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July 10, 2020

OFHA, Inc.
Board of Directors
c/o Ms. Elizabeth Villarreal, President

RE: Race-Based Deed Restrictions (“Racial Restrictions”) in the Oak Forest
Subdivision (“Oak Forest”)

Dear Directors:

Per your request, I have prepared this letter for public dissemination within the Oak Forest subdivision concerning the above matter. This letter is for informational purposes only, and it is not intended and should not be construed to create an attorney-client relationship between the author and any third-party recipient hereof.

Subject to the foregoing, I have examined the original recorded deed restrictions for each of the eighteen (18) sections of Oak Forest, the by-laws and other dedicatory instruments of OFHA, and the governing provisions of the Texas Property Code and other applicable law, in order to identify the offending Racial Restrictions and determine the scope of authority, if any, of OFHA to act in this situation.

I. HISTORY AND SCOPE OF THE PROBLEM

Oak Forest is comprised of eighteen (18) Sections which were successively developed between 1946 and 1955, each section having a wholly separate set of deed restrictions that were drafted and recorded at the time of each section’s development. Of these, the deed restrictions for Sections 1 through 7, which were executed between November 1946 and April 1949, contain substantially identical versions of the following provision, varying only as to formatting:

RACIAL RESTRICTIONS

**None of the lots shown on the said plat shall be conveyed, leased,
given to, or placed in the care of, and no building erected thereon shall**

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be used, owned or occupied by any person other than of the Caucasian Race. This prohibition, however, is not intended to include the occupancy or use by persons other than the Caucasian Race while employed as servants on the premises.

None of the deed restrictions for Sections 8 through 18, which were successively executed between April 1950 and April 1955 contain either the above Race Restrictions or any other language of a discriminatory nature.

Though the Racial Restrictions in question have remained in place on the documents for nearly three quarters of a century, they have been effectively unenforceable since 1948, when the United States Supreme Court decided Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). In *Shelley*, the Supreme Court held that “the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment” and that, therefore, the enforcement of race-based restrictions regarding real property interests by the State of Missouri was unconstitutional as it denied the petitioners equal protection of the law.

Moreover, effective January 1, 1984, the State of Texas enacted Tex. Prop. Code § 5.026, which reads as follows:

- (a) If a restriction that affects real property, or a provision in a deed that conveys real property or an interest in real property, whether express or incorporated by reference, prohibits the use by or the sale, lease, or transfer to a person because of race, color, religion, or national origin, the provision or restriction is void.
- (b) A court shall dismiss a suit or part of a suit to enforce a provision that is void under this section.

See Tex. Prop. Code Ann. § 5.026 (West). As such the Racial Restrictions are automatically both void and unenforceable as a matter of law, without further action by OFHA or anyone else.

HISTORY AND SCOPE OF OFHA’S AUTHORITY

The powers and authority of a property owner’s association (POA) in Texas derives from a combination of its dedicatory instruments and Texas law. Under the Texas Property Code, a POA is a designated representative of the owners of property in a subdivision, whether incorporated or otherwise, and includes, but is not limited to, an organization described as any of the following:

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- Homeowners association
- Community association
- Civic club

See, e.g., Tex. Prop. Code §§ 202.002(2), 204.004, and 209.002(7) (West). Which chapters of the Texas Property Code apply to a POA, specifically which statutory procedures are available to the POA to modify existing deed restrictions, including removing them, depends entirely upon whether the POA is created pursuant to provisions in the deed restrictions themselves and whether membership in the POA is mandatory or not.

However, before reaching the question of the proper statutory procedure, three conditions must be met in order to amend an existing restrictive covenant:

- 1) The instrument creating the original restrictions must establish both the right to amend such restrictions and the method of amendment;
- 2) The right to amend implies only those changes contemplating a correction, improvement or reformation of the agreement rather than a complete destruction of it; and
- 3) The amendment to the restrictions must not be illegal or against public policy.

See Hanchett v. East Sunnyside Civic League, 696 S.W.2d 613, 615 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (citations omitted). For present purposes, the latter two conditions may be assumed to be met, leaving only the first, i.e., does the original instrument establish a right to amend and a method of amendment.

In this instance, the deed restrictions for Sections 1 – 7 do in fact establish a right (on the part of the owners) to amend and a method. In each of the applicable instruments, they provide that any restriction or covenant may be released by a duly recorded agreement executed and acknowledged by the owners of lots comprising fifty percent (50%) of the front footage of the lots in the applicable section. Note: This means 50% of the lot front footage, not 50% of the owners. However, the restrictions set forth specific points in time at which the agreements must be recorded in relation to their effective date(s), as follows:

- Any restrictions or covenants may be released by such agreements in the 25th year after the date of the original deed restrictions, and in any 15th year thereafter;

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but only if

- The agreement is recorded at least two (2) years prior to the effective date, i.e., by the 23rd year of the initial 25-year term, or by the 13th year of any successive 15-year term.

What this translates into is shown in the following chart:

<u>Section:</u>	<u>Original Date:</u>	<u>Next Available Effective Date</u>	<u>Next Filing Deadline:</u>
1	11/1946	11/2031	11/2029
2	10/1947	10/2032	10/2030
3	7/1948	7/2033	7/2031
4	9/1948	9/2033	9/2031
5	11/1948	11/2033	11/2031
6	2/1949	2/2034	2/2032
7	4/1949	4/2034	4/2032

In every case, the last previous, available effective date was between 2016 and 2019, and the agreements would have had to have been on file between 2014 and 2017 to take advantage of those dates. Moreover, this method requires action by the owners themselves.

Texas statute does provide alternative methods that do not rely on the methodology set out in the deed restrictions. The Texas Property Code provides three (3) statutory procedures for the modification of existing deed restrictions, one of which requires direct action by property owners themselves (Ch. 201), one of which authorizes action by a POA whose membership is mandatory (Ch. 209), and the last which authorizes action by a POA in which membership is non-mandatory, but which POA was created either (a) by the deed restrictions themselves; or (b) through a specific procedure outlined in the statute (Ch. 204).

OFHA was not created, even in its prior, unincorporated form as the Oak Forest Civic Club (the “Club”), by the deed restrictions, which make no reference to the creation or formation of a POA. Instead, the Club was organized at some undefined point by the owners themselves and was incorporated in its present form as OFHA in 1989. OFHA’s Articles of Incorporation and its By-Laws have two highly significant provisions:

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1. **Membership is Discretionary** - they make membership non-mandatory by describing it as “available” upon payment of specified dues, rather than automatic by virtue of property ownership (see By-Laws, at Article IV); and
2. **OFHA is Not Expressly Empowered to Modify Deed Restrictions** – each document describes OFHA’s purpose identically, as being “to meet, organize and *bring about the enforcement of deed restrictions* and promote programs which shall help make the Oak Forest Subdivision a better place in which to live” (see Articles of Incorporation, at Article IV, and By-Laws, at Article II) (emphasis added)

Based upon the foregoing, OFHA does not have the authority to amend or modify the deed restrictions to remove the Racial Restrictions, and any such effort would need to be undertaken independently by the owners themselves in accordance with the procedures set forth in Chapter 201 of the Texas Property Code. Moreover, the amendment process for each section would need to be pursued separately by the owners of lots within that section. Obviously, this is a complex, lengthy process, which can be expected to be extremely costly, and owners are strongly encouraged to obtain the assistance of counsel beforehand if they wish to pursue this course of action.

Sincerely Yours,

John P. Barnes

John P. Barnes,
Managing Member

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