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**GUIDELINES**  
**FOR PROSPECTIVE**  
**MONTGOMERY COUNTY**  
**PROPERTY OWNERS**  
  
**(QUESTIONS TO ASK**  
**AND ITEMS TO CHECK)**

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# **TABLE OF CONTENTS**

<b>INTRODUCTION</b>	<b>Page 3</b>
<b>GENERAL</b>	<b>Page 4</b>
<b>COVENANTS</b>	<b>Page 7</b>
<b>ROADS</b>	<b>Page 9</b>
<b>PARKS AND COMMONS</b>	<b>Page 10</b>
<b>LAKES</b>	<b>Page 12</b>
<b>OTHER AMENITIES</b>	<b>Page 13</b>
<b>ROLL BACK TAXES</b>	<b>Page 14</b>
<b>DEFINITIONS</b>	<b>Page 14</b>
<b>RESOURCES</b>	<b>Page 16</b>

## INTRODUCTION

Montgomery County is one of the fastest growing counties in the state and the 32<sup>nd</sup> fastest growing county in the U.S. The population has increased by about 61% between 1990 and 2000 and is currently increasing at around 8%/year. Its rolling hills and heavily wooded developments and the proximity to National Forests, Lake Conroe and the amenities and jobs in Houston, make it one of the prettiest and most desirable locations in the state. These factors are attracting many new affluent residents and driving an accelerated pace of residential and commercial construction. While this pace of development is adding attractive housing and amenities for residents, the boomtown atmosphere can also create some problems for home buyers if they are not aware of potential pitfalls related to purchasing property.

These guidelines are intended to help the prospective property owners determine the risks associated with the purchase of property within platted subdivisions. The guidelines are based on the collective experiences of current property owners in several developments in Montgomery County, Texas. While the questions are valid anywhere, some rules may vary from county to county within Texas. These comments should not be interpreted as a condemnation of all developers or sales agents as there are many qualified and ethical ones. However, the guidelines may help identify those developers that are unable or unwilling to deliver what they promise.

**While we have tried to identify many of the questions to ask and the areas to check, there is no simple formula to help you decide how much or what risks to accept with a given purchase. That decision will have to be yours and yours alone.**

There are laws in Texas to protect the consumer; however, our general experience highlights the practical rule “*caveat emptor*” (let the buyer beware) as the legal remedies available to buyers tend to involve civil vs. criminal action and are time consuming and costly. Time spent checking these guideline issues before purchase (and the few hundred dollars it costs to hire a good real estate attorney) can save you thousands later trying to remedy a deal gone bad. Remember, your attorney can only comment on the text of the documents you supply. You need to go armed with your concerns and observations and you need to know what the contract should contain before you meet with your attorney.

## GENERAL

***Financial Capabilities of the Developer:*** The four main reasons developments fail or at least fail to deliver what is promised at the time of purchase:

1. Inexperience of the developer;
2. Lack of sufficient capital to carry the development through the early stages;
3. Lack of ethics of the sales staff, the developer or both;
4. Changes in the housing market.

***Housing Outlook for the Area:*** What are the chances that the local housing market will support a successful venture? While forecasts are always very subjective, the outlook is still worth considering. Information on the local housing outlook may often be obtained through HUD at [huduser.org](http://huduser.org), through [texas.construction.com](http://texas.construction.com), or through the housing department of the local newspapers.

**Before you spend much time on the items listed below, it would be prudent to spend some time upfront researching the outlook for the local housing markets and the background and resources of the developer selling the property you are considering.**

***Past History of the Developer:*** Ideally one should be able to determine whether a developer has had a poor performance record. However, it has been found to be very difficult to obtain performance data on any particular developer for several reasons, including but not limited to:

1. State agencies focus on mediation rather than prevention;
2. Poor developers frequently change their company name after a failed development;
3. Property owners who have been wronged rarely report the problem to the Better Business Bureau as evidenced by the fact that problem developments in the area don't show up in BBB records.
4. Property owners are reluctant to go to the press out of concern for their property values.

