

## REAL ESTATE, TITLE INSURANCE & CONSTRUCTION LAW

# The Two Faces of Restrictive Covenants

Thwarting development, but enhancing desirability and market value

By David R. Pierce

Many people believe that restrictive covenants are antiquities not to be seen in their lifetime, however, a recent unpublished Appellate Division case, *Welch v. Chai Ctr. for Living Judaism*, Nos. A-4088-13T1, A-4163-13T1, 2016 N.J. Super. Unpub. LEXIS 1906 (App. Div. Aug. 15, 2016), should serve as a reminder of their effects.

Restrictive covenants are restrictions contained in a deed which run with the land and either restrict the use of the land or prohibit specified uses. Thus, restrictive covenants can have critical impacts on proposed development of the land. On one hand, they can thwart proposed development, as in the *Welch* case, but alternatively, they can be used to enhance the desirability and market value of some developments, particularly residential developments.

Restrictive covenants are commonly used either to protect, in some fashion, another property or as part of an overall development scheme intended to mutually benefit all properties in the development. One typical use of restrictive covenants has been found in shore communities where they are used to impose various restrictions intended to protect



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the view shed of the other properties involved. *See e.g. Perelman v. Casiello*, 392 N.J. Super. 412 (App. Div. 2007). Neighborhood schemes may also incorporate restrictions on setbacks and other improvements in order to promote or maintain a pleasing visual aspect of the development.

In *Homann v. Torchinsky*, 296 N.J. Super. 326 (1997), a restrictive covenant was incorporated into the development of Birchwood Lakes by the developer and affected approximately 198 homes. The restrictive covenant provided, in part, that "no lot shall be used except for residential purposes." *Id.* at 329. While there were other provisions in the restrictive covenant that created some ambiguities, the *Homann* court found that the clear intent of the portion of the restrictive covenant being debated was to prohibit the use of property in the development from use for anything other than residential purposes.

To successfully establish a restrictive covenant constituting a neighborhood scheme, the restrictive covenant

must: 1) apply equally to all lots within the scheme; 2) create a reciprocal benefit for all lots that are subjected to the burden of the restriction; and 3) be reasonably uniform so as not to impose an inequitable burden or benefit. *Id.* at 334 (quoting *Olson v. Jantausch*, 44 N.J. Super. 380 (App. Div. 1957).

Restrictive covenants, including neighborhood schemes, are deemed to be perpetual and run with the land unless there is an expressed intent to limit its duration or to create a benefit for an individual rather than another property. *Perelman* at 419. Nevertheless, a restrictive covenant may be deemed unenforceable because of changed conditions that frustrate the purpose of the restriction, because of equities that make unmodified enforcement unjust, or because the parties have abandoned the restrictive covenant. *Id.; Homann* at 336.

Abandonment is not evidenced by minor violations of a restrictive covenant. To constitute an abandonment of a restrictive covenant, the violations in question must be such that they denote

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a change in the neighborhood or a clear intent of the property owners to abandon the original plan. *Homann* at 336 (citing *LeFetra v. Beveridge*, 124 N.J. Eq. 24 (E. & A. 1938)). In *Homann* it was found that a restrictive covenant limiting property use to residential property had not been abandoned despite prior incidents in which properties had been devoted to other than residential use, because such uses were isolated instances and did not vitiate the neighborhood scheme. In addition, the president of the homeowners association provided testimony indicating that there was limited budget to bring enforcement actions against those who violated the covenant. Thus, despite the fact that a prior owner was a doctor who had treated patients in the house 20 years earlier, the restrictive covenant was found to be enforceable against the new owner who wanted to set up an oral surgery home occupation. *Id.* at 337-338.

