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Restrictions on Use: What is required to create new covenants in an HOA?

An HOA may always adopt a new covenant¹ that restricts homeowners' use of their property if all affected homeowners approve the new restrictive covenant (100%).

Alternatively, an HOA may adopt a new restrictive covenant that restricts use for all owners with majority approval as provided by the CC&Rs, if:

- (a) the CC&Rs expressly grant the HOA authority to create new restrictive covenants with a majority vote;²
- (b) the HOA exercises its authority (to create new covenants) "in a reasonable manner consistent with the general plan of the development;"³ and
- (c) purchasers had notice that the HOA could amend the CC&Rs (i.e. the HOA's CC&Rs are recorded, and expressly grant the HOA authority to create new covenants).⁴

If an HOA's CC&Rs do not already grant the HOA authority to create new restrictive covenants with majority approval from homeowners, then the HOA may be able to amend its CC&Rs to grant that authority.⁵ If an HOA opts to amend its CC&Rs to grant it the authority to create new restrictive covenants with majority approval, then the HOA will only have the authority to create the new covenant if the amendment is validly adopted.⁶

To determine whether an HOA's exercise of authority is "in a reasonable manner consistent with the general plan of the development," Washington courts look to the language of the covenants, the importance of those covenants, and the surrounding facts.⁷

¹ “A party may enforce a real covenant if it meets the following conditions:

- (1) the covenant must have been enforceable between the original parties . . . ;
- (2) the covenant must ‘touch and concern’ both the land to be benefitted and the land to be burdened;
- (3) the covenanting parties must have intended to bind their successors in interest;
- (4) there must be vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and
- (5) there must be horizontal privity of estate, or privity between the original parties.”

Weaver v. Ryderwood Improvement & Serv. Ass'n, 2010 Wash. App. LEXIS 1869 at 13-14.

“A party seeking enforcement of an equitable covenant must establish:

- (1) a promise, in writing, which is enforceable between the original parties;
- (2) which touches and concerns the land or which the parties intend to bind successors; and
- (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession;
- (4) who has notice of the covenant.”

Weaver 2010 Wash. App. LEXIS 1869 at 13-14.

² *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263 (Wash. App. Ct. 2014) (A homeowners' Association which was located on an island adopted a covenant which authorized the Association to form an LLC to lease and operate a marina, and to collect assessments from homeowners to pay for the operation. The court held the Association's action was valid because: (1) a majority of homeowners approved the action, (2) the Association exercised its authority in a reasonable manner, and (3) the lease and operation of a marina was consistent with the general plan of a development that was only accessible by boat or plane.)

³ *Roats*, 169 Wn. App. 263.

⁴ *Wilkinson v. Chiwawa Cmty. Ass'n*, 180 Wn.2d 241 (2014) (a new restriction on short-term rentals was invalid because “homeowners cannot force a new restriction on a minority of unsuspecting homeowners unrelated to any existing covenant”).

⁵See, *Roats* 169 Wn. App. 263 at 281.

⁶ The amendment must be adopted in accordance with the amendment procedure(s) provided by the CC&Rs.

⁷ *Weaver*, 2010 Wash. App. LEXIS 1869 (An Association adopted a new covenant with majority approval- but not 100% approval-which restricted ownership of properties in the community to persons 55 years or older. The court held the new covenant was valid because it was consistent with the community's general plan to function as a retirement community, and the facts surrounding the new covenant demonstrated that the change in language was necessary to preserve the community's status as a retirement community without violating state and federal housing discrimination laws.).