

Dealing with Deed Restrictions

BY: OMAR IZFAR, ATTORNEY, WILSON CRIBBS+GOREN



Private covenants and restrictions, often simply called “deed restrictions,” run with the land, bind future owners, and usually affect what you can do with your property. Deed restrictions for residential neighborhoods contain a variety of rules that impact development, such as land use controls, setback, lot size, and frontage rules.

I often see extremely old deed restrictions that don’t adequately address the needs of the current property owners, yet they are still in effect and enforceable. As cities continue to urbanize and developers find infill opportunities, outdated restrictions clash with modern development goals. Modifying these deed restrictions can be challenging and often requires professional assistance.

Restrictions on commercial property, unlike restrictions for residential neighborhoods, are typically more recently drafted and often easier to amend, but may still contain land use restrictions and other provisions that interfere with new development plans.

So my deed restrictions seem to interfere with my proposed development. What can I do?

There are a few options. The more straightforward approach is to attempt to amend the restrictions. Many older restrictions do not contain thorough amendment procedures, if they contain any at all. That often leaves property owners relying on provisions of state law that allow for amendments approved by a certain percentage of property

owners affected by the restrictions. Gathering the votes needed to approve an amendment requires leg work that includes getting in touch with the other property owners and securing their consent to the amendment. If you get this far, once recorded, the amendment serves as the new deed restrictions affecting your property. Deed restrictions that contain amendment procedures can also pose their own problems, especially if there are specific windows for the timing of restrictions. Few sets of deed restrictions are exactly alike and need to be studied on a case by case basis to determine your options.

If an amendment is not feasible, and if you have good reason to believe the restrictions are not enforceable, you’ll have to file a lawsuit to have a judge declare that the deed restrictions are not enforceable. This can be based on the fact that enough property owners violate the restrictions that they have effectively been waived, or there is a change in circumstances that justifies treating the restrictions as unenforceable, or other reasons. Unfortunately, this is not fast or cheap, and requires you to sue all the individual property owners affected by the restrictions all at once.

Sometimes, but not often, the deed restrictions are not enforceable at all. There are methods under state law to reconstitute lapsed deed restrictions that are highly technical, complicated, and very easy to mess up. Sometimes, the mistakes render the deed restrictions completely void. Sometimes, your development is the type that is protected by law, and the deed restrictions that prevent the development are not enforceable. Again, these kinds of issues have to be examined on a case by case basis.

So what happens if I just ignore the deed restrictions? Several properties already violate these restrictions! Why do I have to comply?

People used to be able to get permits much more easily than today. Older developments that violate the restrictions may have been approved without much scrutiny. Their existence

is no guarantee that you will get approvals or escape lawsuits against your proposed development. I would not recommend that anybody take the steps that people used to take to get projects approved that would violate deed restrictions.

So what happens if you ignore the restrictions? In the first place, you will not be able to get a building permit. Securing permits these days typically requires the permit applicant to sign an affidavit that the plans will not violate any deed restrictions. Not being completely truthful about this is a crime in the State of Texas.

You will also not be able to plat your property if your proposed development violates the deed restrictions. Cities and counties are prohibited by state law from approving subdivision plats that violate deed restrictions.

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Worst of all, you'll set yourself up to be sued. Deed restrictions are typically enforceable in court by any of the individual property owners bound by the restrictions or by a property owners association. The City of Houston also has the unique ability to file suit on behalf of a property owner to enforce deed restrictions, with the result that the City's taxpayers collectively bear the cost of deed restriction enforcement rather than the individuals that benefit from those restrictions. That means that older areas with inactive property owners associations and several examples of deed restriction violations still contain individual property owners that can file suit to potentially prevent your development. ■

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