



## **Restatement Third, Property (Servitudes) American Law Institute 2000**

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### **Selected sections**

Note: The Restatement, formerly the Restatement of Laws, is not statutory law but common law, which is court made law as a result of prior court opinions. States first look to statutory law and in the absence of pertinent laws will look to common law for persuasive authority. The Restatement is the work of lawyers under the publisher, ALI, who “summarize” numerous court opinions into a workable, understandable set of guidelines to be applied to issues to be decided by the courts. As “persuasive authority”, such restatements are not binding upon the court.

The Restatement consists of two volumes for a total of 1348 pages, replete with case law. Not all of the contents within a chapter, section, subsection, comment or Reporter’s Note have been included in this document.

#### **a. Chapter 1, Definitions**

##### **§ 1.3 Covenant running with the land**

(1) A covenant is a servitude if either the benefit or the burden runs with the land.

#### **b. Chapter 2, Creation of Servitudes**

#### **c. Chapter 3, Validity of Servitude Arrangements**

##### **§ 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.

[comment h, p.359]. The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law.

### **§ 3.4 Direct restraints**

Reasonableness is determined by weighing the utility of the restraint against injurious consequences of enforcing the restraint.

### **§ 3.5 Indirect restraints**

- (2) A servitude that lacks a rational justification is invalid.

### **§ 3.7, Unconscionability**

A servitude is invalid if it is unconscionable.

....

[Comment c, p. 485]. Unconscionable transactions contain an element of overreaching, unfairness, surprise, or harshness that leads to the conclusion that the servitude should not be enforced, even though the disadvantaged party could have protected him- or herself through the exercise of proper precautions.

## **d. Chapter 4, Interpretation of Servitudes**

### **§ 4.1 Interpretation of servitudes [in part]**

- (2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy.

## **e. Chapter 5, Succession to benefits and burdens of servitudes**

## **f. Chapter 6, Common Interest Communities**

### **§ 6.3 Power to Create a Common Interest Community Association**

- (1) If creation of an association has not otherwise been provided for in a common-interest-community, and has not been expressly excluded by the declaration . . . the owners of a majority of the lots or units not owned by the developer may create an association to manage the community and enforce the servitudes. All members of the common-interest-community are automatically members . . . .

(2) If necessary for the management of common property, the court, on petition of owners of less than a majority of the lots may authorize the creation of an association.

### **§ 6.5 Power to Raise Funds: Assessments, Fees, and Borrowing**

(1) Except as limited by statute or the declaration:

(b) assessments may be allocated among the individually owned properties on a reasonable basis, and are secured by a lien against individually owned properties.

(2) Unless expressly authorized by the declaration, fees for services rendered, or for the use of common property, must be reasonably related to the costs of providing the service, or providing and maintaining the common property, or the value of the use of service.

Comment b. Scope and rationale. . . . Common –interest communities play an increasingly important role in American housing. Both the private-property owners in the community and the public have stakes in the association’s ability to maintain the comm. Property and both may be affected by the association’s ability to carry out its other functions. . . . The assessment power is critical to the financial viability of most common-interest communities.

Comment d. Lien securing assessment obligation. Because assessments are vital to the economic health of a common-interest community, the governing documents normally provide that the assessment obligation is secured by a lien against individually owned property.

Case law issues: Assessments may be invalid if board fails to comply with required procedures (meeting notice; illegal board election; existence of a quorum, etc.); collection of assessments (FDCPA); assessment obligation is independent of association duties (cannot use statutory right of setoff as contravention of public policy; failed to maintain; pay under protest, and sue; grievance cannot offset);

### **§ 6.7 Power to adopt rules governing property**

(3). Absent specific authorization in the declaration, the common-interest community does not have the power to adopt rules, other than those designed to protect the common property, that restrict the use or occupancy of, or behavior within, individually owned lots or units.

Comment b. Rationale. Rules are not valid unless also reasonable. . . . Even in the absence of an express grant of authority, an association enjoys an implied power to make rules in furtherance of its power of the common property. The association has no inherent power to regulate use of the individually owned properties, however, except as implied by its responsibility for management of the common property.

