

# Forever is an Awfully Long Time

Affordable Housing Covenants  
in Colorado (Part II)

BY BEN DOYLE



*There is no Colorado statute defining the nature of affordable housing covenants, and there are few reported decisions on point. Therefore, practitioners must carefully draft regulatory covenants to capture the intent of the government and the grantor.*

*This article considers the terms these covenants should include.*

**T**his two-part article aims to assist public and private sector practitioners with negotiating affordable housing covenants, with a focus on agreements imposed as a condition of local land use approval.

Part I of this article, published in the July 2019 issue, described the most common ways affordable covenants are created in Colorado, how each type of covenant is affected, if at all, by the rent control statute, and the exception in the rent control statute that allows for “voluntary” agreements.

This Part II is a transcript from a hypothetical pre-application meeting between a developer and a town planner, along with each party’s counsel, to discuss the terms a voluntary affordability covenant might include.

### **Meeting at the Town Planning Department**

*Developer:* Thanks for meeting with us today to discuss our project. We’re really excited about our plans and we think the town will be as well.

*Planner:* Sure thing. We’re glad you’ve come in to talk about our land use process before submitting your application.

*Developer:* Maybe it would help if we start with an overview of our project. We own about an acre of land near downtown. We’d like to redevelop it with a mix of housing and a few small commercial spaces, with most of the housing affordable to people making 60% of area median income or less. We know the town has a well-documented need for more workforce housing. We’re new to Colorado, but we’ve talked with our counsel and we

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understand that the town code encourages affordable housing.

*Planner:* That’s right, we adopted an inclusionary housing program several years ago. Our program requires that anyone building residential units contribute to our affordable housing goals, with a variety of ways to comply.

### **Inclusionary Housing Compliance Options**

*Developer:* I’ve heard a little about inclusionary housing, but tell us more about how your program works.

*Planner:* Well, a residential developer can choose to create affordable units off-site, either by new construction or by deed restricting an existing building. Alternatively, you can find vacant land to dedicate to the town for affordable housing. If none of these options is feasible, you can make a cash-in-lieu payment to the town. Are you planning on building rental or for-sale units?

*Developer:* Apartments for rent.

*Planner:* OK. We ask because if you were building for-sale units, you could choose to deed restrict a portion of those units to satisfy the ordinance. But if you’re building rentals, state law prevents us from mandating rent control on-site as a condition of granting land use approval.

*Developer:* My lawyer mentioned something about this—is that the *Telluride*<sup>1</sup> case?

*Town counsel:* That’s the one. In 2000, the Colorado Supreme Court held that Telluride could not require developers to deed restrict rental units on-site as part of its inclusionary program.<sup>2</sup>

*Developer:* I see. The thing is, we don’t own any other property in town, and we don’t really want to pay cash-in-lieu. It’s expensive enough to build here already. We’d rather get credit for deed restricting the affordable rental units on-site that we’re planning on building.

*Planner:* Hmm. Are you working with any of our local housing authorities by chance?

*Developer:* Not yet. I've been meaning to reach out to see if they might be willing to partner with us. It would be great to have them on board to help identify potential tenants and provide services to residents.

*Planner:* That makes sense. Another thing to consider is that, in some circumstances, if an authority has an ownership interest in your project, your project is eligible for exemption from property and sales and use taxes.<sup>3</sup>

*Developer:* Good to know. I will follow up with them separately. For purposes of today's discussion, assume they are not involved in our project.

*Planner:* Understood. By the way, we asked because the rent control statute contains an exception that says, in essence, it is not intended to prohibit municipal rent control on properties in which a housing authority has an ownership interest.<sup>4</sup>

*Developer:* Ah, I see.

*Planner:* There is another exception in the rent control statute for "voluntary agreements."<sup>5</sup>

*Developer:* Yes, my counsel mentioned something about that. Before you go on, I should mention that I don't think I can make my project work financially under the current building envelope and density limitations. Is there any flexibility there?

*Planner:* We might have some options. As a planning staff, we acknowledge that a bit more density on this site could work given the character of the surrounding area. But we're not the deciders, and our elected officials are so busy that they haven't had time to tackle a major update to our zoning code to allow that. The good news is that you could apply under our current planned unit development (PUD) regulations. That would avoid the delay and uncertainty associated with a comprehensive rezoning.

