

Governing Property Use

Living with Deed Restrictions



Michael and Nancy Palmer purchased a home in an established neighborhood. The home was located in one of the oldest subdivisions in the city. The Palmers contemplated making major structural changes to refurbish the old residence. The contractor, however, thought the proposed modifications would violate a deed restriction requiring 51 percent of the house's exterior to be either brick or stone. The restriction was placed on the subdivision by the original developer.

This was the Palmers' first exposure to deed restrictions (or restrictive covenants as they are sometimes called). The Palmers wondered if the deed restrictions were still enforceable and, if so, who had the power to enforce them. Also the Palmers wondered about having the deed restrictions removed. Here is what they found.

Deed restrictions are an established means of regulating land use. Properly implemented, deed restrictions govern such things as (1) property use and (2) the kind, character and location of buildings or other structures.

The party imposing the restrictions must first own the land; then the restrictions may be placed in subsequent deeds or recorded with a subdivision plat. Recording gives constructive notice to all purchasers, thus binding them to its terms and conditions. Potential purchasers can determine whether property is subject to deed restrictions by researching the chain of title to the property and by examining the subdivision plat.

A title policy, if purchased, also reveals their presence.

Deed restrictions can be confused with conditional fees and determinable fee estates. With each of these, the grantee receives title subject to a condition or limitation. If the specified condition or contingency (as in the case of the limitations) occurs, the grantee loses title to the land. Title can never be lost by breaching a restrictive covenant.

Restrictive Covenants

Deed restrictions may appear in two forms. One is called a personal covenant, the other a real covenant. Personal

and concern" the property. This means the covenant and the property are inseparable once the covenant is recorded. All subsequent transferees will be subject to the covenant whether the restrictions are explicitly referred to in the conveying instrument or not. Consequently, not only are the original grantor and grantee entitled to the benefits and liable for their obligations but so are the successive owners of the property.

Deed restrictions have become a popular tool for developers to preserve and protect the value of land, thereby making the property more attractive to buyers.

Developers employ the restrictive covenants (or subdivision restrictions) to regulate the size and location of structures; quality, cost and design of improvements; setback and yard requirements; architectural styles and other uses of the property. Also the activity of the owners may be regulated. For example, certain commercial enterprises may be prohibited in exclusively residential areas.

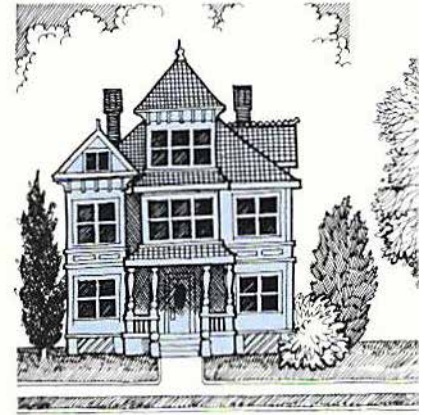
Not all restrictive covenants are enforceable. The grantor has the right to impose restriction and have them enforced as long as they are (1) reasonable in nature, (2) not immoral or illegal and (3) not contrary to public policy. Restrictive covenants forbidding the sale or transfer of property to, or occupancy by, persons of a certain race or religious faith are unenforceable. If the restrictive covenant is ambiguous or not clearly drafted, all doubts will be resolved in favor of the free use of the property and against the enforceability of the restriction.

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covenants are binding only between the present grantor and grantee. After that, subsequent owners are unaffected. Personal covenants have nothing to do with the use or enjoyment of the property. A Texas court decided that a covenant whereby the grantee agreed to purchase gasoline only from the grantor was a personal covenant. No subsequent owner of the property was bound.

Real covenants, on the other hand, directly affect the use and enjoyment of property. Covenants of this nature are said to "run with the land" or "touch

Zoning ordinances and deed restrictions may be imposed on the same geographical area. In case of conflict, the more restrictive of the two prevails.



Examples of cases declaring restrictive covenants unreasonable include instances where covenants prohibit the sale of property to persons over the age of 68 or to families with more than two children.

A case declaring a restrictive covenant illegal involved a city without zoning authority. The city entered an agreement with a large landowner wherein certain restrictive covenants would be imposed on the land in return for certain favors from the city. The courts declared the covenants illegal because the city was, in essence, attempting to zone when it had no power to do so.

A Houston case serves as a good example of a restrictive covenant contrary to public policy. The City of Houston condemned several tracts in a residential area for a fire station. The tracts were bound by a restrictive covenant prohibiting the erection of any structure other than residential dwellings. The courts held the covenant unenforceable in this instance because it violated public policy.

It is difficult to generalize on the effective longevity of covenants running with the land. Each can be different. Some deed restrictions state the length of their effectiveness. Others give the grantor the authority to terminate or amend the restrictions at some predetermined time or at certain intervals of time.

