

March 21, 2019

Dear Representative Kelker:

My name is René Coppock. I have been an attorney practicing in the areas of agricultural law, commercial transactions, water law and real estate and development law for over 30 years. I am very concerned with the issues and erosion of real property rights that will occur with the passage of Senate Bill No. 300. The Bill was drafted in response to litigation currently filed in the Montana Twenty-Second Judicial District Court, Carbon County, Montana. Our law firm represents the homeowners' association and Stephanie Baucus (Moulton Bellingham) is one of the attorneys representing the defendants, Robin and Eric Hogan. Shortly after purchasing a home near Red Lodge, the Hogans began renting their residential property as a Vacation Rental by Owner, with weddings, motorcycle rallies and many other large groups using the property in a manner that was very disruptive to the small subdivision. With the exception of the Hogans, all homeowners in the subdivision voted in favor of an amendment to clarify the covenants on the property, resulting in a complete ban on short term rentals. Although SB 300 will not change the outcome of the litigation, it is still problematic for many reasons.

The issue with attempting to alter property rights in a hurried and piecemeal fashion is that no thought is given to all the ramifications of the legislation or to the effect on other areas of the law. The very purpose of covenants is to place restrictions on development of property. Property owners agree to covenants and conditions that restrict the use and enjoyment of their property for two main reasons. First, and most importantly, homeowners want to maintain or enhance the property's value. Second, homeowners want to use and enjoy their property without annoyance, distraction, or offensive use by their neighbors that falls short of being an actual violation of any existing law zoning ordinance. Although most counties and local governments have laws protecting residents from unsafe or unhealthy conditions on neighboring property, there is little such laws can do to prevent clutter, poor appearance, or just "bad taste." These indiscretions can cost a neighboring property thousands of dollars in appraised value and can also impair home buyers' interest in the property should the owners attempt to move away from the offending property.

Covenants regulate what property owners in a particular area can or cannot do with their property. When a geographically-restricted group of homeowners are bound by neighborhood covenants, individual homeowners are better insulated from the possibility that one errant homeowner will bring down the value of surrounding properties because of the appearance of his or her house. Covenants ostensibly ensure that a residential area will remain a desirable place to live; that the properties contained therein will retain their value; and that, in return for some minor sacrifices, homeowners will be able to better enjoy their own properties. Zoning laws can change, leaving residents unprotected from the possibility that a strip club or gravel pit might be developed in the neighborhood.

SB 300 takes away a homeowner's assurance that surrounding landowners will not degrade the homeowner's property value. Furthermore, it creates total chaos in the enforceability of covenants for the following reasons:

1. Section 1 (1) prevents the enforcement of a covenant that is "more onerous" than when a member first purchased property. I have assisted in amending covenants on Montana property that were drafted in the 1960s. No one in the '60s thought about short term rentals. However, many covenants did prohibit bed and breakfasts. It was clear that the covenants were meant to restrict third parties from using the property in a manner that increased traffic or continually brought "strangers" into the neighborhood. Use of property for short term rentals has the same policy considerations. Under SB 300, a new prohibition on short term rentals could not be enforced against a nonconsenting landowner, even if 99% of the other members of the association voted in favor of the amendment. No owner should have the right to purchase residential property and then turn it into a short term rental for personal gain at the expense of the stability of the residential neighborhood, especially if a majority or super majority of the other landowners are against such use. Furthermore, until recently, no one thought generating electricity for a residence with a

wind turbine would be possible, so very few covenants prohibit the placement of wind turbines within the subdivision. Under SB 300, amended covenants prohibiting wind turbines could not be enforced without written consent of all the landowners. HOAs need to have the flexibility to address the current needs and demands of the property owners. Without that flexibility, there is no certainty in property values or controlling the integrity of the neighborhood.