### **§ 6.8 Enforcement Powers**

In addition to seeking court enforcement, the association may adopt reasonable rules and procedures to encourage compliance and deter violations . . . .

Comment a. Rationale. The procedures adopted by the association accordingly must be reasonable and the association must act reasonably in applying them.

Comment b. Enforcement methods. Fines and penalties . . . are particularly potent enforcement tools if the amount is secured by the association's lien for unpaid assessments and charges against the property. . . . The amounts must be reasonable, and the procedures adopted must provide property owners with notice of their potential liabilities and a reasonable opportunity to present facts and any defenses they may have.

Case law: Fine not a common expense; imposition of a fine is a governmental power; enforcement by legal means – shutting off water or electricity.

### **§ 6.9 Design-Control Powers**

Except to the extent provided by statute or authorized by the declaration, a common-interest community may not impose restrictions on the structures or landscaping that may be placed on individually owned property; or on the design, materials, colors, or plants that may be used.

Comment a. Rationale. Although design controls are a common feature of common-interest communities, they are not necessary to the effective functioning of the community. . . . Design controls may contribute to the maintenance of property values, but they may also interfere with freedom of expression and contribute to the creation of communities lacking in variety or architectural interest.

Comment c. Validity and interpretation of express design controls. By imposing a requirement that design controls be exercised reasonably, courts validated discretionary design controls that might otherwise have violated public policy under principles set forth in § 3.1.

Comment d. Discretionary design controls must be reasonably exercised. Challenges to design-control decisions are governed by the rule set out in § 6.13 that the member challenging the decision bears the burden to show that it is unreasonable. . . . If the property owner establishes a prima facie [i.e., obvious] case of unreasonableness, the burden shifts to the association to establish that the decision is both fair and reasonable. Failure to consider relevant facts or to permit interested property owners to present relevant information may also shift the burden to the association to establish that it acted reasonably.

### **§6.10 Power to Amend the Declaration.**

(3) Except as otherwise expressly authorized by the declaration, and except as provided in (1) [deals with majority vote for amendments] unanimous approval is required (a) to prohibit or materially restrict the use or occupancy of, or behavior within, individually owned units, or (b) to change the basis for allocating voting rights or assessments among community members.

Comment a. Rationale. The declaration for a common-interest community functions like a constitution for the community.

Comment d. Implied amendment powers; prohibition of nuisances. Under this section, the community also enjoys an implied power to amend the declaration to impose restrictions on

individually owned lots or units to prevent harm to and unreasonable interference with the reasonable use of both common property and individually owned property in the community.

**Comment g. Unanimous consent required for amendments that deprive individual owners of significant property or civil rights.**

## **§6.11 Association's Standing to Sue and Defend**

## **§6.12 Judicial Power to Excuse Compliance with requirements of the Governing Documents**

A court may excuse compliance with any of the following provisions in a governing document if it finds that the provision unreasonably interferes with the community's ability to manage the common property, or carry out any other function set forth in the declaration, and that compliance is not necessary to protect the legitimate interests of the members or lenders holding security interests.

- (1) a provision limiting the amount of any assessment that can be levied against individually owned property;
- (4) a requirement that an amendment to the declaration be signed by the members;
- (5) a quorum requirement for meetings of the members.

**Comment a. Rationale.** The public and the property owners have substantial interests in the long-term viability of the common-interest community.

## **§6.13 Duties of a Common-Interest Community to Its members**

- (1) In addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common-interest community;
  - (a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control;
  - (b) to treat members fairly;
  - (c) to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers;
- (2) A member challenging an action of the association has the burden of proving a breach of duty by the association . . . [and] that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common-interest community.

**Comment a. Rationale.** Because the organizational form [i.e., nonprofit corporation] is simply a tool to facilitate operation of the property relationship among community members, in the event of a conflict between servitudes law and the law applicable to the association form, servitudes law should control.

**Comment b. Relationship to "reasonableness" and "business" judgment rule.** It seems more likely, however, that adoption of the business judgment rule is intended to reduce the ease with which disgruntled members can obtain judicial review of association decisions and to discourage judges from substituting their judgment for that of the association. The rules in §6.14 govern the relationship between the directors and officers and the association.

