# 12--Can Property Owners Be Bound by Unrecorded Restrictions, Rights, and Obligations?

A property may be restricted by unrecorded equitable servitudes. An equitable servitude is an enforceable restriction on the property that is not properly recorded. They arise when a property developer with authority to burden a property makes representations about a property within a development to help sell other homes. Washington courts clearly recognize that the court may enforce these promises against subsequent purchasers who have knowledge of the restrictions.[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 some 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 or restrictive covenants, 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, courts may find that an *unrecorded* covenant is enforceable as an equitable servitude, and thus that the property Owner is still bound by the restrictions.[4] Courts may find an implied equitable servitude based on a seller's representations about the property.[5] 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.[6]

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.[7] Additionally, a court may impose a limited equitable servitude when an Owner makes use of a benefit such as a shared road.[8] 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.[9] Moreover, equitable servitudes are binding on subsequent Owners who take the property with notice of the intended restriction.[10]

### 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.[11]

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.[12]

## 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 (2014) (Supporting the equitable right to enjoin the removal of a golf course, the court determined "…that an equitable servitude may be implied…" because some owners may have been induced to purchase their property on the promise of living in a golf course community.); *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 466 (1920). (A property owner sued to prevent a church from being built on a neighboring property. The neighboring property was not subject to a restrictive covenant but much of the rest of the neighborhood was restricted to residential purposes. Court determined that the church knew of the general nature of the community and the existence of the restrictive covenants, that the church would disrupt the residential plan for the neighborhood, and equity barred the use of the property for a church.)

[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 (1999). A covenant "touches and concerns the land if it is connected with the use and enjoyment of the land." *Deep Water Brewing, LLC v. Fairway Res. Ltd.,* 152 Wn. App. 229, 258 (2009). Additionally, the covenant must "touch and concern both the land to be benefitted and the land to be burdened." *Dean v. Miller*, 34501-7-III, 2017 WL 2484027, at *3 (Wash. Ct. App. June 8, 2017) (citing *Lake Arrowhead Cmty. Club, Inc. v. Looney*, 112 Wn.2d 288, 295 (1989)). In other words, a covenant that only benefits or burdens a specific owner but not the land itself would fail to satisfy the requirement.

[4] Under Washington law, an equitable servitude will be found when there 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 (1999) (citing *Stoebuck*, 52 Wash. L. Rev. at 909–10)).

[5] A seller's representations may enable a party to obtain relief in the absence of a written covenant. However, if the original parties to the covenant put the restrictions or requirements in writing, a court will find that an equitable servitude exists regardless of the seller's representations. *See, e.g., Dean v. Miller* (rejecting appellants' argument that an equitable servitude may be implied only if the buyer relied on the covenants sought to be enforced). In short, the seller's representations may be useful to a party who could not otherwise obtain relief due the lack of a written document providing evidence of the covenant.

[6] 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 (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.

[7] A court may find an equitable servitude exists absent any of these factors when the covenant appears in a written document signed by the two parties. *See Dean v. Miller, supra* n.5. Many courts will discuss these factors even when the covenant is expressed in writing; however, they are not necessary to establish the existence of an equitable servitude. In effect, they are a substitute for a written covenant that courts will rely on when doing so is the only method of providing a party with equitable relief.

[8] In *Bowers v. Dunn*, 198 Wn. App. 1034 (2017), the court upheld an order requiring joint users of a road to equally share the costs of maintaining a road, finding that "the joint use of an easement gives rise to an obligation to contribute jointly to repair and maintenance costs." (citing Restatement (Third) of Property: Servitudes § 4.13(3) (2000)). *See also Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702 (2013) (affirming order requiring owner near housing development who used adjoining roadways to pay ongoing maintenance costs to HOA).

[9] 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).

[10] 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.

[11] *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.)

[12] In *Lake Limerick v. Hunt Mfd. Homes*, 120 Wn. App. 246 (2004), the court ruled against a homeowner claiming 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.