



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.

PRIVATE RESTRICTIONS ON PROPERTY

In the previous issue, we discussed the scope and impact of restrictions imposed by a developer on subdivided/platted land. These platted restrictions are generally entitled Covenants, Conditions, Restrictions and Easements (Covenants). These Covenants impose limitations on homeowners within the subdivision regarding the use and maintenance of the property. The Covenants typically establish a homeowners association (HOA) to maintain the common areas, and empower the HOA to charge assessments to the individual lot owners to cover the HOA's necessary expenses. Individual property owners also have the right to impose restrictions on land.

Typically, those restrictions are created when the owner conveys land to a purchaser and the deed recites the specific restrictions to be imposed. As long as the restrictions do not violate local governmental, state, or federal law, they can be enforced by the seller and any other party authorized to enforce the restrictions as set forth in the deed.

When restrictions are imposed on land by the seller, the purchaser acquires the land subject to those restrictions and is bound by the terms recited in the deed. For example, if Mr. Jones conveyed Greenacre to Mr. Smith and recited in the vesting deed that Greenacre is subject to a minimum 35-foot front lot line building set back, then Mr. Smith could be sued if he were to construct a house 20 feet from the front property line. As a result, Mr. Smith could be compelled to tear down the new home or move it back an additional 15 feet. If the restrictions are designated to run with the land and are not limited solely to the use of the land by Mr. Smith, then subsequent purchasers of Greenacre would also be subject to the same building set back limitations. Therefore, it's important to scrutinize any restrictions that impact land that is being purchased.

A companion question relates to enforceability. Let's use the building setback example to address that issue. If the vesting deed delineating the restriction is silent on enforceability, then arguably only Mr. Jones could bring an action to enforce any setback violation. If the vesting deed provides that the neighbors on either side of the property can enforce this setback violation, then those neighbors could also be entitled to enforce the restriction. This might occur when abutting owners of land who are not part of a platted subdivision wish to create a common scheme of a minimum setback.

Limitations imposed on land frequently consist of privately retained easements. For example, Mr. Jones owns a large tract of land with public road frontage along the south property line. He splits the tract in two, creating two separate tracts and plans to sell the south tract. His north tract will be landlocked unless he has the right to cross over a portion of the south tract to access the public road. In preparing the deed for the south tract, Mr. Jones needs to ensure that it includes a well-drafted reservation of an ingress-egress easement across the land of the south tract owner. The deed should recite that the easement is reserved not only for the benefit of Mr. Jones, but also for all subsequent owners of the north tract, include the exact location of the easement, and recite the rights and obligations of both owners relative to the easement area.

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If Mr. Jones intends to retain exclusive use of the easement area, the reservation of easement must recite the exclusive nature of the easement. If Mr. Jones wishes to erect a fence along the border of the easement area, the easement reservation should recite this right to construct a fence. If the easement area is to be used by both owners, then the easement reservation should recite the respective responsibilities of the parties to maintain the easement area.

A purchaser should always protect his investment by determining all matters that impact the property he is purchasing, and obtain title insurance to protect his investment.

Consider the following example. Dave Sellers owns a vacant parcel on the beach. He offers to sell the land at a reduced price to his friend, Joe Purchaser. To cut costs, Mr. Purchaser does a computer search for the public records in the county where the property is situated, and determines that there are no liens on the property. The sale is completed and Mr. Purchaser constructs a three-story house. After the certificate of occupancy had been issued by the

County, Mr. Purchaser receives a certified letter from his neighbor to the West (Mr. Abut), advising him that there is a restriction on the land owned by Mr. Purchaser. The restriction was placed by a prior owner of Mr. Purchaser's land, restricting the height of any homes on the land to two stories. In addition, the restrictions provided that Mr. Abut, and his successors in interest, have the right to enforce this building height limitation, and to collect attorney's fees if a lawsuit is filed to enforce this provision. Mr. Purchaser now needs to retain legal counsel to address the issues presented—at considerably greater expense than the cost of a title insurance policy. This example illustrates why it is always advisable to acquire a title insurance policy, even when purchasing from a neighbor or friend.

Private restrictions and easements should only be drafted by a qualified real estate attorney. All relevant terms should be defined in the recorded instrument. A purchaser is well served by thoroughly understanding his rights and obligations before the sale is completed and should, therefore, seek guidance from his real estate attorney. ▲