

**New Jersey  
N2K Hour:**

**Restrictive  
Covenants and  
the ALTA 9  
Series**

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## What is a Restrictive Covenant?

- A restrictive covenant obligates the property owner to refrain from some specific activity or use on their property.
- A restrictive covenant is in most cases created by declaration, which is a recorded document against multiple properties that evidences the original intent and limitations for the properties within that development.
- However, restrictive covenants can also be expressly written in deeds, leases, and other instruments of conveyance.
- A restrictive covenant is often described as a “negative” easement, since it prohibits the burdened property owner from doing something as opposed to granting a right of use.

## Does the Restriction Run with the Land?

- Land developers use restrictions when subdividing land in efforts to create uniformity concerning the character, size, use, and type of improvements to be constructed on each individual lot.
- “Running with the land” refers to a restrictive covenant that remains with the land regardless of ownership.
- These rights move from deed to deed as the land is transferred from one owner to another.
- Typically, there will be language in the Deed that the covenant or restrictions shall apply to “any respective heirs, successors, and assigns of the grantee,” which means that the covenant runs with the land.

# Types of Covenants

- There are two different types of covenants that run with the land.
- The first type of covenant is an affirmative covenant, which sets out something that the property owners are obligated to do.
- The second type of covenant is a restrictive covenant, which requires the grantee to refrain from doing certain things.
- Property owners are described as "burdened" by affirmative covenants and must "enforce" restrictive covenants.

## Examples of Covenants

- Covenants that run with the land are intended to provide for proper land development.
- An example of an affirmative covenant is that an improvement must be built within a certain setback line, or a home must contain a certain square footage.
- Some restrictive covenants may prohibit the property owner from using the premises to sell or distribute alcohol, or raise livestock on the property.
- Neighbors, adjacent landowners, and municipalities are all examples of parties that can seek to enforce covenants, and may be entitled to money damages or injunctive relief for any violation of these restrictions.

## Right of Reverter

- Some restrictive covenants may contain reverter clauses, which purport to re-vest title in the grantor or the grantor's heirs upon a violation of the restriction.
- For a right of reverter to be enforceable, title must be conveyed to the purchaser as a fee simple determinable or conditional estate.
- Without the required language to create this type of estate, the right of reverter will usually not be enforceable.
- The language in the condition determines what specific remedy applies: either the possibility of reverter or the right of re-entry, and a breach of the condition can result in a reversion or forfeiture of the title.

## Covenants as Part of a Neighborhood Scheme

- A restrictive covenant may be imposed as part of a neighborhood scheme, which requires the buyer of the property to maintain its original appearance or to keep the property in a certain color scheme or style that is comparable to neighboring properties.
- This restrictive covenant will often be described in a declaration, which is a recorded document against multiple properties that evidences the original intent and limitations for the properties within that development.
- These restrictions will uniformly affect all lot owners in a certain area or neighborhood.

# Unenforceable Covenants and Restrictions

- The U.S. Fair Housing Act of 1968 outlawed the refusal to sell or rent a dwelling to any person because of race, color, religion, sex, or national origin.
- Therefore, any restrictive covenants based on race, color, religion, sex, handicap, familial status, or national origin are deemed unenforceable, and should not be shown as exceptions on title.
- However, if the same instrument containing the unenforceable restriction also contains other presumably valid restrictions, then the offensive language should be redacted from the instrument and still listed as an exception on title.



## Restrictive Covenants v. Zoning Laws

- If a restrictive covenant is less restrictive than an applicable zoning regulation, the zoning law prevails.
- However, if the restrictive covenant is more restrictive, it will prevail over the zoning regulation.
- A valid restrictive covenant that is consistent with the applicable law will not be superseded or terminated by the passage of a later zoning ordinance inconsistent with that covenant.
- However, if there is a conflict between the restrictive covenant and the applicable zoning regulation, then the municipality must determine if the current use of the property is permissible and does not harm the public interest.

# Extinguishment of Restrictive Covenants

- Restrictions can be extinguished in several different ways.
- The most common and easiest way to extinguish a restriction is to obtain a release by the party or parties imposing the restriction.
- Restrictions can also be extinguished by the merger of common ownership of all lots affected by the restriction.
- Another option is the abandonment of the restriction or a significant change in the neighborhood.
- However, this last option is more difficult because the property owner who is burdened by the restriction must prove that the restriction is no longer enforceable.

