



# Local Government Interim Committee

## 68th Montana Legislature

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TO: Local Government Committee Members

FROM: Julie Johnson, Staff Attorney

RE: Homeowners' Associations Legal Primer

DATE: March 11, 2024

## I. Introduction

At the January 2024 meeting of this committee, Ms. Henneman discussed her memo on "HOA Governance in Montana" in which she cited current statutory guidance on homeowners' associations (HOAs). As mentioned in that memo, statutory guidance on the governance of HOAs "remains largely silent". However, at least one District Court has had an opportunity to consider the constitutionality of recently enacted restrictions on HOAs. In addition, the Montana Supreme Court has had several occasions to consider and rule on different aspects of HOA governance. This primer discusses the current statutory framework for HOAs, the legal challenges to it, as well as key points of Montana caselaw on HOAs.

## II. Statutory Restrictions on HOAs

### A. Restrictions that Impose More Onerous Restrictions on the Use of the Member's Property Without the Member's Consent

In 2019, the Legislature passed Senate Bill 300, which enacted section 70-17-901, MCA.<sup>1</sup> This section prevents HOAs from creating or enforcing certain covenants without express approval of the members of the HOA. More specifically, these restrictions provide that a HOA:

may not create, amend, or enforce a covenant, condition, or restriction that imposes more onerous restrictions on the use of a member's real property than those restrictions that existed when the member acquired his or her interest in the real property, unless the member expressly agrees in writing at the time of the adoption or amendment of the covenant, condition, or restriction.

Section 70-17-901(1)(a), MCA. If a member does not accept the new covenant, condition, or restriction that imposes more onerous restrictions on the use of the member's real property, the

<sup>1</sup> Attached as Appendix A is the entirety of section 70-17-901, MCA.

member must request that the HOA record the exception applicable to the member. Section 70-17-901(1)(b), MCA. The member, the HOA, or the member's designee, must record the member's exception with the office of the county clerk and recorder of the county where the real property is situated. Id. In addition, the member must: (1) provide the HOA with the date the real property was conveyed to the member; and (2) pay the recording fees for the document setting forth the exception. Id.

The recorded exception, however, does not carry over to a successor-in-interest to a member's real property, unless: (1) the successor-in-interest is owned by or shares ownership with the previous member; or (2) the successor-in-interest is a lender that acquired the real property through foreclosure. Section 70-17-901(2), MCA.

These provisions of SB 300 were challenged at the District Court level in Tok Park Subdivision HOA Inc. v. Muggli, (Lewis and Clark County, DDV-2019-1320). In that case, the HOA argued that the application of Senate Bill 300 against the HOA's newly enacted restrictive covenants that prevented its members from renting their homes as vacation rentals was facially unconstitutional. The HOA cited the Contracts Clause of the Montana Constitution at Art. II, section 31, which provides that "No... law impairing the obligation of contracts... shall be passed by the legislature.

In considering the HOA's argument, the District Court applied the following three-part test:

1. Is the state law a substantial impairment to the contractual relationship?
2. Does the state have a significant and legitimate purpose for the law?
3. Does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose?

First, the District Court acknowledged that the SB 300 did impair the contractual relations of the owners in the HOAs. However, the District Court went on to hold that the purpose of the law "is to protect landowners from having their neighbors (via a HOA) foist upon them limitations on how they use their property when they did not agree to those limitations when they bought the property and do not agree now." Tok Park at 23. This, the District Court reasoned, was a legitimate purpose and imposed reasonable conditions to effectuate the purpose. The District Court concluded that "SB 300 is a proper exercise of the State's police power." Id. at 25.

Ultimately, the parties in the Tok Park case settled out of court and the case was not appealed to the Supreme Court. Therefore, the case is not binding state precedent. Likely, there are other cases pending in Montana district courts challenging the application of the SB 300 to HOA restrictive covenants.

## **B. Restrictions on First Amendment Rights**

70-1-522, MCA, prevents an HOA on infringing on a property owner's First Amendment rights. This section provides that an HOA:

may not, as a condition of property ownership within the jurisdiction of the private entity or by other means, prohibit the placement of a sign advocating the election, appointment, or defeat of a candidate for public office or the passage or defeat of a ballot issue on: (a) property belonging to individual or joint property owners who authorize the placement of the sign; or (b) common areas in which an owner owns an undivided interest.

### C. HOA Remote Meeting Provisions

Both incorporated and unincorporated HOAs must allow for remote meetings. Sections 35-2-525 and 35-2-550, MCA.

### III. Key Points of Montana Caselaw on HOAs

As noted in the introduction, the Montana Supreme Court has issued several rulings related to the governance of HOAs. Time after time, the Court has reiterated that the governing documents of an HOA, including its Articles of Incorporations, Bylaws, and Covenants are considered contractual in nature. Below are excerpts from Montana cases on HOAs.

