

Community Association Restrictions Last Forever ... Right? Community Association Restrictions and the Confusion Surrounding Tax Sales

Written By **Dana M. Lingenfelter** (dmlingenfelter@wardandsmith.com) and **Kristin D. Mitcham** (kdmitcham@wardandsmith.com), **Thomas C. Wolff** (tcw@wardandsmith.com)

June 3, 2022



It may be hard to believe, but community associations ('Associations') occasionally deal with property owners who do not think they are required to pay assessments.

The reasoning for these beliefs can range from "I do not use the pool" to "I am not part of the Association." Some of this confusion stems from an Association's governing

documents, while some situations arise through the uncertainties of a public auction of the lot. Although the majority of such claims are baseless, some may merit consideration. For a better understanding of what a community association is all about, please check out **Unwrapping the Riddle: What is a Community Association**.

Why are Restrictive Covenants Important to an Association?

Restrictive covenants are found in the Association's Declaration (often referred to as CCRs); they often restrict the use of land and create obligations for a property owner in a community association. When the Declaration is recorded in the land records, the Declaration becomes an exception to title on the real property in that community. Associations enforce the restrictive covenants in the Declaration and establish rules for all owners of real property (property owners) within the community.

The Declaration is a contract between the property owner and the Association. When a property owner purchases a lot subject to a Declaration with restrictive covenants, it automatically binds that property owner to the contractual obligations within the Declaration. The Declaration creates obligations for future purchasers of the lot, as well; these obligations are said to "run with the land" because they stay with the lot when the current property owner conveys the lot to a new property owner. The new property owner is bound to the terms of the Declaration. One of the most typical restrictive covenants found in the Declaration is the property owner's obligation to pay assessments to the Association. If the property owner does not pay the assessments, the Association may file a lien against the property owner's lot, which is an encumbrance on the lot.

The Confusion Surrounding Public Auctions

Whether real property is sold through a foreclosure, tax sale, or bankruptcy proceeding, there may be uncertainty whether the property was auctioned free from all encumbrances. When real property is sold in one of these manners, it is generally sold "as-is" and "with all faults," which includes *most* liens and encumbrances. However, there are occasions where a government entity or bankruptcy court indicates a sale is "free and clear of liens, interests and encumbrances," which leads to some confusion.

Generally, when sold at a public sale, some liens and encumbrances are automatically discharged and wiped clean from a property's title. When all liens and encumbrances are removed from the property's title, the purchaser is said to receive "clear title" to the property.

North Carolina has specific procedures in place that allow a government entity with taxing authority to sell real property to recover delinquent taxes - a process called a tax sale. These tax sales are generally conducted in the same manner as a typical foreclosure under a deed of trust or mortgage. Once the property is sold at public auction, ownership is transferred to the purchaser by way of a commissioner's deed. Commissioner's deeds do not contain any guaranties that the property is free of liens and encumbrances. This means that all covenants, liens, and encumbrances recorded prior to the attachment of the tax lien will remain affixed to the title.

However, while the *typical* tax sale transfers all prior encumbrances, the taxing body still holds the power to convey a piece of property free of interests and encumbrances. Although not common, this power of the taxing authority means that Associations should be wary of the manner in which property is purchased through a tax foreclosure. In addition to a tax sale potentially wiping out any past-due Association assessments, the new property owner might try to argue that the lot is not part of the Association anymore because they received a "clean title" that is "free of any interest or encumbrance." North Carolina courts have recently seen similar arguments from owners claiming that a tax sale wipes out conservation easements.

The Power of Restrictive Covenants?

Another area of concern is the Declaration, itself. A Declaration generally provides a description of individuals and entities that are specifically subject to its terms. Likewise, the Declaration can also designate groups that are 'exempt' from its terms. Without careful drafting of the Declaration, it is possible that the Declaration could inadvertently omit some group, creating the potential for a purchaser to avoid being subject to its terms, no matter the manner of sale.

This is an especially important detail when dealing with municipalities and tax sales. Generally, courts in North Carolina have held that restrictions (such as restrictive covenants in an Association's Declaration) are enforceable against *any purchaser* who purchases the land with record notice of those restrictions. However, a taxing authority may attempt to claim it is exempt from the Association's restrictions because it has governmental immunity. Regardless of whether the taxing body feels it can assert governmental immunity or if it has taken ownership of the property free of any interest or encumbrance, the potential exists for a legal dispute with the new property owner who believes their lot is not subject to the Declaration.

Summary

A properly recorded Declaration is a restriction on the land, which generally obligates all current and future property owners in the community to pay assessments. However, if the Declaration is poorly drafted or a tax sale is conducted "free of any interest or encumbrance," the Association can find itself in a legal battle to enforce its restrictive covenants against the new property owner. Although the Association cannot always prevent these situations from occurring, it can place itself in the best position possible for when they do arise.

An Association should be sure to seek experienced legal counsel when drafting or amending its Declaration or when it discovers property in the community is being sold at a public auction free of interests or encumbrances.

--

© 2024 Ward and Smith, P.A. For further information regarding the issues described above, please contact Dana M. Lingenfelter, Kristin D. Mitcham or Thomas C. Wolff.

This article is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

We are your established legal network with offices in Asheville, Greenville, New Bern, Raleigh, and Wilmington, NC.