

Louisiana Law Review

Volume 60 | Number 3
Spring 2000

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Repository Citation

James Slaton, *Storming the Castle: Surrendering the Sanctity of the Home to the Will of the Masses - Amending Building Restrictions under 1999 La. Acts 309*, 60 La. L. Rev. (2000)
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Storming the Castle: Surrendering the Sanctity of the Home to the Will of the Masses—Amending Building Restrictions under 1999 La. Acts 309

I. INTRODUCTION

The Louisiana Legislature made sweeping changes to the way private land may be subjected to control by parties other than its owner when it enacted Act 309¹ in the 1999 Regular Session. The act amended provisions of the Louisiana Civil Code and made an addition to Title 9 of the Louisiana Revised Statutes to simplify the process of changing existing residential building restrictions by allowing them to be more burdensome with less-than-unanimous consent of affected homeowners. The act subdivides Louisiana's building restriction regime into two schemes, applying the newly created Louisiana Homeowner Association Act to those properties that are part of a "planned community" and applying the amended Civil Code provisions in all other situations.

The act was a legislative response to the Louisiana Supreme Court's decision in *Brier Lake, Inc. v. Jones*,² in which the court invalidated amendments made to a residential subdivision's building restrictions because the modifications had not been unanimously approved by the affected lot owners. Although the decision was consistent with the doctrine and prior Louisiana jurisprudence, it was contrary to jurisprudence in other states. Act 309 brings Louisiana's approach to the process of building restriction amendment in line with other states as well as the current trend in residential development of granting homeowner associations more control over their communities. It also raises the question being debated in several other states of how far the amendments can reach without the unanimous approval of the residents. This comment will analyze Act 309, its effects and the motives behind its drafting and passage.

II. 1999 LOUISIANA ACTS 309

A. Introduction

Act 309 amends Civil Code Articles 776, 780 and 783; enacts the Louisiana Homeowners Association Act (hereinafter "LHAA");³ and expressly overrules *Brier Lake*.⁴ The amendments to the code articles alter the language doctrinal

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1. 1999 La. Acts 309.
2. 710 So. 2d 1054 (La. 1998).
3. La. R.S. 9:1141.-1141.9 (Supp. 2000).
4. 1999 La. Acts 309.

writers⁵ and the courts relied on in both *Brier Lake*⁶ and *Mackey v. Armstrong*⁷ for the position that unanimous consent is required for amendments that make building restrictions more burdensome. In addition, the LHAA provides new rules that govern in the event a residential development is created as a "planned community." These new provisions go farther than the amendments to the codal provisions, allowing even greater freedom in certain types of developments to determine what level of homeowner consent is necessary to amend restrictions.

B. Article 776

The changes to Article 776,⁸ which provides for the establishment of building restrictions, are minor. A second sentence has been added, stating that "[o]nce established, building restrictions may be amended or terminated as provided in this Title."⁹ This revision does not appear to change the law.

C. Article 780

The changes to Article 780,¹⁰ however, are significant. Before the amendment, the article read:

Art. 780. Termination according to title; agreement of owners

Building restrictions terminate as provided in the act that establishes them. In the absence of such provision, building restrictions may be amended or terminated for the whole or a part of the restricted area by agreement of owners representing more than one-half of the land area affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for at least fifteen years, or by agreement of both owners representing two-thirds of the land affected and two-thirds of the owners of the land affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for more than ten years.

The bill changed the title to: "Amendment and termination of building restrictions." It also added language to the first sentence so that it now reads: "Building restrictions *may be amended, whether such amendment lessens or increases a restriction, or may terminate or be terminated* as provided in the act

5. See, e.g., Lee Hargrave, *Property—Servitudes & Building Restrictions, Developments in the Law 1989-1990*, 51 La. L. Rev. 371, 384-85 (1990); A.N. Yiannopoulos, *Predial Servitudes* § 196, at 521-22, in 4 *Louisiana Civil Law Treatise* (2nd ed. 1997); Allen S. Crigler, Comment, *Some Observations on Building Restrictions*, 41 La. L. Rev. 1201, 1205 (1981).

6. 710 So. 2d 1054, 1059 (La. 1998).

7. 705 So. 2d 1198, 1199 (La. App. 2d Cir. 1997).

8. La. Civ. Code art. 776.

9. *Id.*

10. La. Civ. Code art. 780.

that establishes them."¹¹ The effect of these additions is to directly counter the arguments against more restrictive amendments, which were based on the presumption that the power to amend provided in Article 780 was only a power to lessen restrictions.¹²

D. Article 783

The act adds a second sentence to Article 783,¹³ the article governing the interpretation of building restrictions. Although the first sentence still provides that building restrictions should be interpreted consistent with a policy in favor of the unrestricted use of immovables, the new section adds that the Louisiana Condominium Act,¹⁴ Louisiana Timesharing Act¹⁵ and the newly created LHAA¹⁶ supersede the Civil Code provisions in the event of a conflict. Those acts generally defer to the provisions of the contracts that originally created the restrictions—defined in the act as “community documents”¹⁷—to determine how they will be modified. The effect of this change is to shift decisions regarding the control of certain residential environments away from the state and to the parties who consented to being a part of those particular regimes.

E. LHAA

The LHAA¹⁸ applies only to “planned communities,” defined in the act as a “real estate development, used primarily for residential purposes, in which the owners of separately owned lots are mandatory members of an association by virtue of such ownership.”¹⁹ These subdivisions are governed by community documents that include the restrictions burdening the individual lots. The act seeks to give priority to these documents in disputes over building restrictions.

The LHAA departs from the civil code provisions regarding building restrictions in several pertinent respects. First, it requires that the “existence, validity or extent of a building restriction . . . shall be liberally construed to give effect to its purpose and intent.”²⁰ This provision is directly contrary to Article 783: “Doubt as to the existence, validity, or extent of building restrictions is resolved in favor of the unrestricted use of the immovable.”²¹ Comment (b) to

11. *Id.* (emphasis added).

12. *See supra* note 5.

