

Words Really Do Matter

Drafting and enforcing real estate use restrictions

By Thomas A. Gattozzi

Brouse McDowell LPA

Restrictive covenants are an important tool for owners or operators of real property to impose restrictions on the use of property. Such use restrictions are typically imposed in deeds or in leases which are filed of record so as to be enforceable against third parties. But how can you be certain that the restriction you have put in place will actually prevent someone from using the property for that purpose?

Drafting use restrictions requires considerable thoughtfulness and care so that you can enforce the restriction in court if the need arises. That appears to be a relatively simple task on the surface. But the restriction must not be so broad that it is open to many interpretations, and at the same time, it must not be so specific that it fails to cover the uses which you desire to prevent.

The Ohio Supreme Court has stated that “[a] ‘restrictive covenant’ is ‘a private agreement, [usually] in a deed or lease, that restricts the use or occupancy of real property . . . and the uses to which the property may be put.’” (*Canton v. State*, 95 Ohio St. 3d 149 2002) (quoting Black’s Law Dictionary).

Ohio courts have made it clear that restrictions on the free use of real property generally are disfavored. If the language in the restrictive covenant is indefinite or capable of differing interpretations, the covenant must not be enforced; but



if the language in the restriction is clear, Ohio courts will enforce the restriction. In Ohio, courts are required to give the words used their common and ordinary meaning so as to determine the intent in imposing the restrictive covenant.

Within the last several years, I have had a couple opportunities to consult with my litigation colleagues at Brouse McDowell on litigation involving the enforceability of restrictive covenants. In both cases, the court examined the specific words used in the covenant with extraordinary detail.

One case involved a restriction on the use of vacant land for the sale of motor vehicle fuel. The restriction was to benefit the seller of the restricted property so long as the seller, *or its successors or assigns*, owned or leased property within a certain geographic area. The seller owned gas station properties within the geographic area which sold seller’s branded fuel. The seller subsequently transferred the ownership of such properties to

franchisees for the continued operation of gas stations selling seller’s branded fuel. Several years later, a purchaser of the restricted property challenged the enforceability of the deed restriction stating that the seller no longer owned or leased property within the geographic area. The seller argued that its franchisees operating gas stations on properties within the geographic area were the very “successors or assigns” contemplated by the deed restriction. The court disagreed and concluded that, upon a strict reading of the plain language of the restriction, the seller’s franchisees were not “successors or assigns.” In finding the covenant unenforceable, the court noted that if the seller had intended the restriction to benefit franchisees selling its product, it was required to make specific mention of such parties in the covenant language. The term “successors or assigns” was simply too broad for this court to include the seller’s franchisees.

In another case, Party A sold real estate to Party B with a deed provision restricting the property from being used for the



R.M. RIGGLE

FIRE SUPPRESSION & MECHANICAL CONTRACTOR

440.234.0700 | WWW.RMRIGGLE.COM
879 W. BAGLEY RD. | BEREA, OH 44017

operation of a “building supply business.” Party B subsequently entered into an agreement to sell the property to Party C who intended to use the property for the sale of discounted and/or discontinued building materials and products. When Party C discovered the existence of the restrictive covenant and Party A refused to waive the restriction, Party C decided not to purchase the property. Party B filed suit against Party A seeking damages. Party B argued that the sale of “discounted or salvage building materials” was not the operation of a building supply business – that the items sold by Party C would have been salvage materials that could not be resupplied or that would not have been sold on a bulk basis. The trial court granted summary judgment in favor of Party A and enforced

the restrictive covenant. On appeal, the appellate court affirmed the trial court’s decision. The appellate court quite literally interpreted the plain meaning of the words by quoting The Merriam-Webster

Drafting use restrictions requires considerable thoughtfulness and care so that you can enforce the restriction in court if the need arises. That appears to be a relatively simple task on the surface.

Dictionary for the definition of the words “building,” “supply” and “business.” The court concluded that Party C’s intended use fell within the plain meaning of

a “building supply business” and determined that nothing in the language of the restrictive covenant placed qualifiers on the type or amount of building supplies being offered for sale. In this case, the restrictive covenant was not specific enough so as to exclude Party C’s specialty sale of salvage or discontinued building supplies from a general building supply business.

As these cases demonstrate, courts in Ohio will take great care in analyzing and interpreting the specific words used in a restrictive covenant. It is well worth the time and effort for you and your legal representative to carefully think through and craft the language in any restrictive covenant so that you are able to enforce the restriction in accordance with your intent. **P**

Thomas Gattozzi is the co-chair of the Real Estate & Construction Practice Group at Brouse McDowell (www.brouse.com). In his almost 25 years of practice, Gattozzi has worked closely with owners and operators of commercial real estate in all phases, including advising on deal structure and deal terms, and negotiating and preparing the transactional documents necessary to secure and close deals from acquisitions, divestments, leasing, development, easements, sale/leaseback transactions and financing. He can be reached by email at tgattozzi@brouse.com or phone at 216.830.6831.

The sky is the limit.

At Brouse McDowell, we focus on construction and real estate law. Our team offers legal counsel, practical guidance and extensive experience in navigating all stages of your real estate transaction. Let us help you build your business.



AKRON | CLEVELAND | NAPLES | TOLEDO | YOUNGSTOWN

www.brouse.com
330.535.5711

