



REAL ESTATE

FALL

2009

NEWS & VIEWS

Take Restrictive Covenants Seriously

North Dakota Supreme Court Upholds Restrictive Covenant as Prohibiting Operation of Daycare

by Constance Hofland

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Constance Hofland

This summer, the North Dakota Supreme Court determined the restrictive covenant of a neighborhood, that required property be used for “residential purposes only,” effectively prohibited the use of a residence for a day care in *Hill v. Lindner*, 2009 ND 132, 679 N.W.2d 427.

The Hills and the Lindners were next door neighbors in Fargo. Both of their homes were subject to the same restrictive covenants of that property division. The covenants included the typical

language stating “to protect the community and the individual land owners the said property shall be subject to the restrictions and conditions.” The restrictive covenant also stated that such conditions and restrictions will be a part of every conveyance or deed of the property and shall run with the land when conveyed or deeded.

Under the section “Land Use and Building Type” this covenant required the lots be used for “**single family residential purposes only.**”

The Lindners purchased their house in this division in 2001 and have operated a licensed daycare in the home since that time. In June 2008 they were providing day care for eight children. The next door neighbors, the Hills, sued the Lindners to stop them from operating the day care in their home because, the Hills claimed, it violated the covenant of “single family residential purposes only.” The Lindners answered by claiming the Hills were too late in complaining; that the day care complied with Fargo’s zoning ordinances and that use of their home as a day care did not violate the restrictive covenant.

The district court agreed with the Lindners and dismissed the case. The district court determined the Lindners’ use of the house as a day care was residential in nature and was consistent with the incidental use of a home as a residence; therefore, it did not violate the language of the restrictive covenant. The Hills appealed the case to the North Dakota Supreme Court.

The North Dakota Supreme Court disagreed with the district court and reversed the ruling. In explaining its decision, the Supreme Court first stated the general rule -- that property can be subject to restrictive covenants, provided the covenants are not contrary to public policy.

The Supreme Court also recognized that restrictive covenants are not favored but will be given full effect when clearly established. Also, covenants will be interpreted using the same rules used to interpret a contract. The Supreme Court also stated restrictive covenants will be strictly construed to favor the free use of land, but will not be interpreted to defeat the obvious purpose of the restrictive covenant.

Having said that, the North Dakota Supreme Court recognized courts in other states have come down on different sides of the issue when deciding if operating a day care was contrary to restrictive covenants; however, each case varied in the language of the covenant and the facts of the day care.



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*Commissioner
Kris Sheridan, Chair*

From Kris Sheridan, Chair:

It's license renewal time and we have a surprise for you!

When you renew your license this year, you will have a new option instead of using the standard paper renewal. In our quest to simplify this process, the ND Real Estate Commission is pleased to announce that you will have the option of renewing your license online. We are confident that you will find this new system simple and easy to navigate. Although we may find a few glitches to work on, we believe online renewals will be a huge benefit to all licensees who are comfortable with this age of technology. You won't have to be a computer geek (remember who is writing this) to use this system and a tremendous amount of paper and time will be saved. So, I encourage everyone to try this new method of license renewal. We also look forward to any feedback you can give us so that this procedure can become even better. Watch for the instructions to arrive soon and, as always, please don't wait until the last minute to start this process.

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Articles by outside experts express the author's particular viewpoints. These opinions are not necessarily shared by the Commission, nor should they be mistaken for official policy. The articles are included because we feel they will be of interest to our readers.

Tidbits of Information

- Commission meetings are open to the public and that includes real estate licensees. Commissioners welcome and encourage licensees to attend meetings held by the Commission. Meeting dates, time & location can be found on the Commission's web site www.realestatend.org.
- Award Presented: Special Assistant Attorney General Constance Hofland and NDREC Executive Director Pat Jergenson received certification for the completion of the 2009 ARELLO Investigator Workshop held September 2009.
- RISC has notified the Commission office that the premium for errors and omissions insurance for 2010 will be \$152 – the same as last year.
- Continuing education can be taken either online, in a classroom setting, or a combination of both. This is true for mandatory courses as well.

