeing to change the covenants in whole or in part.

Hyde 1 (Glen Hyde): These covenants and restrictions are to run with the land shall be binding upon all parties and all persons claiming under them for a period of 99 years from date hereof, after which said time covenants shall be automatically extended for successive periods of 10 years, unless an instrument signed by a majority of the then property owners of record and same shall be promptly recorded, agreeing to change the covenants in whole or part.

Hyde 2 (Dean Henry): These covenants and restrictions are to run with the land shall be binding upon all parties and all persons claiming under them for a period of 30 years from date hereof, after which time said covenants shall be automatically extended for successive periods of 10 years, unless an instrument signed by a majority of the then owners of record, agreeing to change the covenants in whole or part, be filed for record in the office of the County Clerk of Denton County, Texas.

"Record owners of the property" = property owners of record

"Property owners of record" = property owners of record

"Owners of record" = property owners of record

These three phrases are equal. Thus, the complete conjunctive phrase reads "unless an instrument signed by a majority of the then property owners of record has been recorded, agreeing to change the covenants in whole or in part."

Hyde copied AVDCO's amendment provisions verbatim except in some versions he changed 30 years to 99 years. These time periods have nothing to do with when the restrictions can be amended. These time periods and the automatic extensions associated with them were merely the means by which the deed restrictions could run with the land forever without suffering the harsh effects of the Rule Against Perpetuities ("RAP"). The RAP could prevent the restrictions from running with a particular tract if it were conveyed with a contingent remainder that violated the RAP. Whether 30 years or 99 years or any number of years in between, these values, by themselves, do not place any limits on when property owners can amend the restrictions. They can be amended at any time.

Voting rights are based on one vote per owner regardless of the number of lots owned and the restrictions can be amended at any time by a majority of owners under them. The language used dictates these results. The use of other language would produce much different results.

Texas common law proves the one vote per owner interpretation and also embraces the rules of logic applied to conditional statements to prove that amendment can occur at any time as the following analysis will show.

A. Voting Rights

Texas courts will uphold voting rights based on either a one vote per owner or one vote per lot basis depending on the language used. The language in question is: "a majority of the then property owners of record." Like other states, Texas law holds that such language means one vote per owner regardless of the number of lots owned unless the declarations manifest an intent elsewhere that owners will vote on a one vote per lot basis. Because neither the AVDCO nor Hyde-Way restrictions manifest any such intent, the underlined language means exactly what it says: voting rights are by owner and not by lot. Thus, if Able owns three hangars on three separate lots, Able gets one vote. Two Texas appellate cases demonstrate the point: *French v. Diamond Hill Jarvis Civic League*, 724 S.W.2d 921 (Tex. App.—Fort Worth 1987, no writ) and *Miller v. Sandvick*, 921 S.W.2d 517 (Tex. App.—Amarillo 1996, no writ). Both cases evaluate substantially similar language and hold that voting rights are based on one vote per owner. No case law contradicts these opinions.

French v. Diamond Hill Jarvis Civic League (one vote per owner): A dispute arose whether the covenants allowed one vote per owner or one vote per lot. The Court evaluated the following provision:

> These covenants and restrictions are to run with the land and shall be binding on all parties and all persons claiming under them until JANUARY 1, 1985, at which time said covenants shall be automatically extended for successive periods of ten years unless by a vote of a majority of the then owners of the lots it is agreed to change said covenants in whole or in part.

French, 724 S.W.2d at 923 (emphasis added). The court then explained what this language means:

> We construe the language of the covenants to mean what it says, i.e., "a majority of the then owners of the lots," not the owners of the majority of the lots. We have been referred to no Texas case directly on point, but we are in agreement with the courts of other states which have construed the same or similar language. *See Cieri v. Gorton*, 179 Mont. 167, 587 P.2d 14, 16-17 (1978); *Beck v. Council of the City of St. Paul*, 235 Minn. 56, 50 N.W.2d 81, 83 (1951). A previous case before this court, *Bryant v. Lake Highlands Dev. Co. of Texas*, 618 S.W.2d 921, 923 (Tex. Civ. App.—Fort Worth 1981, no writ) is distinguishable because in that case there was an intent manifested within the original declaration that voting rights be exercised on a per lot basis.

Id.