*Developer:* We wondered about a PUD. We've had success with that approach elsewhere. Tell me more.

*Planner:* You mentioned that you will likely need more density permitted on-site to make your project work financially. Our regulations allow for a "density bonus" if the developer elects to provide additional affordable units.

*Developer:* Great, that sounds like something

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we'd be interested in. If we go that route, does that mean we'll also satisfy the inclusionary housing requirements?

*Planner:* Unfortunately, no, those are separate requirements in our code. For a project like yours, the density bonus is optional; compliance with inclusionary housing is mandatory.

*Developer:* Got it. I should mention, one development scenario we are strongly considering—if we can find suitable financing—is making 100% of the units affordable.

*Planner:* Are you applying to the Colorado Housing and Finance Authority (CHFA) for tax credits?

*Developer:* Yes, we intend to submit an application in the next round.

*Planner:* That's great to hear. We're familiar with these projects. So if you receive an allocation of tax credits, you will have to execute and record a land use restriction agreement (LURA) to comply with the federal tax code, right?

*Developer:* Yes, that's correct.<sup>6</sup>

*Planner:* So let's assume for the sake of discussion that you move forward with a tax credit project, and all of your residential units will be deed restricted by CHFA as affordable. In that situation, would you be open to making a commitment to the town as part of the entitlement process that you are going to build affordable housing on-site?

#### **Committing to the Town**

*Developer:* Possibly. In fact, it could help my application to CHFA if I have the support of the town for an affordable project. CHFA will need to see that I have my zoning and other entitlements in place as part of the application. What would that look like?

*Planner:* Well, it could take a couple of different forms. Typically, we address all the key land use issues in our PUD agreement. And if it's an affordable housing project, we require the developer to sign a separate covenant that addresses the issues unique to the affordable units, like maximum income, maximum rents, and so forth.<sup>7</sup>

*Developer:* OK, yes, we have seen similar approaches in other jurisdictions. What are the terms of your affordability covenant?

*Planner:* Here's a copy of our form. We updated this after the 2010 amendments to the rent control statute, which clarified that "voluntary agreements" are not prohibited.<sup>8</sup> We brought a copy today because you'd mentioned you wanted to talk about affordable housing. Can I point out a few key sections?

*Developer:* Please do.

*Planner (turning to Town counsel):* Do you want to cover this?

*Town counsel:* Sure. First of all, the covenant recites who the parties are. We said earlier that the developer signs the covenant, but to be more accurate, the property owner will sign the document for the benefit of the town. Sometimes the developer is the owner; sometimes the owner is a different entity. In any case, the town is the



beneficiary, that is, the party with the right to enforce the covenant—not neighbors or tenants.<sup>9</sup>

*Developer:* Makes sense. That’s different than the LURA, which allows prospective, present, or former occupants of the building to enforce it, in addition to CHFA. Go on.

*Planner:* The covenant gets recorded in the real estate records against title to the property. That way, future buyers, lenders, and everyone else is put on record notice of the restrictions.

### **Is Perpetuity a Long Time?**

*Developer:* How long is the covenant in place?

*Planner:* Good question. After watching a few older affordability covenants expire over the past couple of years our town council is concerned that, if the term is limited, the owners will take the rents to market rates when it expires. The community benefit gained by granting the discretionary land use approvals will be gone forever. So now we require permanent affordability.

*Developer:* What exactly do you mean by “permanent”?

*Planner:* The covenant remains in place in perpetuity.

*Developer:* Is that legal?

*Town counsel:* We think it is. We haven’t yet been challenged in court.

*Developer (turning to her lawyer):* What do you think about this?

*Developer counsel:* There is no Colorado statute authorizing perpetual affordability covenants, as there is for conservation easements.<sup>10</sup> I’m not sure whether that would stand up in court. You may have to weigh whether you’re willing to voluntarily accept a very long term because doing so facilitates the project becoming reality.<sup>11</sup> We can talk more about the legal issues later.

*Developer (turning back to Planner):* Would the town consider a 99-year term instead of perpetuity? We have no idea what the world will look like in 99 years. There may no longer be a need for affordable housing in this part of

town. The property may need to be replaced or refinanced with market-rate housing, or adapted for another use.

*Planner:* Sure, staff is willing to bring that request to the council. We have seen them agree to a term shorter than perpetuity before.