13. La. Civ. Code art. 783.

14. La. R.S. 9:1121.101-1124.115 (1999).

15. La. R.S. 9:1131.1-1131.30 (1999).

16. La. R.S. 9:1141.1-.9 (Supp. 2000).

17. La. R.S. 9:1141.2 (1999).

18. La. R.S. 9:1141.1-1141.9 (Supp. 2000).

19. La. R.S. 9:1141.2 (Supp. 2000).

20. La. R.S. 9:1141.4 (Supp. 2000).

21. La. Civ. Code art. 783.

Article 783 states the documents establishing the restrictions are to be strictly construed.²²

Second, the act allows building restrictions to be established in accordance with the community documents.²³ Thus, the creation of new restrictions—those not originally contained in the community documents when homeowners purchased their property—only need the approval of the number of homeowners provided for in the community documents. The LHAA does not specify a minimum number or percentage of owners that must approve the amendments. The act further provides that in the absence of such a provision, the agreement of three-fourths of the lot owners is sufficient to create new restrictions. This conflicts with Article 776 which, even after its revision, requires unanimous consent of the affected lot owners for the creation of new restrictions, regardless of the provisions of a document that governs the development.

Third, the act allows existing building restrictions to be made more burdensome by agreement of two-thirds of the lot owners²⁴ and lessened or terminated by a vote of more than one-half of the lot owners.²⁵ This differs from the formula in amended Article 780, which requires agreement of the owners representing more than one-half of the land area affected by the restrictions for those in effect for more than fifteen years or by agreement of both owners representing two-thirds of the land area affected, and two-thirds of the owners of the land affected by the restrictions if they have been in effect for more than ten years.²⁶ The LHAA simplifies the voting requirements by eliminating the division based on the age of the restriction. It also changes the language regarding how votes are to be counted—whether by ownership of land area or lots—but conflicting language in the act's provisions create confusion regarding the allocation of votes.

On its face, the provision allocating votes by the number of lot owners appears to shift the balance of power away from parties who own large amounts of land to a more democratic per-owner allocation.²⁷ For example, in a ninety lot development where one-third of the lots have been sold to thirty buyers and the developer retained ownership of the other two-thirds, Article 780 would vest power in the developer to make or block changes to fifteen-year-old restrictions as the owner of more than one-half of the land area. In the same example, the developer would also have to consent to any changes to ten-year-old restrictions. The act, however, considers the number of lot owners rather than the amount of land owned.

22. *Id.*

23. La. R.S. 9:1141.6(A) (Supp. 2000).

24. La. R.S. 9:1141.6(B)(2) (Supp. 2000).

25. La. R.S. 9:1141.6(B)(3) (Supp. 2000).

26. La. Civ. Code art. 780.

27. La. R.S. 9:1141.6(B)(1) (Supp. 2000) reads: "Building restrictions may be established by agreement of three-fourths of the *lot owners*"; La. R.S. 9:1141.6(B)(2) (Supp. 2000) reads: "Existing building restrictions may be made more onerous or increased by agreement of two-thirds of the *lot owners*"; La. R.S. 9:1141.6(B)(3) (Supp. 2000) reads: "Existing building restrictions may be made less onerous, reduced, or terminated by agreement of more than one-half of the *lot owners*" (emphasis added).

Given the example of thirty-one lot owners (the thirty buyers and the developer), only twenty-one would have to agree to an increase and sixteen for a decrease. Under this interpretation, the developer would have no stronger voice than any other purchaser.

This literal reading is contradicted, however, by the language in §1141.7: "Each lot represents a single vote . . . A plot or parcel of unimproved land which is substantially larger than a majority of other lots in the association, however, shall be treated as separate lots."²⁸ This is clearly a different method than calculation by the number of lot owners; instead, this is by the number of lots owned. To be consistent with §1141.7, the method of calculation in §1141.6(B)(1) would have to be expressed as "agreement of the *owners of three-fourths of the lots*" rather than "agreement of three-fourths of the *lot owners*," as it now stands.²⁹

The practical problem this disparity signals is a lack of clarity regarding the balance of power in homeowner governed subdivisions. Does the developer retain an amount of power in proportion to the amount of land he owns (the per-lot method of allocating votes), or does it rapidly yield to the homeowners themselves as it would under a per-owner method? It appears that the per-lot method was intended by the legislature, as the §1141.7 provisions on how the votes are to be exercised is more specific than §1141.6, which only generally deals with the method of amending. Because the intent of the legislature controls the interpretation of laws, it is likely that the per-lot method will be used, despite the conflicting language. This inconsistency in wording places doubt on the balance of power in these types of developments and should be corrected so home buyers and developers alike may know how much of a voice they will have in deciding the course of their properties.

The per-lot allocation method is a superior compromise between protecting the investment of the developer and giving the residents control over their community. Per-lot allocation places the voting power in the hands of the party with the greatest financial investment in the development. In the case of a new development, where the developer still owns much of the property, this method is especially desirable to ensure that the development is not taken out of the developer's hands at an early stage, derailing the project. As the properties are sold off, however, power gradually shifts to the purchasers, eventually giving them complete control over their neighborhood. For example, a developer who purchases a large area of land plans to build a 300-lot community in three phases. He sells the first 100 lots. Under a per-lot allocation, the developer retains two-thirds of the voting power. A per-owner method, however, would give control to the homeowners over the entire development even though collectively they only hold an interest in one-third of that property. The developer would lose control of his investment and the buyers may choose to alter the project in virtually any way they choose. Not only does this take authority away from the party that likely has the greatest expertise in real estate development, but it also puts a substantial investment at risk without

28. La. R.S. 9:1141.7(A) (Supp. 2000).

29. La. R.S. 9:1141.6(B)(1) (Supp. 2000).

providing sufficient compensation—he is losing power over two-thirds of his investment for the price of only one-third of the land. This sort of economic risk would operate as a disincentive for development. The per-lot method avoids this problem by tying control directly to amount of investment. As the developer sells off more of his property, his power wanes and the collective power of the homeowners increases.

