



The New Supreme Law of the Land: Property Law of Servitudes

The latest edition of the common law relating to property and servitudes, The Restatement Third, Property (Servitudes), no longer accepts the description of covenants running with the land, those HOA CC&Rs, as “equitable servitudes” (See § 4.1). Rather, in my opinion, the recognition of the reality of homeowner association governance and constitutions is reflected in the new term, “servitudes.” There is nothing equitable about CC&Rs from the burdened homeowner’s perspective.

When an answer is sought to the question, “Why?”, the Restatement offers the rationale of the courts, since the Restatement is a “summary” of court opinions. When the homeowner – or anyone seeking an understanding of “the law” -- reads § 3.1, Validity of Servitudes, his first reaction is one of comfort, until he examines the commentary, Reporter Notes, and examples of court opinions. Section 3.1 puts restraints on covenant validity:

§ 3.1 Validity of Servitudes: General Rule

A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy

Servitudes that are invalid because they violate public policy include, but are not limited to:

- (1) a servitude that is arbitrary, spiteful, or capricious;
- (2) a servitude that unreasonably burdens a fundamental constitutional right;
- (3) a servitude imposes an unreasonable restraint on alienation under § 3.4 or § 3.5;
- (4) a servitude that imposes an unreasonable restraint on trade or competition under §3.6; and
- (5) a servitude that is unconscionable under § 3.7.

Reading the above, there is an apparent conflict between an “unconstitutional” servitude, and one that is a violation of public policy under “that unreasonably burdens a fundamental constitutional right”. The implication is that a servitude can be consistent with public policy if it reasonably violates a fundamental constitutional right, and is therefore valid. An attempt to find a clarification brings the reader to “comment h”, which reads in part, ***“The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law.”***

This judicial view of the supremacy of private agreements written by profit-seeking developers, without any governmental oversight, is shocking. How can a covenant, a servitude, that violates the US and state constitution not be illegal and invalid? It cannot, unless the courts adopt the position that servitudes are the supreme law of the land. The courts have allowed amendments to the CC&Rs to deprive a homeowner of his property without compensation, and have validated ex post facto amendments. Neither of which is permitted in the public sector

under the Constitution. The courts have also validated the surrender of fundamental rights by the mere posting of CC&Rs at the county clerks office, without the express consent of the homeowner as required in other areas involving the surrender of fundamental rights.

Who is guarding our Constitution and our constitutional and fundamental rights? Surely not the courts, nor the legislatures who “sanction” these CC&Rs by establishing laws that mimic the very same CC&Rs that the legislation is supposedly attempting to regulate. While we repeatedly read about court attention to the intent and explicit wording of a covenant, and the interpretation of vague wording by using the common everyday meaning of the words, the courts, including US Supreme Court, have allowed themselves to radically deviate from these pronouncements. This is especially true when it comes to applying constitutional prohibitions and restraints to individual property rights. (See the US Supreme Court Kelo eminent domain decision).

The Colorado Legislature defiantly proclaims that it’s Common Interest Ownership Act reflects public policy in support of homeowner associations as vital to the economy of Colorado, and that there is no authority to the contrary. (See in this eEditorial syndicated webpage, “Colorado Legislature Defiantly Protects HOAs” at <http://pvtgov.wordpress.com/2007/03/01/173/>).

As a result of judicial rulings and pro-HOA legislation, we are witnessing the transformation of the American system of government that is based on the Declaration of Independence and US Constitution to one supporting independent principalities. We are witnessing the creation of independent, private, contractual, authoritarian governments that are permitted to operate outside the US Bill of Rights as a result of judicial opinion and HOA legislation. The public policy thusly created reflect the placement of the laws of servitudes created by profit-seeking developers superior to the Constitution.

This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. (US Const., art VI).