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Restrictions are easements! *Say what?*

An understanding of land title restrictions, how they are created and enforced, and recent initiatives regarding restrictions.

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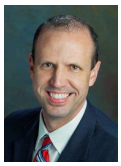
Speaker



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Agenda

Restrictions are Easements

Review of Easements	10min
Introduction: *Tulk v. Moxhay*	10min
Restrictions Examples	10min
Racial Restrictions – History	10min
Homeowners' and Condo Liens	10min

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Easements

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Easements basics

- Simply put, an easement is an interest in real estate that gives one person the right to use another person's land for a specified purpose.
- The concept of an easement is derived from English law and follows many of the rules established by the courts of England and Wales.

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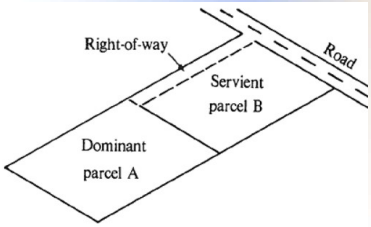
Easement Examples

Examples:

- Private road
- Shared driveway
- Utility easement
- Drainage easement
- Bike path
- Beach access
- Railroad tracks



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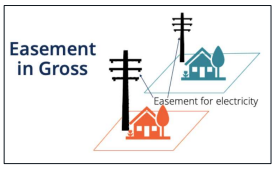
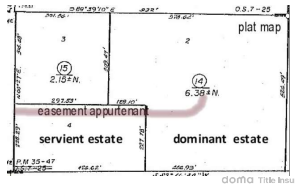
Types of easements

Two basic types of easements:

- Easement appurtenant
- Easement in gross





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Easement Terminology

- Land benefited by an easement appurtenant is called the "dominant" estate.
- Land burdened by an easement appurtenant is called the "servient" estate.
- An easement appurtenant that is validly created runs with the land and passes to subsequent owners.
- Easement appurtenant may be created by separate instrument (agreement) or by deed transferring the dominant estate.

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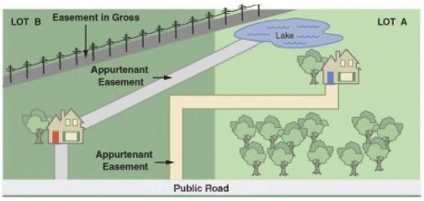
Framework of How Easements Work



The owner of Lot B has an appurtenant easement across Lot A to gain access to the lake.
The utility company has an easement in gross across both parcels of land for its power lines.
Note that Lot A also has an appurtenant easement across Lot B for its driveway.

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Introduction: *Tulk v. Moxhay*

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Tulk v. Moxhay

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Tulk v. Moxhay

- In 1845, Leicester Square and some of the homes abutting it were owned by a man named Tulk.
- Tulk sold the square to Elms, who covenanted to keep it clear of buildings so it could continue to be used as open space.
- But Elms forgot or ignored his covenant and sold the square without listing any restriction on the deed to a party named Moxhay.
- Moxhay commenced to attempt to build houses on the square.

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Tulk v. Moxhay

- Tulk, who still owned some of the houses abutting the square, brought suit to prevent this.
- Moxhay answered the suit that his ownership of the square was unrestricted in the deed to him; he had no contract with Tulk, and that if Elms had covenanted with Tulk to keep the square open, Tulk should sue Elms for his breach of the covenant.
- Moxhay further motioned the court that Tulk should have no cause of action against him.

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Tulk v. Moxhay

- Tulk's attorney then advanced what was then a new theory in law. Namely, that when Tulk sold the square and Elms made the covenant, Tulk retained an interest or negative easement in the square itself. To put it another way, Tulk retained an easement for use and enjoyment of the park, which negated any use in contradiction to the use of the grantee.
- This negative easement was a property right, or "equity" as *Her Majesty's Courts of Justice of England and Wales* called it. Tulk could prevent any assignee of the grantee from using the park in any other way.
- The court agreed with this contention and so Leicester Square is still a park today. The Case of *Tulk v. Moxhay, 2 Phil. 774, 41 English Reprint 1143 (1848)*, became the leading case in the history of building and use restrictions and covenants.

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Restrictions as negative easements …

- Your neighbor wants to raise chickens in his backyard.
- Restrictive covenants of the subdivision say "no livestock, poultry or game may be raised on the property."
- Who has a property right to enforce the restriction?