### **What about Future Owners?**

*Developer:* OK, let’s move on. What happens if we sell the property after it’s been developed in accordance with the PUD agreement and the affordability covenant?

*Planner:* The covenant runs with the land, so the new owner will be subject to its terms for as long as it is in effect. We don’t regulate based on who owns property; we regulate land use.<sup>12</sup>

*Developer:* And the owner after that, same answer?

*Town counsel:* Yes. Our form of covenant states that it was voluntarily granted<sup>13</sup> and is intended to run with the land and bind successors.



*Developer:* We know what we are getting into with our project, but we will not own the property forever. What if a future owner tries to operate the property without regard to the covenant?

*Planner:* Well, all future owners will be on record notice of the restrictions and will be bound by them.<sup>14</sup> The town has a few different options for enforcement (*turning to Town counsel*).

*Town counsel:* That's right. Most likely, we'd seek specific performance or an injunction as the remedy for noncompliance. Ideally, potential buyers will research the zoning and other restrictions associated with property before they buy it, but we realize most buyers don't call or stop by the town planning department. Nearly every buyer will obtain a commitment for title insurance, however, which reveals liens and encumbrances recorded against title. So we record these covenants to put people on notice, even though technically we may not need to.<sup>15</sup> Governmentally imposed use restrictions contained in PUDs aren't subject to the recording act.<sup>16</sup>

*Developer:* Sure. But forever is a long time. What happens if the market changes and we need to modify the covenant at some point?

*Planner:* We are always willing to sit down with owners and discuss necessary or appropriate amendments to our covenants or PUD agreements based on unforeseen circumstances. Unless the council delegated the authority to make changes to our town administrator, approval of any amendment would be at the council's discretion.

### Financing Matters

*Developer:* Hmm, no guarantees then. But hopefully a future council would be reasonable if circumstances had changed.

OK, back to financial feasibility. As you know, without adequate financing, there is no project, no public benefit created. I have been talking with lenders about a construction loan. They tell me they will require that their deed of trust be superior to any affordability covenant. What does your form say about subordination?

*Town counsel:* Our standard request is for existing lienholders to subordinate their liens to

our development agreements and affordability covenants.<sup>17</sup> Our view is that the property is both burdened and benefited by these agreements defining permitted uses on the property.

*Developer:* Well, that's just not going to work for my lender. Has the town ever agreed to subordinate its interests to a lender?

*Planner:* Yes, from time to time. Our practice has varied over the years. What would happen to our agreements if your bank foreclosed its lien?

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 But according  
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 Court opinion  
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*Developer (turning to her lawyer):* My understanding is that the bank needs a clean slate in terms of title if it has to foreclose. Is that right?

*Developer counsel:* Yes, for these affordable multifamily rental projects, that's what the bank requires before they'll make the loan. They will demand that any junior liens and encumbrances get wiped out if the foreclosure proceeds, unless specifically permitted to remain on title.

*Planner:* I could see why the bank would want the affordability agreement gone, as it could depress the value of the bank's collateral, if the reason for the foreclosure was that the affordable project wasn't viable. (*Turning to town counsel*) If all of our agreements are wiped out, would the new owner lose its right to operate the property in accordance with the PUD agreement? Would the new owner have to come back through the town's discretionary process to get its desired uses approved by the town?

*Town counsel:* Not necessarily. Depending on how far along the project was, the owner may well have a statutory or common law vested right to complete and operate the project in accordance with the site-specific development plan approved by the town.

While I have the floor, let me clarify something said earlier. We've actually taken the position that development agreements and covenants required as part of a land use approval process survive foreclosure no matter their recording order. They're not like other covenants between private parties, which get wiped out if the noticed junior interest holder elects not to redeem. Rather, they're tools to carry out our zoning regime, inherently different from real covenants and contractual covenants, subject to different rules.

*Developer counsel:* Can you share your authority for that position?

*Town counsel:* I don't know of any Colorado case law on point, but decisions from other jurisdictions support this view.<sup>18</sup>

*Developer counsel:* Don't you think a covenant would be treated like any other junior encumbrance in foreclosure?

*Town counsel:* Well, if a court treated our regulatory covenants like other real covenants, yes. But according to the most recent Colorado Supreme Court opinion on restrictive covenants, a covenant restricting property use is not a property interest.<sup>19</sup> If that's the case, the foreclosure statute wouldn't apply at all.