F. Retroactivity

Act 309 is “remedial” and is thus intended to apply prospectively and retroactively.³⁰ The LHAA applies to existing as well as future planned communities, but the building restrictions created under the special provisions of that act do not affect existing structures. Louisiana Revised Statutes 9:1141.6(C)(1) provides: “[N]o new or more onerous building restriction shall impose a duty on the current owner to act affirmatively or remove or renovate any existing structure. All new or replacement structures, however, shall be subject to the new or more onerous building restriction.”³¹ The LHAA further allows that when a new restriction is established under the act itself—rather than in accordance with a specific provision in the community documents—a current owner may file with the association and the clerk of court a statement declining to be covered by the building restrictions.³² Similarly, the LHAA provides that the current owner of an improved lot is exempt from complying with amendments or new restrictions that increase or create new set-backs or minimum square foot requirements when those increases or amendments are created under the act rather than under the community documents.³³ This distinction based on how the amendments were created presumably deals with notice; if the amendments were made in accordance with provisions in the community documents, the homeowner can be assumed to have notice of the fact that the restrictions may be changed, and thus it is less onerous to hold him bound by the changes. On the other hand, an owner who purchased without agreeing to an amendment provision did not have notice that his subdivision’s building restrictions could be changed and it therefore would arguably be unfair to bind him by subsequent changes. These exemptions and waivers are personal to the owner and do not pass to the successor in title of the property, who will be bound by the restrictions as amended.

On the whole, this method appears to be a fair way to enforce the LHAA. Homeowners who acted before the amendments or new restrictions were added—and therefore had no notice of the change—are not hurt by the amendments as they are “grandfathered” in. Those who act after have notice of the new or enhanced restriction and act at their own peril. The only groups of homeowners that this approach treats unfairly are those who purchased with the

30. 1999 La. Acts 309 § 4.

31. La. R. S. 9:1141.6(C)(1) (Supp. 2000).

32. La. R.S. 9:1141.6(D)(1) (Supp. 2000).

33. La. R.S. 9:1141.6(D)(2) (Supp. 2000).

intent of using their property some way in the future that they are prevented from doing as the result of a change in the building restrictions.

For example, a buyer purchases a house in a subdivision that allows pools, planning to install one when he has the necessary funds. Two years later, before he has the money to build a pool, the building restrictions are amended to prohibit pools in the subdivision. This seems like an unfair result, especially if the purchaser relied on the freedom to build a pool when choosing the particular house or lot (e.g., extra price was paid for a large backyard that could accommodate a pool). This homeowner has recourse under the LHAA if his community documents do not provide a method for restricting amendment by filing a waiver declining to be covered by the change.³⁴ If the community documents did contain an amendment provision, however, (and many do) he is stuck with the new prohibition. The argument in favor of this result is that he had notice the restrictions could be changed at any time.

However, if he purchased the home before the LHAA was adopted and relied on (or was advised by his attorney in light of) prior jurisprudence interpreting amendment provisions in community documents, he arguably did not have notice that the amendments could be made more burdensome. Furthermore, even if he purchased after the LHAA was enacted, it is questionable what sort of notice he was given. If every other house in the neighborhood had a pool, would it be reasonable to say that he was on notice that the subdivision would later become hostile to pool development? An argument based on notice principles is weak when the notice provided is as vague as a clause in a contract that the building restrictions may be amended.³⁵ This sheds no light on how or to what extent the restrictions may be amended. Does "amendment" encompass only minor changes such as fence height or may an amendment alter the subdivision's character by eliminating carports, pools or even pets? As will be discussed later in this comment, the limitations on the power to amend are not clear. Courts apply a variety of tests and do not always reach the same results. As a result, the prospective homeowner can only guess what he is agreeing to when he agrees to a vague amendment provision. Unless the buyer happens to be psychic, he cannot fairly be said to have notice. Without notice, he has not truly consented.

Act 309 does not directly address the retroactivity of the changes to the Civil Code articles. Aside from these special provisions under the section dealing with amendments made under the LHAA, Act 309 does not address the retroactive enforcement of amendments to building restrictions. Presumably, the LHAA's mechanism for enforcement would be applied to the amendments under the Civil Code by analogy.

34. La. R.S. 9:1141.6(D)(1) (Supp. 2000).

35. A typical example of an amendment clause is found in *Brier Lake, Inc. v. Jones*: "The terms and provisions of this Act of Dedication, and any of the servitudes, privileges or restrictions herein contained, may be modified in whole or in part, terminated or waived . . . by an Act of Modification, Termination or Waiver signed by the then owners of a majority of the lots and duly recorded with the Clerk of Court for St. Tammany Parish, Louisiana." 710 So. 2d 1054, 1056 (La. 1998).

III. BACKGROUND AND *BRIER LAKE, INC. V. JONES*

In *Brier Lake, Inc. v. Jones*,³⁶ the homeowner association of Brier Lake Estates sued homeowner Herbert Jones, claiming he violated certain subdivision restrictions and had failed to pay outstanding dues and assessments.³⁷ The trial court found for the plaintiffs and awarded \$18,331.45 for attorney's fees and outstanding assessments. The First Circuit Court of Appeal affirmed. The Louisiana Supreme Court reversed in part, reducing the award to \$735 for overdue assessments and attorney's fees.

The restrictions were originally created in 1978 when Brier Lake's developer and sole property owner recorded an act of dedication of building restrictions.³⁸ The dedication provided for amendment of the restrictions by agreement signed by the owners of a majority of the lots.³⁹ The original restrictions were made applicable to the lots as they were developed. In 1983, a majority of the owners of the lots in Brier Lake voted to amend the original restrictions. The amendments made the fence height restriction more burdensome, changing the maximum fence height from seven feet to five feet; increased the maximum amount of assessments from \$15 a month to \$20 a month; increased the amount of interest, costs and reasonable attorney fees claimable in the event of nonpayment of assessments from 20% of the amount due to 35% of the amount due; and added a provision stating that reasonable attorney fees and all costs would be recoverable by any person who successfully enforces any of the restrictions in court.⁴⁰

Jones purchased his lot in 1984, one year after the original restrictions were purportedly amended. He claimed that he was not bound by the amendments because they were not adopted by the unanimous consent of the landowners.⁴¹ He was accused of violating several restrictions, but the only alleged violation resulting from amendments was his construction of a six-foot fence. The other claims—that he failed to pay assessments since January 1, 1991 and built a carport and installed a satellite dish without submitting plans to the Environmental Control Committee for approval—would have been violations under the original restrictions as well.⁴² Brier Lake did rely on the amended restrictions, however, for their claim to a higher amount of interest and costs on the action to recover the assessments and their claim for attorney fees for enforcing the restrictions.⁴³

The Louisiana Supreme Court held that the amendments increasing the original restrictions were not valid because they were not unanimously approved by the subdivision homeowners. The court analogized the increasing of building restrictions to the creation of new building restrictions, which requires unanimous

36. 710 So. 2d 1054 (La. 1998).