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The Supreme Court discussed the cases in different states and did state that they decline to adopt a bright line rule prohibiting any incidental business use on property subject to a "residential purposes only" covenant. But, looking at the situation and language of the covenant in this case, the Court decided the Lindners' use of the home for a licensed day care for eight children was more than an incidental use of the home, so it violated the restrictive covenant.

So what do we take away from this case? This case does not necessarily mean any restrictive covenant that mentions residential use, or other limitation of home use, will be interpreted to prohibit the operation of a day care in a home. The determination of whether the use of the home violates the covenant will depend upon the actual language of a restrictive covenant and the specific facts and circumstances of the home use. However, this case illustrates that restrictive covenants in certain situations will be upheld in North Dakota. Despite the fact the Court made the point that restrictive covenants will be construed to favor free use of land, the Court also stated a restrictive covenant will be interpreted to uphold the obvious purpose of the restrictive covenant.

EDUCATION INFORMATION

Continuing Education Requirements for 2010 License Renewal

Basic information:

Total CE needed: 16 hours taken in 2008/09

Deadline: December 31, 2009 - Courses must be completed prior to license renewal.

Courses to take: 6 hours mandatory in Agency Law, Contract Law or a combination of both and 10 hours in approved elective courses.

FAQs:

Q: In what time frame do courses have to be taken to count toward the 2010 renewal?

A: Courses taken between January 1, 2008 and December 31, 2009 meet the continuing education requirements to renew your license for 2010.

Q: Do my certificates of course completion have to be sent to the Commission office?

A: No.

Q: What do I do with the certificates of completion?

A: Keep them in case of a Commission audit in the future.

Q: If I took CE hours during this current CE cycle (2008/09) to activate my license, can I use those hours as part of the 16 hrs required to renew my license for this CE cycle?

A: No.

Q: What if I took some courses in another state?

A: Courses taken in another state that have been approved for real estate CE can be used to satisfy the 10 hours of elective courses.

Q: Can I take a mandatory course online?

A: Yes, be sure the course number begins with "MAN".

Q: What if I don't know how many CE hours I have taken?

A: CE certificates are not kept at the Commission office. Licensees are expected to maintain their own records. If you do not have a CE certificate contact the course provider for a duplicate copy.



In Memory

The ND Real Estate Commission extends its sincerest sympathy to the families and friends of the following licensees who recently passed away:

Mitchell "Mick" Bergeron, Fargo, ND

Donald R. Henry, Bottineau, ND

Lawrence D. Powers, Fargo, ND

Michael "Jon" Natwick, Bismarck, ND

Continuing Education Hours Required at the End of the Calendar Year

Licensees are reminded that they are required to complete a total of sixteen (16) hours of continuing education by no later than December 31, 2009 unless specifically exempted by statute. Last year all licensees were required to have completed a minimum of six (6) hours of continuing education with the remaining ten (10) to be completed by no later than December 31, 2009. If you are one of those licensees who completed a total of sixteen (16) hours of continuing education in 2008 including both elective and required courses then no additional hours are required when renewing your license for calendar year 2010. Credit is given for any courses taken January 1, 2008 through December 31, 2009.

Please remember that Licensees are required to take a total of 6 hours of required education for the 2008/09 continuing education cycle devoted to one or more of the following topics: "Contract Law" and/or "Agency Law". A licensee can choose any topic or combination of topics to fulfill the 6 hour education requirement as long as the course or courses have been approved by the North Dakota Real Estate Commission for that purpose.

Approved courses can be taken online, in a classroom setting, or a combination of both.

Trust Account Reminder

If you have unclaimed funds that have been in your trust account for three years you must, by law, file a report with the Unclaimed Property Division of the North Dakota State Land Department.

For more information and Holder Reporting Instructions and forms go to: www.land.state.nd.gov
Click on Unclaimed Property Division – then Business Owners/Local & State Government.

Questions?

Contact: Linda Fisher

Unclaimed Property Division

ND State Land Dept.

PO Box 5523

Bismarck, ND 58506-5523

Phone: 701-328-2800

Email: llfisher@nd.gov

RENEW ONLINE



Online renewals are here and we are excited! Although we will still mail a paper renewal form to each designated broker to be used in the event a licensee does not want to renew online we are really hoping that licensees will renew online. We hope that you will share your comments about your online experience with us so that we can work to provide an even better renewal experience in the future. Upon completion of your online renewal you will receive a confirmation that you can print for your files and be assured that you have paid your fee and renewed your license.