Miller v. Sandvick (one vote per owner): Two couples owned 71 of the 96 lots in Pine Grove Estates. They attempted to cancel their deed restrictions under the following provision:

"These covenants may be amended by an instrument signed by two-thirds (2/3) of the then owners of building sites or building plots (each building site or building plot to have one vote)." Believing that this provision gave them one vote per lot and they owned more than 2/3 of the lots (74%), the two couples did not involve any other homeowners in the "vote." The other homeowners sued, claiming that the cancellation was invalid. The *Miller* court agreed:

> We construe the language of the covenants to mean what it says, i.e., two-thirds of the then owners of the lots, not the owners of the majority of the lots. . . . The parenthetical instructs that each lot is entitled to one vote even though there may be multiple owners of the lot, rather than indicating that owners of multiple lots are afforded multiple votes.

Miller, 921 S.W.2d at 522. The Texas Property Code explicitly authorizes this interpretation and requires it in some circumstances. "A property owner may not cast more than one vote, regardless of the number of lots the person owns. If more than one person owns an interest in a lot, the owners may cast only one vote for that lot."[20]

Other cases conclude just the opposite when the language requires. For example, the deed restrictions governing Air Park Dallas can be "revoked or modified in whole or in part by a three-fourths majority vote of the then owners of the real property therein, said vote to be on the basis of <u>one vote per lot</u> therein."

Residential subdivision Crestwood Acres provides another example: "should the owners of a <u>majority of the lots</u> in CRESTWOOD ACRES desire to change, modify or eliminate said restrictions, they may do so by executing and acknowledging an appropriate agreement . . . ."

With these rules of construction firmly established, Texas law interprets both the Aero Valley and all versions of the Hyde Restrictions to mean one vote per owner regardless of the number of lots owned.

B. Time Period Before Amendment

Equally as critical as voting rights is the question of when restrictions can be amended. The answer to this question may not be obvious. Reaching the correct answer requires identifying the logical triggers in the language used and evaluating it appropriately. In this case, one could wrongly conclude that the AVDCO restrictions could not be amended for 30 years and some versions of Hyde's restrictions could not be amended for 99 years. Texas common law applies the rules of conditional logic to prove that these restrictions can be amended at any time.

The word "unless" is a logical trigger that means "if not." The proposition "A unless B" thus means "A if not B." Putting this into standard "if-then" conditional form gives: If not B, then A. In the original provision in the deed restrictions, "A" represents all the language before *unless* and "B" represents all the language after it. Substituting the actual language for A and B gives:

[20] Tex. Prop. Code Ann. § 211.004 (2012).

If a majority of the property owners do not amend the deed restrictions (if not B), then these deed restrictions will run with the land and bind all persons claiming under them for a period of 99 years, after which [these deed restrictions] will automatically extend for successive 10-year periods (then A). But if the property owners do amend the restrictions, then these deed restrictions may not run with the land for 99 years. Exactly what happens to the restrictions depends entirely on how they were amended so long as the amendments are not illegal, against public policy, or do not result in their complete destruction.[21]

It should now be apparent that 30 years or 99 years refers only to how long the deed restrictions will run with the land before they automatically extend. In our case and many others, these values have nothing to do with when the restrictions can be amended. The same goes for the prepositional phrase that extends the restrictions automatically for successive 10-year periods. The property owners can amend the deed restrictions at any time.

The AVDCO restrictions were first written in 1977. Deed restriction amendment language has evolved considerably since then. More modern deed restrictions now read:

> These restrictions and covenants shall run with the land and shall be binding upon all parties and all persons claiming under them ... unless at any time an instrument, executed by the then Owners of a majority of the Lots within the Property, has been filed for record agreeing to change these restrictions in whole or in part.

Wwch Ldef v. Wilchester West Fund, 177 S.W.3d 552, 563 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (emphasis added).

Like voting rights, however, Texas courts will uphold just about any clearly defined amendment time limits. Consider *Crispin v. Paragon Homes*, *Inc*., 888 S.W.2d 78 (Tex. App.—Houston [1st Dist.] 1994, writ denied):

> Paragraph six provides that the amended restrictions become effective on the date one or more copies ... are filed of record in the office of the County Clerk ... and shall be effective until January 1, 1994, and shall automatically be extended thereafter for successive periods of ten (10) years; *provided however, that* should the owners of a majority of the lots in Crestwood Acres desire to change, modify or eliminate said restrictions, they may do so by executing and acknowledging an appropriate agreement in writing for such purpose and filing the same for the record in the manner then required for the recording of land instruments, within the one year period prior to January 1, 1994, or within the one year period prior to the expiration of any ten (10) year period thereafter.