Restrictive covenants imposed on subdivisions generally contain provisions that allow a vote by certain percentage of lot owners to change, extend or remove the restriction. Changes, extensions or removals must apply equally to all owners affected by the initial restriction. If changes are desired, but no specific procedures for implementation are stipulated, a unanimous vote of the lot owners normally is required.

Because procedures for changing, extending or removing deed restrictions had been omitted from so many subdivisions within the state, Texas legislators began passing statutes in 1987 to alleviate the problem. Chapters 201, 204, 205, 210, 211 and 212 of the Texas Property

Code were amended. The procedure for changing, extending or removing the restrictions depends on the population of the county or city within which the subdivision is located. For more information, see publication 1417 entitled *Creating, Changing, Extending Deed Restriction*.

Overlapping Authority

In many areas, deed restrictions and zoning ordinances are imposed on the same geographical area. In case of conflict, the more restrictive of the two prevails. For instance, a city zoning property as commercial cannot override the subdeveloper's restrictions that make the subdivision exclusively residential.

After investigating the deed restrictions on their property, the Palmers decided to proceed with the renovations. Other homeowners in the development had done so without opposition.

After the work was completed, several owners within the subdivision filed a lawsuit against the Palmers for violating the restrictive covenant.

Legal Defenses

The Palmers sought legal counsel. Their attorney divided the possible defenses into two groups. The first group included (1) a change in character of the neighborhood, (2) abandonment, (3) acquiescence and (4) waiver. The second group included (1) estoppel, (2) laches, (3) statutes of limitation and (4) ambiguity.

The defenses in the first group related to the magnitude of the prior violations within the subdivision. The four defenses in this group are closely intertwined and at times practically indistinguishable. The attorney warned that three or four prior infractions of the restrictions were probably insufficient to make any of these defenses viable.

The attorney first addressed the defense concerning the change in the character of the restricted area. He pointed out that the courts have refused to enforce a restriction where a change

of conditions within the restricted area make it impossible for the affected parties to secure the benefits originally sought by the imposition of the restriction.

The second possible defense is abandonment. The courts refuse to enforce restrictions where violations are so extensive in nature to indicate an intent on the part of the lot owners to abandon the original scheme or plan. It must be shown, however, that the violations were so great that the average person will conclude that the scheme or plan has been abandoned.

The third and fourth defenses, acquiescence and waiver, are practically inseparable from abandonment. The Texas Supreme Court stated, "It (the court) may refuse to enforce it (a restrictive covenant) because of the acquiescence of the lot owners to such substantial violations within the restricted area as to amount to an abandonment of the covenant or a waiver of the right to enforce it." By this statement, acquiescence, abandonment and waiver are practically synonymous.

In another Texas case, the court stated, "Restrictions may be waived, but in order to establish a waiver of a general scheme or plan for the development of a particular area, it must be shown that such a plan has been violated to such an extent as to reasonably lead to the conclusion it in fact had been abandoned . . ."

Consequently, it appears the defenses of change of character, abandonment, acquiescence and waiver are based on the extent of the prior violations. If they have been extensive, and no prior enforcements have been initiated, the courts may refuse to enforce the restriction using any one or all four of the defenses as justification.

An attempt to quantify the magnitude of the violations appeared in *Moran v. Memorial Point Property Owners Association Inc.* Here, the Houston Court of Appeals



held that a 2.7 percent rate of violations of a deed restriction does not amount to an abandonment or waiver. The plaintiff contended the rate was much higher, possibly as high as 37.5 percent.

Invalid Defenses

In the Palmers' case, however, the courts probably will refuse to allow any of these defenses. A lot owner's failure to complain about prior violations that did not materially affect the enjoyment of her or his property does not preclude that person from challenging future violations that do materially affect the property. Waiver, acquiescence or abandonment cannot be used as a valid defense in such instances.

However, the attorney was still optimistic about the Palmers' chances of raising a valid defense based on the defenses in the second group. Each deals with the plaintiff's actions or inactions during the time the Palmers were making the modifications to their home.

According to the attorney, estoppel and laches are practically inseparable. Some legal commentaries even refer to a defense called "estoppel by laches." Estoppel arises when the plaintiff, either through actions or inactions, misleads the defendant into acting to the defendant's own detriment. The courts refuse to enforce a claim brought by a plaintiff who was at least partly responsible for the defendant's wrongdoing. A Texas court has noted that an inconsistent position, attitude or course of conduct may not be employed to cause loss or injury to another.