Nevertheless it is worth checking your local Better Business Bureau records at [bbbhouston.org](http://bbbhouston.org). There are also services for a fee such as [www.knowx.com](http://www.knowx.com).

***Master Plan For the Development:*** Is there a master plan for the development that has been prepared by a registered engineer from a reputable firm? Beware of incomplete or hastily drawn maps which often indicate there was little or no thought or cost involved in the development design. Be prepared to ask questions about the logic of the design. If the salesman can't answer your questions he/she should be prepared to find someone who can.

**Obtain and hold a copy of the master plan and advertising until you are satisfied the development has been completed as promised in your contract and related advertising.**

**Funding:** Check the developers resources/funding e.g. how much money does the developer have available up front, after the purchase of the land, to pay for roads and other promised amenities? Is the developer relying too heavily on sales of lots to fund the promised amenities? Does it look like a Ponzi scheme? (See page 15)

**Compatibility with County Transportation Plans:** What are the long term plans for major roads in the area and has the developer planned for this in the way the development is laid out? In some cases, the impact of a major thoroughfare will be positive, but it can also have a negative impact on a quiet neighborhood if the development is poorly planned. For example quiet isolated residential streets can become major thoroughfares as residents in adjoining developments cut through to reach newly constructed highways. A properly designed development will allow for this with dead end cul de sacs and isolated sections with only one entrance.

You can obtain the County transportation plan from the County Engineers Office or your local Council of Governments (Houston-Galveston Area Council near Greenway Plaza for prospective Montgomery County residents).

**Ownership:** Does the developer or development corporation own all of the land in the planned development? Check this at the County Real Property Records. Situations where the development company only owns part of the platted sections should raise a red flag. That may suggest the actual owner is not committed to the development, and/or there are problems with the developer's resources, and/or the current landowners are reluctant to sell or the developer perceives a high risk of failure and is protecting assets in case of bankruptcy. If you discover this situation, you might reasonably inquire about the relationship between the developer and the land owner. Why isn't all of the property owned by the corporation?

**Approval by Commissioners Court:** Is the lot you are interested in shown on a plat approved by the County Commissioner's Court? Does the copy you are shown have the Commissioners signatures and has it been recorded in the County Real Property Records (e.g. is it official)?

**Flooding:** Ask the neighbors if there has been any history of flooding in the area. What is the elevation of the lot relative to the surrounding country side? Are you near any streams

Does the developer have a TNPDES (Texas Pollution Discharge Elimination System) permit from the state? In unincorporated non-urbanized areas, any development clearing over 5 acres or part of a construction project clearing over 5 acres will need this permit and the associated pollution prevention plan. Urbanized areas have more stringent requirements. Failure to obtain this permit may be a signal that the developer is not paying attention to details. It may also signal construction or enforcement problems ahead.

***Mineral Rights & Surface Access for Drilling:*** It is unlikely the mineral rights will be sold with the surface rights, but be sure to ask. In the event that the mineral rights are retained (held) by others, what provisions have been made for special drilling sites? Do the mineral rights holders have general access to the surface including the property you are considering buying?

***Utilities:*** Generally central utilities are arranged by the developer, but it is worth asking which utilities will be provided, whether the deals have been confirmed and who the providers will be. You may want to consult with your attorney as to what should be clearly stated in your sales contract. You may also want to check on the installation costs. Is the cost of bringing the utilities to the edge of all of the lots incorporated in the cost of your lot and consequently handled by the developer or will this be an additional charge shared by all of the lot owners? (This is different from the cost of connecting your house to the central lines which is generally born by the property owner).

***Waste Disposal:*** If the lot sizes in the development are under one acre, you may need to be connected to a central waste treatment facility (The minimum lot size may be higher in some cases and there may be some exceptions to the minimum lot size requirement for lots listed on the Montgomery County tax rolls before December 16, 1986).