Follow These Easy Steps to Renew Your License Online:

- ❖ Go to the Commission's web site at www.realestatend.org and click on "Online License Renewals Now Available".
- ❖ This will take you to a screen to create your account or to login with your user name & password if you have already created an account.
- ❖ Once you have created your account you will be able to begin the process of renewing your license.
- ❖ Once you have completed your renewal form, click "Continue" – this will take you to the Billing Information page. Verify your payment information then click "Continue to Payment". Enter your credit card information and click "Pay". Your renewal will then be placed in a pending state until the completion of continuing education hours has been verified by your broker & we have received proof of errors and omissions insurance.

- ❖ The Payment page gives you the renewal fee and payment options. You will then select the method of payment: Discover, Master Card or Visa. Upon completion of payment, there will be a confirmation page that you can print and keep for your records. You will also receive an email verification.
- ❖ Once your broker has certified completion of your continuing education and we have received certification of E&O insurance coverage from you, you will be notified that your license has been renewed for 2010.

Deadline:

Remember: if you renew online, you must do so by **midnight December 31, 2009** to avoid a late fee. Hint: Do not rely on your computer clock if you are renewing close to midnight.

Renewing Company License Online:

Designated brokers may renew the company license once they have created their account under their own name.

Transaction Fee:

A transaction fee will not be charged this year.

Payment Online:

Credit cards accepted:

Discover, MasterCard & Visa

"A pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty."

Sir Winston Churchill (1874-1968)

RENEW BY MAIL

- ❖ You will need to request a renewal form from your broker or go to our website www.realestatend.org and download a form.
- ❖ Submit your renewal form, signed by your broker, with proof of Errors and Omissions insurance, and the appropriate fee.
- ❖ Have your renewal postmarked by December 31, 2009 to avoid any late fees.
- ❖ Make sure your check is in the correct amount.
- ❖ No changes can be made on the renewal form. If you need to notify us of a change of address or name change you must do so on a Change of address or name form and submit that separately.



RENEWAL FEES



If submitted by December 31, 2009:

(Submitted means paid online by midnight December 31, 2009 or if submitted by mail, the postmark, not your postage meter mark, on your envelope is on or before December 31, 2009)

- ❖ Corporate/firm license fee \$150.00
- ❖ Broker license fee \$120.00
- ❖ Salesperson license fee \$100.00
- ❖ Duplicate license fee \$ 10.00
- ❖ Branch office fee \$ 10.00

If submitted on or after January 1, 2010:

(Submitted means paid online after midnight on December 31, 2009 or if submitted by mail, the postmark, not your postage meter mark, is on or after January 1, 2010) a \$50 late fee will be assessed.

- ❖ Corporate/firm license fee \$200.00
- ❖ Broker license fee \$170.00
- ❖ Salesperson license fee \$150.00

If submitted on or after February 1, 2010:

(Submitted means paid online after midnight on January 31, 2010 or if submitted by mail, the postmark, not your postage meter mark, is on or after February 1, 2010) a \$100 late fee will be assessed.

- ❖ Corporate/firm license fee \$250.00
- ❖ Broker license fee \$220.00
- ❖ Salesperson license fee \$200.00

RENEWAL DEADLINES

for 2010 Licenses

- ❖ December 31, 2009 – last day to renew without penalty
- ❖ January 1, 2010 – add \$50 late fee
- ❖ February 1, 2010 – add \$100 late fee
- ❖ March 1, 2010 – if not renewed license is automatically cancelled without notice



West Virginia Case Prompts Change in Agency Disclosure

In Terra Firma Company v. Morgan, 674 S.E.2d 190, 2008 W. Va. LEXIS 119 (2008), the West Virginia Supreme Court of Appeals considered the case of property sellers who complained that they could have commanded a higher sale price if they had known that they



were selling their property to a coal company. While the sellers were not successful in their claims against the company or the real estate agent involved in the transaction, the Court's decision prompted the West Virginia Real Estate Commission to drop language contained in its "Notice of Agency Relationship" form that required agents to disclose, to both the buyers and sellers, "... all facts known to the agent materially affecting the value or desirability of the property."