*Developer counsel:* That case was decided in 1925. If a Colorado court were presented with that question today, I think it would treat this kind of covenant as a real property interest. There was a case involving Steamboat Springs a few years back where the Colorado Court

of Appeals described “restrictive covenants” as the preferred modern term for “negative easements.”<sup>20</sup> The court said that, like easements, covenants are protected property rights, in the nature of a servitude, regardless of whether labeled as affirmative or negative easements.<sup>21</sup>

*Town counsel:* I know the case you’re talking about. It involved the value of a condemned greenbelt within a private homeowner association (HOA). That’s different than a covenant that is the product of a PUD approval process. And the Court of Appeals can’t overrule the Supreme Court. As I say, our position is that our covenant survives foreclosure because it’s governmental in nature, rather than a property or contract right.<sup>22</sup>

The covenant in the Steamboat Springs case was between private property owners and their HOA. The court was analyzing an easement appurtenant. An affordable housing deed restriction granted to the town is different because there are not two estates—one burdened, one benefited. Affordable housing deed restrictions are more like conservation easements granted to a government, which are statutorily defined as negative easements in gross.

*Developer counsel:* You lost me. Why are we talking about easements in gross? I haven’t thought about them since my first-year property class in law school.

*Town counsel:* “In gross” historically meant the easement was personal; the benefit ran to an individual rather than being appurtenant to an estate in land.<sup>23</sup> The legislature defined its way out of that problem in the conservation easement statute by stating that a conservation easement in gross is an interest in real property; it’s not personal in nature.<sup>24</sup>

*Developer counsel:* But there is no corresponding Colorado statute defining affordable covenants as “negative easements in gross” or any other type of legal interest, correct?

*Town counsel:* That’s right.

*Developer:* Guys, this is fascinating, but we’re in the weeds. Less than 1% of tax credit developments end up in foreclosure.

*Planner:* Wow, that is low. Why is that?

*Developer:* Lots of reasons. For one, demand for affordable housing is so high that our vacancy rate is very low. The projects are underwritten

with greater scrutiny and by more parties than market-rate apartment projects. Usually multiple public agencies help fund the project, and they remain invested in its success—if a project needs financial restructuring, typically they do what they can to help the owner fend off foreclosure. In addition, there are various financial incentives available to help make these projects viable, like tax-exempt debt, rental assistance vouchers, and the property tax breaks you mentioned earlier.

*Planner:* That’s good to know. Knowing there’s a solid financial plan in place may help address some of the concerns voiced by neighbors who have called us with concerns about the viability of the project.

*Developer:* Here’s the thing. Even though the risk of foreclosure is remote, my lender still won’t approve my construction loan unless I get all covenants subordinated.

*Developer counsel:* Colorado’s foreclosure statute doesn’t speak directly to town development agreements or restrictive covenants. But banks don’t like to take on risks they can avoid. In our experience, the lender is going to assume that a court is going to treat a covenant like an easement, as the *Steamboat Springs* court did.<sup>25</sup> The foreclosure statute treats the holder of an easement like a lienor, but without any lien amount, and subjects easement holders to all requirements imposed on lienors.<sup>26</sup> Rather than debating the fine points, the bank wants to resolve the priority question by requiring the covenant beneficiary to subordinate to its deed of trust. Sadly, it’s that other golden rule: “He who has the money makes the rules.”

*Planner:* Ah, understood.

*Developer counsel:* If it helps, we will be making the same subordination request to

other governmental agencies we expect will be involved in the project, such as CHFA and the Colorado Division of Housing. It’s typical in Colorado for rental affordability covenants to terminate in the event of foreclosure.<sup>27</sup>

*Planner:* It does help to know the town is not being treated differently in this respect than other governmental stakeholders, although—fair warning—our council feels strongly about protecting the community benefit it bargained for. While staff considers your subordination request, please talk to your lender about the benefit of the town agreements remaining in place after foreclosure. You might mention that banks are often willing to allow their deed of trust to be “junior” to HOA covenants because it improves the value of their collateral to be within the common interest community.<sup>28</sup>

*Developer:* Sure, I’ll mention it to my lender. What else should we go over today?

*Planner:* That’s it for now. Let us know if you have further questions as you pull together your application. As we prepare our staff recommendation for the public hearings before the planning commission and council, we’ll be in touch if we have questions for you.