If the lots in the development are below the minimum to allow septic or on site treatment facilities, does the developer have a permit to install a central treatment facility? If there is an existing facility, is it permitted to handle the increased load? If there is not a treatment facility yet, what guarantees do you have that there is money available to build one (bonds, protected escrow money etc.)? There have been cases in counties in the Houston area where the developer sold lots that required a central facility, but went bankrupt before the plant was installed. This left the residents with lots they couldn't build on without sharing the major expense of building a central waste treatment plant.

If you are purchasing a house with an existing legal on-site system do you know where all of the lines are? Are they accessible for excavation in case major repairs are necessary? There have been cases in the county where the owner discovered the lines

# COVENANTS OR DEED RESTRICTONS

The “Declaration of Covenants, Conditions and Restrictions” usually referred to as the covenants or deed restrictions serve as your constitution and should be designed to protect your property values and insure that you and the other property owners are treated fairly.

They also spell out your obligations and are legally binding. Regardless of what the sales staff say or whether you think covenants are important to you, **obtain a copy of them well before making a decision.** Take time to review them prior to any decision to purchase. **Remember, by law, these covenants are binding and you will be required to abide by them.** If you are uncomfortable with a provision, you should discuss it with your attorney before signing a contract.

**Listed below are some of the provisions that have presented special problems in some developments or have proven to be especially onerous:**

***Control:*** At what point does the developer relinquish control of the Association to the property owners? Be suspicious of any section that grants the developer control after 75-85% of the lots have been sold. Be especially careful of wording that grants control “as long as the developer has any financial interest in the development”.

***Authority to Change the Covenants:*** Be suspicious of any wording that grants the developer effective unilateral ability to change the covenants. The ability to grant variances, if it exists, should be very restrictive, otherwise you may find that the covenants you end up with are nothing like the ones you agreed to at your purchase.

***Restrictions on Size and Type of Construction:*** Review these carefully and don’t assume anything beyond the wording in the text. If you can’t live with these restrictions this development isn’t for you.

***Assessments:*** What can you afford to pay? How rapidly can the assessment be increased? Regardless of what the salesman tells you, be aware what the covenants say regarding the starting assessments and how rapidly they can be increased.

**Commercial Activity:** Do the covenants restrict commercial activity within the development? Is commercial activity clearly defined? If you work from your home, you should make sure the wording concerning home offices is very clear in this regard.

**Unusual Restrictions:** Are there any unusual restrictions that you can't live with? For example, do the covenants give the developer/POA unreasonable powers relative to dissent? Apparently one developer had a clause that gave the development the right to fine a property owner \$100/day for going public on a disagreement with the development or a builder. Be careful of such clauses.

## ROADS

Roads are likely to be the greatest financial exposure for most developments (unless there will be a central septic system and/or dams and lakes); consequently it is worth spending some time to learn about their construction.

Some of the main issues here relate to whether the roads will remain public or private and whether protections are in place to insure the quality and completion of the road.

Problems occur when inexperienced developers attempt to build the roads themselves to cut costs. Standards for development road construction are included in the County's Rules for Subdivisions that may be accessed on the County web site ([www.co.montgomery.tx.us](http://www.co.montgomery.tx.us)).

### **Some questions to consider when asking about roads include:**

#### ***Public:***

1. Has the developer committed to convey them to the County, and what guarantees do you have that this will happen?
2. Does the County require a road bond in case the developer defaults before he/she is finished? If so, is the agreement in place and what is the rating of the bonding company?
3. What triggers the County accessing the bond money?

You can probably obtain some reasonable road maintenance cost estimates from the County Engineer's Office along with an opinion of how well the development roads have been or are being constructed.

## **PARKS AND COMMONS**

A variety of problems related to common areas have been encountered including:

1. Unusual ownership arrangements;
2. Failure to clear title in a timely fashion;
3. Changes in the advertised land use;
4. Undisclosed obligations for land use by third parties;
5. Failure to deliver parks as advertised.

