

A NOTE ON AFFORDABILITY COVENANTS

Affordability covenants are becoming a common mechanism to address housing affordability. Such tools are obviously in the forefront during housing shortages/rapidly escalating housing prices.

Such covenants are in common use. One estimate has over 2,300,000 housing units placed in service as part of the Low Income Housing Tax Credit program – which program requires an affordability restriction. And some 1.5 million units with such restrictions as part of HUD's Project Based Rental Assistance, Moderate Rehabilitation program.

One recent estimate (2019) guessed some 3.8 million privately-owned residential housing units with affordability covenants recorded in their chains of title.

Real covenants and equitable servitudes are generally non-possessory and private land use controls, in which one parcel of land is burdened for the benefit of another parcel.

Covenants and Horizontal privity, or covenant in gross.

Public or Private enforcement.

Hybrid land use devices: conservation easements or servitudes, environmental covenants, contingent zoning, development agreements.

Is enabling legislation necessary (like conservation easements in MT)? Note, inclusionary zoning has been prohibited in MT.

History of courts finding ways to allow enforceability.

Common law covenant theory, contract theory, inherent governmental powers.