37. *Id.* at 1057.

38. *Id.* at 1055.

39. *Id.* at 1056.

40. *Id.*

41. *Id.* at 1058.

42. *Id.* at 1061.

43. *Id.* at 1061-62.

approval under Article 776: "[W]e agree with the consensus among the legal commentators that amendments by a mere majority vote can only lessen existing building restrictions, but an 'amendment' that creates more burdensome restrictions requires unanimous consent of all owners of the affected immovable property."⁴⁴ Because the fence was only in violation of the amended restrictions, the judgment of the court of appeal ordering Jones to remove his fence was reversed.⁴⁵ The court also reversed an order to pay attorney fees, which was not allowed under the original restrictions; reduced the amount of assessments owed to the \$15 a month maximum; and reduced the costs based on the past due amount of the assessments to the 20% originally provided for.⁴⁶ The court upheld the lower court's ruling that he must remove his carport and satellite dish, which were constructed in violation of the original restrictions.⁴⁷

The *Brier Lake* decision was consistent with both the Louisiana commentary and the jurisprudence on the issue. The commentators are in agreement that the proper interpretation of prior Articles 776 and 780 allowed building restrictions to be lessened according to the documents that created them, but that increasing them required unanimous consent. In his civil law treatise on Louisiana property law, A.N. Yiannopoulos writes:

An "amendment" of building restrictions may actually involve termination of existing restrictions, an imposition of new restrictions, or both. However, the requirements for the termination of building restrictions and for the termination of existing restrictions are not the same.

It has been correctly suggested that Article 780, as amended, contemplates amendments that lessen restrictions on property. When a purported amendment results in the impositions of restrictions or in expansion of existing restrictions, all owners of the affected immovables must consent.⁴⁸

The requirement of consent before a burden is imposed on an immovable is "consistent with basic real rights theory—that imposing a basic real right on property is an alienation that can be made only with the consent of the landowner at the time of the contract."⁴⁹ At first glance, this view seems inconsistent with the pre-revision language of Civil Code article 780, which provides a mechanism for the amendment of restrictions.⁵⁰ However, the commentators read Article 780 *in*

44. *Id.* at 1059.

45. *Id.* at 1063.

46. *Id.*

47. *Id.*

48. Yiannopoulos, *supra* note 5, at 521-22.

49. Hargrave, *supra* note 5, at 384.

50. La. Civ. Code art. 780 provides in part:

[B]uilding restrictions may be amended or terminated for the whole or a part of the restricted area by agreement of owners representing more than one-half of the land area affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for at least 15 years, or by agreement of both owners representing two-

pari materia with articles 776 and 783. [Article 783 requires strict construction of building restrictions in favor of unrestricted use of the immovable.] and [Article 776 requires unanimous consent to create a restriction.] In light of the policy expressed in article 783 and because "the effect of tightening the existing restrictions is the same as creating new ones,"⁵¹ it is appropriate to treat more burdensome restrictions under article 776 rather than 780. One commentator writes:

To construe that reference to amendments [in article 780] as empowering the burdening of all lots in the subdivision with new restrictions upon approval of the owners of only a simple majority of the land area affected would be to make a major change in the law on scant authority. There would seem to be little policy reason to move in that direction, policy being more generally toward free use of property and limiting private land use controls. It would be more consistent with that history and policy to construe article 780 to refer only to amendments that lessen the restrictions on property.⁵²

This view in the context of amendments to building restrictions was first considered by the courts in *Prien Oaks Homeowners Association Inc. v. Mocklin*.⁵³ In *Prien Oaks*, a subdivision homeowner association sued a homeowner, claiming violations of certain building restrictions. The Louisiana Third Circuit Court of Appeal held that an amendment to the subdivision's building restrictions limiting the height of fences did not apply to the defendant, who purchased the property and built the offending fence prior to the amendment.⁵⁴ Without much discussion, the court held "a subdivision property owner may not enforce a building restriction, effective subsequent to the alleged violation, relying upon the contention that the action is out of harmony with the general plan."⁵⁵ The court significantly noted that the Mocklins did not consent to such a restriction when they purchased their property and that the lack of a fence height restriction was one of their primary considerations for selecting that property.⁵⁶ Although the court did not explicitly state the above mentioned policy considerations regarding free use of property and need for unanimous consent in its reasoning, "[t]he court's opinion . . . is consistent with this view."⁵⁷

The Second Circuit addressed the issue more directly in *Mackey v. Armstrong*,⁵⁸ specifically holding "[Article] 780 contemplates amendments that lift

thirds of the owners of the land area affected and two-thirds of the owners of the land affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for more than ten years.

51. Crigler, *supra* note 5, at 1205.

52. Hargrave, *supra* note 5, at 384-85.

53. 560 So. 2d 115 (La. App. 3d Cir. 1990).

54. *Id.*

55. *Id.* at 118.

56. *Id.* at 117.

57. Hargrave, *supra* note 5, at 385.

58. 705 So. 2d 1198 (La. App 2d Cir. 1997).

rather than add restrictions on the use of property."⁵⁹ In *Mackey*, the court held invalid restriction amendments that increased the subdivision's minimum square footage requirement for houses and added requirements for a two-car garage or carport. Plaintiff R.A. Mackey, Inc., was the owner of the nineteen vacant lots in the subdivision, purchased before the amendments were made.⁶⁰ The amendments were adopted by a majority of the owners of the subdivision lots, in accordance with the subdivision's original declaration of restrictions. Mackey brought suit for a declaratory judgment to invalidate the amendments.⁶¹ The court granted the judgment sought, reasoning that "the title to [Article] 780 refers solely to termination."⁶² For this provision in Article 780 that allows an amendment to existing restrictions to make sense, it must be read to refer to a lifting or lessening of the burden on the property."⁶³

Clearly, however, all of these objections have been addressed and dealt with through the changes in the articles made by Act 309. Article 776 now provides a distinction between establishing and amending restrictions. The title to Article 780 has been changed to include "amendment" rather than only "termination." The text of the article has also been changed, to explicitly allow amendments increasing restrictions. Finally, and perhaps most significantly, article 783—once the voice of a highly conservative policy regarding land controls—now defers interpretation of building restrictions in certain contexts to an act that espouses a liberal construction of restrictions. Furthermore, the contexts in which 783 defers interpretation are those in which disputes of this nature are most likely to arise, planned communities and condominiums.