*Developer:* Great. Please send us drafts of the PUD agreement and affordability covenant before you publish your recommendation. Thank you for your time.

### After the Meeting: Developer and Her Counsel Compare Notes in the Parking Lot

*Developer:* Can the town really deed restrict private property forever?

*Developer counsel:* We don’t know for certain. Most property law is a matter of state law, and the issue has not been thoroughly litigated in Colorado.



As a practical matter, you should think about whether you are willing to accept the covenant so you can move forward with your project now. Let future parties deal with amending or terminating the covenant if and when the need arises. The town may be open to amending the covenant in the future if the restriction is preventing the property from being refinanced and rehabilitated. If things are really bad and the property needs to be completely repurposed for another use, the town may agree to release the covenant entirely.

Worst case, if the town won't agree to amend or terminate the covenant, the owner at that time could ask a judge to step in, asserting that conditions have changed. Colorado follows the majority rule that a court can exercise its equitable powers when a restrictive covenant no longer serves its original purpose, or when circumstances have changed and enforcement of the covenant would impose an oppressive burden without any substantial benefit.<sup>29</sup>

Another theory might be that a perpetual covenant is an "impermissible restraint on alienation."

*Developer:* What do aliens have to do with it?

*Developer counsel:* Oh, alienation just means transfer of property to another. Like most jurisdictions, Colorado public policy favors the transferability and marketability of interests in residential real property "free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the residential real property."<sup>30</sup>

I want to caution you: there is no Colorado case holding that a perpetual restrictive covenant running in favor of a government, granted as part of a negotiated bundle of development rights, is an unreasonable restraint on alienation.<sup>31</sup> In fact, courts in other jurisdictions have upheld affordability covenants against challenges that their term was indefinite.<sup>32</sup>

There's a similar argument an owner could make, which is that a perpetual covenant violates the rule against perpetuities.<sup>33</sup>

*Developer:* Hey, that sounds promising.

*Developer counsel:* You would think so. But Colorado's Statutory Rule Against Perpetuities Act doesn't apply to commercial transactions.<sup>34</sup>

*Developer:* But this is a deal with the town, not a commercial party.

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*Developer counsel:* That's right, but in this context there's a good chance that a court would interpret "commercial" to mean a transaction between sophisticated parties.


*Developer:* I am nothing if not sophisticated.

*Developer counsel:* There may be other legal theories a future owner could employ to achieve the amendment or termination of the covenant, too.<sup>35</sup>

If you want to resist the town's request now, we could argue that if the town really wants to control what happens on a piece of property forever, the best way to do that is to pay for fee simple ownership. Then it can ground lease the property to an affordable housing developer, or sell it with a right to repurchase it in the future if certain conditions are met. That way, the town regains control of the property in the future.

*Developer:* Interesting. I will think about it. Perhaps I needn't worry too much about this perpetuity issue for the time being.

### Conclusion

We don't have the benefit of a Colorado statute defining the legal nature of affordable covenants and permissible terms such as duration; method of creation, modification, and termination; eligible grantors and holders; enforcement rights, including for third parties; recordation requirements; remedies for violations; assessment and taxation; and effect on the residual estate. For the time being, practitioners must draft these instruments with as much specificity and precision as possible to capture the intent of the parties, tailoring each one to its time, place, and circumstances, assuming that a court will do its best to enforce the instrument as written. 



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### NOTES

1. *Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000).
2. *Id.*
3. CRS §§ 29-4-227 and -507.
4. CRS § 38-12-301(5).
5. CRS § 38-12-301(2).
6. IRC § 42(h)(6)(B).
7. Historically, developers (or their opponents) argued that agreements with governments in exchange for land use approval amounted to illegal "contract zoning," the theory being that "municipalities may not by contract



or otherwise surrender their governmental, legislative or police powers.” *King’s Mill Homeowners Ass’n v. Westminster*, 557 P.2d 1186, 1191 n.10 (Colo. 1976). Today, it is difficult to win a contract zoning claim in Colorado, given references in the statutes to development agreements, subdivision improvements agreements, annexation agreements, and the like, along with case law upholding these tools as legitimate. See, e.g., *Geralnes B.V. v. City of Greenwood Village*, 583 F.Supp. 830 (D.Colo. 1984). A voluntary affordability covenant, required to help memorialize the terms of a discretionary land use approval, is akin to these development agreements.

