

Restrictive Covenants

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V. RESTRICTIVE COVENANTS

A. Types of Covenants, Conditions and Limitations

1. The individual conveyance-embedded covenant vs. the master declaration

Concerning matters that are revealed by a search and examination of the title to real estate, covenants that restrict the use of land are commonplace, and vary considerably concerning their content. Covenants are devices used either to maintain a land use arrangement or assure that property is used for family, charitable or public purposes. Of principal importance are covenants that restrict property for certain residential uses only, and in this regard, methods of imposing covenants evolved during the twentieth century. Restrictive covenants until the late 1940's tended to be expressed within the four corners the deed conveying the title to individual lots within a larger tract or subdivision, resulting in a multitude or smattering of individual conveyance instruments that displayed covenants that were identical and applied to the development as a whole. Later, restrictive covenants were created by a single declaration or master instrument signed by the land's developer or subdivider and recorded. The older method of restricting use, though it has fallen into disuse, presents a recurring problem for the present day prospective purchaser of parcels within the development: In the case of some lots, the applicable chain of title revealed a restrictive covenant, but in others, possibly through inadvertent omission when preparing the conveyance, there were no covenants. Does a "common scheme of development" exist that is apparent from viewing the vicinity that are enforceable, notwithstanding the lack of any restriction in the chain of title for the subject lot, imposing restrictions upon the prospective purchaser? In one case, restrictions that were contained in 5 of 16 lots were held insufficient to create a common scheme of development against the non-restricted lots. Martin v. Morris, 239 Wis. 651, 2 N.W. 2d 204 (1942).

2. Changed circumstances

As housing preferences have become more discriminating and pricing of new housing developments ever more tiered, private restrictive covenants have in turn proliferated, resulting in ever more exacting and more comprehensive terms and conditions. The older residential restrictions, which were rudimentary, typically required use for residential purposes only, prohibited animals and outdoor privies, and imposed setback lines requiring the placement of the buildings a minimum distance from the street. Some covenants prohibited the sale of alcoholic beverages (Exhibit 45). Occasionally, because the neighborhood has changed dramatically, the continuation of restrictions created many years ago has become

inconsistent with current land use in the vicinity and will interfere with the property's intended development. The property may have become valuable as a non-residential development site. In the event that the covenants affect the entire subdivision, and there is a widespread pattern of non-conformity with the terms of the covenants, a title insurer may agree to provide affirmative coverage as against the enforcement of the covenants.

3. Reverters

A reverter is a provision that, if imposed in an instrument and if valid, will cause the title of the present owner to re-vest in a former owner of real estate upon the occurrence of a future event. Until the mid-20th century, reverters were often included within the instrument that created the restrictive covenants. Thus, the violation of a restrictive covenant may entitle the party entitled to enforce the reverter by divesting the title of the owner, this in contrast to enjoining to violation itself but leaving the violator's ownership intact. It may be debated whether the creation and enforcement of the reverter are draconian in contrast to other alternative remedies available to conform property owners to restrictive covenants. In any event, there are two principal types of estates in land that are subject to a reversionary interest: a fee on condition subsequent and a determinable fee. The two estates are very different. Under a reverter on condition subsequent, a violation of the restriction will entitle the former owner to enforce the restrictive covenant and reclaim ownership of the real estate of the violator. (Exhibit 46) However, under a determinable fee, upon the happening of an event, the title reverts automatically to the former owner. In many instances, the former owner is a company that has ceased operations and dissolved, or an individual who is deceased.

4. Who is entitled to enforce the restrictive covenant?

Where it is determined that restrictive covenants may in fact prove enforceable and that, in order to eliminate the risk that enforcement will interfere with the intended use of the property, a release of the restrictive covenants must therefore be obtained from the appropriate parties, the question must be addressed, from whom is it necessary to execute a release of the right to enforce the covenants? In some instances, the restrictions state that they are enforceable by the "heirs, successors and assigns" of the grantor. The controlling question is whether the grantor intended to create a restriction appurtenant to the estate for the mutual benefit of the respective grantees of portion of the estate for whose benefit the covenant was made. Boyd v. Roberts, 131 Wis. 659, 111 N.W. 701 (1907). Generally, such covenants are enforceable by lot owners, not only by the original developer or its "heirs or assigns." Schneider v. Eckhoff, 188 Wis. 550, 206 N.W. 838 (1926). Consequently, only if the

release is executed by all lot owners will the release effectively prevent the enforcement of the restrictive covenant.