Under the new law, the LHAA would have applied to the Brier Lake case because it was a planned community whose "declarations have been duly executed and filed for registry."⁶⁴ The amendments, which were approved by a majority of the owners of the lots in Brier Lake Estates as provided under the subdivision's community documents,⁶⁵ would have been valid under LHAA.⁶⁶ The defendant purchased his land one year after the amendments were added. As a result, the trial and appellate court decisions would likely have been upheld, costing the defendant \$18,331.45. This result seems just as the defendant in *Brier Lake* is not a sympathetic one. He bought his home after the amendments were adopted and failed to comply, not only with the amended restrictions, but even with the original building restrictions.

59. *Id.* at 1200.

60. *Id.*

61. *Id.*

62. The title of La. Civ. Code art. 780 prior to revision by Act 309 read: Termination according to title; agreement of owners.

63. *Mackey*, 705 So. 2d at 1199.

64. La. R.S. 9:1141.3(A) (Supp. 2000).

65. *Brier Lake, Inc. v. Jones*, 710 So. 2d 1054 (La. 1998).

66. La. R.S. 9:1141.6(A) (Supp. 2000) provides in relevant part: "Building restrictions affecting association property, including lots and common areas, or those imposing an affirmative duty may be established, amended or terminated in accordance with the terms of the applicable community document."

A more sympathetic case is set out in the above example of the homeowner who purchases a house with a large backyard with the intention of later constructing a pool. The extra large yard cost him an additional \$5,000 on his purchase price. Two years after his purchase, a highly publicized drowning of a child in a backyard swimming pool causes a public outcry over the safety of swimming pools. A vocal group of homeowners in the subdivision begins a movement to ban the new construction of pools and promotes an amendment to the subdivision's building restrictions to that effect. In a narrow vote, 101 of the 200 homeowners vote in favor of the amendment. If his subdivision is not a "planned community,"⁶⁷ Articles 776, 780 and 783 apply to determine the validity of amended building restriction. Assuming that everyone voting owns an equal share of land and that the restrictions have been in effect for at least fifteen years, the amendment would be binding on our would-be pool owner. Despite his expectations when he purchased his land, he would be prohibited from building a pool.

If the subdivision was a planned community and the community documents were silent regarding the amendment of restrictions, 101 out of 200 owners (again assuming all owned an equal share of land) would not be sufficient to amend the restrictions.⁶⁸ Instead, the amendment would require 134 votes. On the other hand, if the community documents did address the issue of amendment and set the required number of votes at more than half, 101 would be sufficient.⁶⁹

In either of the scenarios where a 101-vote would be sufficient to amend the restrictions, a bare majority is able to determine the use to which a property owner can put his land to use. Given the political dynamics of popular, media-driven issues such as the one in the example, a majority plus one vote would often be fairly easy for even a vocal minority to stir up. The changes that Act 309 provides places the real rights of homeowners and the free use of property in grave peril, subject to the political whims of a relatively small number of fellow property owners. This flies in the face of the long-recognized public policy, announced even in the amended Article 783,⁷⁰ in favor of the unrestricted use of property.⁷¹

67. "[P]lanned community' means a real estate development, used primarily for residential purposes, in which the owners of separately owned lots are mandatory members of an association by virtue of such ownership." La. R.S. 9:1141.2 (7) (Supp. 2000).

68. La. R.S. 9:1141.6(B)(2) (Supp. 2000) states in pertinent part: "Existing building restrictions may be made more onerous or increased by agreement of two-thirds of the lot owners."

69. See La. R.S. 9:1141.6(A) (Supp. 2000).

70. La. Civ. Code art. 783 states: "Doubt as to the existence, validity, or extent of building restrictions is resolved in favor of the unrestricted use of the movable." Comment (b) to the article states: "According to well-settled Louisiana jurisprudence, documents establishing building restrictions are subject to strict interpretation. Any doubt as to the existence, validity or extent of building restrictions must be resolved, therefore, in favor of the unrestricted use of the property."

71. See also La. Civ. Code art. 730: "Doubt as the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate." Comment (b) to the article states: "The rule incorporates into Louisiana law the civilian principle that any doubt as to the free use of immovable property must be resolved *in favorem libertatis*." La. Civ. Code art. 777 provides that building restrictions are "regulated by application of the rules governing predial servitudes to the extent that their application is compatible with the nature of building restrictions."

Although Act 309 authorizes such amendments, it does so at the expense of this basic civilian property law principal.

IV. CONSENT AND COMMUNITY CONTROL

In general, other states have long recognized what appears to be the policy behind Act 309, i.e., granting control over a community to the majority of its inhabitants. "Just as courts have generally accepted the right of property owners to impose protective covenants, they have not often questioned contracts or covenants which permitted the amendment or nullification of the restrictions imposed."⁷² With only a few exceptions,⁷³ the common law states have recognized an ability to modify a subdivision's original restrictions by whatever method was set forth in those restrictions when originally created, including granting the right to make modifications to the subdivider, a homeowners' association or a certain percentage of homeowners.⁷⁴ As succinctly stated by the First District Appellate Court of Illinois: "A restrictive covenant which has been modified, altered or amended will be enforced if it is clear, unambiguous and reasonable."⁷⁵

The rationale seems to be one of notice and consent. In *McMillan v. Iserman*,⁷⁶ the Court of Appeals of Michigan said that amendments to increase existing building restrictions are not *per se* invalid:

We are not prepared to say that a clause permitting original deed restrictions which are more restrictive to be amended must be limited to allow only for the imposition of restrictions which are less restrictive than those originally imposed. As the plaintiffs point out, defendants Iserman

72. B.C. Ricketts, Annotation, *Validity, Construction, and Effect of Contractual Provision Regarding Future Revocation Or Modification Of Covenant Restricting Use Of Real Property*, 4 A.L.R.3d 570 (1996).

