Racially Restrictive Covenants in the State of Washington: A Primer for Practitioners

Rajeev D. Majumdar

I. INTRODUCTION

Prior to the civil rights movement, the placement of covenants, conditions, and restrictions within titles that prohibited the habitation, use, or ownership of real property by specific religious or racial groups was an accepted practice. The Fair Housing Act of 1968 rendered these restrictions unenforceable with regard to the housing market. The legacy of racially restrictive covenants, however, lives on in Washington where many of these unenforceable covenants still remain in the language of titles to land. Consequently, for a variety of reasons, including the potential for offending particular racial or ethnic groups as well as the social repercussions of purchasing real estate in an area perceived to be unpleasantly exclusionary, these covenants should be removed from both title and public record.

Despite legislative action to enable a wide array of individuals, including those with minimal property rights, to strike racially restrictive

---

5. Id.
6. For example, those rights associated with occupancy that a tenant might possess.
covenants from titles and public record,7 there has been very little written about the process itself. Given the ubiquitous nature of such covenants in Washington,8 this article aims to provide attorneys the knowledge to effectively remove racially restrictive covenants without affecting other, beneficial covenants.

Part II of this Comment will begin by examining the history of racially restrictive covenants, specifically the nature of covenants and the role of the federal government in both spreading and hindering the usage of such covenants. Part III will discuss the legal underpinnings of what makes such covenants unenforceable in Washington, and the best processes an attorney can use to remove them.

Part IV will discuss a recent case that has significantly altered the collateral consequences of attempting to destroy racially restrictive covenants upon other associated covenants.9 As a result, those seeking to retain the benefits of other covenants associated with the land should no longer fear that an entire set of beneficial covenants will be invalidated due to a specific challenge against a racially restrictive provision. Although the Washington Supreme Court has made this abundantly clear in the case of textually separate covenants, it has left open the question of multiple restrictions that are not textually distinct.10

Part V provides an analysis of Washington courts’ logic and prevailing policy, and that of other jurisdictions that have tackled this issue, and Part V also argues that Washington courts would likely allow the racially restrictive portions of covenants to be excised from a document without endangering affiliated covenants, regardless of how the covenants are structured.

II. A HISTORY OF RACIALLY RESTRICTIVE COVENANTS

This Part first examines the history of covenants in general and their evolution under American jurisprudence. Next, this Part examines the influence and role of the federal government in both spreading and hampering the usage of racially restrictive covenants.

A. Covenants in General

A covenant is a promise or obligation contained in a binding instrument of contract such as a deed.11 If a covenantor fails to fulfill a promise, the covenantee may enforce a covenant in court.

---

8. Turnbull, supra note 4.
10. Id.
covenanator’s side of the promise is called the “burden” side, and the covenantee’s side is called the “benefit” side. A covenant takes the form of a promise to perform or abstain from an action affecting the land, relating in some way to the property owner’s legal interests.

Covenants come in a myriad of forms, and stem from centuries old English common law. A “running” covenant can descend to successors in interest, such as future owners or assignees of the land, and can be put in action by or levied against such successors. Running covenants are found in two general forms, real and equitable, and the latter are commonly called “equitable servitudes.” Breaches of real covenants are subject to damages, and one who has breached a covenant may be forced to pay money damages. Equitable servitudes, on the other hand, may be equitably enforced, meaning a court can award an injunction or an order for specific performance.

Real covenants arose earlier in history, first appearing in English common law at the King’s Bench in 1583. Equitable covenants, or equitable servitudes, are a relatively late legal development, arising out of an English Chancery Court decision in 1848. Prior to its importation from English law, American courts had formed “indigenous theories that incorporated both a doctrine of real covenants and of equitable restrictions” similar to equitable covenants.

A major difference in distinguishing between the two categories is that, unlike an equitable servitude, a real covenant requires horizontal privity, meaning that a land transfer between a grantor and grantee is expressly tied to the original promise. Though the language stems from English court usage, the development of these concepts in American law

13. Id.
15. Id.
16. Black’s Law Dictionary, supra note 11, at 393, 579; Stoebuck & Weaver, supra note 12, at § 3.1.
17. Stoebuck & Weaver, supra note 12, at § 3.9.
21. Stoebuck & Weaver, supra note 12, at § 3.1 n.4 (citing Uriel Reichman, Toward a Unified Concept of Servitudes, 55 S. Cal. L. Rev. 1179, 1188–1211 (1982)); see, e.g., Whittendon Mfg. Co. v. Staples, 41 N.E. 441, 445 (Mass. 1895) (wherein the court noted that “we see no good reason why . . . an easement or a servitude calling for the performance of positive acts may not also be created”).
was not entirely identified with the subject matter distinctions that might be historically assumed in English courts by use of the words servitude or covenant.\footnote{See Reichman, supra note 21, at 1181.} For example, in the formative period of American land-use law, the most widely used forms of covenants were those aimed at restricting land uses between neighbors.\footnote{See id.} In particular, the greatest concern of land owners and courts was working out a theory that either allowed neighbors to enforce a promise against the other, or to allow a subdivision association to enforce promises against the owners.\footnote{Letter from John W. Weaver, Professor, Seattle University School of Law, to Rajeev Majumdar (Nov. 20, 2005) (on file with author).}

