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A guide to property restrictions: Covenants and easements - by Philip Hastings and Alexandra Brewer

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Covenants and easements are two common title encumbrances that can impact the development of real estate. It is important for purchasers, owners, and occupants of real estate to understand these concepts.

A restrictive covenant prohibits a property owner or tenant from doing something on the property. These types of covenants are imposed to enforce a standard of uniformity across a development, safeguarding property values. The scope and extent of possible restrictive covenants is vast and variable. In the residential context, covenants usually proscribe a building's construction (e.g., a minimum floor area) and prohibit certain types of uses (e.g., no home businesses). In the commercial context, covenants can be quite complex and impose a broad range of control and limitations.

A restrictive covenant, in most cases, is created by the landowner "declarant" recording a written "declaration" in the public real estate records (in New Hampshire, the county Registry of Deeds) or by setting forth the restrictions in the recorded deed to the burdened property. A restrictive covenant is often difficult to terminate or amend. Depending on the terms of the document creating the covenants, the written consent of all (or at least a majority of) the benefited property owners is necessary, as well as the consent of the holders of the mortgages on the property, if any. In some cases, approval from the municipality or a court may be required to modify or terminate the covenants.

A restrictive covenant may “run with” the land or to a specific person (or specific group). Its terms may be enforced by any person that has an interest in or benefit of the restriction or the property. This usually includes the “declarant”, the property owners’ association, and the other owners of benefited property, and sometimes includes third parties, such as the municipality.

An easement is a property right that gives its holder a nonpossessory property interest in someone else’s land for a specified purpose. An easement does not allow the holder to use the land for any other purpose nor does it prohibit the property owner from using the easement area, so long as the use does not unreasonably interfere with the holder’s specified use. Like restrictive covenants, easements may benefit (and “run with”) a particular property (an easement appurtenant”) or benefit a specific individual or entity (an easement “in gross”). Examples of an easement appurtenant include a right of way for access to and from a property or for the use of a well on another person’s land. The prototypical easement in gross is a power line easement to a utility company.

An easement may be express, implied, or prescriptive. An express easement is created by a written agreement or easement deed describing the burdened property, the benefited property (if any) and the terms of the specific use. Express easements are recorded in the same manner as deeds are.

An implied easement may be created when a person is granted the right to use someone’s land by law and not in a written agreement or easement deed. For example, the owners of lots in a subdivision shown on a recorded plan usually have an implied access easement over the streets shown on the plan (even if the street has not yet been built).

An easement by prescription arises when a person uses another’s property for a particular purpose over an extended period of time without permission. For example, a person who regularly crosses over a neighbor’s property to access a beach may be entitled to a prescriptive easement to continue to do so.

Most people use easements in their daily life, whether it’s using a shared driveway or flushing a toilet that relies on underground pipes to connect to the municipal sewer system. Generally, easements will continue indefinitely. However, some common ways to terminate an easement include impossibility of purpose, merger, abandonment, and by the express terms of the agreement itself.

Easements and covenants are not the only legal constraints that may affect a particular parcel of land. It is important to understand the effect of all encumbrances on your property. Partnering with capable legal and survey professionals is strongly recommended.

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