***Ownership Issues:*** If a development is marketing a master planned community with specific commons and related amenities, it is not unreasonable to expect it to have title to all of the land within the plan area. Yet developments have been encountered where the development company holds title to only the sections that have been platted while most of the land is retained by the developer (as an individual).

There are also cases where the developer, as an individual, has retained ownership of commons within platted sections. Either of these situations should raise an immediate red flag that there may be serious problems with the entire development plan.

***Failure to Clear Title in a Timely Fashion:***

***Commons Shown on Plats:*** What is the plan for transferring title to the property owners association? Are the titles to the commons to be cleared section by section as each is sold out or will the bank hold a lien until the entire development is complete? Is this process specified in your sales contract?

***Commons Not Shown On Plats:*** If the development is in the early stages, the land containing many of the advertised parks and commons may not yet be platted, but these amenities should at least be shown on the master plan. If these amenities are important to you, the developer should be willing to tell you the plans for transfer and include this in your sales contract.

There may also be a class of land such as a nature reserve or large lake that will never be

**Land Use Issues:** Restrictions on the use of commons should be specified on the section plat, the covenants or both. If there are no restrictions designated in writing, what assurance do you have that the property won't be sold off for a different use?

**Park Facilities:** If parks and/or natural areas are included in the advertising, how will any equipment be paid for, what equipment is included, what is the completion schedule? Most importantly, what are your guarantees that these areas will be completed as promised?

If there is to be a natural area, will it be placed in a conservation easement? Which land trust will hold the easement and who will hold the fee title? If the fee title is to be held by an entity other than the property owners association or the County, you may want to ask more questions regarding how the area will be managed. If the staff has trouble answering these questions, that may indicate poor planning or worse.

## **LAKES**

Lakes are generally the second greatest financial exposure of a development. Many new developments in Montgomery County are advertising amenity lakes to improve the desirability of the property and value of the lots. Properly developed, a lake can be an attractive asset to a community. Poorly done, it can be a long term financial drain and a maintenance nightmare.

In either case, it is important to realize that any lake will come with maintenance obligations. You should check to see whether monies to maintain the lake/s have been included in the annual budget and related assessments. If not, this will be an additional cost you should budget for.

Unfortunately, many of the new developers are ignorant of the regulatory requirements related to constructing a lake. This often has led to major delays in construction and in some cases may lead to outright stoppage of the lake construction.

**IF YOU ARE PURCHASING LAKEFRONT PROPERTY ON A PLANNED LAKE you should check the following:**

Water rights and COE permits are not guaranteed, consequently you should know the status of the permit/s to properly evaluate risk of completion. If the permits have been issued, you may also wish to acquire a copy of the permits either from the developer or the agencies, to determine any long term obligations that will fall to the property owners. This information is public information and readily available..

***Design & Construction:*** Have the dam/s and lake/s been designed by a registered engineer and approved by the State dam safety group in Austin? Can the sales staff furnish you a copy of the dam design certified by a registered engineer? What is the experience of the contractor constructing the dam and spillway and who is overseeing the construction of the lake and dam?

Poorly constructed dams can be a maintenance nightmare and require continual expenditures. Are there large areas of the lake that are under 4 feet in depth? Shallow lakes can also create serious maintenance problems due to the likelihood of early development of extensive weed growth. If you have questions you should contact your local NRCS (Natural Resource Conservation Service) or County Extension Service Offices.

## **OTHER AMENITIES**

In some cases, the advertising promises additional amenities such as community centers, swimming pools, equestrian centers, nature trails etc. If these are important to you, you may wish to determine how the developer plans to fund them.

Will these amenities be furnished by the development, at the developer's expense, or will the cost be passed on to the property owners as an additional expense? What guarantees do you have of their completion? Are the amenities written into your contract and bonded to guarantee completion or are they dependent on external factors such as finding an investor willing to develop the facility and charge a user fee?

