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RESTRICTIVE COVENANTS AND ARCHITECTURAL REVIEW: SOME SUGGESTED STANDARDS

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Regulating the use of land through private restrictive covenants is an old idea. Such covenants can serve as useful tools for a residential developer to achieve such goals ranging from controlling the rate of growth of the area to providing for maintenance of common areas. One use of covenants which is gaining in popularity is as a means of regulating the aesthetic quality of a development. This is often done through the creation of an Architectural Review Committee which must review and approve all plans for any building or renovation within the development.[1]

INTRODUCTION

Any attempt, whether public or private, to regulate aesthetics is bound to generate controversy since aesthetic considerations are, by nature, subjective. The adage "beauty is in the eye of the beholder" applies to architecture as well as it applies to any other subject of aesthetic consideration.[2] Nonetheless, a degree of aesthetic regulation, if applied evenhandedly and with restraint, can be desirable. In any event, attempts to regulate the appearance of residential developments will not go away. The key, therefore, is to establish standards to guide review committees so they can further the legitimate goal of preserving the developmental scheme without turning into petty tyrannies of the majority, enforcing blind uniformity.

To balance the rights of individual property owners against those of the community as a whole, the committee must make decisions pursuant to some type of standards to prevent arbitrary enforcement. Yet because of the subjective nature of aesthetic

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1. *See infra* notes 7-15.

2. *See* Palmetto Dunes Resort v. Brown, 336 S.E.2d 15, 19 n.2 (S.C. Ct. App. 1986). The court noted that "[i]n the thirteenth century Aquinas made a stab at defining beauty: 'Beauty relates to the knowing power, for beautiful things are those which please when seen.'" *Id.* (quoting St. Thomas Aquinas, Summa Theologica, I-I, q. 5, art.4).

judgments, formulating meaningful standards can be difficult.[3]

This Article will briefly review the creation of a typical covenant scheme and look at some provisions for regulating a development's appearance.[4] This Article then examines how courts have construed these provisions to require that enforcement be reasonable.[5] Finally, this Article suggests guidelines which can be incorporated in the covenant to ensure that the committee's decisions will be not be artibrary.[6]

I. Creation and Typical Provisions

The essential element of an enforceable covenant of this type is a common scheme or plan of development.[7] The documents, in whatever form, must clearly establish the common plan. The restrictions must be applicable to all, or nearly all, the lots in the development. This can be accomplished in a number of ways: conditions written on the plat itself, included on deeds, or provided in a separate declaration filed contemporaneously with the plat.[8] Any of these methods will provide sufficient notice to the purchaser of the conditions and restrictions and establish the common scheme necessary for enforceability.[9]

Some typical conditions and restrictions which have been held valid include those limiting development to residential uses[10] and restricting such physical characteristics as setback lines.[11] Frequently such covenants attempt to regulate the aesthetics of the development. The intent of such provisions is to ensure uniformity of appearance and prevent unsightly construction which can be hard on the eyes as well as decreasing the value of surrounding property.[12] This is typically accomplished by creating an Architectural Review Committee (ARC) which must review and approve all plans

3. *See id.* (giving examples of statements made by great thinkers describing the subjectivity inherent in the formulation of aesthetic judgment).

4. See *infra* text accompanying notes 7-15.

5. See *infra* text accompanying notes 16-50.

6. See *infra* text accompanying notes 51-60.

7. *See also* Robert Kratovil, *The Declaration of Restrictions, Easments, Liens and Covenants: An Overview of an Important Document*, 22 J. Marshall L. Rev. 69 (1988); Wallace v. Hoffman, 84 N.E.2d 654, 656 (Ill. App. Ct. 1949); *see generally* Thomas E. Roberts, *Private Land Use Controls: Enforcement Problems with Real Covenants and Equitable Servitudes in North Carolina*, 22 Wake Forest L. Rev. 749, 793-94 (1987).

8. Kratovil, *supra* note 7, at 74-75; 20 Am. Jur. 2d *Covenants* § 168 (1965); Illinois Institute For Continuing Legal Education, *Land Use Law* § 151, at 1-65 (1989).