A 1943 Texas Supreme Court case clearly depicted the factors comprising estoppel: (1) the plaintiff knows his or her rights, (2) takes no steps to enforce those rights, (3) until after the condition of the defendant, acting in good faith, (4) has so changed that the defendant cannot be restored to the former state, (5) and

it would be inequitable or unfair to now enforce those rights due to the plaintiff's delay, therefore (6) the plaintiff is "estopped" or precluded from asserting his or her claim. Estoppel, does not apply when the defendant did not act in good faith and when the defendant was not misled by the actions or inactions of the plaintiff.

On the other hand, laches is based solely on the plaintiff's inactions. Laches is defined as failure to claim or enforce a right at the proper time. An appellate decision in Texas referred to the same six factors mentioned under estoppel to support the concept of laches. Hence, the defenses for estoppel and laches are viewed in the same light in most instances.

To fully understand laches, one needs to know how it interacts with the statute of limitations. The statute of limitations is a fixed statutory period in which an action must be filed or be forfeited. An action to enforce a restrictive covenant must be initiated within four years of its breach, according to the Texas Civil Practice and Remedies Code (Section 16.051). Laches, an unreasonable delay in pursuing a claim, cannot lengthen the statute of limitations but may shorten it.

Ambiguity enters the picture based on the wording of the restriction. Ambiguity renders a covenant unenforceable. According to *Wilmoth v. Wilcox*, any ambiguity or doubt should be strictly construed against the party seeking to enforce it. The courts favor the free and unrestricted use of property.

However, a covenant is not ambiguous simply because a disagreement exists regarding its interpretation. A covenant is ambiguous only when it is susceptible to more than one reasonable interpretation. Furthermore, ambiguity is a question of law for the courts to decide, not a question of fact for a jury. In *Moran* cited earlier, the plaintiff contended the usage

of the terms *wall, hedge and fence* were ambiguous.

Because the chances of winning the case were not certain, the Palmers asked the attorney what possible legal remedies were available to the plaintiffs if they prevail. The attorney explained that generally the sole remedy for the breach of a restrictive covenant lies within the equitable jurisdiction of the courts. This means the courts will not grant the prevailing plaintiffs monetary relief but instead require the defendant to strictly comply with the restrictive covenant.

In the past, the courts have rendered the following remedies: (1) temporary injunctions, (2) permanent injunctions, (3) court orders directing the removal or modifications of building and structures to conform with restrictions and (4) attorney's fees of the prevailing plaintiffs.

The attorney described two other remedies available in unusual circumstances. First, damages may be imposed on the defendant when the court can no longer strictly enforce the covenant. This occurs when the defendant asserts the valid defense of change-of-scheme, abandonment, acquiescence or waiver. However, to receive damages the plaintiff must prove that the violation of the restriction damaged the plaintiff to some degree.

Second, the municipalities may sue for the enforcement of private, restrictive covenants in limited circumstances. Sections 212.151 through 212.156 of the Texas Local Government Code empower cities and municipalities having a population of 1.5 million or more, with or without zoning ordinances, to enforce or abate a violation of a deed restriction if certain requirements are met. The enforcement is limited to subdivisions located within the municipality's boundaries.

The final question posed by the Palmers regarded the party or parties having the right to enforce restrictive covenants.

Disregarding municipalities empowered under the Local Government Code, the attorney said the right of enforcement lies with the parties for whom the benefit of the covenant was created. Many times the instrument creating the restrictive covenant expressly identifies the parties. Where the parties are not identified, they must be ascertained from the language of the restriction, construed in light of the circumstances existing at the time the restrictions were implemented.

Grantee Versus Grantee

The Palmers asked if grantees (other lot owners in the subdivision) have the right to enforce a restrictive covenant against other grantees such as the Palmers. Their attorney said there are two types of grantee action. One is levied by a grantee against another subsequent grantee in the chain of title, the other initiated against another grantee having a common grantor but not directly in each other's chain of title.

In the first instance, most covenants state that the restriction shall inure to



the benefit of, be binding on and enforceable by subsequent grantees. Such language gives the grantee the right of enforcement against subsequent owners. If not so stated, the courts must again ascertain the original grantor's intent.

In the second instance, where a grantor binds an area with common deed covenants such as a subdivision, each grantee within the restricted area (the subdivision) is both burdened and benefited by the restrictions. Each grantee

(lot owner) acquires the right to enforce the restrictive covenant against other grantees (lot owners) and, in turn, have the covenants enforced against them. Thus, the other owners in the Palmers' subdivision would have the right to seek enforcement.

The Palmers were quite distraught. They faced having to pay their attorney for defending the action plus having to pay the plaintiff's attorney fees if the plaintiff prevailed. Also, should the plaintiffs win, the Palmers still would have to bear the expense of making their home conform to the original restriction.

The Palmers certainly learned a lesson the hard way. Had they researched the matter more fully before proceeding with the renovations, they could have saved time, money and worry. ♦

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