

1999 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1460

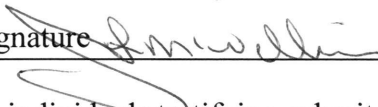
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1460

House Government and Veterans Affairs Committee

Conference Committee

Hearing Date 1-28-1999

Tape Number	Side A	Side B	Meter #
1	X		25.9 - 37.8
3	X		1.0 - 12.6
Committee Clerk Signature 			

Minutes: Some of the individuals testifying submit written testimony. When noted please refer to it for more detailed information.

Representative Klein, Chairman of the GVA Committee opened the hearing on January 28, 1999.

Summary of the Bill: Relating to approval of modifications to covenants running with the land.

Testimony in Favor:

Representative Cleary, Appeared before the committee to introduce the bill. These old covenants had archaic language in them. We are asking a change from 85 to 67 %, this is more reasonable.

Representative Klein, This would not address covenants made before passage of this bill. It would go from here forward,

Representative Cleary, I think it would address some of those made years ago.

Roger Prindiville, Grand Prairie Estates gave the historical background on the covenants in the area he lives in. These covenants go back 25 years old.

Representative Klemin, With covenants, the people or person should know there in these covenants when they purchase and while living there.

Prendiville, Yes we do and we want to change that.

Representative Kroeber, Is there an enforcing agency for these covenants?

Prendiville, No, we don't have one.

Claus Lembke, ND Association of Realtors stated his group supports this bill. If two thirds want a change we support this.

Testimony in Opposition: None.

Representative Klein, Closed the hearing on HB 1460.

Representative Klein, Instructed the committee to go to HB 1460. This is the one having to do with covenants.

Representative Klemin, All do respect to the 1997 legislature, I am not so sure they should have done this. It's not only restricted covenants that are placed on a subdivision, this particular bill is not limited to subdivisions. Out in the county, you could sell a 30 sections of land and I say OK I will sell it to you, but I don't want a pig sty on the property. The guy says OK and I put this on the deed that he cannot use it for hog operations. I don't think that is what the people's intentions were, but now I am the only owner of this property. So I sell it off to someone who only wants it for a hog operation. Well there is only one owner there that is already 100 percent of the owner, so the 85 percent doesn't make any difference. He says OK, I don't have to comply with that because it says 85 percent can change this and since I am the only owner I'll change it because I don't agree with that covenant. The first sentence is completely independent from the second sentence. We have made it possible for people to come in and change covenant which have been

in effect. Simply by having this percentage. I think this is a little bit too broad. This could be made a little bit more palatable with the amendments, possibly. This would work if only applicable to platted subdivisions. I don't think it should apply to preexisting private subdivision, we should do this on a move forward basis, that way everyone knows what they're going into.

Representative Grande, You can have that covenant changed by having a meeting of the owners and saying from now on we want it that 67%.

Representative Kroeber, I don't understand your analogy, the guy who came in and testified came in and said there are 104 people that I have 126 lots. You're no longer talking about someone who owns the whole thing. You're talking about a covenant.

Representative Klemin, Most of the restricted covenants nowadays do contain some type of provisions where they can be changed. The reason they have it on a per lot basis is that a developer might own 50% of the lots, would be only one owner. Otherwise as an owner, even after I sold the first two lots and still owned 98 lots, I would be outvoted. This is not limited to subdivision, it includes all land.

Representative Klein, Your thought is that if we're going to amend it, it should include platted subdivisions.

Representative Klemin, I think so.

The rest of this is just general discussion, please refer to the tape, meter 9 - 12.1.

Representative Klein, Instructed Representative Cleary to take this to the legislative council and have it researched.

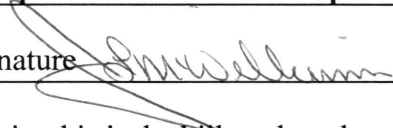
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1460

House Government and Veterans Affairs Committee

Conference Committee

Hearing Date 2-5-1999

Tape Number	Side A	Side B	Meter #
1		X	36.0 - 50.3
Committee Clerk Signature 			

Minutes: Chairman Klein, this is the bill we heard on January 28 relating to covenants.

Representative Klemin would you give us the short version of the amendments.

Representative Klemin, Is walking the committee through the amendments. This is a hog house. I think an error was made in the 97 session.

Committee Action:

Representative Metcalf, Made the motion for a Do Pass on the amendments.

Motion Passes: Yes (vocal).