8. The rent control statute suggests that voluntary agreements address three key issues: “how long either private residential property or a private residential housing unit is subject to its terms, whether a subsequent property owner is subject to the agreement, and remedies for early termination agreed to by both the permit applicant or property owner and the county or municipality.” CRS § 38-12-301(3).

9. Typically, constituents can’t bring suit on behalf of a government to enforce an agreement to which the government is a party. Compare CRS § 30-28-137 (lot owners within a subdivision may sue to enforce a subdivision improvements agreement) with *Goodman v. Superior Court*, 137 Ariz. 348 (Ariz.Ct.App. 1983) (where the developer purchased property from a cemetery owner for the purpose of constructing a residential development, the property was subject to a restrictive covenant that allowed it to be used for a memorial park only, and the covenant expressly provided that it was for the benefit of the city and neighboring property owners, the city could not extinguish the interest of the neighboring property owners in maintaining the covenant intended for their benefit, absent a change to circumstances respecting the use of the property so substantial as to render operation of the covenant oppressive and inequitable).

10. “A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it.” CRS § 38-30.5-103(3).

11. The focus of this article is covenants with governments (i.e., regulatory covenants), not covenants between private parties. The two types of covenants share enough characteristics, however, that it seems likely Colorado courts will refer to the body of law developed around private covenants when interpreting regulatory covenants. Foundational principles in the background of all private covenant disputes include the following: “A restrictive covenant that is clear on its face should be enforced as written,” *Greenbrier-Cloverdale Homeowners Ass’n v. Baca*, 763 P.2d 1 (Colo.App. 1988); “[O]nly the intent of the grantor as expressly set forth in the covenant is relevant . . . [O]ne does not look to an amorphous general intent in determining the meaning of the restrictive words, but, instead, must look to the very words used,” *Double D Manor, Inc. v. Evergreen Meadows Homeowners’ Ass’n*, 773 P.2d 1046, 1049 (Colo. 1989) (citation omitted); “Any doubts as to the meaning of a covenant should be resolved against restricting the use of the

land and in favor of its free and unrestricted use,” *Greenbrier-Cloverdale*, 763 P.2d 1; CRS § 38-34-103 (“Building restrictions and all restrictions as to the use or occupancy of real property shall be strictly construed . . .”). However, the general principle of resolving doubts against the restriction “should not be applied in such a way as to defeat the clear intent and the plain and unambiguous purpose expressed in the restrictive covenants.” *Double D Manor*, 773 P.2d at 1052 (Erickson, dissenting).

12. “Zoning is a device to control the use of land, not its ownership.” Kelly, ed., *Zoning and Land Use Controls* vol. 7, § 39.04 (Matthew Bender 2019). “The right to maintain a nonconforming use does not depend upon ownership or tenancy of the land on which the use is situated. The right attaches to the land itself; it is not personal to the current owner or tenant. Accordingly, a change in the ownership or tenancy of a nonconforming business or structure does not affect the right to continue the nonconforming use.” *Town of Lyons v. Bashor*, 867 P.2d 159, 160-61 (Colo.App. 1993).

13. To preserve the defense under the rent control statute, it’s critical for the local government to build a clear record that

the covenant was granted voluntarily. See *Meyerstein v. City of Aspen*, Colo. Court of Appeals No. 13CA0330, 5-6 (Jan. 30, 2014) (unpublished).

14. At least in theory. See Pampuro, “Couple Sues Denver Over Affordable Housing Law,” *Courthouse News Service* (Sept. 25, 2018), [www.courthousenews.com/couple-sues-denver-over-affordable-housing-law](http://www.courthousenews.com/couple-sues-denver-over-affordable-housing-law) (a retired couple who unknowingly purchased a home located in an income-restricted neighborhood sued Denver after the city asked them to sell at a loss).

15. See *Martinez v. Affordable Hous. Network, Inc.*, 123 P.3d 1201, 1206 (Colo. 2005) (subsequent purchasers or lienholders are deemed to have constructive notice of encumbrances when a search of title records would have revealed the encumbrance, and they are deemed to have inquiry notice when they become or should have become aware of facts that, if investigated, would have revealed the encumbrance).