9. Kratovil, *supra* note 7, at 74-75.

10. Sherwood v. Rigsby, 581 N.E.2d 696 (Ill. App. Ct. 1991).

11. Chesebro v. Moers, 134 N.E. 842, 843 (N.Y. 1922).

12. Clark v. Rancho Santa Fe, 265 Cal. Rptr. 41, 49-50 (Cal. Ct. App. 1989); Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981).

for construction within the development.[13]

Any proposal for construction on a lot covered by the covenant must be submitted to and approved by the committee.[14] Such covenant provisions may also apply to appurtenant structures such as decks, storage sheds, and swimming pools.[15]

II. The Fate of ARC Provisions in the Courts

Courts have generally enforced provisions requiring submission of plans to an ARC.[16] This does not mean, however, that the ARC has unbridled discretion to impose its subjective vision of utopia on the entire development. The courts have insisted that some standards be applicable to the committee's decisions, although the standards need not be detailed and specific.[17] The majority rule is that a covenant's architectural review provisions will be enforced even absent detailed standards, subject to the rule of reasonableness. In other words, the committee's exercise of discretion must be reasonable and not arbitrary.[18] Unfortunately, determining what is "reasonable" in this highly subjective field has not always been easy.

Most of the reported cases have involved construction of a primary residence. Some basic principles have emerged from these cases. First, building restrictions cannot be interpreted so as to prohibit all use of the subject property.[19] Moreover, all covenant restrictions must be construed narrowly and in favor of the free and unrestricted use of land.[20] Nevertheless, the doctrine of strict construction will not be applied to defeat the obvious purpose of the

13. *See, e.g.,* Rhue v. Cheyenne Homes, Inc., 449 P.2d 361, 362 (Colo. 1969) (discussing dispute regarding architectural review committee).

14. *See, e.g.,* Westfield Homes, Inc. v. Herrick, 593 N.E.2d 97, 98 (Ill.App. Ct. 1992).

15. Chicago Title & Trust Co. v. Weiss, 605 N.E.2d 1092 (Ill. App. Ct. 1992) (basketball hoop); *Westfield Homes*, 593 N.E.2d at 100 (swimming pool); Amoco Realty Co. v. Montalbano, 478 N.E.2d 860 (Ill. App. Ct. 1985) (lightposts); Lindner v. Woytowitz, 378 A.2d 212 (Md. Ct. Spec. App. 1977) (swimming pool); Four Seasons Lakesites Property Owners Ass'n, Inc. v. Dungan, 803 S.W.2d 173 (Mo. Ct. App. 1986) (driveway and retaining wall); Sherwood Estates Home Ass'n v. McConnell, 714 S.W.2d 848 (Mo. Ct. App. 1986) (dog pen); Gosnay v. Big Sky Owners Ass'n, 666 P.2d 1247 (Mont. 1983) (fence and stable); Beckett Ridge Assoc. v. Agne, 498 N.E.2d 223 (Ohio Ct. App. 1985) (clotheslines); DeNina v. Bammel Forest Civic Club, Inc., 712 S.W.2d 195 (Tex. Ct. App. 1986) (satellite dish).

16. *Weiss*, 605 N.E.2d at 1095; *Westfield Homes*, 593 N.E.2d at 101; *Rhue*, 449 P.2d at 362.

17. Clark v. Rancho Santa Fe, 265 Cal. Rptr. 41, 49-50 (Cal. Ct. App. 1980); Donoghue v. Prynnwood Corp., 255 N.E.2d 326 (Mass. 1970); Palmetto Dunes Resort v. Brown, 336 S.E.2d 15, 19 (S.C. Ct. App. 1985).

18. *Weiss*, 605 N.E.2d at 1906; *Westfield Homes*, 593 N.E.2d at 101.