Representative Thoreson, Made the motion for a Do Pass on the amended bill.

Representative Haas, Seconded the motion.

Representative Devlin, I have a problem doing this. Were going in and changing it and I have a real problem doing that.

Representative Grande, I have a problem bringing it down to the 67%.

Page 2
House Government and Veterans Affairs Committee
Bill/Resolution Number HB 1460
Hearing Date 2-5-1999

Motion Passes: Do Pass Amended **10-4-1**.

Representative Cleary, Is the carrier for the bill.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1460

Page 1, line 1, after "A BILL" replace the remainder of the bill with
"for an Act to create and enact a new section to chapter 11-33.2 of the North Dakota
Century Code, relating to modification of subdivision building restrictions; and to repeal
section 47-04-25.1 of the North Dakota Century Code, relating to modification of
covenants running with the land.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 11-33.2 of the North Dakota Century
Code is created and enacted as follows:

Modification of subdivision building restrictions. Subdivision building
restrictions executed after July 31, 1999, must contain procedures for modification of the
building restrictions. The register of deeds shall not record any instrument containing
subdivision building restrictions unless the instrument contains provisions for modification
of the building restrictions. If subdivision building restrictions recorded before August 1,
1999, do not contain procedures for modification, the owners of sixty-seven percent of the
lots in the subdivision may agree, in writing, to amend the building restrictions to include
provisions for modification. Following approval of the amendment of the building
restrictions and following approval of any modification of the building restrictions, the
amendment or modification must be recorded in the office of the register of deeds of the
county in which the subdivision is located. The provisions of this section relating to
subdivision building restrictions recorded before August 1, 1999, do not apply to
subdivisions where the plat has been recorded for less than fifteen years.

SECTION 2. REPEAL. Section 47-04-25.1 of the North Dakota is repealed.

Renumber accordingly

Date: 2-5-99

Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1460

House GOVERNMENT AND VETERANS AFFAIRS Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken DP AMENDED

Motion Made By THORESON Seconded By HAAS

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN KLEIN	✓		REP. WINRICH	✓	
VICE-CHAIR KLINISKE		✓			
REP. BREKKE	✓				
REP. CLEARY	✓				
REP. DEVLIN		✓			
REP. FAIRFIELD					
REP. GORDER		✓			
REP. GRANDE		✓			
REP. HAAS	✓				
REP. HAWKEN	✓				
REP. KLEMIN	✓				
REP. KROEBER	✓				
REP. METCALF	✓				
REP. THORESON	✓				

Total (Yes) 10 No 4

Absent 1

Floor Assignment CLEARY

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1460: Government and Veterans Affairs Committee (Rep. Klein, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). HB 1460 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 11-33.2 of the North Dakota Century Code, relating to modification of subdivision building restrictions; and to repeal section 47-04-25.1 of the North Dakota Century Code, relating to modifications of covenants running with the land.

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SECTION 2. REPEAL. Section 47-04-25.1 of the 1997 Supplement to the North Dakota Century Code is repealed."

Renumber accordingly

1999 TESTIMONY

HB 1460

MORTGAGE - SHORT TERM MORTGAGE REDEMPTION

Combination Mortgage, Security Agreement,
and Fixture Financing Statement
(\$1,500,000.00)

HB 1460

This Mortgage is made this _____ day of January, 1999, between _____, a North Dakota limited partnership, whose post-office address is _____ ("Mortgagor"), and _____, a national banking corporation, with an address at _____ ("Mortgagee").

WITNESSETH, THAT, to induce the Mortgagee to make certain financial accommodations to Mortgagor, between Mortgagor and Mortgagee (the "Agreement") and to secure the Mortgagor's obligations under a term loan in the amount of \$1,500,000.00, the Mortgagor does hereby mortgage, grant, bargain, sell and convey unto the Mortgagee, its successors, and assigns, forever, all the tracts(s) or parcel(s) of land ("Land"), described as follows:

The property described on Exhibit "A".

TOGETHER With all the buildings and improvements now or hereafter erected thereon, and all lighting, heating, ventilating, air-conditioning, sprinkling and plumbing fixtures, water and power systems, engines and machinery, boilers, ranges, ovens, dishwashers, carpeting, mirrors and mantels, furnaces, oil burners, elevators and motors, refrigeration plants or units, communication systems, dynamos, transformers, electrical equipment, storm and screen windows, doors, awnings and shades all other fixtures of every description now or hereafter found or used upon the property above described or appurtenant thereto, all of which, together with replacements and additions thereto, shall be deemed fixtures and subject to the lien hereof, and together with all hereditament, easements, appurtenances, royalties and mineral, oil and gas rights now and hereafter pertaining to the Land (all of the foregoing, together with the Land, are the "Mortgaged Property").