73. See *Van Deusen v. Ruth*, 125 S.W.2d 1 (Mo. 1938) (court construed a clause in an original declaration of restrictive covenants allowing for their modification as only allowing existing restrictions to be terminated or made less harsh). Cf. *Lakeland Property Owners Assoc. v. Larson*, 459 N.E.2d 1164 (Ill. App. 2d 1984) (court recognized that original declaration of restrictions allows their amendment, but invalidated the addition of assessments for dues. It characterized the addition as a new restriction, rather than only a modification of an existing one and thus not allowed without unanimous consent.)

74. See *Zito v. Gerken*, 587 N.E.2d 1048 (Ill. App. 1992) (amendments to restrictive covenants adopted by homeowners association valid and enforceable, even though they increased the restrictions on the affected property); *Eagle Mortgage Corp. v. Johnson*, 427 S.W.2d 550 (Ark. 1968) (provision in bill of assurance providing for its modification by agreement of the more than 50% of the owners of the land is valid); *Johnson v. Three Bays Properties Inc.*, 159 So. 2d 924 (Fla. Dist. Ct. App. 3d 1964) (upheld provision in declaration of restrictive covenant that reserved to the subdivider the power to amend those restrictions, even if amendment increases the restrictions); *Ardmore Park Subdivision Assoc. Inc. v. Simon*, 323 N.W.2d 591 (Mich. Ct. App. 1982) (court holds that where a deed restriction properly allows a percentage of owners to modify restrictions, other owners are bound by those changes in the same manner as those contained in the original restrictions); *Harrison v. Air Park Estates Zoning Comm.*, 533 S.W.2d 108 (Tex. Civ. App. 5th 1976) (court upholds amendment increasing a building restriction made in accordance with the mechanism for amendment described in the original restriction).

75. *Zito v. Gerken*, 587 N.E.2d at 1050.

76. 327 N.W.2d 559 (Mich. Ct. App. 1982).

were on notice that the restrictions originally imposed and applicable to their land when they bought it were not absolute and could be amended at a later time.⁷⁷

The court ultimately held for Iserman, but on an estoppel theory. The court reasoned that although the amended restriction prohibiting the use of property for state mental health facilities was valid, Iserman's facility could remain because he had begun construction on the facility before the amendment was adopted and had no notice of the proposed amendment.⁷⁸

Notice was also a crucial part of the Arkansas Supreme Court's decision in *Eagle Mortgage v. Johnson*.⁷⁹ There, the court held that a modification to a subdivision's community documents made in accordance with the provisions of the original documents was valid because the clause allowing modification was "a part of the [community documents] when the lots were purchased, and therefore, all lot purchasers were on notice that the restrictions could be modified, or canceled, in whole or in part."⁸⁰

There is perhaps a more modern rationale for a legal regime allowing homeowners to exercise control over their collective environments, the rise of the "planned" or "common interest" communities.⁸¹ This trend in residential development was apparently the primary force behind Act 309. Although the act will have an effect on all properties burdened with building restrictions, the majority of the new provisions created by the legislation deal exclusively with those organized as a "planned community,"⁸² which will be governed by the LHAA. In fact, the legislation was in response to caselaw involving a planned community, as evidenced by the fact that it expressly overrules *Brier Lake*. The act's official recognition of the ability to vest in homeowner associations the right to modify and even establish restrictions is consistent with a national trend to empower property owners.⁸³ This is viewed as a necessary power for the viability of these sort of developments:

The power to amend the governing documents in a common interest community prevents a small number of holdouts from blocking changes regarded by the majority to be necessary to adapt to changing

77. *Id.* at 562.

78. *Id.*

79. 427 S.W.2d 550 (Ark. 1968).

80. *Id.* at 554.

81. The primary feature of this sort of development is a homeowners' association. The definition of a planned community in Act 309 is consistent with the generally accepted view of planned or common interest communities: "A real estate development, used primarily for residential purposes, in which the owners of separately owned lots are mandatory members of an association by virtue of such ownership."

82. The LHAA, La. R.S. 9:1141.1-9 (1999).

83. "Today there appears to be a tendency to vest the powers of revocation and amendment in the owners of properties which were subject to original protective covenants and restrictions. . . ." 4 A.L.R.3d 570 (1966 & 1998 Supp.).

circumstances and thereby permit the community to retain its vitality over time.⁸⁴

A development's original declaration—which gives rise to the community itself, its homeowners association and its restrictions—is likened to the association's constitution, “laying out the rights and responsibilities of owners within the association. Because the declaration is always recorded, all purchasers have at least constructive notice of its contents.”⁸⁵ So while retaining the notice rationale, a new element is added to strengthen the need for legal recognition of the ability to amend building restrictions, that of flexibility with an eye toward a community's long-term viability.

V. LIMITATIONS ON THE POWER TO AMEND

The power to amend is not unrestrained, despite its apparent favor in the eyes of the law. In those jurisdictions that have recognized this authority—even in the context of common interest communities—limits have also been consistently recognized. The touchstone appears to be an element of reasonableness. The court in *Lakeland Property Owners Assoc. v. Larson* held that: “[R]estrictive covenants, which affect land, while not favored at law, will be enforced according to their plain and unambiguous language where reasonable, clear and definite.”⁸⁶ In *Lakeland*, the court struck down as unreasonable an amendment to the community restrictions which levied dues assessments against property owners. The court found it was unreasonable because it was unrelated to any of the other provisions of the original restrictions and thus the assessment was not an amendment to the existing restrictions, but an entirely new restriction.⁸⁷ A similar view of reasonableness was expressed by the Texas Court of Civil Appeals while upholding an amendment to restrictive covenants in *Harrison v. Air Park Estates Zoning Committee*: “Because this modification enhanced, rather than abrogated, the original plan specified in the contracts between the developer and the various lot owners, we hold it to be reasonable.”⁸⁸ In both cases, the reasonableness

84. Restatement (Third) of Property (Servitudes) §6.10 (Tentative draft No.7, 1998).

85. Carl B. Kress, *Beyond Narhstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. Rev. 837, 840 (1995).

86. 459 N.E.2d 1164, 1169 (Ill. App. Ct. 2d 1984). Cf. *Zito v. Gerken*, 587 N.E. 2d 1048, 1050 (Ill. App. Ct. 1992) (“A restrictive covenant which has been modified will be enforced if it is clear, unambiguous and reasonable”). A similar result would also likely be reached under La. Civil Code art. 778 which allows building restrictions establishing affirmative duties (such as an obligation to pay dues) only when those duties are “reasonable and necessary for the maintenance of the general plan.”

