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HOUSE TALK:

Eliminating Restrictions From a Property Deed

By PATRICK BARTA

Question: How do I remove or modify a restrictive covenant that applies to my vacant lot? It was placed on my property by a previous owner, and it stipulates that I have to set my house back 90 feet from the street; I'd like to change that to 70 feet. I've been told everything from "once it's on the deed, it can't be modified" to "only the person who put the restriction on the property can remove it." What should I do? I can't seem to find a clear process for changing the covenant.

—Victor, New Mexico

Victor: Modifying or removing a restrictive covenant isn't easy. But it can be done in certain cases.

Restrictive covenants, which are common across the country, often are placed on properties when builders first develop a subdivision. The idea behind them is to establish a unique set of rules for all the properties in a community beyond what's already dictated by local zoning. For example, some restrictive covenants create limitations on the kinds of improvements you can make to your property, like adding a toolshed or a basketball court. Others establish minimum size requirements, or outlaw commercial uses of the property. Some covenants even regulate the color schemes of all the homes in an area.

The first thing to do if you want to sidestep those limitations is to get a copy of the covenant itself, which often is on file at the county courthouse. In many cases, the covenants include provisions that lay out the circumstances under which the rules can be changed or ignored. Sometimes, the documents will allow property owners to violate the covenant if they obtain permission from all the residents in the community. In other cases, the covenants include an expiration date, meaning you might be free to do as you please if you just wait a little longer.

If the covenant provides no clear-cut roadmap, building what you want will become tougher. But you still have some options. One approach would be to simply go to your neighbors; if they all agree to allow you to ditch the covenant, and they put it in writing, you could be in the clear, though it's wise to consult an attorney to make sure. You might also check with your state's building association; in some cases, states have laws that give property owners the right to modify their covenants, so long as they follow certain procedures.

If that doesn't work, you can try to get the covenant invalidated. There are many instances under which a judge might invalidate some or all of the provisions of a covenant because they are vague, impractical or flat-out illegal. For example, some older covenants included discriminatory

provisions that prevented the sale of homes to certain minority groups. Other covenants provide vague instructions, calling on owners to ensure that certain unspecified "quality" standards are maintained; a judge might determine those standards are unenforceable. In other cases, the covenants can be deemed not applicable if other owners in the neighborhood have consistently violated them in the past.

In all of these cases, though, the best approach is to go to a judge before you start construction and ask for a declaratory action that will make clear that some or all of the covenant's provisions don't apply to you. Such a judgment will protect you if anyone raises a stink later.

Of course, if all this fails you can always just go ahead and build. That subjects you to a lot of risk, though. "It will only take one neighbor to say 'I'm going to file suit, or get an injunction to stop construction, or get an order to have this building demolished,'" says David Crump, an attorney at the National Association of Home Builders. "It's a harsh consequence, but they can do it," he says. If you can't get everything ironed out before construction, you might be better off just sitting tight, altering your plans to conform to the covenant, or selling the property.

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