19. Baker v. Henderson, 153 S.W.2d 465 (Tex. Civ. App. 1941).

20. *Weiss*, 605 N.E.2d at 1095.

covenant.[21] Thus, where a restriction is clear and unambiguous, the courts will attempt to give it effect.[22]

Covenant restrictions typically take a variety of forms, ranging from the concrete (literally and figuratively) to the amorphous. Restrictions covering setback lines,[23] minimum floor area,[24] maximum height,[25] and even minimum cost of the primary residence[26] can be applied with little more than a pocket calculator. In these cases, the function of the ARC is essentially ministerial.[27] Other provisions regulate such matters as color schemes[28] or the type of materials which can be used.[29] As long as the committee does not attempt to alter the standards unilaterally[30] and applies them in an evenhanded manner,[31] courts have little trouble with these provisions.

On the other hand, some covenants purport to give the committee broad powers to pass on proposed building plans solely on the basis of appearance; in other words, purely aesthetic considerations. While such provisions have been viewed with some skepticisim, the majority of courts have upheld them in a given case, as long as the committee's action is "reasonable."[32] Standards as amorphous as "harmony of external design"[33] or even "aesthetic considerations"[34] have been held sufficiently straightforward to permit enforcement. Obviously, however, such language is pregnant with opportunity for arbitrary enforcement.[35]

One of the leading cases on this type of provision is *Rhue v. Cheyenne Homes*.[36] In *Rhue*, the plaintiffs wanted to move a 30-year-old Spanish-style ranch into a neighborhood of modern split levels. When the ARC refused to approve their plan, the plaintiffs

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21. *Id.*
22. *Id.*
23. Chesebro v. Moers, 134 N.E. 842 (N.Y. 1922).
24. J.P Bldg. Enters., Inc. v. Timberwood Dev. Co., 718 S.W.2d 841 (Tex. Ct. App. 1986)
25. Jones v. Brown, 748 P.2d 747 (Alaska 1988).
26. Griffin v. Pence, 187 N.E.2d 545 (Ill. App. Ct. 1963).
27. *See* Alliegro v. Homeowners of Edgewood Hills, 122 A.2d 910 (Del. Ch. 1955).
28. Trieweiler v. Spicher, 838 P.2d 382 (Mont. 1992) (committee rejected homeowner's proposed use of gray because seven of last ten homes built used gray).
29. Calvin v. Sinn, 652 S.W.2d 277 (Mo. Ct. App. 1983); Stergios v. Forest Place Homeowners Assoc., 651 S.W.2d 396 (Tex. Ct. App. 1983).
30. Dodge v. Carauna, 377 N.W.2d 208 (Wis. Ct. App. 1985).
31. Normandy Square Assoc. v. Ells, 327 N.E.2d 101 (Neb. 1982).
32. Chicago Title & Trust Co. v. Weiss, 605 N.E.2d 1092, 1096 (Ill. App. Ct. 1992).
33. *Normandy Square Assoc.*, 327 N.W.2d at 103.
34. Palmetto Dunes Resort v. Brown, 336 S.E.2d 15, 18 (S.C. Ct. App. 1985).
35. See *infra* note 39 and accompanying text.
36. 449 P.2d 361 (Colo. 1969).

filed suit. The court upheld the validity of the covenant provision and had little difficulty in determining that the committee's decision was reasonable.[37] Whatever the merits of having a neighborhood consisting of nothing but modern split levels, the Spanish ranch was clearly not in keeping with the character of the neighborhood, and was not consistent with the scheme of development.[38]

A few courts, however, have held that such an amorphous standard does not constitute a "scheme or plan" of development.[39] The covenant at issue in *Rhue* contained no specific standards to guide the committee. Where standards are vague or nonexistent, courts do not simply give the committee unbridled discretion. Rather, they will seek further guidance from the covenant's statement of purposes or from a *de facto* common scheme or plan of development.[40] At the very least, this gives the court some basis by which to review the committee's decision. In this way, courts have found committee decisions unreasonable where the committee sought to impose standards stricter than those expressly contained in the covenant,[41] rejected a proposal where identical proposals had previously been approved,[42] or imposed restrictions or prohibitions in

37. *Id.* at 363.

