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Restrictions on Use: Can property owners be bound by unrecorded restrictions, rights, and obligations?

If a property developer with authority to burden a property makes representations about a property within a development to help sell other homes, such representations may impose an equitable servitude — an enforceable restriction on the property that is not properly recorded in the deed. Washington courts clearly recognize such obligations as covenants that run with the land to bind subsequent purchasers with knowledge of the restriction.[1]

In many cases, a developer may intend that certain lots in a subdivision be limited to a specific use, whether to increase property values, attract prospective buyers, or for some other purpose. For example, a developer may market a community as a golf course community, with a promise that property within the subdivision will be maintained as a golf course. Or the developer may attract buyers with a promise that the subdivision will be comprised strictly of single-family residences.

Under Washington law, there are two mechanisms for limiting the use of property:

Real Covenants

A real covenant is created when a limitation on property use is written into individual deeds, signed by the parties to be bound, and recorded.[2] A valid real covenant is a contract for an encumbrance on the property. As with other valid contracts, a real covenant may be enforced by the parties on its terms. And, if a real covenant limiting the use of property "runs with the land,"[3] it will bind subsequent owners even if they were not party to the original contract. Real covenants running with the land are

generally found in deeds, condo Declarations, CC&Rs and other documents recorded with the county.

Equitable Servitudes

Even where a deed does not contain a properly recorded covenant, the property owner may still be bound by restrictions on the use of the property. Courts may find an implied equitable servitude based on a seller's representations about the property. Unlike a covenant, an equitable servitude is not a recorded contract for an encumbrance on property. Rather, it is a basis for a remedy derived from Washington courts' power to do what is just and fair under the circumstances. In the interests of justice and fair play, courts may use their discretion to enforce an owner's promise to limit the use of its property or fashion another appropriate remedy.[4]

The recognition of equitable servitudes is very fact specific. Factors a court might consider in determining whether to impose an equitable servitude include: acquiescence by property owners, time, the relative visibility of the intended restriction, and the extent of the burden being created. However, Washington courts have made clear that equitable servitudes are likely to be implied and enforced when an owner makes representations about a property's restricted use in order to facilitate the sale of a property.[5] Moreover, equitable servitudes are binding on subsequent owners who take the property with notice of the intended restriction.[6]

Enforcement of Other Promises by Property Owners in the Interests of Justice and Fair Play

Equitable servitudes, in a nutshell, create an enforceable interest in the property of another party based on that party's promises related to the use of the property. A party's representations about related considerations, such as the scope of an Association's powers or owners' liability for assessments, can also create an enforceable obligation.

If a homeowner acquiesces to an Association's authority over a period of years, the owner is unlikely to prevail if the owner later asserts that the Association lacked authority.[7]

And, if a homeowner accepts the benefits of Association membership, such as access to amenities and the resulting increase in property value, the owner is unlikely to prevail if the owner attempts to skirt the responsibilities of membership, including payment of assessments.[8]

Conclusion

In the interests of justice and fairness, courts have authority to enforce a seller's promises related to the property and to recognize the powers of an HOA. Property owners should be aware of such non-contractual rights and obligations when buying and selling property and when enforcing their property rights as against other owners.

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[1] *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888; *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 466 (1920).

[2] The Statute of Frauds (RCW 64.04.010 and .020) governs conveyances and encumbrances of real estate, including covenants. RCW 64.04.010 provides that such conveyances and encumbrances must be by deed. Under RCW 64.04.020, the deed must be "in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized…to take acknowledgments of deeds" (notarized).

[3] A covenant "runs with the land" and binds subsequent owners if it is: (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. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836, 841 (1999).

[4] Although a court finding an implied equitable servitude would most likely enforce the restriction intended by the parties by way of an injunction, the court is not limited to this remedy. And in some cases,

injunction might, in itself, produce an inequity. This was the case in *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 337 P.3d 1076 (2014), where the homeowners presented evidence of an implied equitable servitude restricting the development of a golf course marketed as a community fixture, but the developers presented evidence that the golf course was unprofitable. Acknowledging that forcing the developers to operate an unprofitable golf course may be inequitable, the Washington Supreme Court noted that, once an equitable servitude was definitively established, the "parties [would] be free to present evidence and argument as to the nature and scope of any appropriate equitable and injunctive relief." *Riverview Cmty.*, 181 Wn.2d at 899.

[5] In *Riverview Cmty.*, when a community group representing several homeowners in a subdivision sued the developers to prevent them from building apartment houses on the community golf course, the Supreme Court explained that an equitable servitude could be implied from the words "golf course" on one of three recorded plats for the subdivision, as well as several homeowners' sworn testimony that the developers had promised the golf course complex would remain a permanent fixture of the community.

The Washington Supreme Court has also acknowledged this trend in other states. For example, in Oregon, an appellate court found an implied equitable servitude where "prospective buyers who asked for assurances that the golf course would remain in place were told that the golf course would continue to be there and that there was no need to worry about it." *Mountain High Homeowners Ass'n v. J.L. Ward Co.*, 228 Or. App. 424, 427, 209 P.3d 347 (2009).

[6] Thus, in *Johnson*, when a subdivision was marketed as "residences only" and buyers paid a fifteen to twenty percent premium as a result of the restriction, a lot owner who repeatedly acknowledged the limited use prior to purchasing the property was prohibited from building a church on the lot, even though the owner's deed did not expressly state the restriction.

[7] *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787 (2007) (Homeowners disagreed with the Association's assessment of fees for Association activities. They challenged the Association's authority to make the assessments, arguing that the Bylaw amendment that created the Association was invalid. The court held that the homeowners' acquiescence to the Association's authority for over three years, which included attendance and voting at meetings as well as payment of assessments, constituted a ratification of the amendment. Accordingly,

the homeowners were estopped from challenging the amendment or the Association's authority thereunder.)

[8] *Lake Limerick v. Hunt Mfd. Homes*, 120 Wn. App. 246 (2004) (Court ruled against a homeowner arguing that he was not obligated to pay Association assessments because he had not personally contracted to do so and the covenant to do so did not "run with the land." The court noted that the homeowner had accepted the benefits of Association membership, including access to a golf course and the related increase in value to his property, and that allowing the homeowner to keep these benefits without fulfilling the correlated promise to pay assessments would result in unjust enrichment. The court held that, under these circumstances, an "implied in law" contract could arise, by which the homeowner had both the right to enjoy certain common facilities and the obligation to pay for it.)