

## RESTRICTIVE COVENANTS

### **Definition:**

Restrictive covenants are also commonly known as covenants, conditions, or restrictions. These documents are most typically agreements either put in place by the original creator of a subdivision or established by mutual agreement between two or more parties with an interest in a certain property. The purpose of them is typically to limit the manner in which a property may be used or developed, and they typically take the form of an agreement in the form of a document recorded in the County real property records, map records, or deed records. A restrictive covenant (as opposed to a personal covenant) runs with the land (is conveyed when the property is sold) and thus binds all future property owners to the terms of agreement. Restrictive covenants usually are sometimes included in the seller's deed to the buyer and are sometimes recorded in separate, independent documents. Above and beyond all, their most common purpose is to preserve property values and particular standards within a neighborhood, subdivision, or community.

### **How Restrictive Covenants are Created:**

#### Upon Development

Restrictive covenants are often written at the time of platting of the subdivision or in connection with a development plan for a tract of land and are usually initiated by the creators of the subdivision or the development to blanket the entire subdivision or development. These covenants most often become part of the deeds for all the lots within the subdivision or development.

Covenants established in this way must meet very specific requirements, as follows:

1. The covenant must expressly run with the land and bind the parties and the heirs and successor owners of the land;
2. The parties to the covenant must share privity of estate, meaning there must be a relationship between them as either simultaneous or successor owners of the land; and
3. The covenants must touch or concern the land; and
4. Notice of the covenant must be provided to successor in interest.

#### Mutual Agreement Between Parties

Restrictive covenants may also be created by mutual agreement between parties. Such a covenant is often called a negative easement rather than a restrictive covenant. These "negative easements" do not have to be made in connection with the conveyance of land and do not require privity of estate between the parties.

The parties to the easement may designate the manner in which the easement may be modified, terminated, and enforced. In doing so, the parties may designate a property

owners association as an enforcement entity if the members of the association derive any benefit from the restriction.

The parties to such a restriction may be a single property owner, neighboring property owners, or a group of property owners, so long as the boundary of the restriction is reasonable and clearly stated.

### Petition

The Texas Property Code provides for property owners within certain municipalities (Austin is one of those municipalities) to petition to impose restrictive covenants within their legal subdivision. These petitions require participation by a majority of the owners of lots within the subdivision, square footage of land within the subdivision, or parcels within the subdivision.

Creation of a petition under these circumstances requires strict compliance with the statutorily-mandated procedures and will not bind owners who state in the petition that they opt to be excluded from it.

### **What Can Restrictive Covenants Do?:**

Restrictive covenants can be used to govern just about any use or development of land within the limits of the law. Some common restrictive covenants, for example, may limit the color one may paint a house, the kind of trees one may plant, the size of home that may be built on the property, fencing, flagpoles, the types and configuration of bedded flowers, and even architectural features, such as facades. Restrictive covenants also may impose an obligation for adequate lawn maintenance, or prevent the storing of boats or trailers in driveways or street, cars with flat tires or expired tags, and construction improvements that may have not been approved by the Architectural Control Committee (ACC) of the Home Owners Association or Property Owners Association.

### **Example:**

Think for a moment about why you bought your home in the first place. You may have liked the curb appeal of your house or its floor plan, but you probably also considered the neighborhood - how the houses looked next door and down the street. You bought the neighborhood at the same time you bought your house. You bought a lifestyle and surroundings which were much larger than your own property, encompassing everything from the subdivision entries and the recreation center to all the other homes in the neighborhood, assuming it would stay that way.

Unfortunately, many subdivisions don't stay as nice as they were when they were new. Just like a home, a neighborhood can be well-maintained or it can be allowed to fall apart. The big difference between an attractive and an unattractive neighborhood is not really the restrictive covenants. Some neighborhoods have reasonably good restrictive covenants. The crucial factor is the willingness of the men and women who make up the

association's board of directors to enforce the rules that you do have. Other neighborhoods have no restrictive covenants and must rely on zoning and governmental land use regulation to preserve the character of the neighborhood. Unfortunately, such governmental regulations are limited with respect to their permissible scope and what regulations they can impose.

### **What Restrictive Covenants Can't Include:**

In short, restrictive covenants may not impose restrictions that conflict with public policy or law. If they do, they are not enforceable. A covenant may not include or enforce a provision that prohibits or restricts a property owner from:

1. implementing measures promoting solid-waste composting of vegetation, including grass clippings, leaves, or brush, or leaving grass clippings uncollected on grass;
2. installing rain barrels or a rainwater harvesting system;
3. implementing efficient irrigation systems, including underground drip or other drip systems; or
4. conveying the property to certain protected classes of people.

### **Enforcement of Restrictive Covenants:**

Restrictive covenants are usually enforceable when they are clear and unambiguous, when they mandate a legal purpose, and when they are written to cover reasonable boundaries. They are enforceable by any person entitled to benefit from the restriction or by persons designated as enforcement parties by the parties to the restriction.

Factors that may negatively impact enforcement of restrictions are:

1. Express expirations written into the covenant;
2. Changed conditions;
3. Waiver of enforcement by parties;
4. Condemnation of the property or acquisition by a governmental authority.