

# **Restrictive Covenants Running with the Land: Origin, Elements, Creation, and Enforcement**

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## **A. Overview.**

- This presentation covers the origin, elements, creation, and enforcement of restrictive covenants running with the land.
- The primary emphasis is on Texas law, particularly as it relates to restrictive covenants applicable to residential neighborhoods.

## **B. Restrictive Covenants in General.**

- A “covenant” is an agreement or promise between two or more parties that something is done, will be done, or will not be done.
- If a covenant obligates a person to maintain the status quo or perform some act in the future, the covenant is “affirmative.”
- If the covenant prohibits a person from performing an act, it is “negative.”
- Unless a covenant relating to land qualifies as a covenant running with the land, it is deemed to be “personal” as between the parties to the agreement or promise and enforceable only as between those parties.

## C. Origin and Evolution of Covenants Running with the Land.

- In the late 1500s, the English courts began to recognize that covenants relating to the use of land could be binding on successors and assigns of the original parties if the covenants met certain requirements and, therefore, were said to “run with the land.”
- In *Spencer’s Case*, decided in 1583, the court established the early test for covenants running with the land:
  - (1) the covenant may not be merely collateral to the land, but must “touch and concern the thing demised;”
  - (2) the covenant must relate to something in existence or, alternatively, must expressly state that it binds the successors and assigns of the original parties; and
  - (3) the original parties must also have a common interest in the burdened land, or “privity of estate.”

- In the early days of covenants running with the land, such covenants were typically imposed between the original parties in conveyances (or deeds) of land.
- For example, the village blacksmith might condition a conveyance of land adjacent to his blacksmith shop on the agreement by his grantee that neither the grantee nor his successors or assigns will place or operate a blacksmith shop on the land conveyed.
- The English courts would enforce this negative covenant against remote successors, as long as it complied with the technical requirements of a covenant running with the land.

- The rules for creating covenants running with the land were part of the English common law that was adopted in the Constitution of the United States and certain states' constitutions.
- Today the concept of covenants running with the land is recognized in all American states, although expression of the elements may vary somewhat from state to state.

## D. Covenants Running with the Land in Texas.

- Covenants running with the land are recognized and enforced by the Texas courts.
- Although the Texas requirements for a covenant running with the land have been expressed in various ways by the Texas courts over the years, the consensus appears to establish the following elements for a covenant running with the land:
  - (1) the covenant in question touches and concerns the land;
  - (2) the covenant relates to something in existence or is expressly binding on the parties and their successors and assigns;
  - (3) the original parties intended that the covenant run with the land;
  - (4) successors and assigns who are burdened by the covenant have notice of the restrictions imposed by the covenant; and
  - (5) there is privity of estate between the original parties with respect to the land burdened by the covenant.

- A covenant “touches and concerns the land” if the promising party’s interest in the burdened land is lessened by the covenant, or the promisee’s interest in the land is increased.
- A covenant expressly binds the successors and assigns of the parties by so stating in the instrument containing the covenant.
- Intent that the covenant run with the land is typically evidenced by language to this effect in the instrument creating the covenant.
- The notice requirement is satisfied by recording the instrument containing the covenant in the official records of the county where the land is located, so it appears in the successors’ and assigns’ chain of title and, therefore, places them on constructive notice of the covenant.
- “Privity of estate” typically exists when the promisee owned the benefitted land and the burdened land and conveyed the burdened land to the promisor.



- Local zoning ordinances and building permits do not trump (i.e., override) pre-existing covenants running with the land.
- Generally, if the restrictive covenant regarding use of the land is less restrictive than the zoning ordinance, the ordinance prevails.
- Conversely, if the covenant is more restrictive than the ordinance, the covenant prevails.
- Thus, a municipality does not have authority to abrogate restrictive covenants. However, although Texas law permits municipalities to enforce restrictive covenants, a municipality has no obligation to enforce or even honor covenants running with the land.
- In fact, the City of Austin commonly makes decisions on zoning and building permits that ignore valid, pre-existing restrictive covenants.

## **E. Creation of Covenants Running with the Land.**

- As originally conceived and implemented, in England and then in the United States, covenants running with the land were components of individually negotiated land transactions that were peculiar to the original parties, like the blacksmith shop example given above.
- In those cases, the covenant and the required language were included in the conveyance of the burdened land.
- These practices continued in the United States into the twentieth century.

- With the advent of identifiable neighborhoods, industrial parks, shopping centers, and other new, specialized land uses, the method of creating covenants running with the land evolved away from individualized transactions and toward blanket restrictions covering entire developments.
- This resulted from real estate developers' recognition that the value of land within their developments would be enhanced by requiring purchasers of land in the developments to be bound by uniform restrictions that would be enforceable by the developers or other owners of similarly burdened land within the development.