These restrictive covenants were once considered a form of spurious easement by American courts, but restrictive covenants have been treated as equitable servitudes under modern case law.\footnote{Cf. Palm Beach County v. Cove Club Investors Ltd., 734 So. 2d 379, 385 n.8 (Fla. 1999) (citing Bd. of Pub. Instruction of Dade County v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955) (wherein the Florida Supreme Court stated that restrictive covenants are defined as equitable servitudes under modern law)).} Restrictive covenants are now synonymous with equitable servitudes, as courts hold the requirement of privity is not necessary.\footnote{Id.; BLACK'S LAW DICTIONARY, supra note 11, at 393; see also Note, Covenants Running With the Land: Viable Doctrine or Common-Law Relic?, 7 Hofstra L. Rev. 139, 178-80 (1978); see also Nicholson v. 300 Broadway Realty Co., 164 N.E. 2d 832, 835 (N.Y. 1959) (wherein New York held that affirmative obligations could run with the land without a requirement of privity).} Consequently, despite the nomenclature used, racially restrictive covenants are actually equitable servitudes, given that horizontal privity is not needed when a group of landowners individually agree to such a restriction and that courts favor interpretations of equitable servitudes over real covenants.\footnote{Stoeckel, supra note 22, at 886.} For the purposes of this Comment, however, the term covenant will be used for both equitable servitudes and real covenants, although the term is most often used to refer only to real covenants.

Given that a basic principle of property law is the free alienability and use of land, it is important to consider that although covenants encumber titles in some fashion, they are often used to "make land more marketable and improve its value."\footnote{Stoeckel, supra note 22, at 886.} Being mindful of free alienability, Washington courts have held that "restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not...

...
be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land."30

B. Racially Restrictive Covenants and Federal Influence

The practice of using racially restrictive covenants was once widespread throughout the United States and arose in the early twentieth century as a method of protecting the "value" of residential property.31 Extensive use of racially restrictive covenants in the Seattle area—where relatively dense populations of minorities have existed in comparison to most of Washington—began in the 1920s.32 In particular, these racially restrictive covenants applied primarily to "citizens of Negro or Oriental ancestry and (in some cases) Jews."33 As in most Western states, the racially restrictive covenants in Washington also targeted Native Americans, Pacific Islanders, and people of Mexican ancestry.34 The targeting of African Americans and East Asians in particular appears to follow a trend of local responses throughout the West towards influx populations of non-whites.35 For example, in California's Imperial Valley, an influx of Punjabi farmers in the early twentieth century led to a bar on selling land to "Hindoos" through laws passed by local government.36

The federal government tackled racially restrictive covenants both through the courts and through legislation. This Part will now explore Supreme Court decisions that invalidated public usage of such restrictions. Then, this Part will examine how the federal government helped promulgate the usage of private racially restrictive covenants. Finally, this Part will outline a national policy shift that led to the widespread condemnation of such restrictions.

31. See generally Farrell, supra note 1.
32. See Terry Pettus, Seattle is Blighted by Restrictive Covenants, New World, Jan. 15, 1948, at 1.
33. Id.
35. Id.
36. See generally KAREN ISAKSEN LEONARD, MAKING ETHNIC CHOICES: CALIFORNIA'S PUNJABI MEXICAN AMERICANS (1992). This source details the fascinating history of Punjabi migrants to California. Id. The farmers, labeled as “Hindoos” despite their varied religious backgrounds as Sikhs, Muslims, as well as Hindus, were prohibited from buying farm land in the Imperial Valley. Id. The immigrates were mostly male, and married Mexican women refugees from the Mexican Revolution who were allowed to possess and take title to land. Id. The indirect result of the restrictions and the direct result of over 500 inter-racial marriages between these two groups produced a unique hybrid community known as Mexican Hindus, which has remained a successful farming community over several generations. Id. See also Pioneer Asian Indian Immigration to the Pacific Coast, Mexican Hindu, http://www.sikhpioneers.org/mexhindu.html (last visited May 14, 2007).
1. Early Supreme Court Decisions

Not long after the initial proliferation of racially restrictive covenants, the U.S. Supreme Court, relying on the Fourteenth Amendment, put an end to state-sponsored promulgation of racially restrictive covenants. In 1917, Buchanan v. Warley invalidated racial-segregation ordinances like those seen in the Imperial Valley.\(^{37}\) The plaintiff, a seller of a parcel of property, challenged a Louisville city ordinance that would deny an African American purchaser from taking possession, which was a requirement of the sale.\(^{38}\) The title of the ordinance read as follows:

An ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively.\(^{39}\)

The Supreme Court held that while the authority of the state to pass laws in the exercise of the police power for the promotion of the public health, safety and welfare is broad in nature, such authority “cannot justify the passage of a law or ordinance which runs counter to the limitations of the federal Constitution.”\(^{40}\) Property, along with life and liberty, is protected under the Fourteenth Amendment from usurpation by the states without due process of law, and states cannot place arbitrary restraints on the alienation of property.\(^{41}\) Relying on Blackstone, the Supreme Court defined property as “consist[ing] of the free use, enjoyment, and disposal of a person’s acquisitions without control or diminution save by the law of the land.”\(^{42}\) Accordingly, the Court held that the right to acquire, use, and dispose of property was protected by the Constitution, and, as a result, all citizens of the United States have the right to purchase property and use it without laws discriminating against them on account of their race.\(^{43}\)

Although Buchanan ended the era of state-sponsored racial restrictions on property, the question of private covenants was left wide open. No law restricted private parties from attaching racially restrictive covenants to land and limiting alienability with regard to race.\(^{44}\) In 1926,

\(^{37}\) See Buchanan v. Warley, 245 U.S. 60, 82 (1917).

\(^{38}\) See id. at 69–70.

\(^{39}\) Id. at 70 (quoting City of Louisville Ordinance, approved May 11, 1914).

\(^{40}\) Id. at 74.

\(^{41}\) Id.; U.S. Const. amend. XIV.

\(^{42}\) Buchanan, 245 U.S. at 74.

\(^{43}\) Id. at 74, 81–82 (citing Holden v. Hardy, 169 U.S. 366, 391 (1898)).

