

REAL ESTATE LAW

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A well respected Winter Park attorney, Frank Pohl practices in the area of real estate law. His column covers a wide range of topics that can help you better understand and avoid potential legal issues related to buying, selling, and owning a home.

If you have questions or topics pertaining to the legal aspects of residential real estate that you would like to see addressed in this column, send them to Frank c/o:

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This Article is not a substitute for hiring an independent attorney to prepare and review your real estate contract.

HOA RESTRICTIONS ON PROPERTY

Many individuals purchasing real property assume that they have the right to use the land without interference from their neighbors. However, that right is limited both by local governmental regulations and any recorded restrictions imposed on the property. This article addresses private restrictions.

Developers typically place restrictions on large tracts of land that are subdivided into smaller parcels and then formally submitted to the local governing body as a new plat, or subdivision. These Developer restrictions typically incorporate terms that are more extensive than private parcel restrictions. These recorded Covenants, Conditions, Restrictions and Easements (*the "Covenants"*) impose easements and restrictions on lots in the subdivision. So, any purchaser of a lot acquires that property subject to those conditions. Terms vary and often cover a wide variety of items such as the type of roof shingles that can be installed, to the selection of exterior paint color, location of trash cans, and the right to construct fences and the type of material for a fence. They may also include building setbacks, the location of utility easements on each lot, and even the number of pets that a lot owner may allowed to have. Covenants will also occasionally include minimum age requirements for lot owners.

Covenants usually provide for the mandatory membership of all lot purchasers in a named Homeowners' Association ("HOA"), with the obligation to pay annual dues and special assessments, together with the obligation to abide by its Rules and Regulations. Some individuals take the position that they should not be subject to the HOA's authority and the restrictions on the property. However, purchasers of land in Florida acquire their title subject to those matters that have been previously recorded and which directly impact their property. Therefore, a purchaser is "on notice" of the Covenants, and is obligated to be a member of the HOA, pay assessments, and abide by the restrictions.

HOAs generally are responsible for the care and maintenance of common areas and recreational facilities on the plat. They also oversee each lot owners' compliance with the restrictive covenants. The HOA will assess each lot owner his proportionate share of these maintenance expenses. Prior to closing, a prospective purchaser should determine the amount of dues each lot owner must pay annually to the HOA. In today's market, a buyer should also determine whether there are substantial special assessments that will be charged to cover payments by delinquent lot owners, or to pay for expensive repairs to the common areas. A prospective buyer, not wishing to become responsible for paying



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such fees and assessments is well advised to purchase property elsewhere.

A buyer should also determine if there are any regulations in the Covenants with which he cannot comply. For example, if Andy Anderson intends to rent the property after a closing, he should first confirm that the Covenants and the HOA's rules and regulations permit non-owner occupied lease agreements, their permitted terms, and whether the HOA must pre-approve the tenant.

Recently, Tom Johnson received a notice from an HOA concerning outstanding dues. Tom told me that he has lived on the property for over five years, that no one has ever contacted him to pay dues, and that he wasn't even aware that there was any HOA in his subdivision. A review of the original recorded Covenants confirmed that there were no provisions establishing any HOA. Subsequent amendments to the Covenants also failed to identify any HOA. I advised Mr. Johnson that this HOA appears to be voluntary in nature, and that he could not be required to pay any dues. We subsequently obtained a title search for Mr. Johnson's property and confirmed that neither Mr. Johnson, nor his predecessors in

title, ever consented to the authority of this voluntary HOA.

I frequently receive questions concerning the enforceability of restrictions. For example, if the Covenants provide that a lot owner cannot build a fence along the rear property line, the HOA typically retains the right to enforce these restrictions. The HOA can sue to have the fence taken down; impose a fine on a lot owner who violates this fence restriction; and record a lien against that owner if the fine is not timely paid. That lien will attach to the real property and, if provided for under the Covenants, can be foreclosed.

Alternatively, if there is no HOA, the Covenants usually provide that any impacted lot owner in the subdivision may enforce the restrictions. Although there may be situations where a neighboring property owner is granted rights to enforce restrictions, generally only those subdivision lot owners who are subject to Covenants have a right to compel compliance with its terms. Certainly a neighbor could contact the city or county government if the actions of a lot owner constituted a public nuisance. But this right is distinct from the right afforded to members of the HOA to enforce its Covenants. ▲