THE TIE THAT BINDS: Covenants and Equitable Servitudes

Introduction. As a real estate attorney, I am often called upon to draft covenants and equitable servitudes in connection with the development of client property. Common in contemporary land development practice in the United States, a covenant typically refers to restrictions created in contracts, like deeds of conveyance. “Covenants, conditions, and restrictions,” commonly abbreviated “CC&Rs” or “CCRs,” are a system of covenants affecting all of the lots in a common subdivision, whether a residential subdivision or a commercial subdivision. Sometimes required by municipal code as a condition to obtaining government approval for the right to subdivide property, covenant drafting is a balance between satisfying legal requirements granted for subdivision rights, the developer’s marketing and revenue goals, and lot-owners’ desire to control their real property and be free from extensive “private regulation” of their use and enjoyment of their lot.

CCRs might, for example, dictate building and roofing materials, require buildings be a minimum square footage, require approval of building design, allow homes to be painted only certain colors, restrict fencing materials, require a certain amount of landscaping, require a certain number of bushes and trees, require a certain minimum caliper tree, or place restrictions on whether a home can have a basketball hoop attached to it, whether RVs or campers can be parked in the driveway and restrict how long a garage door can remain open. The purpose of these regulations is to maintain a neighborhood character or prevent improper use of the land.

Outside of the subdivision CCRs, a covenant may be included in a deed itself, to prohibit something from happening on the land in order to benefit other land. For example, one of my clients was selling a lot on the perimeter of a retail shopping center to a buyer who intended to construct a hamburger fast-food restaurant on it. The retail subdivision had CCRs that governed the use and maintenance of the center’s common parking and landscape. However, in order to induce the buyer to purchase the lot, my client agreed to place a specific restriction on the adjacent properties it owned to provide that, for a period of 5 years, the adjacent properties were prohibited from being used for the sale of hamburgers except in connection with a restaurant that did not have drive-through service.

So, what exactly is a covenant? A covenant is a type of contract in which one party makes a promise to the other party to do (affirmative covenant) or not do some action (negative covenant). In real property law, the term “real covenants” is used to describe conditions tied to the use of land. If the covenant imposes restrictions on how the land may be used, it’s a “negative covenant,” and if it requires a certain continuing action, it’s an “affirmative covenant.”

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negative equitable servitudes can be found without a writing. a "covenant running with the land" imposes duties or restrictions upon the use of that land by the current and future owners.

as a general rule, in order for the burden of a covenant to run with the land, the following must apply:

1. the covenant must be in writing.

2. the original parties to the covenant must have intended that successors be bound by the agreement.

3. a subsequent owner must have had actual notice, inquiry notice, or constructive notice (record) of the covenant at the time of purchase of the affected property.

4. the covenant must "touch or concern" the land, that is, the covenant must relate to the use or enjoyment of the land.

5. there must be "horizontal privity" between the original parties to the covenant. horizontal privity is found if, at the time the original parties enter into the agreement, those parties share some interest in the subject land independent of the covenant (e.g. landlord and tenant, mortgagee and mortgagor, or holders of mutual easements).

6. there must be "vertical privity" of estate. vertical privity characterizes the relationship between the original party to the covenant and the subsequent owner. to be bound by the covenant, the successor must hold the entire estate in land held by the original party (usually fee ownership).

what is an equitable servitude? an equitable servitude is a term used in the law of real property to describe a non-possessory interest in land that provides the same type of protection and burden as a covenant running with the land but is found when someone claiming a covenant right can’t establish the privity requirements of a covenant. negative equitable servitudes can be found without a writing, when the burden is implied from observation (such as a common theme for development in a residential subdivision).

equitable servitudes are enforced by obtaining a court order to compel compliance or enjoin violation. a party who has rights under a covenant may sue for damages.

what has idaho done with covenants and equitable servitudes? as recently discussed in a 2007 case before the idaho supreme court, birdwood subdivision v. bulotti construction, idaho recognizes and enforces covenants restricting land use:

"covenants restricting the free use of land are valid and enforceable in idaho."