38. *Id.*

39. These courts have usually said that "aesthetic considerations" is simply too vague to consitute a "plan or scheme" of design. In *Alliegro v. Homeowners of Edgewood Hills*, the court upheld the decision of the architectural review committee to disapprove plans for a house which was considerably smaller than others in the development. 122 A.2d 910 (Del. Ch. 1955). The court noted that restrictions on cost, setback and floor area, providing fixed standards, were subject to nondiscretionary enforcement. In *dicta* the court questioned the board's authority to disapprove plans "for aesthetic or other reasons." *Id.* at 912-13. Another Delaware court later cited *Alliegro* for the proposition that "where the language used in the restrictive covenant is overly vague, imprecise or so unclear as not to lend itself to evenhanded application, then the grant of authority is normally not enforceable." Seabreak Homeowners Assoc. v. Gressner, 571 A.3d 263, 269 (Del. Ch. 1986). The covenant at issue in *Seabreak* authorized the ARC to reject plans for aesthetic or other reasons and to consider the "suitablility of the propoesd building . . . the harmony thereof with the surroundings and the effect of such improvements . . . on the outlook from the adjacent or neighboring property." *Id.* at 267. The court railed at this "imprecise, vacuous" language, finding that the term "outlook" in particular had no objective standards permitting it to be applied in an evenhanded manner. *Id.* at 270. The real basis of the *Seabreak* court's decision, though, was that the committee attempted to use the general "outlook" language to justify imposing a setback requirement which conflicted with a setback requirement elsewhere in the covenant. Thus, the decision did not really turn on the committee's application of aestheic considerations, but on its arbitrary enforcement of the language in the covenant itself.

40. *See., e.g.,* Boiling Springs Lakes v. Costal Servs. Corp., 218 S.E.2d 471, 478 (N.C. Ct. App. 1975); Young v. Tortoise Island Homeowners Assoc., 511 So. 2d 381, 384 (Fla. Dist. Ct. App. 1987).

41. *Boiling Springs Lakes*, 218 S.E.2d at 478; *Seabreak*, 517 A.2d at 270.

42. Trieweiler v. Spicher, 838 P.2d 382, 383 (Mont. 1992).

addition to those expressly contained in the covenant.[43]

III. Special Problems with Auxiliary Structures

Another problem of interpretation involves the application of building review procedures to auxiliary structures such as swimming pools. Many covenants expressly include such structures within the authority of the ARC. Others which apply to all "structures" or all "buildings" have been interpreted as applying to these auxiliary buildings as well.[44]

Presumably, outbuildings could be banned entirely. Many covenant provisions expressly list certain types of prohibited construction. A recent appellate court decision applied the principle of *incluso unius est exclusio alterius*, holding that the committee could not prohibit the building of a structure which was not specifically banned.[45]

In *Westfield Homes, Inc. v. Herrick*, the defendants purchased a home in a subdivision developed by the plaintiff.[46] The declaration of covenants, conditions, restrictions, and easements provided that plans for any construction or remodeling on the premises had to be submitted to the ARC. The declaration specifically prohibited construction of certain structures, including television antennas, clotheslines, and satellite dishes.[47] The Herricks submitted plans for, among other things, an above-ground pool, which was not listed among the types of structures which were specifically prohibited.[48] The committee refused to approve the plans for the pool and when defendants persisted with construction, plaintiff brought suit to enforce the declaration.[49] At trial and on appeal, Westfield took the position that the committee could refuse to permit a pool under any circumstances.[50]

The appellate court held that the committee could not entirely prohibit construction of a structural type which the declaration did not specifically bar. In so holding, the court stated as follows:

> [W]e agree with the trial court that the blanket denial was unreasonable under the circumstances. Nothing in the covenant states that an above-ground pool will be prohibited under any circumstances, although other items are specifically prohibited. Nothing in the record

43. Davis v. Huey, 620 S.W.2d 561, 568 (Tex. 1981); *Young*, 511 So. 2d at 384.

44. Lindner v. Woyotowitz, 378 A.2d 212 (Md. Ct. Spec. App. 1977); Greenberg v. Koslow, 475 S.W.2d 434 (Mo. Ct. App. 1971); Plymouth Woods Corp v. Maxwell, 181 A.2d 321 (Pa. 1962).