## Extinguishment of Restrictive Covenants (cont.)

- Lastly, a quiet title action can be used as a last resort to determine the validity of a restrictive covenant.
- The instrument of conveyance should provide the duration of the covenant, and if a time limit is not set forth, the court will imply a reasonable limitation.
- A court may also refuse to enforce a covenant if a time limit is not present.
- NJ also has case law pertaining to the enforcement of deed restrictions.

## Extinguishment of Restrictive Covenants (cont.)

- In NJ, residents are protected under traditional principles of property law-principles that specifically account for the rights afforded under our constitution's free speech and association clauses, and has recognized that restrictive covenants on real property that violate public policy are void as unenforceable. Committee For A Better Twin Rivers vs. Twin Rivers Homeowners Ass'n., 192 N.J. 344, 370 (2007).
- Also, deed restrictions are always to be strictly construed, and courts will not aid one person to restrict another in the use of his land unless the right to restrict is made manifest and clear in the restrictive covenant.. Cooper River Plaza East, LLC v. Briad Group, 359 N.J. Super. 518, 532-3 (App. Div. 2003).

## Affordable Housing Restrictions (AHR)

- In NJ, the Mount Laurel Doctrine requires that municipalities use their zoning powers in an affirmative manner to provide a realistic opportunity for the production of housing affordable to low and moderate income households.
- This doctrine stems from two NJ Supreme Court cases in 1975 (Mount Laurel I) and 1983 (Mount Laurel II).
- The NJ Fair Housing Act was then enacted and in turn created the New Jersey Council on Affordable Housing (COAH) to provide an administrative mechanism for implementing the Mount Laurel doctrine.

## Affordable Housing Restrictions (cont.)

- The Uniform Housing Affordability Controls (UHAC) govern the administration of affordable units and affordability controls for many affordable units, including COAH-credited units, in New Jersey.
- Pursuant to N.J.A.C. 5:80-26.1 et seq., COAH can place restrictions and affordability controls on affordable housing units to ensure that these units meet their affordable housing obligations.
- Some of these restrictions may include price restrictions for ownership units, rental restrictions, and limitations on the amounts of mortgages placed upon such properties.

## Affordable Housing Restrictions (cont.)

- In terms of underwriting, a foreclosure will not extinguish affordable housing restrictions, even if the restrictions appear to state otherwise.
- On June 24, 2019, the State of New Jersey enacted the following bill, P.L.2019, c.132, concerning affordability controls on affordable housing.
- In relation to real estate owned (REO) properties, the new statute states that a deed restriction on affordable housing is not extinguished because of a foreclosure on that property.

## Affordable Housing Restrictions (cont.)

- Therefore, when reviewing county and chancery searches for REO properties, please note any affordable housing restrictions that are disclosed of record, and always include them as an exception in your title commitment.
- If an AHR is to be omitted from title, a release will be required.
- Please consult your underwriter for any further guidance on affordable housing restrictions.



## Historical and Conservation Restrictions

- N.J.S.A. § 13:8B-3 states that a conservation restriction or an historic preservation restriction may be acquired by the Commissioner of Environmental Protection in the name of State, or by any local unit, or by any charitable conservancy in the same manner as other interest in land may be acquired by gift, purchase or devise and, in the case of the State or local unit, by condemnation.
- Conservation restrictions in recorded instruments must always be raised as exceptions on title.
- However, these restrictions may also be applicable by operation of law regardless of whether a deed restriction instrument has been recorded against the property.

## Historical and Conservation Restrictions (cont.)

- In the case of Barry v. NJDEP, App. Div. No. A-2428-17T2, the Appellate Division affirmed an Office of Administrative Law decision holding that notwithstanding the absence of a recorded instrument, the conservation restriction was applicable by operation of law based on the property owner's having availed itself of the benefits of a permit issued by NJDEP.
- In order to release a conservation restriction, NJDEP Commissioner approval is required following a public hearing process and a determination that the release will not jeopardize the public's interest in protection of the regulated resource.

