M E M O R A N D U M

From The Office of the Charlottesville City Attorney

FROM: Lisa Robertson, City Attorney
TO: City Council; City Planning Commission
RE: Private Restrictive Covenant v. Zoning Ordinance
DATE: June 14, 2021

Many of you have been receiving comments and questions from City residents who question whether or not the City may enact a zoning ordinance that introduces additional residential density (duplexes, apartment buildings, etc.) or mixed use development into subdivisions where lots are subject to private deed covenants that restrict use of lots to "residential uses". Private restrictive covenants and City zoning regulations are completely separate. They both impact land uses, but their legal underpinnings, and their interpretation and enforcement, are fundamentally different.

Restrictive covenants are regarded by courts as private contractual obligations among people who own land within an area subject to a common development scheme. As a general rule, the City government has no standing to enforce private covenants, or to challenge them in court, to declare them invalid, or otherwise purport to release or extinguish them. (If a decades-old restrictive covenant might today be contrary to law or public policy, a landowner who is subject to that covenant is the party who would need to bring legal action). *See* Va. Constitution Art. I, §11.

A zoning ordinance, in and of itself, does not have any impact on whether a group of landowners may, among themselves, enforce a private restrictive covenant. Neither does the existence of a private covenant deprive a locality of the right to exercise its zoning authority to allow or prohibit uses of land, based on the locality's determination of what land uses will best promote the public welfare. The General Assembly expressly authorizes the City to classify its territory into districts ("zoning districts") and in each district, to "regulate, restrict, permit, prohibit and determine….the use of land, buildings, structures and other premises for…business, industrial, residential…and other specific uses." Va. Code §15.2-2280.

As a result, where private covenants exist, the requirements of those covenants apply separately from, and <u>in addition to,</u> the City's zoning district regulations. Any use of land must comply with both the City's zoning ordinance—as it may be amended from time to time—and with any applicable restrictive covenants.

1. **<u>The enactment of a zoning ordinance allowing an activity that is prohibited by a restrictive covenant will not invalidate the restrictive covenant</u>**.

The Virginia Supreme Court has long held that the exercise of a locality's zoning authority does not relieve lots within a subdivision from private restrictive covenants. *Omega Corp. of Chesterfield v. Malloy*, 228 Va. 12, 19-20, 319 S.E.2d 728, 732 (1984), citing *Ault* v. *Shipley*, 189 Va. 69, 75, 52 S.E.2d 56, 58 (1949). In the *Omega* case, a corporation that builds and operates group homes for disabled persons sought to establish a group home on a lot subject to a restrictive covenant that limited uses to "residential purposes" and prohibited structures other than "single-family residential dwellings". Despite the Commonwealth's announced public policy that, for zoning purposes, group homes for up to eight people should be considered residential occupancy by a single family, and despite a local zoning ordinance that allowed the proposed use, the Supreme Court ruled that the public policy against exclusion of group homes did not apply to private contractual rights arising from restrictive covenants. The Court

ruled that—for purposes of interpreting the language of the covenant—the group home was a residential use, but was not residential occupancy by a "single family". Therefore, the group home was held to be prohibited by the restrictive covenant, even though state law and the local zoning ordinance permitted the group home as a single family use. (*See also, e.g.,* Va. Code 15.2-2290(C), which says that, even if a zoning ordinance must treat a manufactured home the same as a single-family dwelling, the zoning ordinance does not relieve a lot from any obligations relating to manufactured housing units imposed by the terms of a restrictive covenant). The *Omega* court decision verifies that a zoning ordinance does not operate to invalidate a valid restrictive covenant. (Note: Va. law now requires a restrictive covenant to be interpreted by courts as allowing this group home use, *see* Va. Code §36-96.6)

2. **The City is not required to adopt a zoning ordinance that mirrors or incorporates a development scheme implemented by restrictive covenants in a particular location**.

Some years ago, several individual lot owners within the Carrsbrook Subdivision (Albemarle County) filed a court action against River Heights Associates Limited Partnership and related entities (developer Wendell Wood and his family), who also owned four (4) lots within Carrsbrook. The lots in question are subject to restrictive covenants dating from 1959, specifying that the land within Carrsbrook could be used "for residential purposes only" and "no rooming house, boarding house, tourist home, or any other type of commercial enterprise, or any church, hospital, asylum, or charitable institution shall be operated thereon". In 1969, Albemarle County adopted its first comprehensive zoning ordinance, at which time the lots in question were zoned B-1 (commercial) to a depth of 200 feet from Route 29. Within the B-1 district, residential uses were prohibited. The County continued the B-1 zoning classification in a comprehensive rezoning in 1980, with the result that the lots in question were all zoned for commercial use but were also subject to the restrictive covenant *prohibiting* commercial uses (i.e., the owner of the B-1 zoned lots could not develop the lots for commercial uses, because of the covenant, and also could not develop the lots for any residential use, because of the zoning ordinance). Albemarle County Circuit Court Judge Peatross ruled that the restrictive covenant remained enforceable. Batten v. River Heights Assoc., 59 Va. Cir. 112, 117 (Cir. Ct. 2002).