berezowski v. schuman, 141 idaho 532, 535, 112 p.3d 820, 823 (2005). "however, since restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the court will not extend by implication any restriction not clearly expressed. further, all doubts are to be resolved in favor of the free use of land." id. (citations omitted).
Thus, Idaho recognizes the validity of covenants that restrict the use of privately-held real property. The courts generally apply the rules of contract construction when interpreting such restrictions. Because covenants are in derogation of the right to use land, courts will not extend by implication any restriction not clearly expressed, and all doubts are to be resolved in favor of the free use of land. In interpreting a deed of conveyance, the primary goal of the Court is to seek and give effect to the real intention of the parties. Where a deed is ambiguous, interpretation of the grantor’s intent is a question of fact determined from the instrument itself, as well as from the surrounding facts and circumstances. However, where a deed is unambiguous, the parties’ intent must be ascertained from the language of the deed as a matter of law without resort to extrinsic evidence.

A covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. To determine whether or not a covenant is ambiguous, the Court must view the agreement as a whole. If the covenants are unambiguous, then the Court must apply them as written.

Equitable interests may arise because of the actions of the parties, such as oral representations. The Idaho Supreme Court has established the following test to determine if an oral promise regarding the use of land runs against a successor in interest to the original promisor:

1. whether or not the party claiming the enforceable interest actually has an interest against the original promisor; and

2. if such right exists, whether it is enforceable against the subsequent purchaser.

The dispute involved plaintiffs who purchased real property from Lake Cascade, Inc., located in the Lake Cascade Subdivision in Valley County, Idaho. At the time the plaintiffs bought the property, Lake Cascade, Inc. owned other property that was situated between the subdivision and Lake Cascade Reservoir (the “disputed property”).

The plaintiffs claimed that when they purchased their property in the late 1960s, Lake Cascade, Inc. orally represented that the disputed property adjacent to their newly purchased property would be "used and would remain as a common area for a boat basin, landing strip and other recreational activities." The property and the facilities were used by the owners of the lots in the subdivision as a common area until 1977.

In the meanwhile, Lake Cascade, Inc. filed a petition for bankruptcy relief. The bankruptcy court authorized a private sale of some of the disputed property to the Dishmans and Malleas prior to 1977, who subsequently fenced parts of the disputed property they acquired and denied other parties’ access over it to Lake Cascade.

Plaintiffs sued the Dishmans and Malleas to enforce against them the oral promise made by Lake Cascade, Inc.

The Court held that no writing is required to establish an enforceable right to restrict use of land, affirming the trial court’s finding that as Lake Cascade, Inc. and its agents had identified the common area to the plaintiffs, represented that it would remain a common area for recreational purposes, and as the plaintiffs had purchased their lots at a premium price based on these representations, the plaintiffs had an enforceable interest in the disputed property that was identified as common area.
The Court further upheld the trial court’s finding that the Dishmans and Malleas were not good faith *bona fide* purchasers of the disputed property because they were aware of the use of the common area and the plaintiffs' claims of an interest prior to purchasing the disputed property, and, accordingly, took title subject to the plaintiffs’ claims.

**Conclusion.** The law favors free use of land for all lawful purposes, but will honor restrictions on that use that are clearly expressed, whether in writing or orally, but oral promises granting rights in others to restrict the use of land can be enforced only against the promisor or those taking title with actual or constructive knowledge of the promise.

1 145 Idaho 17, 175 P.3d 179 (2007)


6 *See Latham v. Garner; see also Gardner v. Fliegel*, 92 Idaho at 770, 450 P.2d at 993 (if the language of a deed is plain and unambiguous the intention of the parties must be ascertained from the deed, and parol evidence, that is, documentary, oral, or real evidence extrinsic to the deed itself, is not admissible to ascertain intent); *Hines v. Hines*, 129 Idaho 847, 854, 934 P.2d 20, 27 (Idaho 1997) (noting that “there is no need to resort to extrinsic evidence to interpret or modify the terms of what appears to be a clearly written document”).

7 *Post v. Murphy*, 125 Idaho at 475, 873 P.2d at 120 (citing *Rutter v. McLaughlin*, 101 Idaho 292, 612 P.2d 135 (1980)).

8 “Where there is no ambiguity, there is no room for construction; the plain meaning governs.” *Post v. Murphy*, 125 Idaho at 475, 873 P.2d at 120.

