



## COVENANT, CONDITIONS, & RESTRICTIONS

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“Covenants, conditions, and restrictions” (hereafter CC&Rs) is a generic term for privately-created rules and regulations that frequently govern the use and improvement of real property. They are a long-time staple of the real estate market, appearing regularly as exceptions to title.

### The Basics – CC&Rs Defined

A covenant is an agreement or promise to do or not to do a particular act. It is created by those words in a deed or other instrument that denote an agreement between the parties to that deed or instrument.

A restriction is a limitation on the use of the land.

Land developers often utilize covenants and restrictions when subdividing land in order to establish uniform provisions concerning the use of the lots and the character, size, and location of the improvements to be constructed on the lots. These restrictions are usually called general plan restrictions, and are normally set forth on a plat of subdivision, in the developer’s deeds to the initial lot purchasers, or in a declaration. (While probably not entirely synonymous, the terms “covenant” and “restriction” will be used interchangeably in this article.)

A condition in a deed, on the other hand, is a qualification of the estate granted. It is a requirement of the conveyance.

Building lines (also known as building setback lines) create areas of unobstructed light, air, and vision for the benefit of the public and for the benefit of all the owners upon whose property the restricted area is laid out. They also secure uniformity in the appearance of

the buildings, which helps keep property values high. Building lines are a form of covenant. A declaration of covenants, conditions, and restrictions containing building lines is a limitation on the use of the land. The building line limits where the improvements may be placed on the land. Most building lines are created by a plat of subdivision or in a declaration of CC&Rs. These are privately created building lines.

Through the zoning power, municipalities and counties may create building lines as well. These publicly-created building lines on occasion are different from the privately-created setbacks.

The difference between these two types of setbacks lies in their enforcement. Private building lines may be enforced by other owners in the subdivision. Zoning setbacks may be enforced by the municipality or county.

Because building lines are a form of covenant, they will not be discussed separately in the remainder of this article.

### “Running with the Land”

Most CC&Rs “run with the land,” which means that they are binding on subsequent owners of the property. A covenant runs with the land if: (1) the parties so intended, (2) the covenant “touches and concerns” the land (that is, relates to the use, value, enjoyment, or occupation of the land), and (3) there is privity of estate between the parties. Accordingly, any CC&R affecting the land that is recorded in a property’s chain of title will appear as a Schedule B exception in a title commitment or policy of that property.



When a CC&R “runs with the land” it will bind all subsequent owners of the land. If it doesn’t run with the land, then it will bind only the grantee against whom the covenants, conditions, and restrictions were made.

## Burdens and Benefits

Every CC&R includes a burden and a benefit. For example: Developer owns three contiguous parcels of land—lots 1, 2, and 3. He sells lot 1 to Purchaser, and the deed contains a covenant that the lot will be used only for residential purposes. Thus, lot 1 is burdened by this restriction. On the other hand, lots 2 and 3 enjoy the benefit of this limitation in that these lots will be adversely impacted by Purchaser building and operating, for example, a slaughterhouse or tannery on lot 1.

## Remedies upon Breach of a CC&R

The most significant difference between a covenant and a condition lies in the remedies available to the injured party(s) upon a breach of the covenant or condition.

With a breach of a covenant, this injured party(s)—that is, usually other lot owners in a subdivision who are similarly bound by the covenant—can seek relief by either an action for money damages or an injunction terminating the breach of the covenant. For example, if a recorded covenant states that only single family homes can be constructed on a lot. Adam buys two adjoining lots and begins to construct an apartment building on the lots. Any lot owner in the subdivision can go to court and ask the court to *enjoin*, or stop, the construction of the apartment building by another owner. Remedies relate to the prohibited activity and not to the title to the subject property.

On the other hand, a breach of a condition can result in the complete forfeiture or reversion of the title. Illinois recognizes two types of conditions—the possibility of reverter and the right of re-entry. The language used in the

particular condition determines what type it is.