- "Restrictive covenants are construed under the same rules of construction as other contracts: courts read declarations of covenants on their four corners as a whole, and terms are construed in their ordinary or popular sense."<sup>2</sup>
- Courts should "read declarations of covenants on their four corners as a whole, and terms are [to be] construed in their ordinary or popular sense."<sup>3</sup>
- The Montana Supreme Court has recognized that "[o]nly where an ambiguity exists may the court turn to extrinsic evidence of contemporaneous or prior oral agreements to determine the intent of the parties."<sup>4</sup>
- "[T]he language of the Covenants may entitle the [prevailing party] to attorney fees."<sup>5</sup>
- The Montana Consumer Protection Act typically does not apply to member of a homeowner's association because members are not considered consumers under Act.<sup>6</sup>

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<sup>2</sup> Fink v. Meadow Lake Estates Homeowners' Ass'n, 2016 MT 108N, ¶ 7, 384 Mont. 552. (citing Bordas v. Va. City Ranches Ass'n, 2004 MT 342, ¶ 24, 324 Mont. 263, ¶ 24, 102 P.3d 1219, ¶ 24.)

<sup>3</sup> Bordas v. Va. City Ranches Ass'n, 2004 MT 342, ¶ 24, 324 Mont. 263, ¶ 24, 102 P.3d 1219, ¶ 24.

<sup>4</sup> Rich v. Ellingson, 2007 MT 346, ¶ 15, 340 Mont. 285, ¶ 15, 174 P.3d 491, ¶ 15.

<sup>5</sup> Fink at ¶ 16.

<sup>6</sup> Fink at ¶ 14.

- "[C]laims [under the Covenants] are barred by the tort and contract statute of limitations, [which is within 8 years]."<sup>7</sup>.

## APPENDIX A

**70-17-901. Homeowners' association restrictions — real property rights.** (1) (a) A homeowners' association may not enter into, amend, or enforce a covenant, condition, or restriction in such a way that imposes more onerous restrictions on the types of use of a member's real property than those restrictions that existed when the member acquired the member's interest in the real property, unless the member who owns the affected real property expressly agrees in writing at the time of the adoption or amendment of the covenant, condition, or restriction.

(b) When a member claims the benefit of this subsection (1), the member shall request that the homeowners' association record, or allow recording of, the exception applicable to the member. Upon request by the member, the homeowners' association, the member, or a designee shall record the member's exception with the office of the county clerk and recorder of the county where the real property is situated. The member shall provide the homeowners' association with the date the real property was conveyed to the member and shall pay the recording fees for the document setting forth the exception.

(2) A successor-in-interest to a member's real property may not claim the benefit of subsection (1) to the extent that the homeowners' association entered into, amended, or enforced a covenant, condition, or restriction before the successor-in-interest purchased the real property, even if the covenant, condition, or restriction was not enforceable against the previous owner pursuant to subsection (1), unless the successor-in-interest is owned by or shares ownership with the previous member or unless the successor-in-interest is a lender that acquired the real property through foreclosure.

(3) This section does not apply to a covenant, condition, or restriction:

- (a) that is not subject to enforcement by a homeowners' association; or
- (b) that is required in order to comply with applicable federal, state, and local laws, ordinances, and regulations.

(4) Nothing in this section may be construed to prevent the enforcement of a covenant, condition, or restriction limiting the types of use of a member's real property as long as the covenant, condition, or restriction applied to the real property at the time the member acquired the member's interest in the real property.

(5) Nothing in this section invalidates existing covenants of a homeowners' association or creates a private right of action for actions or omissions occurring before May 9, 2019. However, after May 9, 2019, unless the member has consented as provided by subsection (1), a homeowners' association may not enforce a covenant, condition, or restriction in such a way that

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<sup>7</sup> Fink at ¶ 9.

limits the types of use of a member's real property that were allowed when the member acquired the affected real property.

(6) As used in this section, the following definitions apply:

(a) "Homeowners' association" means:

(i) an association of all the owners of real property within a geographic area defined by physical boundaries which:

(A) is formally governed by a declaration of covenants, bylaws, or both;

(B) may be authorized to impose assessments that, if unpaid, may become a lien on a member's real property; and

(C) may enact or enforce rules concerning the operation of the community or subdivision;  
or

(ii) an association of unit owners as defined by 70-23-102 subject to the Unit Ownership Act.

(b) "Member" means a person that belongs to a homeowners' association and whose real property is subject to the jurisdiction of the homeowners' association.

(c) "Person" means one or more individuals or a legal or commercial entity.

(d) "Real property" has the meaning provided in 70-1-106, except that it is limited to real property governed by a homeowners' association.

(e) "Types of use" means the following lawful types of use of the real property:

(i) use for residential, agricultural, or commercial purposes, unless the use was impermissible according to the written or recorded restrictions;

(ii) the ability to rent the real property, including the land and structures on the real property, for any amount of time; and

(iii) the ability to otherwise develop the real property in accordance with applicable federal, state, and local laws, ordinances, and regulations, unless the ability was impermissible according to the written or recorded restrictions.