\(^{44}\) See, e.g., Corrigan v. Buckley, 271 U.S. 323 (1926).
the Supreme Court endorsed this practice in *Corrigan v. Buckley*. The issue in *Corrigan* paralleled *Buchanan* in that it involved a transfer of property between a white property owner and an African American buyer, where property owners sought to prevent the buyer from taking title or possession due to a racially restrictive covenant. Unlike in *Buchanan*, the Court held that the Fourteenth Amendment did not apply because it has "reference to State action exclusively, and not to any action of private individuals." Thus, the *Corrigan* Court concluded that racially restrictive covenants established by private property owners were not in violation of the Constitution, because "contracts entered into by private individuals in respect to the control and disposition of their own property" were valid.

2. The Federal Housing Administration's Role in Proliferation

*Corrigan* took on increased significance with the establishment of the Federal Housing Administration (FHA) in 1934, which spurred the growth of racially restrictive covenants across the country. The purpose of the FHA was to provide mortgage loan guarantees in order to facilitate home ownership, and in pursuing this purpose the FHA would advise developers on what factors to use to determine whether a neighborhood would receive financing. The FHA's Underwriting Manual contained guidelines for retaining property values and community desirability:

If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes. Further, appraisers were warned of the dangers of infiltration of "inharmonious racial or nationality groups." As a means of enforcing this segregation, the Underwriting Manual recommended

---

45. *Id.*
46. *Id.* at 327–28. In 1921, thirty land owners, including the defendant, Corrigan, recorded a racially restrictive covenant that stated "no part of these properties should ever be used or occupied by, or sold, leased or given to, any person of the negro race or blood; and that this covenant should run with the land and bind their respective heirs and assigns for twenty-one years from and after its date." *Id.* at 327. In 1922, Corrigan executed a contract of sale with the defendant, Curtis. *Id.* Corrigan knew Curtis was black, and Curtis knew of the covenant, but both intended to carry forward with the sale over the objections of the other parties to the covenant. *Id.* at 327–28. The plaintiffs sought an injunction preventing the defendants from carrying the contract of sale into effect, or to delay the conveyance until the racially restrictive covenant expired. *Id.* at 328.
47. *Id.* at 330 (citing Virginia v. Rives, 100 U.S. 313, 318 (1879); United States v. Harris, 106 U.S. 629, 639 (1883)).
48. *Id.* at 331.
49. Farrell, supra note 1, at 381.
50. *Id.*
“subdivision regulations and suitable restrictive covenants” as an excellent method to maintain neighborhood stability.51

Due to the FHA’s criteria for financing, racially diverse neighborhoods were excluded from receiving insured mortgages. Even if such an area received FHA insurance, its appraised value was substantially diminished.52 Consequently, properties in racially diverse neighborhoods were effectively valued “at zero because, in the Manual’s words, those neighborhoods’ ‘racial aspects render[ed] the locations actually noncompetitive.’”53

Because of the diminished values placed on racially diverse neighborhoods by the FHA, a model form for racially restrictive covenants promulgated by the FHA became a tool for developers and land owners to protect their property values.54 This had direct ramifications in Washington, particularly in Seattle, where the Boeing Company developed vast tracts of land.55 In developing much of the North Seattle area, Boeing made extensive use of racially restrictive covenants as prescribed by the FHA Manual.56

For example, the neighborhood of Innis Arden in Shoreline, Washington, was subdivided by the Boeing Company and created with a racially restrictive community covenant.57 The language of the community covenant still exists today, and the “clause, ‘no person other than one of the white race shall be permitted to occupy any property in said addition . . .’ is still part of part of the covenant that families purchasing property today in Innis Arden are required to sign.”58 Currently, the document lists the clause that contains the racially restrictive language as “invalidated,” but it still exists on the formal covenants.59 For several years, many community members in Innis Arden gathered signatures in an attempt to

52. Farrell, supra note 1, at 381–82.
53. Id. at 381 (citing FEDERAL HOUSING ADMINISTRATION, UNDERWRITING MANUAL § 1304, at ¶ 904 (1938)).
56. Id.
59. Innis Arden Covenant, supra note 58, at cl. 15.
remove the language from the community covenant, but not until 2006 was the community finally able to gather enough signatures to do so.\footnote{Innis Arden Club, http://www.innisarden.com/index.html (last visited May 14, 2007). Currently, all three subdivisions have collected just enough signatures to remove the restrictions; ironically, however, this comes after the passage of recent legislation discussed below, which gives the board of a homeowners association standing to remove such covenants. 2006 Wash. Sess. Laws Ch. 58 (S.B. 6169).}

Many other communities and individual properties hold similar covenants.\footnote{Brief of Defendant-Appellant at 3, Viking Props., Inc. v. Holm, 155 Wash. 2d 112, 118 P.3d 322 (2005), 2004 WL 3155201.} Another prominent example also originates from an FHA-guided Boeing development, the Boeing Subdivision, which was recently the subject of scrutiny in \textit{Viking Properties, Inc. v. Holm}, discussed below in Part III.\footnote{Id.}

3. A National Policy Shift

It was not until February 1950, two years after racial covenants were declared unenforceable and contrary to public policy by the Supreme Court in \textit{Shelley v. Kraemer},\footnote{Shelley v. Kraemer, 334 U.S. 1 (1948).} that the FHA officially stopped encouraging racially restrictive covenants.\footnote{Nier, \textit{supra} note 51, at 626.}

In \textit{Shelley}, the Court rendered racially restrictive covenants unenforceable because the U.S. Constitution conferred upon no individual a "right to demand action by a State which results in the denial of equal protection of the laws to other individuals."\footnote{\textit{Shelley}, 334 U.S. at 22.} There, two cases were consolidated for the review. In both cases, property owners brought suit against African American families in order to restrain them from taking possession of property they had purchased subject to the terms of a restrictive covenant.\footnote{\textit{Id.} at 6.} The Court, however, did not find merit in the assertions of the white property owners, who claimed that the refusal of the courts to enforce terms of the racially restrictive covenant against African American purchasers was a denial of equal protection of the laws.\footnote{\textit{Id.} at 22; cf. Marsh v. Alabama, 326 U.S. 501 (1946).}

