



CHICAGO TITLE INSURANCE COMPANY

TOPIC: <u>Restrictive Covenants</u>
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TITLE SEARCH & CLOSING RULES:

1. All documents in the chain of title of the property, including prior out conveyances of properties shown on the same recorded plat of subdivision, plats of subdivision, documents referenced in the documents that are directly affecting the parcel being searched, must be carefully checked to assure that any reservations, restrictions, easements or other matters that may affect title to your property are excepted in your title opinion.
2. Declarations or restrictive covenant (and easement) documents founds must be carefully checked for:
 - Owner's association dues of assessments (which must be checked, paid current at closing and disclosed to the buyer to alert them to future payment)
 - Setbacks
 - Easements
 - Restrictions on use
 - Restrictions on or requirements for approval of future improvements (such as architectural review)
 - Reversions (for which recordable releases must be obtained prior to closing)
 - Rights of First Refusal (for which recordable waivers must be obtained prior to closing)
 - Any other matters affecting the property
3. Properties may be the subject of *multiple sets* of restrictions. So do not assume that a single set is the only one.
4. In the event of any violations or questions regarding amendment, waiver, change of circumstances, expiration or unenforceability, underwriting counsel should be contacted prior to closing to determine what coverages are recommended or even available and upon what terms.

TITLE INSURANCE REQUIREMENTS, EXCEPTIONS AND COVERAGE:

Lender's v. Owner's Coverage: Lenders require affirmative coverage against loss or damages which result from violations of restrictions. This coverage includes losses resulting from a current violation and also insures that a future violation will not cause a forfeiture or reversion of title. If there are no known violations and the restrictions do not

contain a forfeiture or reversionary clause, then the loan policy may include the affirmative coverage. The affirmative coverage is not included on the owner's policy. On commitments, separate exceptions regarding restrictions must be made for the owner and the lender. A sample of the affirmative coverage on the lender's policy is:

This policy insures against loss or damages as a result of violation of same. This policy insures that a violation of same will not cause a forfeiture or reversion of title.

FORMS:

None

LEGAL DISCUSSION:

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Restrictive Covenants, commonly referred to as "restrictions," are provisions contained in real property documents which prohibit, limit or regulate the use and development of land. Restrictions are generally found in three places:

1. They may be in a separate instrument which may affect only the subject property for the benefit of other adjoining or neighboring property, or restrict a particular tract or subdivision to assure a common development scheme.
2. They may appear in a deed in the chain of title. or
3. They may be incorporated in the recorded plat of a parcel or subdivision.

NOTE - for this discussion covenants and restrictions will be given the same meaning.

Frequently, restrictions are included in an instrument, such as a Declaration of Covenants, Conditions and Restrictions, which also dedicates easements and may contain covenants providing for assessments, obligations to maintain certain facilities or other conditions or obligations. They may be a part of Planned Unit Development, Planned Community or Condominium documentations as well. (See separate Topics) We rely upon the certifying attorney to report the existence of restrictions, whether or not they contain a forfeiture or reversion clause, building set back lines, limitations on the type of building, assessment obligations, easements, and whether they are use restricted, such as a "residential only" restriction.

Restrictions are independent of and may not even be consistent with regulations of governmental bodies, such as planning and zoning boards. Consequently, restrictions remain effective even though they may be more restrictive than governmental regulations.

Restrictions Based on Race, Color, Religion, Sex, Handicap, Familial Status, or National Origin: Restrictions based on race, color, religion, sex, handicap, familial status, or national origin are against public policy and unenforceable. In addition, the Department of Justice has interpreted a provision of the federal Fair Housing Act as requiring title insurance companies to refrain from showing or reporting restrictions based on such matters. As a result any restriction based on such matters must be omitted from our

commitments and policies. If such a restriction is part of other restrictions which are valid and need to be excepted, a special provision “carving out” this invalid provision should appear in the exception.

Forfeiture or Reversionary Clauses: A forfeiture or reversionary clause may divest the owner of title to the real property upon a violation of a covenant or condition. If the certifying attorney reports that the restrictions contain a forfeiture or reversionary clause, and if no recorded waiver is obtained, then an exception for the restrictions cannot contain any language which insures against forfeiture or reversion. In any event, the underwriter *must take specific exception to the clause* and note the waiver recordation, if one.

Building Restriction Lines: A common restriction affecting subdivided property is the building restriction line (setback line). These restrictions may appear on the recorded plat, in recorded restrictions, in the deed from the developer/subdivider, or in other recorded instruments. These restrictions should not be confused with zoning requirements, which may coexist with the restrictions.

Setback lines must be excepted to in schedule B of the title insurance policy. This may be accomplished by excepting to the instrument which creates the setback lines, such as the plat, restrictive covenants, or deed.

On occasion it is possible to insure over a violation of a setback line. This usually requires that the violation is minor or has existed for a long period of time (at least six years). This is more likely to be done for the lender, but in a low risk case may be done for the owner. If a violation is not extremely minor (less than 1% of the setback) or recent (less than six years old), then underwriting counsel must be contacted prior to providing affirmative coverage.

Questions to Ask - Insuring Over a Setback Violation:

1. Extent of violation in relationship to the setback amount. For example, 2 feet into a 10 foot setback.
2. How long has the violation existed?
3. What are the actual effects of the violation on neighbors? Is it significant enough to be noticeable?
4. Do similar violations exist in the subdivision?

Restrictions on the Type, Size, or Style of a Building: Restrictions may address the type, size or style of building. These most commonly appear as prohibitions against manufactured or mobile homes (Please see Topic – “Mobile or Manufactured Homes”), but can also include matters such as a minimum square footage and requirements for or

prohibitions against certain types of siding (such as brick or cedar shake). Generally, exceptions must be made for these restrictions. If a violation of the restriction has existed for extended period of time (at least six years), then the title insurer may be able to provide affirmative coverage. Please contact underwriting counsel prior to closing.

Restrictions on Use of the Property: This usually appears as a restriction limiting the use of the property to residential purposes, prohibiting use of the property for commercial uses or limiting the usage to a particular type of use or against another particular type of usage, such as operating a place of business or an apartment building. Residential restrictions will also prevent a vacant lot from being used as a street, which may create a serious access problem for subsequent development phases. Underwriting counsel must approve any affirmative coverage over a use restriction.

Amendment and Termination of Restrictions: Restrictions will often provide that they will terminate upon a given date or that they are automatically extended for additional periods of time, unless amended prior to the renewal date. Restrictions may also provide for amendment by a certain percentage of property owners. Underwriting counsel must approve any affirmative coverage provided which relies upon an amendment or termination of restrictions.