

WHEN SHOULD AN APPROPRIATE MUNICIPAL PANEL REQUIRE COVENANTS OR OTHER DEED RESTRICTIONS IN ITS DECISION AND CONDITIONS?

Generally, covenants and other deed restrictions should not be included as conditions in an appropriate municipal panel's (AMP) decision unless a restriction or covenant is necessary to meet a standard or requirement in the municipality's land use regulations.

For example, consider the use of deed restrictions and covenants in a proposed planned unit development (PUD). In accordance with 24 V.S.A. § 4417, a municipality may adopt standards for the reservation or dedication of open space in a PUD. A decision incorporating a condition that the PUD declarations (the recorded document containing covenants and restrictions applicable to the development) make provision for creation and maintenance of open space may be necessary to ensure that bylaw standards for open space protection are met.

On the other hand, the applicant might want to include a covenant in the declarations prohibiting erection of accessory sheds in the development. Such a covenant may be a lawful and appropriate tool for creating a more attractive subdivision. From a zoning perspective, however, unless such a covenant is necessary to ensure compliance with some standard in the municipal bylaw, it has no place in the AMP's decision. Such a condition would be unlawful as lacking support in the zoning bylaw. (The bylaw might even allow sheds as an accessory structure in that district.) Further, it might also make the town responsible for enforcing through zoning what amounts to a private agreement between the property owners in the development.

Finally, some deed restrictions and covenants that might otherwise be lawful could violate state law if incorporated in an AMP decision. For example, a condition in an AMP decision that requires a covenant prohibiting modular or prefabricated housing in a PUD could violate the provisions of 24 V.S.A. § 4412(1)(B) to the extent that it excludes modular or prefab construction from the municipality. There are other deed restrictions that are simply unlawful, including racial, ethnic and other restrictions on protected classes, such as persons protected by the Americans with Disabilities Act.

When rendering decisions, an AMP must apply the relevant evidence to the applicable local bylaw at play and set appropriate conditions to safeguard the development standards. Covenants and other deed restrictions between private parties are common and usually legal, including those that regulate type of construction – but don't include deed restrictions that are not relevant, and especially if they violate your municipality's regulations. If your regulations do not control a particular aspect of a proposed project (such as type of construction), leave it out of the decision.

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