Significantly, the Court held that it was unquestionable that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment," which rendered racially restrictive covenants wholly unenforceable.\footnote{\textit{Id.}}

Despite the ruling in \textit{Shelley}, the "lingering effects of discriminatory policies that [lasted] for decades after World War II," essentially

\textit{Racially Restrictive Covenants in Washington} 1103
made it impossible for people of color to get FHA mortgages. The Fair Housing Act of 1968 served to add federal weight to the Shelley ruling by prohibiting discrimination with regards to sales, rentals, and the financing of housing. The Fair Housing Act of 1968 was passed as a result of the outrage over the assassination of Dr. Martin Luther King, Jr., who, in addition to other issues, had called attention to the racial inequalities and barriers in obtaining housing. President Lyndon Johnson urged Congress to pass the act, which specifically barred discrimination on the basis of race, color, religion and national origin. More importantly, in the context of already unenforceable racially restrictive covenants, it allowed third-party standing to individuals to pursue claims against illegal enforcement of such covenants, even if they were not personally discriminated against.

III. WASHINGTON'S STATUTORY REMEDIES AND INTERPRETATION OF PROCEDURE

This Part will first look at Revised Code of Washington (RCW) 49.60.224, which defines what restrictions on property are void under Washington law and to whom the law applies. Then, this Part will discuss RCW 49.60.227, the statutory procedure that the legislature has enacted to remove racially restrictive covenants, and proper procedural approaches to the matter.

A. RCW 49.60.224—Voiding

After the passage of the Fair Housing Act, state legislatures followed suit, passing their own versions of what was then already federal law. In 1969, the Washington legislature enacted RCW 49.60.224, which voids discriminatory provisions in real property contracts. The

71. IRVING BERNSTEIN, GUNS OR BUTTER: THE PRESIDENCY OF LYNDON JOHNSON 495–99 (1996); Johnson, supra note 69.
statute has been expanded several times to protect additional classes from discrimination and now states in relevant part:

Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race, creed, color, sex, national origin, sexual orientation, families with children status, or with any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a blind, deaf, or physically disabled person, and every condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on these grounds is void. 76

Additionally, under this statute it is an unfair practice to “attempt to honor such a provision in the chain of title.” 77 Consequently, any attempt to deny the sale of such a formerly restricted property to members of the formerly prohibited target race(s) can have consequences including prosecution under the Unfair Business Practices-Consumer Protection Act. 78

There has also been some controversy over the word “individuals” in the statutory language, and Washington courts have held that the meaning is not confined to natural persons. In Niemann v. Vaugh Community Church, a member of a church attempted to block a sale of church property by enforcing language contained in the trust controlling the church’s property, which prohibited the use of land by any party other than the church community in perpetuity. 79 The court in Niemann found that while RCW chapter 49.60 consistently uses “individual” to mean a natural person, the church, while not covered under this statute, could still convey the land to another party. 80 The court based its rationale on the fact that the purchasers could possibly be members of classes protected by RCW 49.60.224. 81 Though the harm in this case was to a possible, future unidentified buyer, that harm could have potentially included people of various races; consequently, any titleholder, including a

---

75. The language regarding “national origin” and “or the presence of any sensory, mental, or physical handicap” was inserted in 1979. “Sex,” “families with children status,” “or physical disability,” and “or the use of a trained guide dog or service dog by a blind, deaf, or physically disabled person” were added in 1993, again following the Federal lead in its amendments of the Fair Housing Act. In 1997, “dog guide or service animal” replaced “guide or service dog.” In 2006, “sexual orientation” was added. 1979 Wash. Sess. Laws ch. 127, § 10; 1997 Wash. Sess. Laws ch. 69, § 8; 1997 Wash. Sess. Laws ch. 271, § 16; 2006 Wash. Sess. Laws ch. 4, § 16.
76. WASH. REV. CODE § 49.60.224(1) (2006).
77. Id. § 49.60.224(2).
78. Id. § 19.86.090.
80. Id. at 833–34, 77 P.3d at 1212–13.
81. Id.
business entity, has standing under this statute, and any landowner may take action to remove such a restriction.82

B. RCW 49.60.227—Removing

Though it is not clear whether RCW 49.60.224 provides a remedy for provisions formed before 1969, the Washington Supreme Court has held that declaratory judgment action can be obtained under RCW 49.60.227, regardless of whether the provision originated before 1969. RCW 49.60.227 authorizes "Declaratory Judgment Actions" that have been created to strike the void discriminatory provisions from real property contracts.83 This is an in rem action84 and is applicable whenever there is "a written instrument contain[ing] a provision that is void by reason of RCW 49.60.224."85 The Washington legislature passed this statute in 1987 on the rationale that discriminatory covenants, in addition to being void, are contrary to public purpose, and that the "continued existence of these covenants and restrictions is repugnant to many property owners and diminishes the free enjoyment of their property."86 According to RCW 49.60.227, a court receiving such an action and concurring that there is a void provision under RCW 49.60.224 should issue an order striking the void provision from public record and title.87

While the Washington Supreme Court has not explicitly held whether RCW 49.60.224 provides a remedy to void provisions formed before 1969, it has noted that RCW Chapter 49.60 is broad and remedial in nature, intended to confront and remedy a menace to the institutions and foundations of democracy in the form of discrimination.88 Following this rationale, any discriminatory covenant may be stricken from title and public record through a declaratory judgment action, regardless of whether it originated before or after 1969.89