16. “Colorado’s recording act does not apply to [a] PUD plan because the plan constitutes a form of rezoning for the area within the PUD and was validly adopted pursuant to [a] PUD ordinance, which in turn was validly

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enacted in exercise of [the city's] police power." *South Creek Assocs. v. Bixby & Associates, Inc.*, 753 P.2d 785, 787 (Colo.App. 1987) (PUD restrictions need not be recorded to be enforceable against subsequent purchasers without actual knowledge). "The use restrictions contained in such a plan adopted and approved pursuant to such an ordinance are not imposed principally for private benefit but to advance governmental objectives . . . This is consistent with the generally recognized principle that zoning is not an aspect of title and therefore is not subject to the provisions of recording acts." *Lakewood v. Mavromatis*, 817 P.2d 90, 100-101 (Colo. 1991).

17. If a regulatory covenant is either recorded prior or if the government obtains a subordination agreement from the foreclosing lienholder, the covenant should survive foreclosure of that lien. CRS § 38-35-109.

18. See, e.g., *City of New York v. Delafield 246 Corp.*, 236 A.D.2d 11 (N.Y.App.Div. 1997) (process of "conditional zoning" may be accomplished by a municipality's conditioning a zoning amendment on execution of a declaration restricting the use of property by private parties interested in rezoning the property; once the conditions are incorporated into the amending ordinance, the conditions effectively become part of the zoning law); *15 Tower Ave., LLC v. Ecumenical Hous., Inc.*, No. CV085022316, 2009 WL 241709, at \*2 (Conn. Super. Ct. Jan. 5, 2009) (finding that State's claim that affordable housing restrictive covenant cannot be foreclosed out in a foreclosure action has merit); *Wells Fargo Bank v. Se. N.M. Affordable Hous. Corp.*, 877 F.Supp.2d 1115, 1138 (D.N.M. 2012) ("A covenant remains on property in the event of a foreclosure.").

19. *Thornton v. Schobe*, 243 P. 617 (Colo. 1925) ("an agreement restricting the use of land is not within the statute of frauds because it does not relate to an interest in land but merely to its use").

20. *City of Steamboat Springs v. Johnson*, 252 P.3d 1142, 1146 (Colo.App. 2010).

21. *Id.* at 1146-47 (Colo.App. 2010). "A servitude is simply a covenant that 'runs with the land.'" (citing *Restatement (Third) of Property: Servitudes* § 1.3(1) (ALI 2000) (*Restatement*)). See *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234-35 (Colo. 1998) (discussing "fundamental principles of the law of servitudes"); *Allen v. Nickerson*, 155 P.3d 595, 599-600 (Colo.App. 2006) ("Although this line of cases addresses restrictive covenants, rather than affirmative easements, the same principle applies because both are servitudes."); Kelly, *supra* note 12, vol. 1, § 1.03 (discussing restrictive covenants).

22. "Zoning and other public land-use regulations, the public-navigation servitude, the public-trust doctrine, and rights determined by riparian, littoral, prior-appropriation, or ground-water doctrines are not servitudes within the meaning of the term as used in this Restatement." *Restatement* § 1.1(3). See *Mavromatis*, 817 P.2d at 100-101. Colorado courts frequently rely on the *Restatement* when

interpreting covenants. See, e.g., *Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo. 2003); *Johnson*, 252 P.3d 1142; *Hiwan Homeowners Ass'n v. Knotts*, 215 P.3d 1271 (Colo.App. 2009); *Gleneagle Civic Ass'n v. Hardin*, 205 P.3d 462 (Colo.App. 2008); *Allen*, 155 P.3d 595; *Lewitz v. Porath Family Trust*, 36 P.3d 120 (Colo.App. 2001).

23. See, e.g., *Lewitz*, 36 P.3d at 122 ("An easement in gross . . . is not appurtenant to any estate in land and does not belong to any person by virtue of his or her ownership of an estate in land, but instead is a mere personal interest in, or right to use, the land of another. Unlike an easement appurtenant, an easement in gross does not run with the land and creates no dominant or servient estates.") (citing *Restatement* § 1.4(2)).

24. CRS § 38-30.5-103.

25. See CRS § 38-38-104(1)(d) (junior interest holder's right to redeem); *Halpin v. Poushter*, 59 N.Y.S.2d 338 (Sup.Ct. 1945) (restrictive covenants are easements for purposes of tax foreclosure sale); *First Interstate Bank v. Tanktech, Inc.*, 864 P.2d 116, 119 (Colo. 1993) (internal citations omitted) ("as a property lessee is considered a lienor under Colorado law, we conclude that upon foreclosure of a senior security interest, any subordinate leases, liens or encumbrances are extinguished once the redemption period has expired"); *Town of Grand Lake v. Lanzi*, 937 P.2d 785, 788 (Colo. App. 1996) (noting parties agreed that zoning agreements can be wiped out in foreclosure if junior in priority and the right to redeem is not exercised).