87. *Lakeland Property Owners v. Larson*, 459 N.E.2d 1164, 1170 (Ill. App. Ct. 2d 1984):

Just as courts will enforce changes of restrictions made pursuant to a provisions so permitting because the grantees take title of the property with notice of the possibility that the original restrictions may be changed . . . they should not enforce changes where a grantee takes title without proper notice that a majority of the lot owners may impose an assessment upon his property at some future time.

88. 533 S.W.2d 108, 110 (1976).

appears to be the reasonable expectations of the property owner when making his purchase and agreeing to the existing restrictions.

The Louisiana Supreme Court has applied a reasonableness standard in evaluating building restrictions, although it is unclear what the standard entails. In *Oakbrook Civic Association v. Sonnier*,⁸⁹ the court considered the validity of a building restriction requiring a landowner to submit architectural plans to a neighborhood architectural oversight committee for approval. It held that such a restriction "is enforceable, provided that the authority is exercised reasonably and in good faith."⁹⁰ The court then remanded the case for a determination of whether the committee exercised its discretion reasonably, without guidance as to what such a test would look like. Commenting about *Oakbrook*, one scholar noted:

In the future, reasonable exercise of authority will be the question in any case. . . . Little guidance is provided in the statutes on that question. However, since the source of the rule is the policy of keeping property in commerce, it would seem that the focus in a given case would be the extent to which a particular decision or rule of the committee intrudes on that policy. Also, since court enforcement of committee action that denies due process or equal protection is prohibited, it should not enforce committee decisions that have such an effect.⁹¹

While this policy of commercial fitness is adequate to evaluate the reasonableness of a building restriction in the abstract, it is too narrow an analysis in the amendment cases. The courts in the amendment cases do not ask if the restriction is *per se* invalid; instead, they are considering the broader question of whether it is reasonable to impose this restriction on these landowners *ex post facto*. A valid (and therefore necessarily reasonable) restriction might nonetheless be unreasonable to impose later as an amendment. *Lakeland* is an example of this type of restriction; dues assessments are generally considered to be a reasonable form of building restriction, but the court there found such an assessment unreasonable to impose as an amendment.⁹² In light of this, the *Lakeland* and *Harrison* "expectations" strain of the reasonableness analysis appears more relevant in the amendment cases.

Under this reasonableness standard, a court facing the situation posed in our pool example (assuming for the time being that the subdivision was not a planned community covered under the LHAA) might ask whether the amendment was sufficiently related to the original scheme of restrictions to give the purchaser notice that pools might later be outlawed. Depending on the whim of the court, it could find either the pool restriction amounted to the creation of a new restriction and thus required the unanimous consent of all affected homeowners, or was an amendment needing only the 101 votes. If the LHAA did control, the court would

89. 481 So. 2d 1008 (La. 1986).

90. *Id.* at 1012.

91. Lee Hargrave, *Property, Developments in the Law 1986-1987*, 48 La. L. Rev. 457, 473.

92. *Lakeland Property Owners v. Larson*, 459 N.E.2d 1164 (Ill. App. Ct. 2d 1984).

look at the subdivision's community documents to determine what was required for the amendment or creation of restrictions and would then apply the reasonableness test if necessary to ask the creation or amendment question. In either case, the problem with this approach is the uncertainty it creates for home buyers. How is a purchaser supposed to guess what changes the courts will call amendments and what changes the courts will call new creations? It is likely even the courts themselves would not agree on the answer to this question. Under the pre-Act 309 revision of the Louisiana Civil Code, a home owner knew for certain that the enjoyment of his property could not be infringed after purchase by more burdensome restrictions. This certainty no longer exists.

The freedom to liberally amend building restrictions, as provided under Act 309, necessarily forces the courts to decide what amounts to "changing the deal" on the purchaser. Louisiana courts will now have to face this task. Indeed, it is no simple chore: "What may be a cataclysmic development to one unit owner might be the normal working out of a pre-existing scheme for another."⁹³ As a guide, the courts may choose to look to caselaw involving condominium associations, which are themselves a type of common interest community and closely analogous to the planned community neighborhood developments.⁹⁴ The Ohio Court of Appeals has laid out a four-part reasonableness test to determine the validity of amendments to condominium restrictions: 1) Is the rule arbitrary or capricious, i.e., is there some rational relationship between the decision or rule and the safety and enjoyment of the community?; 2) Is the rule discriminatory?; 3) Was the rule made in good faith for the common welfare of the community?; and 4) What hardships the rule is likely to cause?⁹⁵ It is no coincidence that these considerations are reminiscent of language from cases involving the U.S. Constitution; a common interest community's declaration of restrictions "may be likened to the association's constitution, laying out the rights and responsibilities of owners within the association."⁹⁶ As a result, the court's approach in determining the validity of amendments to those declarations can be expected to have far reaching consequences on the property rights of the affected property owners.

Another area of amendment analysis with constitutional overtones is the fundamental expectations analysis, which attempts to define certain fundamental expectations of purchasers that cannot later be infringed upon by amendment. This

93. Many of the [amendment limitation] cases arise in the condominium context, and stress the special nature of the condominium relationship and special statutes dealing with condominiums. It would not be difficult, however, to make similar arguments justifying association power in dealing with the many non-condominium forms of common interest ownership that have evolved in recent years. These cases simply have not yet reached the appellate courts. When they do, it is likely that the courts will apply an identical analysis.

Patrick A. Randolph, *Changing The Rules: Should Courts Limit The Power Of Common Interest Communities To Alter Unit Owners' Privileges In The Face Of Vested Expectations?*, 30 Santa Clara L. Rev. 1081, 1097 (1998).

94. *Id.* at 1083.

95. *Worthinglen Condominium Unit Owners' Association v. Brown*, 566 N.E.2d 1275, 1277-78 (Ohio Ct. App. 1989).