An action under this statute to remove a racially restrictive covenant should be brought in superior court in the county where the property is located, and may be done by any designated "necessary party," including the owner, occupant, or tenant of the property, as well

82. See id. at n.4.
83. WASH. REV. CODE § 49.60.227 (2006). This Comment is current with legislative updates effective June 1, 2006 authorized by 2006 Wash. Sess. Laws Ch. 58 (S.B. 6169)).
84. In rem is Latin for "against a thing" and is an action "involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing." BLACK'S LAW DICTIONARY, supra note 11, at 809.
85. WASH. REV. CODE § 49.60.227 (2006).
87. WASH. REV. CODE § 49.60.227 (2006).
88. Bennett v. Hardy, 113 Wash. 2d 912, 927, 784 P.2d 1258, 1265 (1990) (citing WASH. REV. CODE § 49.60.010 (2006)).
89. See id.
as any homeowners association that may govern it. 90 As a result of the action, the court shall "enter an order striking the void provisions from the public records and eliminating the void provisions from the title or lease of the property described in the complaint." 91 There is also a required court fee that is set under RCW 36.18.012, which currently stands at twenty dollars. 92

In these cases, judgment is a matter of law, and a wide range of designated parties associated with the property can demand the covenant be stricken and removed from public record. 93 As such, the most expeditious practice is to have a motion for summary judgment attached to the complaint for declaratory action. 94 In the alternative, given the simple and direct nature of the action, it may be possible to expedite the matter even further by approaching a court commissioner to hear the case ex parte with the complaint for declaratory action and a prepared order for signature. 95

As a final cautionary note for those pursuing this remedy, when searching for a racially restrictive covenant, lawyers should be aware that title companies often blank out the discriminatory language in covenants when making copies after a title search. 96 There is no consistent industry

90. WASH. REV. CODE § 49.60.227 (2006). One does not have to be an owner in fee simple—mere occupancy or tenancy is satisfactory for the required standing. This raises the question of the adverse possessor, and I surmise that because the legislature has judged these covenants to be against "public purpose" and "repugnant," the adverse possessor's mere occupancy would allow her to bring such a claim. Incidentally, this would serve as good evidence of open and notorious possession, a requirement of adverse possession; it would encourage adverse possessors to carry out desired public policy in serving their own ends. Id; see generally KELLY KUNSCH, ESTABLISHING TITLE BY ADVERSE POSSESSION, 1C WASH. PRAC. § 89.4 (Supp. 2005).
91. WASH. REV. CODE § 49.60.227 (2006).
92. Id. §§ 49.60.227, 36.18.012(6).
93. See generally id. § 49.60.224.
96. Turnbull, supra note 4, at A13.
policy, however, and some title companies show the language, or make attachments indicating such covenants are invalid.\textsuperscript{97} The original documents recorded, however, will still bear the language unless amended by an RCW 49.60.227 action, as described above.\textsuperscript{98}

IV. PRESERVATION OF ATTACHED BENEFICIAL COVENANTS

This Part outlines the dueling policy interests that arise when land owners wish to keep beneficial covenants that are unfortunately attached to racially restrictive covenants. Recently, the Washington Supreme Court has directly examined this dilemma in \textit{Viking v. Holm}.\textsuperscript{99} This Part discusses the court’s analysis in \textit{Viking} and its holding that racially restrictive covenants that are textually separate can be severed. Further, this Part outlines the shortcomings of \textit{Viking} and argues that the holding should be expanded to excise any presence of racial restrictions from other beneficial covenants, regardless of whether the covenants are within the same sentence or not.

\textit{A. Legal Dilemma: The Destruction of Beneficial Covenants}

There can be great reluctance to alter a covenant attached to a title, especially where there are multiple parts to the covenant.\textsuperscript{100} While many homeowners may view racial restrictions as a blemish or repugnant, they might be loathe to give up other beneficial covenants, such as neighborhood upkeep standards, rights to views, and maximum building heights.\textsuperscript{101} Homeowners purchase and develop properties in reliance on the continued validity and enforceability of covenants, and the threat of destruction of these associated covenants is incentive enough to prevent them from acting to strike language they already understand as void.\textsuperscript{102} As will be shown below, however, Washington courts have determined when restrictive covenants can be severed from a title without endangering other associated beneficial covenants.\textsuperscript{103}

In order for a restrictive covenant to be severable, it must exist in a form that violates public policy.\textsuperscript{104} For example, a covenant that wholly prohibits the use of land would be unreasonable and thus void because it

\begin{itemize}
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Unti, \textit{supra} note 95.
  \item \textsuperscript{99} Viking Props., Inc. v. Holm, 155 Wash. 2d 112, 118 P.3d 322 (2005).
  \item \textsuperscript{100} Id. at 117, 118 P.3d at 325.
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} See id.
  \item \textsuperscript{103} See, e.g., Thayer v. Thompson, 36 Wash. App. 794, 677 P.2d 787 (1984).
  \item \textsuperscript{104} See id. at 796 (citing Golberg v. Sanglier, 27 Wash. App. 179, 191, 616 P.2d 1239, 1247 (1980), rev’d on other grounds, 96 Wash. 2d 874, 639 P.2d 1347 (1982)).
\end{itemize}
would contradict public policy that favors the free alienability of land. Additionally, in order to find that a covenant’s purpose is in violation of public policy, courts require a demonstration of legislative intent to override contractual property rights. In the case of racially restrictive covenants, RCW 49.60.227 demonstrates fulfillment of this premise by the Washington legislature.