26. CRS § 38-38-305(1). See *Restatement* § 7.9 (termination by foreclosure sale or bankruptcy proceedings); Bruce and Ely, Jr., *The Law of Easements & Licenses in Land* § 10:41 Mortgage Foreclosure Sale of Servient Estate (Thomson Reuters Mar. 2019).

27. For example, CHFA provides in its LURA that the covenant is extinguished upon foreclosure or deed in lieu thereof. During the period of three years following any such termination, the owner cannot evict or terminate the tenancy of an existing tenant of any low-income unit other than for good cause and cannot increase the gross rent above the maximum allowed under the Internal Revenue Code with respect to the low-income unit.

Similarly, the Colorado Division of Housing (CDOH) will typically include language in its standard regulatory agreement that the covenants terminate upon foreclosure, unless the pre-foreclosure owner of record (or anyone with business or family ties to that owner) obtains an ownership interest in the property through the foreclosure.

Of course, the CHFA and CDOH covenants are public partner covenants, tied to funding provided to an affordable project, distinct from the regulatory covenants contemplated by the rent control statute. See Doyle, "Hang 'Em High: Affordable Housing Covenants in Colorado (Part I)," *Colo. Law.* (July 2019).

28. See CRS § 38-33.3-218(11) (foreclosure of lien senior to Colorado Common Interest

Ownership Act covenants can result in foreclosed real estate being removed from common interest community).

29. *Schneider v. Drake*, 44 P.3d 256, 261 (Colo. App. 2001) (citation omitted).

30. CRS § 38-35-127(1)(a).

31. See, e.g., *Metro. Dade County v. Sunlink Corp.*, 642 So. 2d 551 (Fla. Dist. Ct. App. 3d Dist. 1992), in which the appellant municipality challenged the trial court's order declaring void as an unreasonable restraint on alienation a restrictive covenant binding the appellee corporation's property. The court held that the duration of the covenant was an unreasonable restraint due to the impracticality of obtaining a release from a majority of the surrounding property owners.

32. See, e.g., *Alfaro v. Community Hous. Improvement System & Planning Assn., Inc.*, 171 Cal. App. 4th 1356, 1378-79 (Cal. App. 6th Dist. 2009), where the court stated:

Plaintiffs criticize the deed restriction here as "perpetual in duration" and purporting "to prohibit inheritance by the heirs of Plaintiffs." We see nothing in the deed restriction attached to the complaint that prohibits inheritance. . . . The covenant itself provides that it is binding on the assigns and successors in interest of the original owner. This would seem to apply to the heirs of an owner. We do not see a perpetual restriction in the deed either. It remains effective while the "development authorized by said permit or any modification of said development, remains in existence in or upon any part of, and thereby confers benefit upon, the subject property described herein."

We understand this to say that it remains effective while it is beneficial. Presumably when there is no further need for affordable housing for low-income households, the restriction will lose effect. . . . We conclude that this deed restriction, which ensures that residential property will remain affordable to very low-, low-, and moderate-income households so long as such a restriction is beneficial, is a reasonable restraint on alienation.

33. Private covenants "typically must apply only for a limited period of time or they run afoul of the rule of perpetuities." Kelly, *supra* note 12, vol. 1, § 1.03 (internal citations omitted).

34. CRS §§ 15-11-1101 to -1107; 2A *Colorado Methods of Practice* § 72:27 (6th ed. Thomson West 2019) (rule against perpetuities—overview).

35. For the list of legal theories under which Maine's legislature anticipated an affordability covenant could be challenged, see 33 M.R.S. § 125 (preempting claims based on certain theories). For similar provisions in other state statutes on affordability covenants, see 27 V.S.A. § 610 (Vermont); ALM GL ch. 184, §§ 31 and 32 (Massachusetts); and ORS § 456.270-295 (Oregon). See also Wolf, ed., *Powell on Real Property*, vol. 9, § 60.10, *There are Several Ways to Terminate Covenants* (Matthew Bender 2019).