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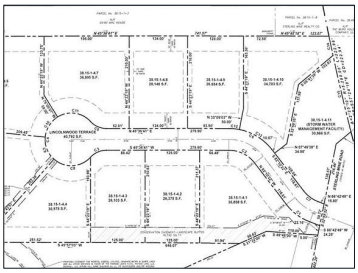
Restrictions as negative easements…

- 11 lots. Restrictions created when the plat was filed, signed by subdivision creator.
- No "homeowners association."
- Restrictions state they "run to the benefit of lot owners, and their successors …"



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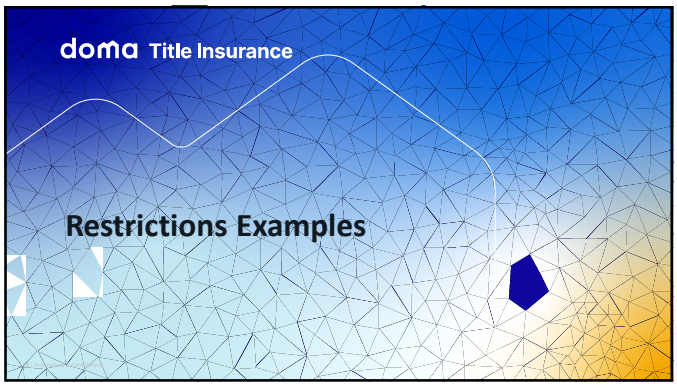

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Golf Course Must Stay

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Golf Course Must Stay

WS CE Resort Owner, LLC v. Holland, Supreme Court of Georgia, February 21, 2023, 2023 Ga. LEXIS 45

Facts:

- The homeowners purchased lots in the Manor Homes subdivision located adjacent to a par 3 golf course.
- The homeowners testified that the golf course was an essential part of their decision to purchase at that location and that they paid a premium for their lot sites due to its proximity to the course.
- Because the golf course was not profitable, the resort owner applied to rezone the course to enable its conversion to a residential development.

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Golf Course Must Stay

WS CE Resort Owner, LLC v. Holland, Supreme Court of Georgia, February 21, 2023, 2023 Ga. LEXIS 45

Facts:

- After the rezoning was granted, the homeowners sued for a declaratory judgment that the use of the property as a golf course could not be eliminated and the course could not be converted to residential or any use other than a golf course.
- The trial court granted summary judgment to the homeowners finding that they had established an implied easement that required the resort owner to keep the par 3 course operating.
- The appellate court affirmed on the ground that the lot owners acquired an easement in the golf course based only on a showing that the lot was purchased with reference to a recorded subdivision plat that depicted the course adjacent to the subdivision and paid a premium for the lot's proximity to the course.

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Golf Course Must Stay

Holding:

- The Georgia Supreme Court held that easements in basic features like streets, parks and lakes that are integral parts of a unified subdivision plan, the scope of which can be ascertained with reasonable certainty for their mere designation on the plat, can be granted by such designation plus sale of lots with reference to the plat.
- Golf courses do not fall into the limited set of features for which a plat designation alone presumptively demonstrates the clear intent needed to recognize an easement in those features.
- Instead, the necessary intent must be demonstrated case-by-case through evidence based in the deed and plat as a whole.
- The inquiry should be whether the evidence, taken as a whole, demonstrates a clear intent to grant an easement in the property in question.

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Restrictions for a View

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Restrictions for a View

Weir v. Palm Beach County 85 So. 2d 865 (Fla. 1956)

- In Ms. Weir's case, the county proceeded to widen the roadway in front of her home. Doing so caused the ground on one side of her home to settle, and her foundation sustained some damage from the settling. In addition, her suit claimed that the new road blocked her view of the ocean, lessening the value of her property. She claimed that the value of her property was tied to the view.
- Ms. Weir lost her case on two counts. First, the county of Palm Beach County, like most governmental jurisdictions, is immune from tort claims. Ms. Weir's claim that the construction caused damage to her home's foundation was dismissed. The court's finding was: "*… plaintiff only had the right to lateral support for soil and not for her building. Otherwise, landowners were able to build houses on the edge of their property, thereby preventing public improvements.*" Her second cause of action – the issue of blocking her view of the ocean – was also dismissed. The court concluded: "*Plaintiff's rights to enjoy the view from her property and of ingress and egress to her property were subordinate to the public's right to an improved road.*"

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Racial Restrictions

- Racially restrictive covenants refer to contractual agreements that prohibited the purchase, lease or occupation of a piece of property by a particular group of people. Racially restrictive covenants were not only mutual agreements between property owners in a neighborhood, but were also agreements enforced through the cooperation of real estate boards and neighborhood associations.
- The use of racial restrictive covenants emerged in 1917, when the U.S. Supreme Court deemed city segregation ordinances illegal. That year, in *Buchanan v. Warley*, the court ruled that outright segregation ordinances violated the 14th Amendment. After the ruling, segregationists turned to restrictive neighborhood covenants. Racial deed restrictions became common after 1926, when the U.S. Supreme Court validated their use in the case *Corrigan v. Buckley.* The restrictions were an enforceable contract and an owner who violated them risked forfeiting the property.