In general, the enforcement of a restrictive covenant depends upon its reasonableness. *Davidson Bros. v. D. Katz & Sons*, 121 N.J. 196, 210 (1990). The New Jersey Supreme Court identified eight factors to be evaluated when determining whether a restrictive covenant was reasonable:

- (1) The intention of the parties when the covenant was executed, and whether the parties had a viable purpose which did not at the time interfere with existing commercial laws, such as antitrust laws, or public policy.
- (2) Whether the covenant had an impact on the considerations exchanged when the covenant was originally executed. This may provide a measure of the value to the parties of the covenant at the time.
- (3) Whether the covenant clearly and expressly sets forth the restrictions.
- (4) Whether the covenant was in writing, recorded and, if so, whether the subsequent grantee had actual notice of the covenant.
- (5) Whether the covenant is reasonable concerning area, time or duration. Covenants that extend for perpetuity or beyond the terms of a lease may often be unreasonable.

(6) Whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenanter. This may be the case in areas where there is limited space available to conduct certain business activities and a covenant not to compete burdens all or most available locales to prevent them from competing in such an activity.

(7) Whether the covenant interferes with the public interest.

(8) Whether, even if the covenant was reasonable at the time it was executed, "changed circumstances" now make the covenant unreasonable.

*Id.* at 211-212. (Citations omitted.)

After trial on remand, the Appellate Division in *Davidson Bros. v. D. Katz & Sons*, 274 N.J. Super. 159 (App. Div. 1994), determined that a restrictive covenant prohibiting the use of property as a supermarket for 40 years, and created by a supermarket that had relocated from the property, was unenforceable. The impact on the public and the lack of suitable sites for other supermarkets in the immediate vicinity led the court to conclude the enforcement of the restrictive covenant would be contrary to public policy. *Id.* at 163-171.

Apart from the reasonableness of the restrictive covenant, it will only be enforced to the extent that its language and intent are clear. Restrictive covenants are essentially contracts and their interpretation involves the application of general legal principles of contract construction, the most basic of which seeks to determine the parties' intent. While restrictive covenants are permissible, they are disfavored by the courts because they impair the alienability of the land, *Bubis v. Kassin*, 184 N.J. 612 (2004). Accordingly, when called upon to interpret and construe restrictive covenants, the courts apply principles of strict construction. If the purpose of the restriction is obvious however, strict construction will not be used to defeat the purpose. Restrictive covenants must be evaluated in the context of the circumstances surrounding their execution. *Homann*. To be enforced,

the meaning of restrictive covenants must be "clear and free of doubt." *Caullett v. Stanley Stilwell & Sons*, 67 N.J. Super. 111 (App. Div. 1061).

There are numerous cases finding restrictive covenants not to be applicable because the language did not clearly prohibit the proposed use, and vice versa. For instance, in the unreported Welch case, the court found that a property could not be used for a house of worship because the restrictive covenant stated that the property "shall be restricted to one private dwelling house for one family with garage appurtenant thereto." *Welch* at 6. While the restriction did not prohibit a house of worship, the court found that the intent of the restriction was clearly to limit the use of the property to residential use. Similarly, in *Ritter v. Jersey City Dist. Missionary Soc. of M.E. Church*, 105 N.J. Eq. 122, 123-124 (N.J. Ch. 1929), the court prohibited the use of a property for a church where the deed restriction stated that "[n]ot more than one (1) house shall be erected on each such fifty-feet frontage, nor shall any house be designed for use by more than one (1) family."

In other cases, language of a restriction has been deemed inadequate to prohibit the use of properties for multi-family dwellings. In *Bruno v. Hanna*, 63 N.J. Super. 282 (App. Div. 1960), the language in question provided "[t]hat no more than one residence or dwelling house shall be erected on any lot hereby conveyed" and "[t]hat the premises hereby conveyed shall be used for dwelling purposes only ...." This language was found by the court not sufficient to evidence an intent to prohibit the erection of multi-family duplexes on the properties.

Restrictive covenants can be an important tool in promoting a neighborhood scheme for a development or thwarting a proposed development that is deemed incompatible with the development scheme. The utmost care, however, must be used when crafting the language of the restrictive covenant to make the intent and restrictions as clear as possible. ■