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## Real Estate Title Insurance & Construction Law

### Preventing the Enforcement Of a Deed Restriction

Grounds for practitioners to explore

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**D**eed restrictions embrace a variety of controls, such as permissible uses, aesthetics, density limitations, setback and other "bulk" restrictions. Attorneys typically are confronted with such covenants when representing a disgruntled neighbor threatening to seek or avoid enforcement. A burdened property owner may wish to test the enforceability of a covenant even when there is no dispute. Generally, New Jersey courts will not hesitate to enforce deed restrictions even when, as a result, structures must be removed. *Blaine v. Ritger*, 211 N.J. Super. 644 (App. Div.), cert. den. 105 N.J. 546 (1986). However, since a deed restriction constitutes an agreement, grounds may be available to preclude enforcement. *Weinstein v. Swartz*, 3 N.J. 80 (1950). Of course, like any claim or affirmative defense, the burden

of proof rests upon the party asserting it. *Italian Fisherman, Inc. v. Commerce Union Assur. Co.*, 215 N.J. Super. 278, 283 (App. Div. 1987).

This article briefly touches upon various grounds which practitioners should explore when faced with the need to prevent the enforcement of a deed restriction.

#### The First Steps

Counsel should first procure the chain of deeds not only for the burdened property but as well for all of the parcels which were owned by the covenantor when the deed restriction was first imposed. Corporate searches may also be necessary to determine the "dead and buried" status of the covenantor. Original tax maps, historical Sanborn fire rating maps, aerial photographs and a personal site inspection of the area are similarly critical. With this information in hand, potential grounds for challenge can then be intelligently considered.

#### Standing

A deed restriction is obviously of no impact unless someone exists with the right to enforce it. *Perelman v. Casiello*, 392 N.J. Super. 412 (App. Div. 2007). There are essentially four types

of restrictive covenants and the right of enforcement varies with each.

The first type of covenant has been dubbed as a "personal restriction" because it may be released by the grantor, and if not, terminates upon his death or earlier if he sells his interest in the retained lands. *Jennings v. Baroff*, 104 N.J. 132 (E. & A. 1929).

A second type is a mutual covenant between the owners of adjoining lands in which the restriction placed upon each produces a corresponding benefit to the other. Either party or his assignees may invoke equitable aid to restrain a violation.

A third class involves covenants intended to implement a general scheme or development. This category embraces all of the various plans, generally referred to as "neighborhood schemes," under which an owner of a tract of land divides it into building lots to be sold to different purchasers by deeds containing uniform covenants that restrict the use grantees may make of their property. These covenants are enforceable by any grantee as against any other since there is a mutuality of covenant and consideration that binds each party. *Olson v. Jantausch*, 44 N.J. Super. 380 (App. Div. 1957).

In a fourth type of restrictive covenant, the grantor exacts a covenant

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from the grantee for the benefit and protection of lands which the grantor retains. *Hemsley v. Marlborough House*, 68 N.J. Eq. 596 (1904). In this type of covenant the grantees cannot enforce the covenant as against each other, although the grantor and his successors may enforce it against either or all of the grantees of the property burdened with the covenant.

**Merger of Title:** A deed history will disclose whether the burdened and the benefited properties were owned by the same party or "merged" following the creation of the restriction. This is critical because if once owned in common the "doctrine of merger" has the effect of extinguishing any previously imposed covenant. *Olson v. Jantausch*, supra at 388.

**Ambiguous Restrictions:** Deed restrictions are strictly construed. Ambiguous restrictions therefore are not enforceable. *Cooper River Plaza East, LLC v. Briad Group*, 359 N.J. Super. 518, 532-3 (App. Div. 2003). This ground opens a number of opportunities for creative argument.

**Public Policy:** Deed restrictions which violate public policy are void. *Committee For A Better Twin Rivers vs. Twin Rivers Homeowners Ass'n.*, 192 N.J. 344, 370 (2007). Thus, restrictions which impose an unreasonable restraint on trade, secure a monopoly for the covenantor, are racially discriminatory, or which violate some other constitutional right are unenforceable.

#### Equitable Defenses Generally

A deed restriction imposes an equitable servitude upon the burdened parcel. Equitable principles thus govern enforcement and may preclude adherence despite the standing to enforce and clarity of the restriction. The cases applying these defenses are understandably not uniform because of the diversity of factual circumstances. Thus, in *Hemsley v. Marlborough House*, 68 N.J. Eq. 596, 601 (E. & A. 1905), the court refused to require the demolition of one particular structure where the violation was accidental because the plaintiff was guilty of laches while construction was ongoing and the resulting injury was "almost

infinitesimal," yet required the demolition of another violative "material encroachment" which the court "[could] not say [was] not a substantial detriment to the complainant's premises."

As a general matter, a party will be barred from asserting any equitable defense if he purchases property with actual knowledge of a restrictive covenant he intended to violate. *Lister v. Vogel*, 110 N.J. Eq. 35, 40 (E. & A. 1932).