For example, a conveyance *on (upon) the condition that* the property be used only for residential purposes is a *right of re-entry*. If the grantee begins building a factory, title to the land does not automatically revert to the grantor. Instead, the grantor, or his heirs, must physically take possession of the property, either peaceably or by a forcible entry and detainer action. With a right of re-entry, title does not revert until the right is exercised. A right of re-entry is characterized by the words, “on the condition that,” or “upon condition.”

On the other hand, a conveyance *for so long as* the land is used for residential purposes is a *possibility of reverter*. If the grantee tears down the existing house and starts to build a high rise office building, the estate in the grantee automatically terminates, and title reverts to the grantor. A possibility of reverter is characterized by words like “so long as.”

In either case, note that only the grantor or his heirs may enforce a condition. Other lot owners in a subdivision do not have that right.

## General Plan Restrictions:

In modern subdivisions it is desirable to establish uniform restrictions as to the use of the lots and the character, size and location of the improvements to be constructed on the lots.

It is also desirable that each lot owner be able to protect his investment by having rights to enforce the restrictions against other lot owners.

This is usually done by the creation of *general plan restrictions* within a subdivision.

This is usually accomplished by the drafting of a declaration of covenants, conditions, and restrictions (CC&Rs). Or, the CC&Rs can be set forth on the plat of subdivision. The recording of the declaration or plat evidences the intent to create a general plan.



A general plan could also be accomplished by inserting the same CC&Rs in every deed to a purchaser of a lot.

### **Enforcement Rights of a General Plan of CC&Rs:**

The first conveyance from the tract owner establishes the general plan by conferring upon the grantee the right to enforce the restrictions against the purchasers of the remaining lots.

The first grantee takes title with the right of enforcement of the grantor and his subsequent grantees.

In other words: covenants, conditions and restrictions have a burden and a benefit. The grantee has the benefit of being able to enforce the CC&Rs against the other lot owners. But on the other hand, the grantee is burdened by the CC&Rs in that the grantor and the other lot owners have the right to enforce the CC&Rs against the grantee.

If the restrictions contain conditions, the owner may have the right to re-enter and terminate the estate of any of his grantees who violate the restrictions.

But while the grantor might possess rights of re-entry or reversion in addition to rights to enjoin (i.e., terminate) a violation or seek damages as compensation, enforcement rights of the lot owners do not include rights of re-entry or reversion. A condition may only be enforced by the grantor or his heirs.

### **Single Plan Restrictions:**

Single plan restrictions are distinguished from general plan restrictions in that single plan restrictions are created and imposed in single transfers of land (as opposed to subdivisions), with the enforcement rights remaining only in the grantor. Other lot owners do not have the right to enforce the restrictions.

### **Methods of Creating CC&Rs:**

There are several different ways that general plan and single plan CC&Rs can be created. Consider the following:

- Deed of a single parcel of land, creating a single plan
- Agreement between two or more owners of land, usually adjacent properties, creating a single plan
- Deeds from a subdivision owner conveying individual lots, intended to establish a general plan
- Declaration of Covenants, Conditions, and Restrictions, thereby creating a general plan
- Notation on a recorded plat of subdivision, creating a general plan

### **Covenants, Conditions, and Restrictions that are unenforceable:**

Generally speaking, a grantor may impose any restrictions as he sees fit, since this is one of the rights of land ownership.

But certain restrictions have been held to be void or unenforceable. These include the following examples:

- CC&Rs that are against public policy; for example, a condition that the grantee shall not marry or shall become divorced.
- CC&Rs that are unlawful for example, a CC&R that violates any federal or state anti-discrimination law.
- CC&Rs that are impossible to perform.
- Restrictions that restrain the right to sell property. For example, a condition against conveying without the consent of the grantor or a condition that the property must be conveyed for only a specified price.



## Environmental Restrictions on Land Use

The Illinois Environmental Protection Act (415 ILCS 5/1 et seq.) provides for a site remediation program.

This program contemplates the recordation of a document at the time of completion of remediation activity. This document is called a "No Further Remediation (NFR) Letter.