B. Role of Statutes of Limitations That Bar Enforcement

1. Statutes and the passage of time

States have enacted statutes that bar the enforcement of ancient covenants, though their approaches have varied considerably. In general, state legislation has eliminated restrictive covenants by promoting marketability of title without requiring that the owner bring legal proceedings to declare the covenants unenforceable. Most states fix the duration of covenants, tracing their continuing viability to the date of their creation or recordation in the public land records. Thus, Minnesota's statute provides that "all covenants, conditions or restrictions" shall cease to be valid and operative 30 years after the date of the instrument creating them. M.S.A. §500.20(2). It is one thing for the legislature to make covenants unenforceable on the basis of the passage of time, but quite another to change the disposition of common law real property interests, causing them, though indefeasibly vested, to lose their reversionary character. Thus, California's Marketable Record Title Act abolished the fee simple determinable and possibilities of reverter. Ann. Civ. Code §885.020. A Maryland law provides that a possibility of reverter and a condition subsequent is extinguished if the specified contingency does not occur within 30 years after its creation. Code, Real Property, §6-101. The constitutionality of marketable title acts that bar the enforcement of the possibility of reverter has been upheld. Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957); Cline v. Johnson County Bd. of Educ., 548 S.W.2d 507 (Ky. 1977).

In some states, when evaluating the enforceability of covenants, an important distinction must continue to be drawn between restrictive covenants that contain forfeiture provisions and those that do not. In these states, forfeiture and non-forfeiture restrictions are treated differently. Thus, in Wisconsin, reverters that vest on condition subsequent are barred 30 years after their recordation, but the restrictive covenants themselves that may be contained within the same instrument, are not barred until 60 years after their recordation. §893.33, Wis. Stats. Furthermore, although reverters on condition subsequent are barred by the Thirty-Year Statute, possibilities of reverter that occur automatically upon the happening of an event after a defeasible fee determinable is conveyed are not. Saletri v. Clark, 13 Wis.2d 325, 108 N.W.2d 548 (1961). Therefore, in jurisdictions where the distinction between reverters on condition subsequent and possibility of reverter have been preserved, it is of particular importance to examine the language of the deed containing the reverter to determine

whether the interest conveyed is a fee on condition subsequent, or alternatively, a determinable fee.

2. Renewal or extension of the restrictive covenant

A question may arise whether an instrument subsequently recorded had, on the basis of the language used in the instrument, renewed or extended the earlier restrictive covenant. Drafting of deed exceptions to warranties clauses varies considerably. Many drafters use a general exception rather than one that specifically identifies the restriction by volume and page. However, one school of thought argues that a specific exception to warranties should be drafted for such matters. “(I)f a (real estate) broker knows that there is a shared driveway, a transmission easement or a serious encroachment affecting the property, the seller should except the defect from the title warranty...” Rick Staff, Wisconsin Real Estate Magazine, January, 2005 “Disclosures and Exclusions to Warranties of Title.” Under this approach to drafting, because they will have been “expressly (referred) to” by deeds, older restrictive covenants and easements, regardless how incongruent with current property use they may prove to be, will ultimately never become time-barred by the statute. Does a standard exception from warranties clause “except for easements and restrictive covenants, if any” serve to renew and extend restrictive covenants?

3. Title insurance coverage

Generally, there is a practice among title insurers to raise as exceptions all easements and restrictive covenants, regarded how long ago they were recorded. Upon request, the title insurer may conceivably agree, provided it first examines the chain of title for instruments that “expressly referred to” the restrictive covenant, to remove the exception for the restrictive covenant.

DOCUMENT NO.

487409

STATE BAR OF WISCONSIN-FORM 1
WARRANTY DEED
THIS SPACE RESERVED FOR RECORDING DATA

GRANT COUNTY, WIS.
RECEIVED FOR RECORD

DEC 22 1981

St. 8-15 A M and recorded in
Vol. 577 of Records Page 37
Municipal & State Register

THIS DEED, made between MILHURN J. COLE, a/k/a MELBURN J. COLE, and KATHLEEN R. COLE, his wife,

Greater
and MAYNE HILLARY and PAT HILLARY, d/b/a HILLARY OIL
COMPANY

Witnesseth, That the said Grantor, for a valuable consideration
of one dollar and other good and valuable consideration
conveys to Grantee the following described real estate in Grant
County, State of Wisconsin:

Beginning at the center of Sec. 24, T1N, R1W of the
4th P.M., Grant County, Wisconsin; thence West 248.90
feet; thence North 174.23 feet; thence East 251.06
feet; thence S. 00 degrees 41' W. 174.24 feet to the
point of beginning, containing 1.00 acres, more or
less, said described tract being located in the S.E. 1/4
of the N.W. 1/4 of Sec. 24, T1N, R1W of the 4th P.M.