## ALTA 9 Series

- The ALTA 9 series consists of the following endorsements.
- Applies to both residential and commercial properties.
- ALTA 9.1 – CC&Rs Unimproved Land
- ALTA 9.2 – CC&Rs Improved Land
- ALTA 9.3 – CC&Rs Loan Policy
- ALTA 9.6.1 – Private Rights – Current Assessments
- ALTA 9.7 – REM Land Under Development (Loan)
- ALTA 9.8 – CC&Rs Land Under Development (Owner's)
- ALTA 9.10 – REM Current Violations

## ALTA 9.1-06 and 9.2-06 Endorsement (Owners Coverage)

- The ALTA 9.1 and 9.2 endorsements provide owner's coverage for violation of enforceable covenants, including covenants relating to environmental protection that are recorded in the public records.
- The ALTA 9.1 is for unimproved land and the ALTA 9.2 is for improved land.
- Both endorsements also include coverage for enforced removal of an improvement as a result of violation of a setback line shown on a plat of subdivision recorded in the public records.

## ALTA 9.1-06 and 9.2-06 Endorsements (Owner's Coverage) (cont.)

- The issuing guidelines are as follows:
- Add an exception in Schedule B for any violation of existing covenants and for recorded Notices of Violation relating to Environmental Covenants.
- For improved property, we require a survey reflecting current improvements and except for encroachments over setback lines.

## ALTA 9.3-06 Endorsement

- This endorsement, and the ALTA 9 series generally, are subject to the exclusions in Section 4, Exclusions from Coverage and Schedule B Exceptions and Conditions.
- This endorsement may only be issued with a loan policy.
- The endorsement includes coverage for loss or damage due to a covenant violation that divests, extinguishes or subordinates the mortgage or results in the mortgage being invalid or unenforceable or suffer a loss of priority.
- If title has been acquired by the insured, e.g. through foreclosure or deed in lieu, coverage is provided for a covenant violation that causes loss or adversely affects the title that was acquired.

## ALTA 9.3-06 (cont.)

- Coverage is also provided for any loss due to violation of an enforceable covenant at Date of Policy unless same is excepted in Schedule B.
- In addition, a notice of violation of a covenant relating to Environmental Protection which is recorded in the Land Records will be covered, unless an exception is taken in Schedule B.
- The coverage is provided only to the extent of the notice of violation.
- The endorsement specifically does not cover any covenant which is contained in a document creating a lease.

## ALTA 9.3-06 (cont.)

- Coverage is also not provided for any covenant relating to a requirement to maintain, repair or remediate the property.
- Any covenant involving environmental protection, including toxic or hazardous conditions, will not be covered, unless there is a recorded instrument pertaining to same and which is not excepted in Schedule B.
- Any covenant excepted in Schedule B regarding DCA, COAH or any other federal, state or local regulations regarding affordable housing is not covered.
- In order to issue this endorsement certain requirements must be met.



## ALTA 9.3-06 (cont.)

- It is important to verify that no applicable covenants contain forfeiture provisions, or if they do that the provisions are expressly subordinated to the insured mortgage.
- If unsubordinated forfeiture provisions exist, you cannot issue the ALTA 9.3 endorsement.
- Also, please confirm if there are any unsubordinated maintenance liens and verify that any prior assessments are paid prior to or at closing, so you can issue the ALTA 9.3.
- If an existing use violates a covenant or if there is an existing violation of a covenant, an exception must be taken in Schedule B.

## ALTA 9.3-06 (cont.)

- A survey is required which shows all current improvements.
- An exception must be taken in Schedule B for all encroachments over building setback lines.
- An exception in Schedule B must be added for any recorded notice of violation of a covenant relating to environmental protection found in the Public Records.
- This affirmative coverage requires underwriter approval, so if there is any uncertainty regarding issuance of this endorsement or any of the ALTA 9 series, please consult your underwriter.

## ALTA 9.6-1-06 Endorsement (Private Rights)

- Private rights are defined in the endorsement to include any private charge or assessment due and payable at Date of Policy, an option to purchase or right of first refusal or a right of prior approval of a prospective purchaser or occupant.
- If any such covenant as described above exists, an exception must be taken in Schedule B.
- The coverages and exclusions contained in this endorsement are essentially the same as in the 9.3-06.
- This endorsement may only be issued with a loan policy.