This document may contain items in the nature of restrictions. Examples include the following:

- Any land use limitation imposed as the result of any remediation activity;
- A prohibition against using the site in any manner inconsistent with any land use limitation imposed as a result of remediation activity without additional remediation activities;
- A statement advising third parties of the opportunity to request a change in land use to a use that would be inconsistent with NFR limitations, provided new investigations and reports are submitted and a new NFR Letter is obtained;
- The letter may also require that in future conveyances of the land, conveyancing instruments shall include the same limitations on land use set out in the NFR letter.
- If the NFR letter is not timely recorded, the Illinois EPA may record a "Voidance of 'No Further Remediation' Letter." This letter voids the NFR letter.

## Covenants, Conditions, and Restrictions and Tax Deeds

A tax deed will not extinguish recorded covenants, conditions, and restrictions.

## Termination of Restrictions

Restrictions terminate or may be terminated by any of the following means:

- **Termination by Voluntary Cancellation**

In order to voluntarily extinguish the CC&Rs that affect the lots in the subdivision, all four parties must sign an abrogation agreement. Their respective lenders would probably also have to consent to this agreement, but an underwriter might choose to waive that additional requirement.

- **Termination of CC&Rs: Expiration of the Prescribed Period of Duration**

CC&Rs may include a date by which they expire automatically. But note: Even after this expiration date, the CC&Rs can still be enforced as to violations that occurred prior to the expiration date!

## Denial of the Enforcement of the CC&Rs

A court may refuse to enforce CC&Rs for any one of the following reasons:

- Change in the Neighborhood

When a restriction is designed to keep an area residential in nature, and the area has either completely changed in character or there is only a small enclave left, surrounded on all sides by property that is no longer residential, it is possible that court will look to the reality of the situation and refuse to enforce the restriction.

Before the change in neighborhood conditions will prevent the enforcement of a CC&R, the change must be so radical and complete as to render the restriction unreasonable, confiscatory, and discriminatory.



- Abandonment of the Right to Enforce a CC&R

The surrounding lot owners see a person violate a CC&R and do nothing for many months. It could be argued that they have abandoned their right to enforce the CC&R.

### Termination by Condemnation

A CC&R is not extinguished because a governmental authority acquires the land by condemnation.

### Priority of CCRs

Even though a CC&R may be recorded after a mortgage, a CC&R will generally survive a mortgage foreclosure.

The reason for this is that the rights of other lot owners to enforce a general plan of restrictions will undoubtedly be unimpaired by the foreclosure and sheriff's deed.

### Title Insurance and CC&Rs

The following endorsements can be used to give limited coverage over present violations of CC&Rs. These endorsements should be read carefully to comprehend the scope of coverage.

- ALTA Endorsement 9.2-06 (for owner's policy, Covenants, Conditions and Restrictions—Improved Land)
- ALTA Endorsement 9.3-06 (for loan policy, Covenants, Conditions and Restrictions)

To issue these endorsements, the title company should be furnished a current survey of the land. The company will also review all recorded declarations and other recorded covenants and may request a written statement from the owner of the land, affirming that the owner is not aware

of any violations of any covenants, or received notice of any violations.

The following endorsements are designed to give limited coverage over future violations of CC&Rs. These endorsements should be read carefully to comprehend the scope of coverage.

- ALTA Endorsement 9.7-06 (for loan policy, Restrictions, Encroachments, Minerals—Land under Development)
- ALTA Endorsement 9.8-06 (for owner's policy, Restrictions, Encroachments, Minerals—Land under Development)

In addition to the requirements listed above, the title company will request a copy of the plan under which the future improvements will be constructed.

For additional title insurance options and information, please contact a Chicago Title underwriter.

*This article was written by Terri Spears, edited by Douglas M. Karlen and incorporates Chicago Title Insurance Company underwriting guidebooks and manuals and the Covenants, Conditions and Restrictions article by Richard F. Bales, dated March 2016.*

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