## **TAXES INCLUDING ROLLBACK TAXES**

In these cases, the developer may owe the difference in the tax rate between exempted and developed land going back several years. There have been cases where property owners had trouble refinancing because rollback taxes were owed by the developer. Therefore, it is wise to insure either the taxes aren't owed or the title policy covers rollback taxes.

## DEFINITIONS

**The following are definitions of some of the terms used in this booklet.**

**Commons:** Those portions of a development that will be owned by the property owners association for the benefit and enjoyment of all of the property owners. These may include lakes, parks, nature reserves, etc.

**Conservation Easement:** A restriction landowners voluntarily place on specified uses of their property to protect natural, productive or cultural features. A conservation easement is recorded as a written legal agreement between the landowner and the "holder" of the easement which may be either a non-profit conservation organization or a government agency" (see Texas Parks & Wildlife, A Guide for Texas Landowners)..

**Easement:** A restriction placed on the land restricting its use. In the general sense it may be for conservation purposes, access, trails, utilities, etc.

**Fee Title:** Refers to the actual ownership of the property and is generally a separate entity from the easement holder. For conservation easements the separation is critical for tax considerations.

**Master Plan:** A map of the entire development as envisioned in its completed form showing the relative location of all of the lots, roads, lakes, common areas, community buildings and other amenities that are the basis for promoting the sale of lots in the development.

**Mineral Rights:** The ownership of the subsurface resources (oil, gas, etc) as opposed to the ownership of the right to develop the surface. Owners of mineral rights cannot be prevented from placing surface facilities on a property regardless of who owns the property unless there is a special arrangement spelled out in an agreement. For example,

**100 Year Flood Plain:** This is the area (generally along a creek or river) that is estimated to have a 1% chance of flooding in any given year. This does not mean that it is predicted to flood only once in a hundred years. In fact the chance that a property in the hundred year flood will flood within the period of any given 30 year mortgage is 26%.

**Ponzi Scheme:** A system where the developer does not have the resources to fund the entire development, but relies on the money from the initial and secondary purchasers to fund the amenities for the first investors. In these situations, the investors who arrive late in the sequence are often left without any of the amenities promised in their section when the developer declares bankruptcy or is charged with fraud.

**Rollback Taxes:** These are taxes that may be charged because the status of the land used for the development has changed. For example, the developer may have had a tax exemption on the land related to either forestry or agricultural activities. At the time the land is platted and approved for development, the County has the right to treat the land under the new classification for several years prior to the official approval of the development, which may result in a tax obligation on the land. The obligation ties to the initial survey that received the exemption and is governed by the difference in the tax rate for the exempted land and the developed land.

## RESOURCES

Answers to Questions About the National Flood Insurance Program, Federal Emergency Management Agency publication FIA-2/November, 1997

Conservation Easements A Guide for Texas Landowners; Texas Parks & Wildlife PWD BK R0400-022 (9/00)

Erosion & Sediment Control for Nonpoint Sources: Best Management Practices for Construction Sites. Houston-Galveston Area Council Community and Environmental Planning Department (713/993-4566).

Flood Plain Maps: For the latest information on the status of revisions to floodplain maps and cautions in their use go to [www.fema.gov](http://www.fema.gov) on the internet.

Guidelines for Operation and Maintenance of Dams in Texas. Texas Water Commission, September, 1990. Check with the Dam Safety Team in your

Natural Resources Conservation Service: Offices located at Commercial Circle, Conroe, TX 77304; Phone: 936-756-4135; [www.offices.usda.gov](http://www.offices.usda.gov).

Ponds – Planning, Design, Construction. USDA Natural Resource Conservation Service, Rev. September, 1997 – May be obtained from your local NRCS office.

Surface Water Rights in Texas. TCEQ publication GI-228 (11/96)

The Impact of Parks and Open Space on Property Values and the Property Tax Base. 2000, John Crompton, National Park & Recreation Association

TCEQ Rules: Chapter 299 Dams and Reservoirs. On the TCEQ website under Rules, Policy and Legislation.

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