THE AFFORDABILITY PRESERVATION PROJECT
a product of Community Legal Resources

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Deed Restriction

How does the Model work?

Deed restrictions are usually imposed on a buyer of land when the property is sold and the restrictions are included in the seller's deed to the buyer. They vary in what is restricted. Often, the restriction reflects a general plan for a neighborhood, such as a restriction on the use of the property for single family residence. In this context, restrictions are often imposed by a property developer to maintain certain standards. Such restrictions may include limits on the color the house may be painted, what trees may be planted, or the size of homes to be built on the property. Affordability restrictions may be imposed through this mechanism.

By accepting a deed with affordability restrictions, a buyer is generally agreeing to sell to an eligible purchaser in order to preserve the affordability of the home. Another method of imposing restrictions on the title to the property is through a separate instrument that is joined by the seller and purchase. This will often take the form of a covenant which explicitly runs with the land. This method of creation allows a little more flexibility in defining the terms, conditions and enforcement remedies of the restrictions.

Affordability restrictions generally prohibit selling the property to anyone other than an "eligible" buyer. If these restrictions are contained in the deed, the grantor will often retain a right of reverter or reentry. In the absence of such a remedy, enforcement of the restrictions may be limited to damages or an attempt to seek specific performance, which may be more clearly spelled out in a separate affordability covenant.

The drawback of this option is that, for the deed restriction to be effective, someone must monitor each unit of housing and enforce the deed restrictions by civil suits, if necessary – this can be costly and cumbersome.

Implications of the Model.

Deed restrictions are not heavily regulated by statute. Most of the legislation imposes some limitation on the duration of the restrictions or regulates the consequences of the enforcement mechanism built into the restriction.

While, theoretically, a restriction may be perpetual, they may also constitute an impermissible restraint on the alienability of property. Both the Michigan courts and the Michigan Legislature have restricted the right to limit sales of property for unlimited periods of time. However, if affordability restrictions are construed to be for public welfare purposes or public, educational, religious or charitable purposes, these rules may not apply.

To the extent that the affordability restrictions are considered to be for "public welfare purposes," MCL 554.381 provides that "[n]o statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes."

Common enforcement mechanisms include an automatic reversion of title to the property upon violation of the restriction (possibility of reverter) or a right to reclaim the property upon violation

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(right of entry). Most possibilities of reverter or rights of reentry must occur within thirty years of their creation or they will terminate unless a written notice of preservation is recorded in the Register of Deeds within a period of not less than 25 nor more than 30 years after creation of the interest. An exception to this requirement exists where the interest to be terminated is an interest held for public, educational, religious or charitable purposes.

Implications for Michigan property taxes.

There is no indication that the existence of an affordability restriction on a property will result in beneficial tax treatment under Michigan law. If effective, the result of the affordability restrictions may offer a homeowner an opportunity to challenge increased property assessments that are based on an area's general appreciation in value. The homeowner would argue that their purchase price is the fair assessment level and should result in consistently lower taxes to that extent.

Impact on transferability and title.

Restrictions are a common device in Michigan property transfers. There should be no adverse impact as a result of the existence of the restrictions in the chain of title. A subsequent purchaser can receive title insurance subject to an exception for the restriction and the rights contained within it. A tougher situation will exist in the event that the restriction has been violated. An insurer will most likely require a quiet title judgment ruling that the property has reverted to the grantor (in whose favor the possibility of reverter exists) or that the grantor has properly exercised its right of entry in order to insure the grantor's title.

Protection of third-party interests.

Many restrictive covenants are recorded against an entire subdivision and benefit—and are, therefore, enforceable by—any homeowner within that subdivision. By contrast, affordability restrictions are specific to individual properties and the beneficiary is the original grantor or the entity described in the initial restricting instrument.

Implications for bankruptcy.

As a covenant running with the land, a deed restriction is not dischargeable in bankruptcy.

Impact on third-party financing.

Lenders commonly take mortgages secured by properties subject to restrictions and covenants. The lender will often ask for a title insurance endorsement that insures them against loss sustained as a result of a violation of the restrictive covenant. This coverage will likely be problematic for a title insurer. However, because a violation will only occur upon a sale to a non-eligible purchaser, at which time the mortgage is usually discharged, it is possible that this risk will be recognized as somewhat remote and lenders may not require the title insurance coverage.

Amount of government involvement.

Government involvement in an affordability restrictive covenant is, at most, minimal. There may be zoning implications but these are determinable at inception and should not be involved thereafter.

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Enforcement mechanisms.

As stated above, enforcement mechanisms usually include at least one of the following: (1) a possibility of reverter, (2) a right of entry, or (3) an action for specific performance. These mechanisms all require some element of active monitoring to determine whether there is a violation at all and then to enforce the restriction. Absent some involvement by the benefited party, an unenforced restriction may ultimately be construed by the courts as unenforceable due to a pattern of waiver and noncompliance.

Ultimately, there is no practical way of ensuring enforcement in the absence of ongoing, vigilant, methodical monitoring and enforcement efforts by some nonprofit or public agency. There is no “self-enforcement” component to these. The beneficiary of the restriction will bear the responsibility to identify a violation and initiate whatever enforcement mechanism is in place at its own expense.

While enforcement may be expense and time-consuming, initiation of the restriction is relatively simple and inexpensive.

Implications for scattered site development.

Deed restrictions are extremely well-suited for scattered site development. They are not dependent on a common use or pattern of development.

Does the Model contemplate ongoing active support of the homebuyer, e.g. source of cash, non-profit involvement?

The model does not have any impact on the homeowner until the homeowner seeks to sell the property. There are generally no obligations or responsibilities other than to sell to an eligible purchaser.

This document is a product of the Community Legal Resources Affordability Preservation Project. Please check the CLR Affordability Preservation Project website for updates to this document:

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This publication is intended to provide general information, and is not a substitute for legal advice. If you have additional questions about this issue, contact Community Legal Resources at 313/964-4130.

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