

# Restrictive Covenants: What Are They And Why Should You Care?

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May 5, 2021



**Restrictive covenants have a significant and substantial impact on the use and value of property; yet they are often ignored entirely or not considered until the end of the due diligence period before purchasing the property.**

Whether you are purchasing property for residential use or for commercial use, it is important to know, first, what restrictions and obligations are tied to the land you are about to purchase, and second, the consequences to you if you don't, or can't, comply with those restrictions and obligations.

Newspapers and online publications frequently feature articles and editorials regarding restrictive covenants and the owners associations that enforce those covenants. Lawmakers have, and will likely continue to, attempt to pass legislation to reign in the powers of owners associations. Yet purchasers of property still do not seem to place enough importance on the impact restrictive covenants and the persons who enforce them can have on the purchasers' use and enjoyment of their property. As part of your due diligence process before you purchase any real property, it is important to take into consideration the following matters regarding restrictive covenants and their potential impact on the use and value of the property you plan to purchase before it's too late to walk away from the deal.

## **What Restrictive Covenants Affect The Property You Plan To Purchase?**

Although they are generally referred to collectively as restrictive, or restrictive and protective, covenants, there are two types of such covenants: (i) restrictions on the use of the property, and (ii) affirmative obligations imposed on the owner of the properties.

### **Restrictions**

Restrictions, of course, restrict your free use of your land. While it is impossible to provide an exhaustive list of all the restrictions that may be included in a set of restrictive covenants, there are a few common restrictions which often encumber both residential and commercial properties.

- **Use.** Restrictive covenants will almost always restrict your property to certain uses. If you are purchasing a house, your primary concern is likely whether the property can be used for residential purposes. However, you may also want to consider whether lots in the community are restricted solely to residential use. You may be surprised to find that your neighbor can operate a business out of his or

her home if such activity is not restricted by the covenants or by local zoning ordinances.

If you are purchasing property for commercial use, it is important to make sure that your particular intended use of your property is not restricted by the covenants. Remember that zoning ordinances and private restrictive covenants are entirely different things. While the zoning ordinances applicable to your property may permit the use of the property for your intended purpose, the restrictive covenants may forbid that use and the restrictive covenant would control because it is the most restrictive. On the other hand, if the zoning ordinance is more restrictive than the restrictive covenants, the zoning ordinance will control.

- **Architectural Review.** If your property is subject to architectural review, any new construction or modification to existing structures must adhere to the restrictions contained in the restrictive covenants and must likely be approved in advance by an architectural review committee. This committee is typically established and controlled by the developer of the property and then, after the developer has sold all or a substantial part of its property in the development, controlled by the board of directors of the owners association.

Possible architectural restrictions may include limitations on exterior paint colors, types of siding, fences, landscaping, and design of structures, to name a few. The scope of review and control of the architectural review committee depends on the power granted to the committee in the restrictive covenants and it varies from community to community. Generally, an architectural review committee considers whether the proposed construction or landscaping adheres to the architectural guidelines and whether it will be consistent with other structures in the community. The restrictive covenants often grant the committee the authority to deny an application on purely aesthetic grounds. Although some architectural review committees do have a great deal of power and discretion, their actions must not be arbitrary or capricious.

- **Lease restrictions.** Your restrictive covenants may prohibit leasing entirely or may just place certain restrictions on the way your property may be leased. For example, the restrictive covenants may provide that your property may not be leased for a term shorter than six months. If you are buying commercial property with the intention of leasing it to a commercial tenant, you may not be deterred by such a restriction. However, if you are purchasing property at the beach or in the mountains, you may be purchasing it with the intention of leasing the property on a weekly basis. A restriction prohibiting leases with a term shorter than six months would significantly reduce the value of your property to you.

### **Affirmative Obligations**

An affirmative obligation does not directly restrict your use of your land, but obligates you, based solely on the fact that you own that particular tract of land, to take some action. The most common example of an affirmative obligation is the duty to pay assessments. Any owner of property that is governed by an owners association, whether residential or commercial, will almost always be obligated to pay assessments to the owners association to fund the common expenses of the association. Those common expenses typically include maintenance of common elements in the development available for use by all owners and enforcement of the restrictive covenants. Your use of common elements has no bearing on your obligation to pay assessments to the owners association. You will be obligated to pay assessments regardless of whether or not you use the common elements and regardless of any complaints you may have against the owners association.

The obligation to pay assessments has been challenged several times but, in a number of North Carolina decisions, the appellate courts have found that assessments are valid as long as there are some criteria by

which the court can determine the amount of the assessment, its purpose, and its reasonableness in light of that purpose.

### **Consequences/Enforcement**

The restrictions and affirmative obligations included in a set of restrictive covenants may be enforced by (i) any individual owner or (ii) in a condominium or planned community, the owners association. Enforcement by individuals was common in older communities before the expansion of owners associations and still is fairly frequent even in communities with owners associations. However, most enforcement of restrictive covenants is now carried out by the appropriate owners association.

In a community with restrictive covenants, but no owners association, it is up to the individual owners alone to enforce the restrictive covenants against other property owners. This typically means that an owner must sue the offending owner in order to get an injunction preventing the offending owner from doing whatever it is that is violating, or threatens to violate, the covenants (such as building a fence or shed if such structures are prohibited by the restrictive covenants or conducting a business at the property if the property is restricted to residential use only). The offended owner may also sue for money damages, but there is often only nominal monetary damage or none at all.

The North Carolina Condominium Act and the North Carolina Planned Community Act have empowered owners associations to use several mechanisms to enforce restrictive covenants. After providing the offending owner with notice of the alleged violation and the opportunity to be heard, an owners association, or an adjudicatory panel appointed by the owners association, may levy a fine against the owner of up to \$100.00 per day or may suspend certain privileges such as use of the common elements (depending on the community, this may include a pool, tennis court, clubhouse, etc.). If an owner fails to pay assessments, the owners association may file a claim of lien against the owner's property subject to the restrictive covenants and may ultimately foreclose on the property to enforce the claim of lien. These enforcement provisions are applicable to both commercial and residential communities governed by owners associations and it is important for purchasers of property in these communities to understand and appreciate these enforcement mechanisms.

### **Benefit/Burden Analysis**

Whether restrictive covenants will be more of a burden or a benefit to you as an owner depends on you and your intended use of your property. Restrictive covenants obviously place restrictions on your free use of your land, but there can also be benefits to purchasing property subject to restrictive covenants, especially in a community where such covenants are enforced by an owners association. Restrictive covenants, such as architectural guidelines, ensure not only a certain level of uniformity and standard of design, but also the consistent use of property within the community. If the community is governed by an owners association, you can purchase property with at least some level of comfort that the restrictions and obligations in the covenants will be enforced and that the common elements will be maintained.

In order to determine whether a particular set of restrictive covenants will create more of a burden or benefit for you, you will need to review all of the community documents in addition to the covenants. Although not applicable to the property per se, the community documents typically include the articles of incorporation and bylaws of the owners association, the rules and regulations of the association, its architectural guidelines, and any other set of guidelines created and enforced by the owners association. Some of these documents are filed in the public records and others must be obtained from the owners association.

### **Conclusion**

The decision to purchase real property involves many different considerations, but one of the most important is the existence and effect of restrictive covenants. Like beauty, whether the restrictive covenants create a benefit or impose a burden is in the eye of the beholder – that is, the individual purchaser. In order to make an informed decision, you, as a purchaser of restricted property, should carefully review all of the covenants affecting the property prior to purchasing it and consider the effect of their restrictions and obligations on your intended use of the property. A little bit of research now may prevent a great deal of heartache in the future.

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