Wood argued that the result of the court's decision would be that he could not use the lots for anything other than open space, resulting in what he referred to as a serious diminution of the value of the lots. Addressing this argument, Judge Peatross cited *Booker v. Old Dominion Land Co.*, 188 Va. 143, 152, 49 S.E.2d 314, 319 (1948) (the effect on the value of property resulting from the enforcement or a refusal to enforce a restrictive covenant "`is of slight if any consequence'", quoting *Allen v. Massachusetts Bonding & Ins. Co.,* 248 Mass. 378, 143 N.E. 499, 502 (1924)). Furthermore, Judge Peatross noted that Wood had constructive notice from the chain of title in the County's land records, of both the restrictive covenant that prohibits commercial use of his property and a note on a 1960 subdivision plat that denied several lots access to Route 29 if they were to be developed for residential uses. The Virginia Supreme Court upheld Judge Peatross' decision, 267 Va. 262, 591 S.E.2d 683 (2004).

Practical note (1): in the example cited above, when Albemarle County enacted a zoning ordinance that applied B-1 zoning district classification (prohibiting residential uses) to lots that could only be developed for residential uses (per the restrictive covenants), any residential uses that had lawfully been established on those lots *prior to* the rezoning became "nonconforming uses". It is not improper or unconstitutional for a locality to enact a zoning district that renders existing uses or structures unlawful ("nonconforming") under a newly-assigned zoning district classification. A nonconforming use may continue indefinitely, but depending on the specific provisions of a particular locality's ordinance, that use may be subject to restrictions on structural changes (expansion) or replacement. *See* **Va. Code §15.2-2307(C)**.

Practical note (2): while the City is not limited to establishing zoning ordinances that mirror or adopt a scheme set out in restrictive covenants, City planners should give reasonable consideration to the existence of such covenants in particular locations—among multiple other factors—when drafting a new zoning ordinance. According to **Va. Code §15.2-2284**: "*Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the* ***existing use and character of property****, the comprehensive plan, the suitability of property for various uses, the* ***trends of growth or change****, the* ***current and future requirements of the community*** *as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the* ***requirements for*** *airports,* ***housing****, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the protection of life and property from impounding structure failures, the preservation of agricultural and forestall land, the conservation of properties and their values and the* ***encouragement of the most appropriate use of land throughout the locality***." No particular factor is controlling over any others.

3. **In 2020 the General Assembly revised Va. Code §36-96.6, to address the validity or effect of certain types of restrictive covenants relating to residential uses of property (effective July 1, 2020)**

Only a landowner who is benefitted by, or obligated by, a restrictive covenant may challenge it or seek to enforce it. If a landowner seeks to enforce a covenant through the court system, a court will enforce it only if the covenant is clear as to its terms, and the terms are lawful (i.e., not contrary to public policy). Courts are averse to declaring covenants unenforceable on the ground of public policy unless their illegality is clear and certain. *Wallihan v. Hughes*, 196 Va. 117, 125, 82 S.E.2d 553 (1954). Only the General Assembly, not the City or any other locality, may declare public policy of the Commonwealth. Va. Code §36-96.6 is an example of a legislative declaration of public policy relating to land covenants:

Va. Code § 36-96.6. Certain restrictive covenants void; instruments containing such covenants.
A. Any restrictive covenant and any related reversionary interest, purporting to restrict occupancy or ownership of property on the basis of race, color, religion, national origin, sex, elderliness, familial status, sexual orientation, gender identity, status as a veteran, or disability, whether heretofore or hereafter included in an instrument affecting the title to real or leasehold property, are declared to be void and contrary to the public policy of the Commonwealth.

B. Any person who is asked to accept a document affecting title to real or leasehold property may decline to accept the same if it includes such a covenant or reversionary interest until the covenant or reversionary interest has been removed from the document. Refusal to accept delivery of an instrument for this reason shall not be deemed a breach of a contract to purchase, lease, mortgage, or otherwise deal with such property.

C. No person shall solicit or accept compensation of any kind for the release or removal of any covenant or reversionary interest described in subsection A. Any person violating this subsection shall be liable to any person injured thereby in an amount equal to the greater of three times the compensation solicited or received, or $500, plus reasonable attorney fees and costs incurred.

D. A family care home, foster home, or group home in which individuals with physical disabilities, mental illness, intellectual disability, or developmental disability reside, with one or more resident counselors or other staff persons, shall be considered for all purposes residential occupancy by a single family when construing any restrictive covenant which purports to restrict occupancy or ownership of real or leasehold property to members of a single family or to residential use or structure.