- Under these circumstances, the preferred method of imposing restrictions on the use of land within a development became the creation and recordation of a set of restrictive covenants running with the land that covered the entire development before any land in the development was sold to third parties.
- Purchasers of land within the development and their successors and assigns would then be obligated to comply with the covenants or face enforcement.
- This is the prevalent practice now.
- The documents creating the blanket restrictive covenants are commonly referred to as “declarations” of covenants, conditions, and restrictions.

- Once lots in a development subject to restrictive covenants are sold, consent of all landowners is required to amend the covenants, unless the declaration provides a different procedure for amendment, usually by the vote of a requisite number or percentage of landowners in the development.
- In that instance, the amendment procedure controls.
- The duration of covenants running with the land can be permanent or perpetual.
- However, declarations of covenants typically have fixed durations, usually twenty-five to thirty years, and usually provide for successive automatic extensions of ten years each, unless the requisite number or percentage of landowners in the development votes to terminate some or all of the covenants.

## F. Construction of Covenants Running with the Land.

- Covenants running with the land are contracts, and the rules of construction (i.e., interpretation) applicable to all contracts are generally applicable to covenants running with the land.
- Thus, in construing covenants running with the land, the courts must first attempt to ascertain the intent of the original parties.
- This determination must be made with reference to the language of the covenant.
- If the covenant is not ambiguous (i.e., subject to more than one reasonable construction), and the intent of the parties is clear from the language employed, the court will interpret and enforce the covenant as written.
- Determining the intent of the parties is more complicated if the covenant is ambiguous.
- Until 1987, as part of the common law, Texas courts interpreted ambiguous covenants running with the land strictly against enforcement and in favor of the free and unrestricted use of land.

- In 1987, the legislature enacted Section 202.003(a) of the Texas Property Code, which provides that “[a] restrictive covenant shall be liberally construed to give effect to its purpose and intent.”
- This appears to be contrary to the rule of strict construction that had prevailed under the common law, at least as regards ambiguous covenants.
- The Texas Supreme Court has recognized the tension between the common law rule and Section 202.003(a) but has not decided a case in which the issue was whether Section 202.003(a) has abrogated the common law rule of strict construction of ambiguous covenants.
- Opinions of the intermediate courts of appeals on this issue are not consistent.

Some courts of appeals have held that Section 202.003(a) has supplanted the common law rule.

Others have held that Section 202.003(a) and the common law rule are not in conflict.

Still others speak in terms of a “balancing” approach that borrows from both standards.

## G. Enforcement of Covenants Running with the Land.

- At common law, any person entitled to benefit from the subject covenant is entitled to enforce it.
- Most current sets of covenants provide that the developer, any owner of property within the restricted development, and the property owners association created by the developer, if any, may enforce the covenants.
- Section 202.004 of the Texas Property Code granted significant power to property owners associations, providing that their exercise of authority in enforcing covenants is “presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.”
- This Section also grants courts the authority to assess civil damages for violations of covenants running with the land in amounts not to exceed \$200 a day for each violation.



- The most prevalent and effective remedy for a current or threatened violation of a covenant running with the land is an injunction (i.e., a court order stopping or prohibiting the violation).
- In order to obtain an injunction, the plaintiff must file a sworn application for injunctive relief and prove that he/she/it is among the class of parties that have standing to enforce the subject covenants, and that the defendant is violating or threatening to violate the subject covenant.
- A party applying for an injunction usually has to prove that he/she/it is threatened with immediate, irreparable harm, due to the conduct justifying an injunction.
- This does not apply to a suit to enjoin a material and substantial breach of a covenant running with the land; in such a case, the requisite harm is assumed.

- The injunction procedure has three stages: temporary restraining order, temporary injunction, and permanent injunction, as follows.
- A temporary restraining order prohibits the defendant from violating, or continuing to violate, the covenant until the court can hold a hearing on the plaintiff's application for a temporary injunction.

An application for temporary restraining order may be heard and granted *ex parte* (i.e., without notice to the defendant), but the local rules of practice in most counties require the plaintiff to make a good faith effort to give the defendant notice of the application and an opportunity to be heard.

The court makes its ruling on the application for temporary restraining order based on the sworn application and legal arguments counsel may make at the hearing, without formal presentation of evidence.

If a temporary restraining order is issued, it is in effect for fourteen days, and may be extended for another fourteen days, or until the application for temporary injunction can be heard, if within one of the fourteen-day periods.

A temporary restraining order may also be extended by agreement of the parties or their counsel. As a condition to issuance of a temporary injunction, the plaintiff must post a bond, or cash deposit in lieu of bond, in an amount set by the court to protect the defendant against damages he/she/it may suffer due to the temporary restraining order if it is dissolved or the application for temporary injunction is denied.

A plaintiff is not required to apply for and obtain a temporary restraining order as a condition to applying for a temporary injunction.

- A temporary injunction prohibits the defendant from violating the subject covenant pending trial on the merits.

