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Deed Restrictions Pose Roadblock On Path To More Housing

By David Holtzman

Law360 (March 1, 2024, 12:16 PM EST) -- Tara Barauskas had to pinch herself. The executive director of Community Corp. of Santa Monica found a 2-acre vacant property in 2020 near Los Angeles International Airport that looked like the perfect place for a large affordable housing development.



A man walks along a street in a neighborhood of single-family homes in Los Angeles. In California, where the housing crisis is perhaps more acute than anywhere else in the U.S., lawmakers passed a law in 2021 overriding certain deed restrictions when a development will be 100% affordable. (Frederic J. Brown/AFP via Getty Images)

"The west side of L.A. has been gentrifying over the years and has become quite inaccessible," she told Law360 earlier this year. "This was a prime piece of real estate with nothing on it except a closed-up office building. It was a developer's dream, and I was like, 'I can't let go of this, right?'"

There was a problem, however. When she dug into property records, she discovered a deed restriction that limited what could be built on the site to one duplex per acre. That meant only two homes could be developed, instead of the 102 homes her team determined could fit on the site. The restriction was included in a set of covenants that tied the 2-acre property to 25 adjoining lots with various owners.

Barauskas had to decide whether to walk away from the project or find a way to overcome the deed restriction. One option was to compensate the other owners to get them to undo the restriction; another was to sue them. Instead, she tackled the issue head-on, working with a member of the California State

Assembly to pass a 2021 law that overrides such restrictions when a development will be 100% affordable.

It was a breakthrough that appealed to state legislators in California, where the housing crisis is perhaps more acute than anywhere else in the U.S. It's also unlikely to be replicated in many states, though deed restrictions are one of the biggest hurdles as cities and states try to create new housing opportunities in low-density neighborhoods.

The Public Policy Argument

Soon after Arlington, Virginia, passed an ordinance in March 2023 legalizing up to six residential units on a lot, a developer spotted a single-family home it wanted to convert to a duplex. Then some of the neighbors informed the developer of a deed restriction that barred more than one unit on a lot. The developer backed off.

"You could try to challenge these [restrictions], but a developer wants to make money the most efficient way possible, and no one wants to buy a lot and have to fight the neighbors," said Kedrick Whitmore, who chairs Venable LLP's land use and zoning practice with an emphasis on the D.C. area. "If they see opposition they're going to walk away."

Along with the limit on structures per lot was a restriction intended to block nonwhite people from buying the Arlington property. The U.S. Supreme Court ruled in 1948 that the state could not enforce such racial covenants, although private parties could abide by them. The 1968 U.S. Fair Housing Act outlawed these covenants altogether. Today, some local and state governments and individuals offer guidance on how to remove them from deeds. For example, California Assembly Bill 1466, which Gov. Gavin Newsom signed in 2021, requires county governments to set up programs to redact racial covenants from property records.

In the case of racial covenants, there was a clear public policy imperative to override them, notes Michael Derdeyn, an attorney at Flora Pettit PC in Charlottesville, Virginia. But that isn't necessarily the case for restrictions on the use of a property, he said.

"The way to defeat a restrictive covenant is changed conditions or if it's against public policy," Derdeyn said. "Changed conditions is pretty difficult to prove, because you have to show that conditions have changed so much that the restriction is of no useful value."

Another complication is that it's quite common for racial covenants and limits on the use of a property to appear together in the same legal documents. Barauskas of the Santa Monica Community Corp. said that Public Counsel, a law firm in Los Angeles that represented her nonprofit as it sought to build on the 2-acre parcel, estimated through research that 60% of residential property in the city has had racial and use restrictions written into its deeds.

Both types of restrictions existed on the property near LAX that Barauskas wanted to buy, which made sense to her, because the restrictions had a similar purpose.

"That's who they were trying to keep out — low-income people of color," she said.

However, a title company advised her that while the racial covenant was unenforceable, the restriction on housing density remained binding. So Barauskas worked with then-Assemblymember Richard Bloom, D-Santa Monica, to pass Assembly Bill 721, which overrode deed restrictions on housing density. The bill applies when rental housing is proposed that is affordable to people making 80% or less of the area median income. The apartments have to remain affordable for at least 55 years.

A separate bill, Assembly Bill 1584, passed in 2021, bars covenants from preventing construction of accessory dwelling units, a form of housing that has **caught on** in some parts of California.

California's idea has spread to at least one other state. In 2023, Washington State Rep. Jessica Bateman, D-Olympia, sponsored House Bill 1110, a bill whose primary purpose was to allow more so-called **missing middle housing** such as duplexes and sixplexes in urban areas that historically only permitted single-family homes. A provision in the bill prevents homeowner associations from prohibiting missing middle homes through deed restrictions.

Bateman told Law360 in an email that the provision only applies to deed restrictions that are created after

the law's effective date, not to existing covenants like the one Barauskas found on the Los Angeles property.

Concerns About Government Overreach

While housing advocates may see a clear public policy reason to work around or eliminate deed restrictions on density, homeowners in neighborhoods with mostly single-family homes often see things differently.

An example of this may be found in the city of Austin, Texas. The city's approval in December of an ordinance allowing up to three housing units on a lot drew criticism from Bill Aleshire, who operates the law firm AleshireLaw PC. He said the city is effectively encouraging developers to try to evade deed restrictions that allow just one unit per lot in many parts of the city.

Aleshire currently represents a group of residents from the Elmwood Estates neighborhood in South Austin in a court battle with a developer that wants to build two units on a lot. That's the maximum allowed by Elmwood's covenants. What upset residents was that the developer first subdivided the lot into two, so it could build four units in an area where only two were previously allowed.

While the covenants in this case allow subdivisions, "You can't use that to defeat the restriction," Aleshire told Law360.

Aleshire said deed restrictions like Elmwood's help protect the lifestyle residents enjoy in their neighborhoods and their property values. The city government disrespected these residents' interests, he argued, when it passed the law allowing increased housing density.

The city claims it does not have anything to do with deed restrictions, as they are agreements between private parties, Aleshire said, but the city's recent actions suggest otherwise.

"It looks to me like the city of Austin is begging to be made a party to the next one of these lawsuits," he said. "They've gone from simply ignoring private deed restrictions to the point of encouraging others to violate them by expediting their applications."

The plaintiffs in Aleshire's case discovered what the developer was doing because they were vigilant, he said. In many neighborhoods, he noted, people aren't paying attention to developers' applications for city permits, and they may not have a homeowners association to protect them from covenant violations.

They may not even know the deed restrictions exist.

Derdeyn of Flora Pettit echoed that sentiment.

"I don't think most people know what kinds of restrictions exist within their chain of title," Derdeyn said. "You have these covenants that may say, no commercial uses, no apartment houses, only single-family homes. But whether anybody enforces them is an open question."

When matters involving deed restrictions do end up in court, homeowners trying to use them to block development may often be at a disadvantage, he said. Courts are usually supportive of a clearly written restriction, but any ambiguity will typically be interpreted in favor of a developer or property owner looking to develop their land.

Cities like Austin may continue to face criticism for passing legislation to diversify neighborhoods' housing stock without taking deed restrictions into account. Meanwhile, at the state level, elected officials have to decide if they want to address the challenge of such restrictions directly.

According to Whitmore of Venable, few states are likely to follow California and Washington's lead and override or block deed restrictions in order to allow housing development. Such actions will typically be perceived as too much of an intrusion on private contract rights, he said.

"Politically, it's a hot-button issue," Whitmore said. "And I think that makes sense, because where do you draw the line and say, it's too much government control?"

--Editing by Haylee Pearl and Dave Trumbore.