#### Doctrine of Relative Hardship

The "relative hardship" doctrine requires a "balancing of the equities" and is usually applied where both parties are blameless, that is, have "clean hands" and money damages will not suffice for the victim. While there is some diversity in our case law as to whether the doctrine of relative hardship is applicable only to a commercial as well as to a residential restriction, it is safe to say it is only applied when the disproportion is gross or of considerable magnitude. The underpinnings of this rule are founded "on the principle that such covenants sometimes affect one's pleasure in the enjoyment of property, and that relief in such a case should not be made conditional on the matter of probable damages." *Rossi v. Sierchio*, 30 N.J. 575, 582 (App. Div. 1954).

#### Unclean Hands

Section 560 of The Restatement (First) of Property, which is generally accepted in New Jersey, *Gilpin v. Jacob Ellis Realties, Inc.*, 47 N.J. Super. 26 (App. Div. 1957), incorporates the historical doctrine of unclean hands by precluding the enforcement of a restrictive deed covenant if the person seeking enforcement has committed a substantially similar violation. One out-of-state case holds that a property owner may purge himself of unclean hands before an enforcement action is terminated. *Stewart v. Jackson*, 635 N.E.2d 186 (Ind.Ct.App.1<sup>st</sup> Dist.1994).

#### Estoppel

A party seeking the enforcement of

a deed restriction may be precluded or "estopped" from doing so if by his silence or omission he was under a duty to but did not speak or act, as a result of which the party against whom enforcement is sought has been injured. *Middletown Township Policemen's Benevolent Association Local 124 v. Middletown Township*, 162 N.J. 361(2000). "[I]n order that a party may be estopped by silence, there must be on his part an intent to mislead, or at least a willingness that others should be deceived, together with knowledge or reason, to suppose that someone is relying on such silence or inaction and in consequence thereof is acting or is about to act as he would not act otherwise." *Weitland v. Turkelson*, 38 N.J. Super. 238, 246 (App. Div. 1955).

While the inaction of the person who imposed the restriction does not estop an unaware successor from doing so, *Kumble v. Jaffe*, 100 N.J. Eq. 290 (E. & A. 1926), prior violations may under certain circumstances constitute an estoppel by abandonment. However, the abandonment or acquiescence in the violation of one restriction does not amount to the abandonment of other separate and distinct restrictions which are material and beneficial to the owners of the lots affected by them. *Steiger v. Lenoci*, 323 N.J. Super. 529 (App. Div. 1993). Further, the law imposes a heavy burden to prove abandonment: past violations must be so wholesale, so pervasive as to clearly and convincingly establish intent to abandon.

#### Laches

Described as inexcusable delay in asserting a right, laches is essentially a specialized form of estoppel. *Amir v. D'Agostino*, 328 N.J. Super. 141 (Ch. Div. 1998), aff'd., 328 N.J. Super. 103 (App. Div. 2000). More often than not the application of laches will turn on whether a party has been misled to his harm by the delay. For example, in *Cooper River Plaza East, LLC v. Briad Group*, supra, laches barred enforcement of a deed restriction where the delay was "significant" in that "it resulted in the construction of a building whose nonconformity easily could have been cured if notice had been provided at the outset" and no

“reason [was] given for the delay.”

#### Changed Circumstances

If the surrounding area has changed substantially since the restriction was imposed, the doctrine of “changed circumstances” may preclude enforcement. However, the change must be so radical that the original purpose of the restriction has been defeated and the perpetuation of the restriction is no longer of any benefit to the dominant estate. *Frick v. Foley*, 102 N.J. Eq. 430, aff’d., 110 N.J. Eq. 573 (E. & A. 1929).

In essence, the changed conditions doctrine is part of an equitable rea-

sonableness test, *Davidson Bros. v. P. Katz & Sons, Inc.*, 121 N.J. 196 (1990), premised upon the common-sense notion that if enforcement will cause none, or at the very least, de minimus harm, the covenant becomes “unreasonable” as it results in harm without benefit and is thus unenforceable. *Murphy v. Trapani*, 255 N.J. Super. 65, 74 (App. Div. 1992).

#### Conclusion

No matter how old the restriction may be, counsel should make no mistake about the likelihood of enforcement absent hard proof of a basis for constraint. In fact, “that only modest

deviations have occurred over more than a century” tends to establish the intent to adhere to the plan sought in the covenant. See *Blaine v. Ritger*. Since in theory the function of courts is to enforce rather than rewrite contracts, and because the laboring oar is on the party seeking to preclude enforcement, a defense or claim should not be undertaken — as with any case — until all of the facts are gathered and objectively viewed in the context of the governing principles discussed. Fact gathering in these cases is typically not a lengthy or materially disputed process, thereby lending itself to summary judgment as an effective tool for prompt disposition. ■