Still, the matter of destroying other covenants associated with racially restrictive covenants is problematic as homeowners may be relying on associated beneficial covenants not void at law. Judicial interpretation of land use policy in Washington, as evidenced by the following cases, supports the idea that homeowners’ benefits from covenants should be protected. In *Lakes at Mercer Island Homeowners Ass’n v. Witrak*, the Washington Supreme Court held that emphasis should be placed on interpreting covenants so that the collective interests of homeowners are protected. Strengthening the idea that covenants may have great value to homeowners, in *Riss v. Angel* the court noted that “in Washington the intent, or purpose, of the covenants, rather than free use of the land, is the paramount consideration in construing restrictive covenants.”

These different policy interests create a dilemma. On one hand, any person associated with a piece of property may bring an action to destroy and remove from public record any racially restrictive covenants attached to the title of the property in question under RCW 49.60.227. Yet, on the other hand, there is strong policy in Washington case law indicating that if some covenants contain benefits that homeowners have relied upon, then the intent of these covenants should be protected and adhered to.

---

105. *Id.* at 797 (citing 5 R. POWELL, REAL PROPERTY § 674 (1981)).
109. *Id.* at 181, 810 P.2d at 29.
B. Recent Resolution of the Dilemma: Viking v. Holm

The competing interests of wanting to excise racially restrictive covenants and keeping beneficial covenants was the issue resolved when King County Superior Court held that an entire covenant, including restrictions on housing density, was void because it included among its elements a racial restriction that was "unenforceable and not severable from the remainder of the covenant."[111] In Viking v. Holm, the Washington Supreme Court overturned the superior court and held that a racially restrictive portion of the covenant must be severed while continuing to enforce the beneficial portion of the covenant.[112]

1. Factual Background

Viking concerned property in the Boeing Subdivision of Shoreline, Washington, the property being subject to a racially restrictive covenant.[113] All of the property owners in the subdivision derive their titles from sales by the Boeing Company which took place between 1937 and 1941.[114] Each lot in the subdivision was subject to the same restrictive covenant, which reads as follows:

[1.] This property shall not at any time, directly or indirectly, be sold, conveyed, rented or leased in whole or in part, to any person or persons not of the White or Caucasian race. [2.] No person other than one of the White or Caucasian race shall be permitted to occupy any portion of any residence tract or of any building thereon, except a domestic servant actually employed by a White occupant of such tract and/or building. [3.] No building or structure shall be erected, constructed, maintained or permitted upon this property except a single family, detached private dwelling house on each one-half acre in area. [4.] As appurtenant to such dwelling house a private garage, garden house, pergola, conservatory [sic], servant quarters or other private appurtenant outbuildings or structures, may be erected, constructed and maintained.[115]

The covenant in its barest essence proscribes racial minorities from any form of ownership or property interest and imposes a housing density limitation of no more than one dwelling on each one-half acre.[116]

In July 2002, Viking Properties, Inc. (Viking) purchased a 1.46 acre lot in the Boeing Subdivision, and three months later it demanded the

---

112. See generally id.
114. See id; see also Viking, 155 Wash. 2d at 116, 118 P.3d at 324.
115. Viking, 155 Wash. 2d at 116, 118 P.3d at 324.
116. Id.
other homeowners (Homeowners) release the entire covenant so that it could redevelop the lot with more residential units, which it could not do with the housing density limitation. 117 Every Homeowner rejected Viking's demand despite being informed that they would be sued by Viking. 118 Viking subsequently asked King County Superior Court to declare the covenant unenforceable in its entirety and invalidate it. 119 Toward this end, Viking argued several points with regard to conflict with new zoning laws. This Comment will focus on Viking's primary argument: "the covenant's racial restriction is invalid and cannot be severed from its density limitation." 120

The court agreed with Viking, holding that the covenant was unenforceable based on Viking's reasoning, and entered summary judgment in their favor. 121 The Homeowners' motion for reconsideration on procedural grounds was denied, and they appealed to the Washington Supreme Court. 122

2. Appellant's Challenge

In Viking, the Homeowners argued that "the court should sever the covenant's invalid racial restrictions and enforce the independently lawful building and use restrictions long relied on by the homeowners." 123 Their argument was based on three premises: (1) that courts have long deferred to private covenants; (2) that the homeowners' collective interests required enforcement of the valid building and use restrictions; and (3) that the void racial restrictions operate independently of the rest of the restrictions. 124

The Homeowners invoked the traditional deference to private interests, their collective interests, and the need to protect homeowners' reliance on beneficial covenants. 125 Indeed, the Homeowners made the argument that beyond protection of their reliance interests, property owners have a right to restrict the use of their land. 126 Additionally, the

117. Id. at 117, 118 P.3d at 325.
118. Id.
119. Id.
120. Id. at 118, 118 P.3d at 325.
121. Id.
122. Id. at 118–19, 118 P.3d at 325.
123. Brief for Defendant-Appellant at 15, Viking, 155 Wash. 2d 112, 118 P.3d 322. For the purposes of examining the severing of racially restrictive provisions in covenants, this article will only survey those portions of the appellate arguments and decisions that apply directly to the issue at hand.
124. Id. at 15–19.
125. Id. at 15–18.
Homeowners argued that restrictive covenants are property rights protected under Washington’s constitution as a contract. They cited to Article I, Section 23 of the Washington State Constitution which states that “[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.” The problem with this argument is that if the contract of the covenant is void due to the racial restrictions, there is no impairment of a valid obligation. Thus, the Homeowners had to show that the racially restrictive portions of the covenant were severable.

In arguing that the racially restrictive portions of the covenant were severable, the Homeowners examined RCW 49.60.224, which voids discriminatory provisions in real property contracts. Specifically, they highlighted the language that emphasized: “Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance . . . [or] occupancy . . . thereof to individuals of a specific race, creed [or] color . . . is void.” Based on this language, the Homeowners argued that the legislature never intended to void entire written instruments, but only those portions that were racially restrictive. Furthermore, the Homeowners pointed out that the statute used the term “provision” repeatedly, indicating that “by definition [it] presumes the existence of a larger instrument whose valid terms survive after invalid terms are stricken.”