In 2003, coal company Consol Energy, Inc. incorporated the Terra Firma Company as a wholly owned subsidiary in order to acquire property, "in the most expeditious and economical fashion", for a planned coal preparation facility. Terra Firma hired William Burton as its real estate agent.

Robert and Vickie Morgan listed their property with real estate agent Nancy Kincaid for \$640,000.00, not knowing Consol Energy wanted to acquire it.

Burton made several offers to purchase the Morgan's land on behalf of Terra Firma and all negotiations were conducted between Burton and Kincaid. The Morgans never met or spoke with Burton until the closing and were unaware of Consol Energy's plans for the property. With each offer that he made to the Morgans, Burton included a signed "Notice of Agency Relationship" form prepared by the West Virginia Real Estate Commission. The preprinted language on the form explained the various duties that agents have to both the buyer and seller in a real estate transaction, regardless of whom they represent, including:

"Must disclose all facts known to the agent materially affecting the value or desirability of the property."

The form also indicated that:

"The agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties [listed on the form]".

After several offers and counter-offers, the Morgans entered into a Real Estate Purchase Agreement to sell their land to Terra Firma for \$525,000.00. Terra Firma agreed to lease the property back to the Morgans for a period of time. At the closing, Mr. Morgan allegedly said to Burton, "I want to know if this is a landfill or a coal company buying it." Mr. Burton's answer was, allegedly, "rest assured, it is for land development purposes only."

After the closing, a neighbor told the Morgans that they had sold their own land to "Consolidated Coal". Eighteen months after that discussion, the Morgans contacted a representative of Consol Energy, expressed their concerns regarding their transaction with Terra Firma and stated that they would "like to have what [the land] is worth." Nothing resulted from that conversation and the Morgans subsequently stopped making rental payments to Terra Firma.

Terra Firma formally terminated the Morgans' lease and filed a lawsuit for possession and back rent. The Morgans counter-claimed, asking a trial-level Circuit Court to reform the Real Estate Purchase Agreement and increase the purchase price. The Morgans alleged inequitable conduct by Terra Firma and that Burton breached his duty to disclose "all

facts known to [Mr. Burton] materially affecting the value or desirability of the property" pursuant to the "Notice of Agency Relationship" form. The Morgans essentially argued that they were damaged because they could have sold the land for a higher price if they had known that a coal company was purchasing it.

On January 18, 2006, the Circuit Court ordered the Morgans to vacate the land and pay back-rent to Terra Firma. However, the circuit court permitted the Morgans' counterclaims to proceed. Terra Firma filed a motion for summary judgment, which the Circuit Court granted, finding no indication that Terra Firma's relationship to Consol, Inc. or the intended use of the property were "material" to the negotiations that resulted in the sale. The Circuit Court concluded that "seller's remorse based on the discovery that one's neighbors may have negotiated better terms in similar transactions does not constitute 'damage' that could form the basis for relief."

The Morgans appealed the Circuit Court's summary judgment order to the West Virginia Supreme Court of Appeals, which affirmed the judgment entered in favor of Terra Firma.

The Supreme Court of Appeals determined that nothing in the record established that the Morgan's mistaken assumptions concerning the identity of Terra Firma or the intended use of the land was material at the time that the Real Estate Purchase Agreement was formed. The Supreme Court emphasized that the Morgans never articulated to Burton that Terra Firma's identity or its intended use of the land were important until after the parties had executed the purchase agreement. The Supreme Court also noted that the Morgans were aware that information that they received from their agent, Kincaid, to the effect that Terra Firma was a residential development company, was based on Kincaid's own speculation. The Court noted with importance that the Morgans made no further inquiries until after they had signed the purchase agreement. Furthermore, the Morgans apparently admitted during the course of the lawsuit that they agreed to sell the land for \$525,000.00 based upon information received from Kincaid and not upon any inducement by Terra Firma or Burton. The Supreme Court of Appeals found no material question of fact regarding the question of whether the Morgan's ignorance of Terra Firma's subsidiary corporate structure or intended use of the property were material to the formation of the real estate contract. The Court ruled that, without proof of such materiality, there was insufficient evidence to establish fraud, misrepresentation or inequitable conduct by Terra Firma or Burton.