Subject to an easement being retained by Grantors for
ingress and egress to other property owned by the Grantors
on the West 33 feet of the above described property.
Restriction:

The property cannot be used at any time in the next 30 years for
sale of alcoholic beverages for consumption on the site.

RETURN TO Fitzgerald Law Office

Tax Key No. _____

State Transfer
Tax Paid
\$18.00

This is not homestead property.

Together with all and singular the hereditaments and appurtenances thereto belonging:
And Milburn J. Cole a/k/a Melburn J. Cole and Kathleen R. Cole, his wife,
warrants that the title is good, indefeasible in fee simple and free and clear of encumbrances

and will warrant and defend the same.

Dated this 12th day of December, 19 81.

(SEAL)

Melburn J. Cole (SEAL)

(SEAL)

Milburn J. Cole a/k/a Melburn J. Cole
Kathleen R. Cole (SEAL)

Kathleen R. Cole

AUTHENTICATION

Signatures authenticated this 12th day of
December, 19 81

Donald F. Fitzgerald

TITLE: MEMBER STATE BAR OF WISCONSIN

(Notary Seal)

This instrument was drafted by

FITZGERALD LAW OFFICE

73 E. Main St.

Platteville, WI 53610

(Signatures may be authenticated or acknowledged. Both are not necessary.)

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ACKNOWLEDGMENT

STATE OF WISCONSIN

County, } ss.
Personally came before me, this _____ day of
_____ the above named _____

to me known to be the person who executed the foregoing instrument and acknowledged the same.

Notary Public _____ County, Wis.
My Commission is permanent. (If not, state expiration
date: _____, 19 ____.)

*Names of persons signing in any capacity must be typed or printed below their signatures.

Indenture, Made the eighteenth day of Sept. in the ye
Twenty-six between John Garbo and Emilia Garbo
parties of the first part, and

Exhibit 46

Madame Jesus Church, to be incorporated under the laws of the State

that the said part is of the first part, for and in consideration of the sum of One dollar

DOLLARS

in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, he
granted, sold, aliened, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, convey and confirm unto the said party
- heirs and assigns forever, all

That certain piece or parcel of land situated in the Town of Cal-
edonia, Racine County, Wisconsin, known and described as Lot eight
(8); Block nine (9), Wolff's Fifth Addition to Racine, according to
the recorded plat thereof.

It is hereby made a condition of this Deed that the second party hereto
does not have the right to bargain, sell or convey the herein described
premises, and if they should the premises herein conveyed shall revert
to the first parties or their heirs, or legal representatives, or if the
second party shall disorganize, said premises to revert to the first
parties or their heirs or legal representatives.

TO HAVE AND TO HOLD the hereditaments and appurtenances thereto in anywise appertaining, and all the estate, rights, title, possession, claim and demand,
of the said parties of the first part, therein and thereto, to have and to hold the same, unto the said party of the second part
its
John Garbo and Emilia Garbo, his wife,
of the first part for themselves, their heirs, executors, administrators, do hereby covenant with the said party of
- heirs, executors, administrators, and assigns, that at the time of the delivery of these presents they
above granted premises, as of an indefeasible estate of inheritance in fee simple, that the same are free and clear from all liens and incumbrances whatsoever,
in the quiet and peaceable possession and enjoyment of the said party of the second part.
forever, against all persons lawfully claiming the same or any part thereof, they will forever WARRANT AND DEFEND.

WITNESS WHEREOF, the said part is of the first part have hereunto set their hand and seals the day and year first above written.

WITNESSES SEALED AND DELIVERED IN PRESENCE OF

E. R. Hermes
E. J. Berdinner

JOHN GARBO (SEAL)
EMILIA GARBO (SEAL)
(SEAL)
(SEAL)
(SEAL)

STATE OF WISCONSIN.
COUNTY OF RACINE.

ss. On this 18th day of September A. D. 1926, came personally
before the subscriber, a Notary Public, in said County

John Garbo and Emilia Garbo, his wife,

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