Viking responded to the Homeowners’ argument that only the racially restrictive covenants should be severed by claiming that “the covenant is invalid in its entirety because pervasive racial restrictions are intertwined with its meaning and because no meaningful restrictions remain when racial restrictions are removed.” This argument by Viking was founded on the premise that the racially restrictive portions of the covenant are dominant, and that there was no severability clause in the

constructed in violation of residential covenant); Hanson v. Hanlv, 62 Wash. 2d 482, 383 P.2d 494 (1963); Granger v. Boulls, 21 Wash. 2d 597, 598, 152 P.2d 325, pin, (1944) (affirming covenant’s limitation for “necessary outbuildings for residence uses”)).
127. Id. (citing WASH. CONST. art. I, § 23; Pierce v. Ne. Lake Wash. Sewer and Water Dist., 123 Wash. 2d 550, 559-60, 870 P.2d 305, 310-311 (1994) (holding that private view protection covenant may give rise to inverse condemnation action for view obstruction)).
128. WASH. CONST. art. I, § 23.
130. Id. at 20 (quoting WASH. REV. CODE § 49.60.224 (2006)).
131. Id. at 20-21.
132. Id. (analyzing WASH. REV. CODE § 49.60.227 (2006)).
133. Brief of Respondent at 14, Viking, 155 Wash. 2d 112, 118 P.3d 322. See also supra note 115.
covenant.\textsuperscript{134} Due to this, Viking argued, there is no rational basis for determining the intent of the covenant.\textsuperscript{135} Re-drafting the covenant as an example, Viking constructed what they termed to be an “absurdly distorted” outcome: “This property may at any time, directly or indirectly, be sold, conveyed, rented, or leased in whole or in part to any person or persons.”\textsuperscript{136} Furthermore, Viking argued that clauses three and four were predicated on the racially restrictive clauses one and two; in particular Viking questioned who would be limited to occupying the “servant’s quarters” authorized in the fourth clause, if not the prohibited races in clauses one and two.\textsuperscript{137}

The Homeowner appellants, however, argued that clauses three and four had clear and unambiguous language from which a separate intent could be discerned from the racially restrictive intent in clauses one and two.\textsuperscript{138} The Homeowners anchored their arguments on an Alabama case that looked at separate servant’s quarters language that was similar to clause four in Viking.\textsuperscript{139} In the Alabama case, the court held that the language was distinct and severable from the racially restrictive portions of the covenant.\textsuperscript{140} Based on policy concerns, the Homeowners also argued that voiding the entire covenant in this case “merely because it includes an outmoded racial restriction would impair the contract and property rights of the Homeowners, who paid value for property in reliance on the valid building and use restrictions made known to all parties at the time of purchase.”\textsuperscript{141}

3. Court’s Resolution

The supreme court weighed both sides of the dilemma and found that the purposes of clauses one and two were logically distinct from that of clauses three and four, and that because the clauses were “textually separate from each other . . . it reasonably follows that the racial

\begin{footnotes}
\item[134] Id. at 16.
\item[135] Id.
\item[136] Id. at 17.
\item[137] Id. at 18.
\item[138] Id. at 22 (citing Mountain Park Homeowners Ass’n v. Tydings, 125 Wash. 2d 337, 344, 883 P.2d 1383, 1387 (1994)).
\item[139] Id. at 24 (citing Callahan v. Weiland, 279 So. 2d 451 (Ala. 1973)). In Callahan, the lots of a subdivision were sold with deeds of conveyance that contained several provisions, including: “That said property shall be used by white persons only, except that any servant or servants employed on the premises may occupy servants’ quarters or house.” Callahan, 279 So. 2d at 453.
\item[140] Callahan, 279 So. 2d at 457 (“The racially restrictive covenant bears no relation to the remaining covenants, and is entirely distinct from the building and use restrictions.”).
\end{footnotes}
restriction is severable from the remainder of the covenant." 142 The court stated that Viking was correct that where the covenant's meaning is radically distorted, the covenant would be invalid; but in this case, Viking's re-construction of the text was "exceptionally strained." 143 With regard to strained definitions, the court held that it would interpret covenants liberally using the plain and ordinary meaning of the text 144 in part to avoid absurd results, 145 and in part because covenants are favored as they generally make land more marketable and improve value. 146

Regarding the lack of a severance clause in the original covenant, the court reasoned that though the drafter's intentions regarding severance cannot be known, intent can be drawn from the ordinary and plain meaning of the covenant's language. 147 A review of the Boeing Subdivision covenant by the court yielded two logically distinct purposes:

[T]o exclude racial minorities from ownership or possession of the land, and to limit the number of principal dwellings to no more than one for every one-half acre. Not only are these purposes logically distinct, they are textually separate from each other, with the racial restriction contained in the first two sentences and the density limitation in the latter two. 148

Given the court's identification of two logically discernable and distinct purposes, it held the racial restriction was severable from the remainder of the covenant as it was both void and textually distinct. 149

Additionally, the court agreed with the Homeowners' statutory interpretation, 150 and held that the legislature's repeated use of "provision" demonstrated that the legislature did not intend to void every written instrument containing a racial restriction. 151 Consequently, given the legislative intent, the strong policy of protecting homeowners' collective interests, and the fact that the clauses were "textually separate from each other," the court held that the racial restrictions were severable from the remainder of the covenant. 152