At the hearing on an application for temporary injunction, the plaintiff must present evidence in support of the application and must show that he/she/it has a probable right to prevail on the merits of the case.

The defendant may also present evidence.

The issues are tried to the court, without a jury.

If the court grants the temporary injunction, it remains in effect until the trial on the merits.

The plaintiff must continue to post a bond, or cash deposit in lieu of bond in an amount set by the court, which may be the same, more, or less than the bond posted for the temporary restraining order.

A plaintiff is not required to apply for and obtain a temporary injunction as a condition to applying for a permanent injunction, but a plaintiff can harm his/her/its position by unreasonable delay in seeking relief.

A party against whom a temporary injunction is issued has the right to an interlocutory appeal of that order, which will be expedited.

- A permanent injunction perpetually prohibits the defendant from violating the covenant.

Either side may request a jury for the trial on the merits. If neither side timely requests a jury, the matter is tried to the court.

The plaintiff has the burden of proof on his/her/its claims by a preponderance of the evidence, and the defendant has the burden of proof on his/her/its affirmative defenses.

If the plaintiff prevails, the court will issue a permanent injunction.

A bond is not required to support a permanent injunction.

Pursuant to Section 5.006 of the Texas Property Code, a prevailing plaintiff may recover reasonable attorneys' fees from the defendant in a suit to enforce a covenant running with the land.

- Declaratory relief under the Texas Uniform Declaratory Judgment Act is also available to resolve disputes regarding the validity, meaning, applicability, and/or effect of restrictive covenants running with the land.
- Declaratory judgment is particularly helpful when a party wants a judicial determination as to the propriety of an anticipated course of action relating to property covered by restrictive covenants.
- Declaratory judgment is available whenever there is a justiciable controversy involving uncertainty concerning a person's rights and legal status, as long as the judgment will serve to terminate a dispute or remove an uncertainty.
- The court in a declaratory judgment case has discretion to award attorneys' fees to a party "as are equitable and just," but such an award is not automatically available to the prevailing party.

## **H. Defenses to Enforcement of Covenants Running with the Land.**

- There are defenses to actions to enforce or construe restrictive covenants.
- An obvious defense is expiration of the covenants; covenants that have expired by their own terms and not renewed are not enforceable.
- Abandonment resulting in waiver is another defense to enforcement of restrictive covenants.

Waiver is the intentional relinquishment of a known right, which can result from affirmative renunciation of the right or intentional conduct inconsistent with claiming the right.

For example, abandonment and waiver occur when the owners of restricted property have acquiesced in such substantial violations of the covenants within the restricted area as to amount to abandonment of the covenants or waiver of the right to enforce them.

A party asserting abandonment has the burden to prove that the violations of the covenants are so great as to lead an average person to reasonably conclude that the covenants have been abandoned and their enforcement waived.

- Other related defenses are estoppel and quasi-estoppel.

A party may be estopped from enforcing a covenant against a person who has, in good faith reliance on the first party's voluntary conduct, changed his/her/its position for the worse.

Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken, when it would be unconscionable to allow a party to maintain a position inconsistent with one in which the party has acquiesced, or from which the party has accepted a benefit.

- Changed conditions is another defense to enforcement of restrictive covenants.

Under this rule, a court may deny enforcement of a restrictive covenant if there has been such a change in conditions in the restricted property or the surrounding area that it is no longer possible to obtain, to a substantial degree, the benefits the covenant seeks to accomplish.

The change in the restricted area must be so radical as to practically destroy the essential objects of the covenants.

The change must have occurred after the party seeking to avoid enforcement purchased the subject property.



- The four-year statute of limitations applies to a suit to enforce a restrictive covenant.

The limitations period begins to run when the violation first openly appears.

A minor violation may not trigger the limitations period if a more serious violation follows.

- The doctrine of laches may preclude enforcement when the complaining party has failed to proceed with reasonable promptness, and this has caused prejudice to the party violating the covenants.

If a claim is not barred by limitations, exceptional circumstances must exist in order for the claim to be barred by laches.

# I. Tips for Property Owners and Property Owners Associations.

- Property owners and property owners associations that want to preserve the character of their neighborhoods through enforcement of restrictive covenants should do the following:

Familiarize themselves with the covenants covering the neighborhood, including what is prohibited, and who can enforce the covenants.

Be vigilant in discovering current or threatened violations. Do not wait until construction of violations is complete or near complete, because c Courts are reluctant to order demolition of completed or near completed improvements.

When new construction or remodeling commences in the neighborhood, obtain a copy of the building permit to determine what the landowner intends to build on the property.

If it appears that the proposed construction will violate the covenants, contact the landowner in person and, in writing, give him/her/it a copy of the covenants, tell him/her/it that he/she/it is violating the covenants, ask that the violation cease, and advise him/her/it that suit will be filed if the violation continues.

Have available a short list of lawyers who handle restrictive covenant cases, and contact one as soon as the current or threatened violation is discovered.