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Racial Restrictions

- The court held that while states are barred from creating race-based legislation, private deeds and developer plat maps are not similarly affected by the 14th Amendment. This was because individuals entering into covenant agreements were doing so of their own volition, whereas segregation ordinances were forced upon populations from the state and municipal levels. Racially restrictive covenants superseded segregation ordinances as instruments to promote and establish residential segregation in U.S. cities, according to the court.
- In 1945, an African American couple named J.D. and Ethel Shelley knowingly purchased a restricted home in St. Louis. They made the purchase to protest the legitimacy of the restrictive covenant that had been drafted by the St. Louis Real Estate Exchange. The following year, in *Shelley v. Kramer*, the circuit court decided that the restrictive covenant was unenforceable because it had been haphazardly assembled.
- The Missouri Supreme Court, however, rejected that ruling and upheld the covenant by invoking *Corrigan v. Buckley.* The plaintiffs appealed to the U.S. Supreme Court, which in 1948, ruled that the racial covenants were legally unenforceable and violated the Equal Protection Clause of the 14th Amendment. Although racial restrictive covenants were no longer legally enforceable, they were not illegal to establish and privately enforce.

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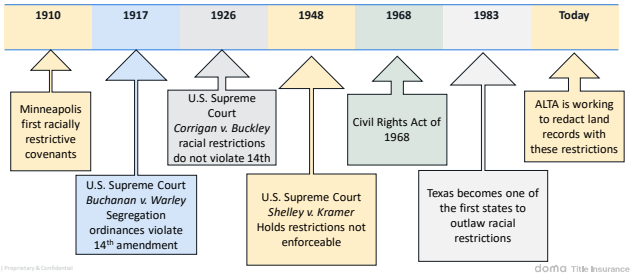
Racial Restrictions



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Racial Restrictions

How to redact / show:

Schedule B in the title insurance policy says, "Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.

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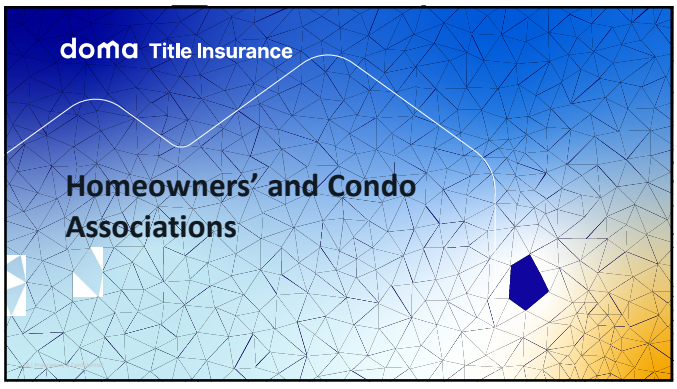

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Homeowners' and Condo Associations

Citation: *Andrea Liu v. U.S. Bank National Association, Case No. 16-CV-262 in the District of Columbia Court of Appeals (Decided March 1, 2018)*

Facts: The D.C. condominium owner obtained a $589,750 purchase money loan in 2007; the secured loan was later assigned to U.S. Bank. The owner defaulted on both his loan and condo assessments. U.S. Bank chose not to foreclose. The D.C. condominium association foreclosed on its statutory six-month super-priority lien, but the notice and advertisement expressly noted that the sale was "subject to the first mortgage" held by U.S. Bank. It should be noted that the lender attempted to pay the arrearage ($11,503.67) but was one day late in tendering its check. The property was sold to a third-party bidder for $17k.

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Homeowners' and Condo Associations

Holding: The D.C. condominium association enforcing its super priority lien may not condition its foreclosure upon protecting any interest in favor of the first mortgage. There is a specific anti-waiver provision in the D.C. Code preventing the condominium from conditioning any such sale. None of the equitable defenses asserted by the lender persuaded the appellate court to grant the lender any relief.

Importance to the title industry: As in several other jurisdictions, the D.C. courts are favorably disposed to the full exercise of a condominium's statutory six-month "super priority lien" and have evidenced little or no concern of the impact on purchase money lenders whose interest will be wiped out even when the arrearage may only be a few thousand dollars.The *Liu* decision, coupled with similar decisions in Nevada and Massachusetts, strongly suggest that super priority liens will be honored in every respect regardless of the impact on other prior recorded and seemingly secured interests.

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Homeowners' and Condo Associations

Tips for the title industry:

- Do not insure the foreclosure of a prior statutory (involuntary) lien that will extinguish a lien insured or held by a federal agency such as HUD. The prior statutory (involuntary) lien could include a homeowner association lien, a condominium association lien, an *ad valorem* tax lien, a mechanic's lien, or a judgment lien.
- Treat the payment of homeowners' association or condo association dues as a lien on the unit/lot and verify the payment to current prior to any transaction (refi or sale).
- In foreclosure of a mortgage or deed of trust, assume that condo and homeowners' association payments due survive foreclosure, and require release.
- Check with your underwriting counsel for specific transactions.

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Questions?

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> **"Ultimately property rights and personal rights are the same thing."**
>
> – Calvin Coolidge - 1872-1933, 30th President of the United States

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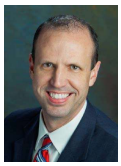
Speaker



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