---

142. Viking, 155 Wash. 2d at 123, 118 P.3d at 328.
143. See id. at 122, 118 P.3d at 327–28.
144. See id. at 121–22, 124, 118 P.3d at 327–29 (citing Stoebuck, supra note 22, at 886).
145. Id. at 122, 118 P.3d at 328 (citing State v. Stannard, 109 Wash. 2d 29, 36, 742 P.2d 1244, 1248 (1987)).
146. Id. at 124, 118 P.3d at 327 (citing Eurick v. Pemco Ins. Co., 108 Wash. 2d 338, 341, 738 P.2d 251, 252 (1987)).
147. Id. at 123, 118 P.3d at 328 (citing Riss v. Angel, 131 Wash. 2d 612, 621, 934 P.2d 669, 675 (1997)).
148. Id.
149. Id. (citing Shelley v. Kraemer, 334 U.S. (1948)).
150. Id. (accepting Homeowners' interpretation of WASH. REV. CODE § 49.60.224).
151. Id.
152. Id. at 124, 118 P.3d at 328.
C. The Future: Excising Racial Restrictions from Textually Unified Covenants

The ruling in Viking presupposes a curious question: whether the outcome would have been the same had the racially restrictive portions of the covenant been textually unified with the building density provisions. If a period becomes a comma in a covenant, will that override the collective interests of homeowners to rely on beneficial covenants, and render the entire covenant void under RCW 49.60.224? A review of the Viking court's policies and the general trend in property law indicate the answer to be no; Washington courts would likely excise racially restrictive language in any form from covenants to preserve the valid benefits in which homeowners share a collective interest.

The Homeowners in Viking cited Alabama's Callahan decision that said "we see no reason why [the void provision] should not be separable from the remaining enforceable covenants, which separation would in nowise affect the validity of the remaining covenants." Callahan is analogous to the facts in Viking, where the court held that language restricting the use of the property to white people was severable from building restrictions that restricted construction to "a single dwelling house with necessary outbuildings." Significantly, Callahan reflected a growing, nationwide trend in post-war America where courts began to hold that separation of racially restrictive portions of the covenant "would in nowise affect the validity of the remaining covenants," and the racially restrictive language must be deleted. The Callahan court also noted that "[a]t least two of our sister state courts have so held, and we are in accord with such holdings."

The issue of textual unity has come before courts in other jurisdictions, and has been decided in favor of excising void racially restrictive portions of specific provisions. For example, in Hawthorne v. Realty Syndicate, Inc., the North Carolina Supreme Court held that a restrictive covenant limiting land to residential use only was not wholly void because of its conjunction with racially restrictive language. The provision in question read as follows: "The property shall be used for residence purposes only and shall be occupied and owned by only people of the white race." The court concluded that even where the racial

154. Id. at 457.
155. Id. at 457.
156. Id. (citing Brideau v. Grissom, 120 N.W.2d 829 (Mich. 1963); Goodstein v. Huffman, 222 S.W.2d 259 (Tex. App. 1949)).
158. Id. at 494.
159. Id. at 496.
restrictions were united textually with building restrictions, "the two clauses [were] so clearly independent that one need not infect the other."160 The court went on to justify its holding by expounding on the value of protecting residential restrictions as a distinct and valuable property right.161 Like the court in Viking, the Hawthorne court reasoned that those who purchase realty in reliance upon covenants should be entitled to the benefit of such covenants where "its imposition [is] violative of no rules of equity or public policy."162

Under the modern view, as revealed by a nationwide survey of cases involving restrictive covenants since 1927, courts generally render covenants unenforceable only "where there has been such a radical change . . . that the original purpose of the covenant has been defeated [thus being] no longer of substantial value to the benefited land, and its enforcement would be unduly oppressive to the burdened land."163 Likewise, in Viking, the court followed a long-standing and favored policy of "allowing property owners to protect their rights by entering into restrictive covenants," by interpreting the plain and ordinary meaning of the covenant without the racial restrictions.164 Ergo, policy in Washington is much in line with other jurisdictions where the collective interests of property owners are to be protected and where racially restrictive language may be severed in order to allow the rest of the benefits to continue to operate.

V. CONCLUSION

While the last century saw the widespread introduction and equally pervasive repeal of racially restrictive covenants, these covenants left an unfortunate legacy within both the public record and in land titles. Given the statutory language and common procedural practice—despite a lack of published case law—the process of removing racially restrictive covenants is a straightforward one. This legacy of race restriction, however, is often bound up with legitimate beneficial covenants, which has complicated the removal of these racially restrictive covenants, pitting exclusionary language against landowner’s interests. Today, in Washington’s post-Viking era, landowners are assured that the benefits of other covenants associated with their land will not be invalidated due to a specific

160. Id. at 500.
161. Id.
162. Id.
163. Mark S. Dennison, Annotation, Change in Character of Neighborhood as Affecting Validity or Enforceability of Restrictive Covenant, 76 A.L.R. 5th 337, § 1(a) (2000).
challenge against a racially restrictive provision. At least, this is true for textually separate, yet associated, covenants.

As a result, courts should allow excision from textually unified covenants as well. Long standing policies of Washington courts allow property rights to be protected by restrictive covenants, and policies advanced by the legislature allow for the removal of racial restrictions. Thus, Viking indicates that Washington is in line with the jurisprudence of other jurisdictions that allow racial restrictions to be excised in any form. Regardless of why the Viking court highlighted the textual separation of the racially restrictive covenant, the result was just. Only by severing capricious racial provisions from textually unified covenants can courts fully protect landowners’ rights and effectuate current remedial social policies of encouraging the removal of racially restrictive covenants. Recently, the Washington legislature used specific language to explain that “[t]he continued existence of these discriminatory covenants, conditions, or restrictions is contrary to public policy” and that the purpose of their action was to allow the removal of “all remnants of discrimination.” 165 Consequently, not only would Washington courts interpret the law in this fashion, but they should.