Much of the Supreme Court's decision is based on an examination of the principles of summary judgment, equitable contract reformation and the elements of mutual mistake, misrepresentation and fraud. However, the decision also addresses the Morgans' allegations that Burton, as Terra Firma's agent, failed to disclose known facts "materially affecting the value or desirability of the property" as required under the "Notice of Agency Relationship" form. The Court noted that the form clearly states that Burton was representing the buyer and that Burton was not obligated to reveal, to either party, any confidential information which did not involve the affirmative disclosures listed on the form. The Court reasoned that, since the Morgans failed to establish that Terra Firma's identity or intentions were material at the time that they signed the contract, it could not be said that a duty to disclose that information was accepted or breached by Mr. Burton.

In a footnote, the Court also recognized that a real estate agent who signs a Notice of Agency Relationship form, as required by the West Virginia real estate license law, explicitly adopts the duties to both parties that are listed on the form. However, the Court also noted that "On the other hand, agency regulations and forms must conform to the Legislature's intent, and we can find nothing in the West Virginia Code creating a duty to 'disclose all facts known to the agent materially affecting the value or desirability of the property.'"

After the decision was issued, the West Virginia Real Estate Commission amended the "Notice of Agency Relationship" form to delete that particular disclosure requirement.



Disciplinary Actions Taken

The following disciplinary actions have become effective since the last report in the newsletter. A Stipulated Agreement is a settlement agreement between licensees and the Real Estate Commission and constitutes neither an admission nor a denial of any violation.

Name	Complaint#	Hearing Type	Order Date	Violation	Penalty
Feland, Sue C	2008-17	Stipulated	09/15/2009	Respondent's conduct may have constituted violations of NDCC 43-23-12 (1) (requiring prominent display of salespersons licenses in place of business and place of business must be designated on license); NDCC 43-23-11.1(v) (dishonesty or fraudulent conduct); NDCC 43-23-11.1(w) (conduct that does not meet the generally accepted standards expertise, care or professional ability expected of a broker) and ND Administrative Code 70-02-01-15(1)(g) (requiring deposit of trust money in designated broker's trust account).	Stipulated to \$500 fine, payment of \$630 investigative/legal fees and 3 hours of education on ethics by December 31, 2009 (not to be used as part of her 16 hours of continuing education).
Neumann, Jack J	2008-17	Stipulated	09/15/2009	Respondent's conduct may have constituted violations of NDCC 43-23-12 (1) (requiring prominent display of salespersons licenses in place of business and place of business must be designated on license); NDCC 43-23-11.1(v) (dishonesty or fraudulent conduct); NDCC 43-23-11.1(w) (conduct that does not meet the generally accepted standards expertise, care or professional ability expected of a broker) and ND Administrative Code 70-02-01-15(1)(g) (requiring deposit of trust money in designated broker's trust account).	Stipulated to \$500 fine, payment of \$630 investigative/legal fees and 3 hours of education on ethics by December 31, 2009 (not to be used as part of his 16 hours of continuing education).
Riepl, Leslie A	2008-17	Stipulated	09/15/2009	Respondent's conduct may have constituted violations of NDCC 43-23-11.1(1)(t) (failure to deposit trust money with employing broker); NDCC 43-23-11.1(1)(v)(dishonest or fraudulent conduct); NDCC 43-23-11.1(1)(w) (conduct that does not meet the generally accepted standards expertise, care or professional ability expected of a salesperson); and ND Administrative Code 70-02-01-10 (requiring a salesperson not to commence work until broker receives appropriate license).	Stipulated to \$500 fine, payment of \$630 investigative/legal fees and 3 hours of education on ethics by December 31, 2009 (not to be used as part of her 16 hours of continuing education).
Tweten, Mark P	2008-18	Stipulated	06/11/2009	Respondent's conduct may have been actionable pursuant to NDCC 43-23-11.1(1)(b), (p), (q), (u), (v), and (w) and ND Administrative Code 70-02-03-09 (use of false or misleading documents.)	Stipulated to \$1000 fine, \$1280 investigative/legal costs and 6 hours of education in ethics and or contracts which is in addition to the 16 hrs of required continuing education

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