* Borrower.
The Mortgagor covenants that the Mortgagor is lawfully seized of the Mortgaged Property in fee simple and has the right to convey the Mortgaged Property; that the Mortgaged Property is free from all liens and encumbrances except as otherwise listed on Exhibit B attached hereto ("Permitted Encumbrances"); that upon foreclosure the Mortgagee shall quietly enjoy and possess the Mortgaged Property; that the Mortgagor will warrant and defend the title to the Mortgaged Property against all claims, whether now existing or hereafter arising, not hereinbefore

expressly excepted; and that all building and improvements now or hereafter located on the Land are, or will be, located entirely within the boundaries of the Land. The covenants and warranties of this paragraph shall survive foreclosure of this Mortgage, and shall run with the Land. *

PROVIDED, NEVERTHELESS, that if Mortgagor shall duly and punctually pay or cause to be paid all of Mortgagor's obligations to Mortgagee under a certain promissory note (the "Note") in the original principal sum of \$1,500,000, dated of even date herewith, payable in monthly installments of principal, together with interest at a fixed rate of nine percent (9%) per annum (based upon the actual number of days elapsed in a 360-day year), through December 31, 1999. Commencing January 1, 2000 and on adjusting on January 1st of each year thereafter, interest shall be payable at an annual rate equal to one percent in excess of Mortgagee's Reference Rate in effect on such date. Monthly payments are to commence February 5, 1999, and to continue on the fifth day of each month thereafter, until December 31, 2003, when the debt is due in full, such installments to be sufficient at all times to fully amortize the obligation over twenty years, together with any and all extensions, renewals or replacements thereof, and shall repay any future advances or loans as authorized herein, and shall also keep and perform all and singular the covenants and agreements herein contained, then this Mortgage shall be satisfied; otherwise the mortgage of the premises remains in full force and effect.

The Mortgagor further covenants and agrees as follows:

1. COMPLIANCE WITH AGREEMENTS/LATE PAYMENT FEE. The Mortgagor shall promptly pay the obligations due under the Note and other sums, with interest thereon, as may be advanced by the Mortgagee in accordance with this Mortgage or the payment of which may now or hereafter be secured by this Mortgage (the indebtedness evidenced by the Note and all such other sums are hereinafter collectively referred to as the "Indebtedness"). In addition, the Mortgagor shall abide by and comply with the Agreement. Each time any scheduled payment is not made within ten (10) days of its due date, the Mortgagor shall pay to the Mortgagee on demand a late payment fee not exceeding 5% of the amount not timely paid.

2. FUNDS FOR TAXES AND INSURANCE. Mortgagor shall deposit with Mortgagee on February 5, 1999 and on the fifth day of each and every month hereafter, an amount equal to one-twelfth (1/12th) of the annual taxes, assessments and insurance premiums (the "Charges") due on or relating to the Mortgaged premises as estimated by Mortgagee. Mortgagor shall make an initial deposit on the date hereof in an amount equal to 2/12ths of the annual Charges and maintain at all times a balance equal to 2/12ths of the annual Charges. From time to time out of such deposits and to the extent such deposits are sufficient, Mortgagee will, upon presentation to Mortgagor of bills thereof, pay the

N.D.C.C. Chapter 47-04 Estates in Real Property

§ 47-04-24. "Covenants running with the land" defined

Certain covenants contained in grants of estates in real property are appurtenant to such estates and pass with them so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they personally had entered into them. Such covenants are said to run with the land.

§ 47-04-25. Covenants running with the land

The only covenants which run with the land are those specified in this chapter and those which are incidental thereto.

§ 47-04-26. Covenants running with the land--Classification

All covenants contained in a grant of an estate in real property, which are made for the direct benefit of the property or some part of it then in existence, run with the land. Such covenants include covenants:

1. Of warranty;
2. For quiet enjoyment;
3. For further assurance on the part of a grantor; or
4. For the payment of rent, taxes, or assessments upon the land on the part of a grantee.

§ 47-04-27. Covenants--Limitation to designated assigns

A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with the land so far only as the assigns thus mentioned are concerned.

§ 47-04-28. Covenants running with the land--Owner of entire estate bound

A covenant running with the land binds only those who acquire the whole estate of the covenantor in some part of the property.