## ALTA 9.7-06 Land Under Development (REM)

- The ALTA 9.7 endorsement insures against violations of restrictions, encroachments over easements, building lines or property lines, and damage by reason of mineral or other subsurface substance development with respect to improvements and future improvements.
- This endorsement can only be issued for a loan policy in NJ.
- This endorsement provides similar coverage to the ALTA 9.10, but only with respect to future improvements that are shown on identified Plans (e.g. survey, site and elevation plans).

## ALTA 9.7-06 (cont.)

- Coverage is additionally provided for an improvement on the Land at Date of Policy or a future improvement encroaching onto adjoining land or the portion of the insured Land subject to an easement.
- Coverage is also given for an improvement on adjoining land onto the Insured Land at Date of Policy. These coverages are applicable unless an exception is taken in Schedule B.
- Coverage is further provided for an improvement on the Land which encroaches onto a portion of the Land subject to an excepted easement, but only if the damage is covered by the exercise of the right to maintain the easement for the purpose for which it was granted.

## ALTA 9.7-06 (cont.)

- There is also coverage for damage due to a future exercise of the right to extract minerals or other subsurface substances.
- The coverage for the extraction of minerals applies to minerals or substances excepted from the description of the Land or excepted in Schedule B.
- The requirements for issuing this endorsement are essentially the same as for the ALTA 9.3, except the survey should show the projected location of future improvements.
- If current or future improvements encroach over more than  $\frac{1}{2}$  the width of an easement, then affirmative coverage cannot be provided via the ALTA 9.7.

## ALTA 9.7-06 (cont.)

- In order to provide the 4(b)(ii) mineral coverage, you must either verify that there are no minerals or subsurface substances or the surface rights have been waived.
- Mineral coverage can also be provided if the property is a single family residence within a plotted subdivision, unless the subdivision has actual mineral development.
- The same is true for apartment complexes and office buildings.

## ALTA 9.8-06 CC&R Land Under Development

- The endorsement can only be issued for an Owner's policy in NJ for land that is under development.
- The affirmative coverage and exclusions are similar to the ALTA 9.2 endorsement, but only with respect to future improvements that are shown on identified Plans (e.g. survey, site and elevation plans).
- Section 2(d) of this endorsement must be completed with the applicable information from the site plans that are being used for the construction project.
- The requirements are similar to the ALTA 9.2, but the survey must reflect both the current and future improvements.



## ALTA 9.10-06 Restrictions, Encroachments, Minerals – Current Violations

- This endorsement to the Loan policy insures against violations at Date of Policy of covenants or restrictions, encroachments over easements, building lines or property lines, and damage by reason of mineral or other subsurface substance development.
- Like the ALTA 9.3 endorsement, this endorsement provides the same coverage and exclusions as it relates to any current violations of covenants or restrictions.
- Additionally, the ALTA 9.10 provides affirmative coverage against loss for an encroachment of an improvement located on the Land onto adjoining land or onto a portion of the Land subject to an easement.

## ALTA 9.10-06 (cont.)

- The ALTA 9.10 endorsement also provides affirmative coverage over an encroachment of an improvement on adjoining land encroaching onto our Land, unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.
- This additional coverage is similar to the coverage provided in the ALTA 28.1 endorsement for encroachments.
- Exclusions from coverage include any covenant included in a lease or relating to obligations of any type to perform maintenance, repair, or remediation on the Land.

## ALTA 9.10-06 (cont.)

- Other exclusions from coverage include any contamination, explosion, fire, flooding, vibration, fracturing, or earthquake; and any subsidence negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances
- Any covenant involving environmental protection, including toxic or hazardous conditions, will not be covered, unless there is a recorded instrument pertaining to same and which is not excepted in Schedule B.
- Any covenant excepted in Schedule B regarding DCA, COAH or any other federal, state or local regulations regarding affordable housing is not covered.

## Wrap Up and Review

- A restrictive covenant is typically created by declaration or can be expressly written in instruments of conveyance such as deeds and leases.
- Please look for language in these instruments which indicate that the restrictive covenant “runs with the land,” and if so please include them as an exception on title.
- Restrictive covenants can be extinguished by a release; lot merger; abandonment of the restriction; significant change in the neighborhood; or a quiet title action.
- In NJ, deed restrictions are strictly construed, and any restrictive covenants which violate public policy are void as unenforceable.

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## July N2K HOUR

Tuesday

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11:00AM