45. Westfield Homes, Inc. v. Herrick, 593 N.E.2d 97 (Ill. App. Ct. 1992).

46. *Id.*

47. *Id.* at 100.

48. *Id.* at 99.

49. *Id.*

50. *Westfield Homes*, 593 N.E.2d at 99-101.

> indicates that defendants' proposed improvements would be unsightly or in 'singularly bad taste.' The court offered plaintiffs ample opportunity to promulgate reasonable conditions for the construction, but plaintiffs chose not to submit such conditions to the court. Plaintiffs could, for example, have required fencing around the pool area, which would have addressed concerns about noise, visibility and safety. We conclude that the trial court did not abuse its discretion in denying plaintiffs a permanent injunction.[51]

Westfield indicates that an ARC is limited to establishing reasonable design standards for proposed improvements and may not ban a class of improvements entirely unless it is specifically prohibited by the declaration. This rule puts prospective home purchasers on notice of exactly what types of construction will be permitted while protecting surrounding owners from particularly noisy or unsightly structures. The court suggested that the committee could reject, for example, a structure which was to be "bright yellow with chartreuse polka dots."[52]

As the court interpreted the covenant, the committee could have conditioned its approval on, for example, the construction of a fence around the pool, or use of a color scheme which was consistent with that of the house. This interpretation effects the purpose of banning construction which is particularly unsightly without unduly hampering the homeowners' ability to enjoy their property. This sounds easy in practice, as exemplified by the yellow-and-chartreuse example. However, when the consideration is purely aesthetic, the questions can blend, literally, into subtle shades. The problem is, how can the committee be given the freedom to make inherently subjective judgments while still operating pursuant to meaningful standards?

IV. Suggested Standards

A. *Primary Residences*

With primary residences, the problem of developing workable standards is at least manageable. As noted above, restrictions such as minimum floor area and minimum cost provide objective criteria to guide committees and courts alike.[53] Of course, some of these provisions are similar to restrictions contained in municipal building and zoning codes.[54] Care should be taken to avoid confusion created by conflicting standards.[55] Other specific types of restric-

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51. *Id.* at 102.
52. *Id.* at 101.
53. See *supra* text accompanying notes 25-30.
54. P. Rohan, Zoning and Land Use Controls § 3.01[1], at 3-4 to 3-12 (1992).
55. *Cf.* Seabreak Homeowners Ass'n v. Gressner, 517 A.2d 263 268 (Del. Ch.) 1986 (ARC imposed setback requirement at variance with covenant, which incorporated county zoning ordinance).

tions can also be used. For example, a covenant might include a specific list of permissible architectural styles. A number of planned developments seek to maintain a particular style, such as colonial. In such a development, a home designed in a contrasting style would appear out of place and detract from the character of the entire neighborhood. Such a structure need not be inherently ugly, it is only out of place. The Spanish ranch in *Rhue* might well have been lovely in its own right; it was merely out of place in a neighborhood of modern split-levels.[56] In the same way, a modern split-level might be out of place in a historic neighborhood of Victorian homes.

It seems that the covenant could also regulate color schemes, thus addressing the chartreuse-polka-dot situation.[57] Regulations covering choice of building materials would have the salutary effect of controlling the quality of the construction as well as the appearance, again, assuring the overall desirability of the neighborhood. All of these standards permit relatively objective enforcement without requiring the committee to delve into subjective questions concerning appearance.[58]

In their most benign sense, these types of restrictions permit the residents of a development, acting through the ARC, to determine the characater of the neighborhood. Since covenants are essentially private contracts, there is no element of official coercion, as there is when communities practice exclusionary zoning. A prospective purchaser who doesn't like colonial architecture, for example, would be ill advised to purchase a lot in a subdivision which restricted construction to that type of home. Other developments certainly exist which are more compatible with his or her tastes.

