

Deed Restrictions – A Limited Alternative for Land Conservation
Massachusetts Land Trust Coalition
November 2007

Statutorily imposed time limitations, recording and enforcement constraints limit the usefulness of deed restrictions (as opposed to conservation and certain other restrictions defined in Massachusetts General Laws Chapter 184 §31) as a long-term land protection tool in Massachusetts. Thus, restrictions not created and approved in strict accordance with §§ 31 - 33 should only be considered in situations where §31 restrictions prove inapplicable. If it is determined that such a limited restriction is the most appropriate mechanism for protecting a parcel, then it is necessary that all the statutory requirements for deed restrictions are met, and the limitations are communicated to all parties.

Background

Most restrictions on the use of land have severe limitations on creation and enforceability reflecting court and legislative policy that land owners should not be limited in their legal rights without clear public policy benefits. Such restrictions (referred to here as “deed restrictions” in contrast to §§ 31 restrictions or “Conservation Restrictions”) are also occasionally referred to as common law restrictions, non-exempt restrictions or private deed restrictions (although they may include non-private parties). Under Massachusetts law, restrictions are limited in duration and enforceability by Massachusetts General Laws Chapter 184 §23 and §§26-30. For example, restrictions that do not specifically address duration are not enforceable after thirty years, and those with explicit longer durations (including “perpetuity”) are only enforceable if the holder of the restrictions files periodic notices extending the periods of enforceability for additional twenty year increments. The overriding legislative purpose behind these sections is to discourage and eliminate obsolete restrictions on the use of land. Deed restrictions on the use of land will not be enforced by the courts unless all the requirements outlined in §23 and §§26-30 are clearly met.

In Practice

Conservation Restrictions are the tool of choice for permanently protecting land while it continues to be owned by individuals or entities which may desire other uses in the future. Deed restrictions should only be used in a limited number of situations. Deed restrictions may be useful:

- when the local or state approvals required for a Conservation Restriction are problematic because of political, temporal or other constraints;
- where the negotiation of terms results in provisions the state deems inappropriate for their approval; or
- where no benefited party is either governmental or deemed appropriate by the state to hold a Conservation Restriction.

Failure to meet the technical requirements imposed on deed restrictions are the most common reason for a court to declare a deed restriction unenforceable. Significantly, donation of a deed restriction cannot provide a charitable deduction for the donor, as such a gift does not meet the requirements of the Internal Revenue Service. It is important to understand the technical requirements imposed by statute on deed restrictions, and to understand continuing enforceability questions, before attempting to make use of them in land conservation practice.

Time Limitations: §23 & §27

Deed restrictions cannot be enforced for more than thirty years unless a longer period is specifically stated. M.G.L. chap. 184 §23 provides that restrictions on the use of land that are “unlimited as to time...shall be limited to a term of thirty years after the date of the deed or other instrument.” In other words, if a deed restriction makes no mention of duration, it will expire automatically in 30 years. A deed restriction can only

exceed the 30 year limitation by explicitly stating a longer term, say 100 years, and adhering to the re-recording procedure in M.G.L. chap. 184 §27(b). A *notice of restriction* must be recorded within 30 years of the restriction's original creation and every 20 years thereafter until the stated term has expired. Re-recording deed restrictions in this way, over a long period of time, however, is cumbersome and likely to be overlooked in practice.

Enforceability Requirements

In addition to the durational issues discussed above, there are two major enforceability requirements. Pursuant to §27(a) a person seeking enforcement of a deed restriction must be either: (1) a party to the instrument which created the restriction or his successor in title, or (2) an owner of an interest in land benefited by the restriction or identified as the benefited party in the instrument. Section 27(a) also requires that the instrument establishing the restriction contain an express identification of the persons and/or land benefited by the restriction. Pursuant to §30, the person seeking enforcement of a deed restriction must also show that the restriction provides him with an actual and substantial benefit at the time of the proceeding. A deed restriction on the use of land that does not wholly meet the technical requirements of §27(a) and §30 is likely to be unenforceable under the law.

For land conservation purposes, deed restrictions also carry provisions which reduce the confidence of the holder in long term enforcement. Section 30 contains several reasons why deed restrictions may be determined by the court to no longer be enforceable. The most disquieting of these, for land conservationists steeped in terms of perpetuity, states: “No restriction determined to be of such benefit shall be enforced or

declared to be enforceable” if continuation of the restriction “would impede reasonable use of land for purposes for which it is most suitable, and would tend to impair the growth of the neighborhood or municipality in a manner inconsistent with the public interest.”

