

Restrictive Covenants—Tools to Limit What a Buyer Can Do With Purchased Property

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“A restrictive covenant is a provision in a real property conveyance that limits the grantee’s use of the property.”ⁱ This type of covenant can be useful in real estate transactions. If you, as a prospective seller of property, do not want the buyer of your property to do certain things with the property, you could include a restrictive covenant to prevent those types of conduct. If you are a prospective buyer, you could agree to include a restrictive covenant, in the conveyance, to incentivize the seller to sell the property to you in exchange for (among other bargained-for benefits to the seller) your covenant not to do certain things with the property. In short, restrictive covenants can be valuable tools to have at your disposal if you are engaged in selling or buying real property. For that reason, it can be helpful to get familiar with some legal principles governing what types of restrictive covenants are permitted by law and how to draft the restrictive covenants so they are valid and enforceable.

Under Alaska law, a “restrictive covenant that is clear on its face should be enforced as written.”ⁱⁱ Although the Alaska Supreme Court recognized the judicial tendency to favor landowners’ free use of their land, the Court has, in multiple cases, manifested a well-entrenched practice of recognizing restrictive covenants. Those covenants should be drafted carefully, though—“doubts [as to whether there is a covenant or whether a covenant actually restricts the use of land] should be resolved in favor of the free use of land,”ⁱⁱⁱ and there are some categories of restrictive covenants that are illegal.^{iv}

Federal and state laws specify categories of conduct, including restrictions in the form of covenants, that are illegal. For example, the Fair Housing Act prohibits discrimination based on race, color, religion, sex, familial status, or national origin,^v and the Americans with Disabilities Act prohibits discrimination against individuals with disabilities.^{vi} Alaska law prohibits discrimination based on “sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin.”^{vii} A restrictive covenant that discriminates on any of these bases would be unenforceable at law.

Alaska courts have demonstrated, however (by repeatedly recognizing restrictive covenants), that such restrictions are often permissible. Restrictive covenants that have been allowed under Alaska law include a covenant prohibiting the use of metal roofing and requiring preapproval of construction plans,^{viii} a covenant imposing height and setback restrictions,^{ix} and a covenant to complete construction within a specified period of time.^x In one case, an Alaska superior court recognized, as enforceable, a covenant restricting lots to residential use to the “extent [the] lots are not to be used to create driveways to other subdivisions.”^{xi}

The Alaska Supreme Court has also listed purposes that it considers valid purposes for restrictive covenants. These permissible purposes are related to, but distinguishable from, the above-listed examples of permissible restrictive covenants. These permissible purposes include “light and air, fire protection, traffic safety, prevention of overcrowding, rest and recreation, solving drainage problems, protecting the appearance and character of a neighborhood, conserving property values, . . . aesthetic and psychological values[, and] ecological and environmental

interests.”^{xii} The fact that a restrictive covenant fits one of these purposes supports the argument that it is enforceable.

Drafting is another matter. There are multiple important considerations for drafting a restrictive covenant. First, a restrictive covenant generally must be in writing to be enforceable.^{xiii} Second, the restriction should be specific, clear, and detailed. It should be expressed in clear and unambiguous language.^{xiv} Third, it should not contain any conditions for enforcement. Fourth, it should designate the purpose for the restriction.^{xv} Fifth, it should explicitly state that the restriction “runs with the land” so that the restriction is not eliminated by a re-sale of the property; the restriction should run with the land by default, but including an explicit statement that it does should eliminate potential issues that might arise in a subsequent reconveyance. Sixth, it should specifically state that the title holder is responsible for compliance with the deed restrictions. If the restriction is in writing, specific, clear, and detailed, it is more likely to be enforceable.

If you are involved in selling your property, or if you are involved in a real estate transaction of any kind, you may want to hire an attorney to represent or assist you. The facts specific to your situation heavily impact many aspects of the transaction, including what kind of documents or instruments need to be drafted and how they should be drafted, so you may benefit from a knowledgeable attorney’s help. If you want assistance with a real estate transaction, please feel free to call CSG, Inc., Attorneys at Law, at (907) 452-1855, and set up a consultation to discuss your situation. We would be glad to help you.

Endnotes:

ⁱ *Cornell Law School*, https://www.law.cornell.edu/wex/restrictive_covenant (last visited July 23, 2021).

ⁱⁱ *Gordon v. Brown*, 836 P.2d 354, 357 (Alaska 1992) (quoting *Greenbrier-Cloverdale Homeowners Ass'n v. Baca*, 763 P.2d 1, 2 (Colo. App. 1988)).

ⁱⁱⁱ *Id.*

^{iv} *See, e.g.*, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213; *and* the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604; *and Shelley v. Kraemer*, 334 U.S. 1 (1948).

^v 42 U.S.C. § 3604.

^{vi} *Id.* at § 12101.

^{vii} Alaska Statute § 18.80.240(2).

^{viii} *See Stadnick v. Southpark Terrace Homeowner's Ass'n, Inc.*, 939 P.2d 403 (Alaska 1997).

^{ix} *See Kohl v. Legoullon*, 936 P.2d 514 (Alaska 1997).

^x *See Lamereux v. Langlotz*, 757 P.2d 584 (Alaska 1988).

^{xi} *See Gold Country Estates Preservation Group, Inc. v. Fairbanks North Star Borough*, 270 P.3d 787 (Alaska 2012) (modification in original).

^{xii} *Kohl*, 936 P.2d at 520 (quoting *Town of Portland v. Wis. Elec. Power Co.*, 543 N.W.2d 559, 560-61 (Wis. App. 1995)).

^{xiii} *See, e.g.*, AS § 09.25.010 (Alaska's Statute of Frauds, which requires "an agreement . . . for the sale of real property, or of any interest in real property, or to charge or encumber real property . . ." to be in writing and signed by the party against whom enforcement is sought.). Alaska law includes a promissory estoppel exception to the statute of frauds in land transactions, *Kiernan v. Creech*, 268 P.3d 312, 317 (Alaska 2012), but it would be unwise to ignore the general rule (that a transaction must be in writing to be enforceable) in hopes that the promissory estoppel exception will save the covenant from unenforceability.

^{xiv} *Id.* (stating that "doubts [as to whether there is a covenant or whether a covenant actually restricts the use of land] should be resolved in favor of the free use of land." (Internal quotation marks and citation omitted.)).

^{xv} *See Hurst v. Victoria Park Subdivision Addition No. 1 Homeowners' Ass'n*, 59 P.3d 275, 276 (Alaska 2002).