2. The language “more onerous restrictions” set forth in Section 1 (1) is extremely vague and ambiguous, with no limiting principle. It would lead to more litigation expenses for HOAs and their members. Accordingly, HOAs would have no choice but to increase assessments significantly to pay for additional legal fees, administrative costs and similar expenses.
3. Most covenants require 66% - 75% of members to vote in favor of an amendment for the amendment to pass. Why should one property owner in a subdivision dictate the use of the land in the subdivision? The democratic process should be allowed to function, not create veto rights for minority owners. If a person does not want to take the chance that covenants will be amended, that person should not purchase property subject to covenants or should convince a majority of the members of the HOA to vote against the amendment.
4. Many covenants allow enforcement by either the HOA or a member of the association. Section 1 (1) prohibits a “homeowners’ association” from enforcing a restriction that is more onerous than when the owner obtained an interest in the real property. However, it does not prohibit another member of the HOA from enforcing the restrictive covenant. Can a member enforce the stricter covenant?
5. Section 1(1) also states that a member must “expressly agree to the restriction in writing at the time of the adoption or amendment of the covenant or condition.” Does an affirmative vote to the amendment at an annual meeting fulfill this requirement or must there be a more complex written document? What if the landowner expressly agrees to the amendment AFTER the adoption of the amendment?
6. Section 1(2) states that a successor-in-interest will be subject to the amended covenant “unless the successor-in-interest is owned by or shares ownership with the previous member.” If the property is transferred to a trust, is the trust “owned by” or does it share “ownership with the previous member”?
7. Section 1(4) will result in the lack of enforcement of covenants. Under this section, different property owners will have different rights and restrictions, depending on when they purchased the property, the substance of the covenants at the time, and the effect of any amendments properly enacted pursuant to the covenants if the owner did not consent. HOAs, which typically have volunteer board members, will have difficulty keeping track of which restrictions can be enforced against which property.
8. The definition of “basic rights” is way too broad and vague. The purpose of covenants is to place restrictions on the development of property, but the definition seems to defeat that very purpose. Does the definition mean that residential property can be used for commercial purposes, since use for commercial purposes is a basic right? What does “the right to otherwise develop the property in accordance with the laws of this state” mean?
9. The inability to enforce covenants in a condominium or townhome as set forth in Section 2 would be devastating to property values. All units in a condominium or townhome, by their very nature, must be governed by the same rules and regulations. If a covenant must be amended relating to the structural components of the property or use of the common elements, all owners must be held to the same standard. Given the close proximity and use of essential common and limited common elements, unit owners’ associations must be able to enforce all covenants equally. Uncertainty in enforcement would have a more devastating effect on property owners in condominiums and townhomes than in subdivisions.

10. This Bill would result in developers having to initially implement highly restrictive covenants, knowing that in the future they could only lessen restrictions. Since covenants run with the property, covenants should be allowed to change as a community's needs or a neighborhood's needs change.
11. The possible effects and ramifications of this Bill on existing contract law and differing rights of various owners is almost impossible to predict.

Every owner purchases property subject to the knowledge that covenants can be amended to allow or restrict certain activities, depending on current views and events. If our State government desires to change the manner in which HOAs have historically operated, it would be prudent to take a broad look at the real estate laws and study the impact of such changes. A quick vote on an internally inconsistent and ambiguous Bill in an attempt to address the short term rental issues in the State will have far reaching ramifications and will devalue property for tens of thousands of landowners in Montana. Those who moved into subdivisions for the certainty of the use of neighboring properties will no longer have the assurance of the enforceability of the covenants or the democratic system in which a majority of those voting prevail. It should be noted that although Montana statutory law specifically regulates unit owners' associations, there are no statutory laws relating to homeowners' associations. Accordingly, any new laws relating to HOAs must give careful consideration to existing case law and the rights of all owners subject to covenants, not just the owners who want to avoid the effect of properly enacted amendments. I urge you to vote against SB 300 and study the issues in detail before making such drastic, devastating and lasting changes to real property laws.

Thank you for your consideration.

Respectfully submitted,

*Renee L. Coppock*