Recommendations

Massachusetts case law on the enforceability of deed restrictions is complicated and highly fact specific. If it is determined that a deed restriction on the use of land is appropriate, then it is important for the party creating the restriction, and each party receiving (“holding”) the deed restriction, to engage legal counsel to consider the issues described here.

First, it is necessary to clearly identify all the benefited land and benefited parties in the original instrument creating the deed restriction. The instrument creating the deed restriction should explicitly state the benefit and purpose of the restriction on the use of land. Most restrictions provide a benefit to abutting land (“benefited land”). Those that do not benefit any particular land are referred to as “in gross” and are only allowed in certain circumstances such as when a general public benefit is provided. It is advisable that parties wishing to create a deed restriction should consider having affirmative rights granted over the burdened property for the benefit (use) of the benefited land in order to create an affirmative easement, which is not subject to the statutory requirements and extinguishment imposed on deed restrictions.¹

Second, it is essential that the instrument creating the deed restriction explicitly state how long the restriction shall exist. Otherwise, the restriction will be subject to the 30 year time limit on deed restrictions and can not be extended beyond 30 years by

recording a *notice of restriction*. For example, the instrument could state, “The restriction granted hereby shall be appurtenant to and run with the land conveyed and be binding for 100 years from the date of the recording.”

It is important to specifically state the purposes of the deed restriction. The general rule, under the law, is that an ambiguous deed restriction will be interpreted as permitting the least limitations in the restriction. Although you don’t want to be too specific. For example, “to protect the 4-toed salamander” would allow extinguishment of the restriction if the 4-toed salamander left the area or became extinct.² If the purpose of the deed restriction is to preserve the natural integrity of the land, the parties creating the restriction should follow the Conservation Restriction guidelines and state that the restriction is in furtherance of Massachusetts’s conservation goals and intended to further a public purpose. By so doing, the purpose of the deed restriction is clear.

It is equally important to adhere to the notice of restriction process and timely re-record the restriction before the 30 year anniversary of the restriction and within every 20 years thereafter until the restriction expires by its terms. The owner of the land benefited by the restriction must sign and record the notice of restriction. Furthermore, the *notice of restriction* must adequately describe the land benefited by the restriction, identify the land subject to the restriction, and identify the original instrument that created the restriction. If the restriction benefits several different land owners then each land owner, to preserve his/her individual right to enforce the restriction, must sign the notice of restriction. For additional technical requirements, refer to M.G.L. Chap. 184 Section 29.

Recommendation for Further Protection

Gifts of conservation interests in land (even where no charitable tax deduction is sought) may create a “charitable trust” which can further protect against conversion of land uses in violation of the wishes of the donor. The charitable trust doctrine (and its cousin the “public trust doctrine” for gifts to government agencies) depends on the clear intent of the donor. Good counsel may advise donors and recipients about the means of instilling charitable trust protections onto deed restrictions.

Conclusions

In sum, the statutory time limitations, re-recording requirements, and enforceability requirements present real challenges to the viability of deed restrictions as a long term land protection tool in Massachusetts. When these time limitations are coupled with the fact that easements and restrictions are frequently litigated, it is clear that deed restrictions should only be used as an alternative land protection tool in a limited number of situations. If a deed restriction is appropriate, it is absolutely necessary that all the requirements discussed in this paper are clearly satisfied. It is highly advisable to seek the assistance of an attorney familiar with property law and the law of easements and restrictions.

Sources

1. Labounty v. Vickers, 352 Mass. 337 (1967).
2. The Stop & Shop Supermarket Company v. Urstadt Biddle Properties, Inc., 433 Mass. 385, (2001).
3. Brear v. Fagan, 447 Mass. 68 (2006).
4. Garland v. Rosenshein, 420 Mass. 319 (1995).
5. Connaughton v. Payne, 56 Mass. App. Ct. 652 (2002).
6. Atwood v. Walter, 47 Mass. App. Ct. 508 (1999).
7. Walker v. Gross, 362 Mass. 703 (1972).
8. Patterson v. Paul, 448 Mass. 658 (2007).
9. Cogliano v. Lyman, 370 Mass. 508 (1976).

Footnotes

1. There is some question as to how much of an affirmative interest must be conveyed to convert a restriction to an easement. Certainly access does it; probably a mere right to go on to inspect does **not**.
2. It is better to be broadly specific, if such a thing is possible, and make sure that the writer is aware of any potential pitfalls.

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