96. *Kress, supra* note 85, at 840.

is a strain of the reasonableness test; we are asking whether it is reasonable to deprive a buyer of a basic expectation of home ownership. In an article discussing such expectations, one scholar⁹⁷ observes:

Although it is true that no exact test can be formulated, there are clearly expectations that unit owners have when they invest The fact that the drafters of the [community documents] did not set forth a "unit owner's bill of rights" listing all the expectations to which unit owners were entitled, may be a reflection of the drafters' assumption that such expectations need not be stated, rather than a statement that all issues are open to change.⁹⁸

The question would be whether the expectation of a certain right not prohibited under the restrictions existing at the time of the purchase was so fundamental that it would not be reasonable to later take away the right. Examples are age restrictions involving children, pet restrictions and leasing restrictions. It has been suggested that courts should apply a stricter level of scrutiny when reviewing amendments that interfere with these fundamental expectations:

[C]ourts should preserve the freedoms traditionally associated with the home, to the extent consistent with maintaining the essential nature of the community, by carefully considering the potential spillover effects of the subject of a restriction. Restrictions that target behavior that does not create substantial negative spillover effects on the community should be suspect unless adopted with the unanimous consent of all owners of a development.⁹⁹

Reflecting this policy is §6.10 (1)(b)(2) of the tentative draft of the Restatement (Third) of Property which states: "Unless expressly authorized by the declaration, the declaration may not be amended to prohibit or materially restrict the permitted uses of individually owned property except upon unanimous approval."¹⁰⁰

It is the fundamental expectation cases that dramatize the high level of control that homeowners are yielding to a majority of their neighbors under these regimes.

97. Prof. Randolph is a professor of law at University of Missouri at Kansas City and has served as the Executive Director of the Joint Editorial Board on Uniform Real Property Acts.

98. Randolph, *supra* note 93, at 1085.

99. Kress, *supra* note 85, at 843.

100. Restatement (Third) of Property (Servitudes) §6.10 (Tentative draft No. 7, 1998) (Comments: Property owners in common interest communities are protected against amendments that would unfairly change the allocation of burdens in the community or change the character of the community. With the advent of common interest communities that involved higher-density development and greater financial interdependence, the extent and nature of the regulations imposed on property owners has increased. However, there is a need for protection of owners against unfair changes the majority may attempt to impose. . . . Some interests are so important that they should be protected by a unanimity requirement unless the declaration provides otherwise).

While few would quibble that a homeowner association is acting within its powers and interests in regulating fence height, mailbox design or even house color scheme, the possible outer limits of this authority should give pause. Homeowners associations have attempted to regulate what breed of dogs residents may own,¹⁰¹ the resident's ability to lease his home¹⁰² and even whether children may live in the residence.¹⁰³ Did homeowners intend to give control over these private aspects of their lives to their neighbors simply by consenting to an amendment provision when purchasing their house or condominium? It seems unlikely.

In addition to the reasonableness tests, three other approaches courts have used to protect homeowners from overreaching associations are the "business judgment test," "public agency model" and the "freedom of contract argument."¹⁰⁴ The business judgment test is similar to the standard used to evaluate commercial enterprise action; the act must be "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes."¹⁰⁵ Here, the court gives deference to the decisions of a homeowner association and will not review a decision unless a resident challenging the action demonstrates a breach of the association's duty to act for the purposes of the community.¹⁰⁶ The public agency model would apply the standards of review used in evaluating the acts of public bodies under procedural and substantive due process analysis to the homeowner association decision making process.¹⁰⁷ Finally, the freedom of contract approach essentially eliminates regulation of association decisions by deferring completely to the decisions made in compliance with the subdivision's community documents.¹⁰⁸ This lack of judicial oversight is undesirable: "Where special hardships arise, however, an absolute enforcement approach will lead to consequences that may deter investment in common interest associations."¹⁰⁹

VI. CONCLUSION

Whatever model the Louisiana courts eventually decide to adopt, consistency in the approach is necessary to ensure organizational stability and to promote effective decision-making by prospective purchasers.¹¹⁰ Consistency in judicial review, however, cannot make up for the lack of certainty that this approach to building restriction amendment creates. By throwing the question of enforcement to the courts—whether we phrase the analysis as reasonableness, fundamental

101. Jennifer Gin Lee, *Residents Closing Ranks Against Feared Canines*, *New Orleans Times-Picayune*, Oct. 31, 1999, at 1.

102. *Breene v. Plaza Tower Ass'n*, 310 N.W.2d 730, 734 (N.D. 1981).

103. *Hill v. Fontaine Condominium Ass'n*, 334 S.E. 2d 690, 691 (Ga. 1985).

104. Randolph, *supra* note 93, at 1121.

105. Kress, *supra* note 85, at 865.

106. *Id.*

107. Randolph, *supra* note 93, at 1124.

108. *Id.* at 1125.

109. *Id.*

110. Kress, *supra* note 85, at 842. ("Excessive inconsistency is detrimental both to organizational stability and effective decision making by prospective purchasers.")

expectations, business judgment or any other test—we necessarily abandon an element of certainty that was present under the previous approach. Under the former regime, a buyer knew that the use of his property could not be abridged without his consent. Under Act 309, the best he can hope for is that the use of his property cannot be abridged without the consent of some percentage of his neighbors and, perhaps, a judge.

To minimize the problems created under Act 309, the attorneys who draft the community documents that will control the future of these developments must be careful to spell out as clearly as possible what rights the buyer may be giving up by agreeing to the regime the contract creates. This would require something more than a vague phrase that the restrictions may be amended; the limits of the amendment power should be defined in the contract. Indeed, doing so will be a monstrous (and perhaps even impossible) task, but given the current state of the law, it is the most effective way to protect the buyer's interests and minimize the chance of future lawsuits.

Although the ability to respond to changes in the community quickly and efficiently is desirable, it must be asked at what cost this efficiency is being gained. The cost of uncertainty is great. Litigation will increase as residents and homeowners are forced to hammer out the limits of their community documents in the courts. Cautious home buyers, faced with the risk of giving up innumerable real rights in their property to their neighbors by living in a planned community, will potentially be reluctant to invest in such communities. Investments made with an eye toward future uses that are foreclosed by amendments will be wasted. Perhaps the greatest cost of this change, however, is the shift of the ability to control real property rights away from the individual owner to whatever size mob the community documents has granted control. By removing the requirement of consent, Act 309 greatly dilutes the rights of individual in his property. The model for the home is no longer the castle and its autonomy, but the communal farm and its vulnerability to the whim of the masses.

James Slaton