Each of these types of restrictions provides several advantages. First, they can be set out with specificity in the covenant. Thus, a prospective purchaser will know with relative certainty what a person can build and what he or she cannot. Second, they reduce the risk of arbitrary enforcement. The ARC can enforce the community's collective value judgments without imposing a tyranny of the majority. The danger that the committee members can use the covenant restrictions to discriminate against their prospective neighbors is virtually eliminated. Any claim of such improper enforcement can be easily addressed by reference to the covenant. Third, the committee's job is made easier. Although the value judgments embodied in the covenant are inherently subjective, their application on a case-by-case basis is mechanical. A red, white and blue colonial is either permitted or it isn't. In this way the commit-

56. See *supra* text accompanying notes 25-39.
57. *Westfield Homes*, 593 N.E.2d at 102.
58. See *supra* text accompanying notes 25-39

tee members are insulated from the wrath of their neighbors because they are merely applying objective criteria contained in the covenant, and a prospective purchaser has notice of what is permitted.

B. Auxiliary Structures

For many people, a "dream home" contemplates more than just four walls used as a residence. It may include swimming pools, decks, screened-in porches, storage sheds, satellite television dishes, and other "auxiliary structures" surrounding the primary residence. These outbuildings may be connected to the main residence or may be freestanding. Such structures have the potential to pose even greater problems than the primary residences for developers and neighbors alike. While a house may be ugly (subjectively speaking), it is unlikely to generate noise or odor or be an attractive nuisance to neighborhood children.

This suggests that the concerns in regulating auxiliary structures are somewhat different than those involved in regulating primary residences. Even in an architecturally diverse neighborhood, neighbors may be legitimately concerned about the noise and light generated by a swimming pool or the unsightliness of a giant satellite dish in the front yard.

Initially, structures which are prohibited under any circumstances should be clearly defined in the covenant. If swimming pools are deemed undesirable in the development, this should be clearly stated up front, so that the aquatically inclined will be on notice that they should look elsewhere. If the prohibited list is intended to be nonexclusive, this too should be clearly stated, although this immediately introduces an element of uncertainty.

Beyond the intial list of prohibitions, the covenant drafters can attempt to provide regulations for other types of structures which are to be permitted. The primary type would be maximum square footage requirements for decks and swimming pools. Such a requirement is entirely objective, and can be enforced by the committee with only a tape measure and a calculator. Other restrictions could include relatively specific guidelines for screening, grading, and landscaping of auxiliary improvements.

In addition to regulating aesthetics such provisions can promote the health and safety of the neighborhood by reducing the danger inherent in swimming pools and similar structures. Here, perfect objectivity is neither possible nor desirable. A covenant could provide, for example, that a pool be screened by trees or shrubs. But what are appropriate plantings will depend on a number of factors, including the lay of the particular lot, the nature and extent of native vegetation and landscaping elsewhere on the

property. Here, then, the committee must perform its essential function: determining whether the proposal is appropriate under the circumstances, guided only by its own common sense and the rule of reasonableness.

Guidelines for color schemes and materials may also be appropriate. Again, these will not be entirely objective, but will permit the committee to function within a specific framework.

CONCLUSION

Increasingly, developers have found it desirable to regulate the future appearance of their developments through the use of restrictive covenants regulating construction on all lots in the community, which are applied and enforced by architectural review committees. A developer desiring to use such a procedure must walk a tightrope. If the restrictions established in the covenant are too narrow and specific, they will not have the desired affect. If they are too broad and vague, courts will find them unenforceable as giving the committee unbridled discretion. These provisions must be carefully drafted to provide the committee with guidance without unduly restricting it in effectuating the covenant's underlying purpose. For this reason, it is desirable to make the restrictions and prohibitions as specific as practicable, with reference to objective criteria. Although purely aesthetic judgments are inherently subjective, it is possible to draft covenants in such a way as to provide reasonably objective standards to guide the committee in its interpretation of the covenant's provisions.