§ 47-04-29. Covenants running with the land--Liability as holder only

No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits.

§ 47-04-30. Covenants running with the land--Apportionment of benefit or burden

When several persons, holding by several titles, are subject to the burden or are entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity.

N.D.C.C. Chapter 11-33.2 Subdivision Regulation

§ 11-33.2-01. Subdivision defined

For the purposes of this chapter, unless the context otherwise requires, "subdivision" means the division of a lot, tract, or parcel of land, creating one or more lots, tracts, or parcels for the purpose, whether immediate or future, of sale or of building development, and any plat or plan which includes the creation of any part of one or more streets, public easements, or other rights of way, whether public or private, for access to or from any such lot, tract, or parcel, and the creation of new or enlarged parks, playgrounds, plazas, or open spaces.

§ 11-33.2-03. Scope of county authority

County regulation of subdivision pursuant to the provisions of this chapter shall in no way affect subdivision within the corporate limits, or within the area of application of extraterritorial zoning jurisdiction adopted pursuant to section 40-47-01.1, of any city. Additionally, no resolution, regulation, or restriction adopted pursuant to the provisions of this chapter shall prohibit or prevent the use of land or buildings for farming or any of the normal incidents of farming.

§ 11-33.2-14. Recording plat

Upon final approval of a plat as required under this chapter, the subdivider shall record the plat in the office of the register of deeds of the county wherein the plat is located. Whenever plat approval is required by a county, the register of deeds shall not accept any plat for recording unless such plat officially notes the final approval of the board of county commissioners.

312 N.W.2d 698

Earl ALLEN and Nash Finch Company, Plaintiffs and
Appellants,

v.

MINOT AMUSEMENT CORP. and Minot Christian Center, Defendants
and Appellees.

Civ. No. 9990.

Supreme Court of North Dakota.

Nov. 12, 1981.

Action was instituted to enforce use and occupancy restriction with respect to a shopping center. The District Court, Ward County, Jon R. Kerian, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Sand, J., held that consent to modify restriction on uses and occupancies allowed by plaintiff in shopping center, specifically given with the understanding that it did not in any way operate as a waiver of any of the plaintiff's rights and further conditioned on the continuing responsibility that the use and occupancy of the land conformed to the provisions of the lease with plaintiff, manifested only a limited exception to restrictive covenant and, although it extended to use of building as a motion picture theater, it did not constitute a waiver of plaintiff's objection to defendants' use of the building as a church.

Reversed and remanded with directions.

A landowner may sell his land subject to such reservations or restrictions as he may see fit to impose, provided they are not contrary to public policy. *Anderson v. Marshall-Malaise Lumber Co.*, 66 N.D. 216, 263 N.W. 721 (1935). Although such reservations and restrictions are not favored, they will be given force and effect when clearly established. *Anderson v. Marshall-Malaise Lumber Co.*,

However, the mere fact that the removal of the restrictive covenant will greatly enhance the value of land will not justify its removal. *Parrish v. Newberry*, 279 S.W.2d 229 (Ky.1955). Neither will mere pecuniary loss prevent the enforcement of a restrictive covenant. *Johnson v. Robertson*, 156 Iowa 64, 135 N.W. 585 (1912).

263 N.W. 721

66 N.D. 216

ANDERSON et al.

v.

MARSHALL-MALAISE LUMBER CO. et al.

No. 6374.

Supreme Court of North Dakota.

Dec. 7, 1935.

Syllabus by the Court.

1. One owning the fee has the right to sell his land subject to such reservations or restrictions as to its future use and enjoyment as he may see fit to impose, provided they are not contrary to public policy. Whether the right to enforce such restrictions or reservations is personal to the grantor, or appurtenant to adjoining land of which he remains the owner, is a matter of fact to be determined from the wording of the restrictive provisions in the light of the circumstances attendant on the transaction.

2. The record is examined, and it is held, for reasons stated in the opinion, that the restriction in the instant case was for the benefit of adjoining land, of which the grantor remained the owner, and that the right to enforce the same is appurtenant to such land and passed to the grantees thereof.

Appeal from District Court, Mercer County; H. L. Berry, Judge.

Action by August Anderson and another against the Marshall-Malaise Lumber Company and another, to enjoin the erection of a building contrary to a restrictive agreement in a deed. From a judgment for defendants, plaintiffs appeal.

Judgment reversed, and judgment ordered for the plaintiffs.