Id. at 82 (emphasis added). The *Crispin* court evaluated similar conditional language as the AVDCO restrictions by substituting "unless" for "provided however, that" and evaluating the language used in the last two prepositional phrases underlined above. "The amended restrictions are effective until January 1, 1994, *unless* the required number of property owners, during the

[21] *See e.g., Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001, no pet.).

one year period prior to January 1, 1994, execute and file for record another agreement. If this is done, the amended restrictions become effective when filed for record." *Id*. (emphasis in original). The difference, of course, is that Paragon Homes gave specific time periods for amendment, i.e., one year before January 1, 1994 or within the one-year period before any ten-year period expired. In our case, no such limiting time periods exist.

Other courts have evaluated language even more similar to AVDCO's. Careful drafting helps eliminate any hint of ambiguity:

> These covenants shall be binding for a period of thirty (30) years from the date they are filed for record in the Deed Records of Comal County, Texas, unless changed or amended as provided herein. Said covenants shall be automatically extended, upon the expiration of said term, for successive periods of ten (10) years each.

Trethewey v. Collins, et al., No. 03-07-00311-CV (Tex. App.—Austin [3d Dist.] 2009, no pet.) (emphasis added). The "as provided herein" provision immediately follows: "The record owners of legal title of fifty-one (51%) percent of the lots as shown by the deed records of Comal County, Texas, may amend or change said covenants in whole or part at any time." *Id*. (emphasis added). Although the phrase "at any time" eliminates any doubt, the same conclusion would follow even if that phrase were missing because no other language modifies the "if not" condition.

Other than changing 30 years to 99 years in most versions, Hyde attempted to copy verbatim AVDCO's amendment method paragraph. (He introduced several errors and omissions in the process.) In any event, whether the time period is 30 years or 99 years, property owners can amend the restrictions at any time.

Deed restriction drafters later realized that putting a specific time period with a similar "unless" construction confused the situation by making laypersons and lawyers alike think that the specified time period always prevented the restrictions from being amended until that time had passed. It can, but doesn't in our case.

Any other result would produce bizarre results. If the property owners can't amend for 99 years, then how much time is available for amendment before the next opportunity arises? Is 99 years even reasonable? When can amendment occur if within a 10-year extension period? What happens if circumstances change such that immediate action is required? Would the court say, "too bad"? Texas law does not favor hobbling property owners with this kind of interpretation.

Hyde's use of 99 years has no analog in deed restrictions but is commonly used in land leases and licenses. Under traditional English common-law, the maximum duration of a land lease or license is 99 years. In 16th century England, 99 years was nearly five generations. Remember that Taiwan went back to China after its 99-year lease expired. Moreover, in the context of deed restrictions a court would likely determine that preventing amendments for 99 years is unreasonable. Hyde's substitution of 99 years for 30 years did nothing but provide more evidence that a competent lawyer was nowhere in sight when he copied parts of the AVDCO restrictions and wrote his own.

III. Conclusion

It is often said that Texas courts traditionally did not favor restrictions on the free use of land and construed a restriction strictly against the party seeking to enforce it.[22] Others claim that such strict construction was no longer allowed after June 1987 when the Texas legislature adopted section 202.003 of the Texas Property Code. This section appears to shift the emphasis in the other direction: "A restrictive covenant shall be liberally construed to give effect to its purposes and intent." This supposed sea change was probably more rhetoric than substance because Texas courts have always treated deed restrictions just like contracts. Texas courts continue to work hard to give effect to every word and phrase based on their commonly accepted meaning.

A thorough review of Texas opinions reveals that Texas courts will uphold voting rights based on one vote per owner or one vote per lot depending on the language used. Texas courts will also uphold wide variations in amendment procedures. All cases reviewed maintain consistency in the rules of construction applied. With knowledge of these rules, those wanting to understand their voting rights and amendment procedures can do so with confidence. The language used in both the AVDCO and Hyde deed restrictions allows a majority of owners to amend them at any time on a one vote per owner basis.

[22] *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987, writ denied).