In the law of business corporations, where it developed, the business-judgment rule is designed to encourage entrepreneurial risk-taking by protecting directors from personal liability for losses due to erroneous business judgments . . . .

There are three significant differences between business corporations and other types of nonprofit corporations and common-interest community associations, however, which suggest that there may be a greater need for judicial review of common-interest community decisions than of decisions of other corporations or associations. First, the stakes of association members are generally much higher than those of shareholders in business corporations. . . . Second, the range of power the association holds over the member's well-being and the range of decisions the association is called on to make is significantly broader than on the business corporation. . . . The third difference is that the association members cannot ordinarily sell their homes as easily as they can sell shares of stock in a business corporation. Association members are more like shareholders in a closely held corporation where liquidity is absent;

#### **§6.14 Duties of Directors and Officers of an Association**

The directors and officers of an association have a duty to act in good faith, to act in compliance with the law and the governing documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions.

Comment a. Rationale. In determining whether a director or officer has breached a duty imposed by this section, the standard should be that of an ordinary reasonable director of a common-interest community.

Comment b. Duty to act in good faith and deal fairly. The primary functions of the community association are to protect property values and quality of life by managing the common property . . . .

Comment c. Duty to use ordinary care and prudence. Failure to do so may result in personal liability to the association or members to the association.

#### **§ 6.15 Liability of Members for Association Torts**

#### **§ 6.16 Representative Government**

The board is entitled to exercise all the powers of the community except those reserved to the members.

Comment a. Rationale. If creation of an association is not provided for, however, or if no governance structure is specified, this section provides for the election of a board to exercise powers of the community.

Comment b. Powers expressly reserved to members. Implementing the assumption that the board is intended to be the governing body of the community, the rule in this section states that the board has all the powers that are not expressly reserved to the members. The remedy of

members dissatisfied with the board's actions is removal or replacement of the board members through the election process.

Comment c. Election of the governing body. Except as otherwise authorized by statute, election procedures must provide a reasonable opportunity for eligible members to become candidates for election and to make their views known to the electorate, and a reasonable opportunity for eligible voters to cast their votes.

### **§6.17 Voting Rights**

Unless a contrary interpretation is required by statute or by the governing documents, a requirement for approval by a certain percentage of "owners" means approval by that percentage of votes.

Comment b. Interpretation of majority- or percentage-vote requirements. Under the rule stated in this section, the developer is not entitled to votes for lots or units that are not subject to assessments unless the governing documents specifically permit it.

### **§ 6.18 Meetings and Elections**

Except when the board properly meets in executive session, members of the association are entitled to attend meetings of the board of directors and to a reasonable opportunity to present their views to the board.

Comment a. Rationale. [A] servitude [i.e., covenant] that substantially denied community members the ability to participate in the governance of the association would be invalid as against public policy under the rule stated in § 3.1.

### **§ 6.19 Developer's Duty to Create an Association and Turn Over Control**

Comment c. Transfer of common property. The common property that must be transferred includes all real and personal property intended for the community, including the governing documents of the community, rules and regulations, insurance policies, funds for the association, and the records of the association from its inception.

### **§ 6.20 Developer's Duty to the Community**

Until the developer relinquishes control of the association to the members, the developer owes the following duties of the association and its members:

- (1) to use reasonable care and prudence . . .
- (2) to establish a sound financial basis for the association . . .
- (3) . . . .
- (4) to maintain records and to account for the financial affairs of the association . . .
- (5) to comply with and enforce the terms of the governing documents . . .
- (6) to disclose all material facts . . . affecting the condition of the property . . .
- (7) to disclose all material facts . . . affecting the financial condition of the association . . . .

### **§ 6.21 Developer's Power to Waive Provisions of the Declarations**

A developer may not exercise a power to amend or modify the declaration in a way that would materially change the character of the development or the burdens on the existing community members unless the declaration fairly appraises purchasers that the power could be used for the kind of change proposed.

## **Chapter 7, Modification and Termination of Servitudes**

## **Chapter 8, Enforcement of Servitudes**

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