

# Massachusetts Appeals Court Clarifies When Restrictive Covenants May Extend Beyond Thirty Years

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In Berger, et al. v. 2 Wyndcliff, LLC, et al., No. 16-P-336 (Mass. Appeals Court, Dec. 5, 2017), a group of homeowners in a subdivision subject to an agreement limiting construction on their lots to one single-family dwelling sought to extend the agreement beyond its original 30-year period and enforce the restriction against a fellow landowner. A judge of the Land Court held that the 30-year period set out in the agreement could not be extended. The Appeals Court affirmed, though for a slightly different reason.

## **Background**

On March 26, 1980, the grantor of certain property in Acton, MA that had been approved as a subdivision recorded an agreement of "protective covenants and easements" that would apply to the subdivision lots for 30 years. Among other things, the covenants limited construction on each lot to one single-family dwelling, with a two- or three-car garage and "such other accessory structures as are commonly used as appurtenant to a single-family dwelling." The original agreement did not contain a provision for extending the restriction beyond the 30-year period. In 2002, however, an amendment to the agreement was recorded, which re-stated the original covenants and their expiration date of March 26, 2010 and, among other changes, purported to allow the extension of the original covenants for unlimited successive periods of 20 years if such extensions were approved by 2/3 of the property owners in the subdivision. A dispute arose when a group of property owners sought to enforce the restrictions against 2 Wyndcliff, LLC and another property owner. The Land Court judge granted 2 Wyndcliff's motion for summary judgment on the basis that, even assuming that 2/3 of the property owners could amend the agreement to provide for extensions of the restriction period, the mechanism the property owners chose to do so failed to achieve its desired purpose. The judge concluded that the amendment in effect transformed the agreement to one "unlimited in time" and that, because under G.L. c. 184, § 23, restrictive covenants with no time limit are deemed to expire after thirty years and cannot be "renewed," the agreement terminated on March 26, 2010. The property owners that sought to enforce the restrictions appealed.

## **The Decision**

The Appeals Court held that G.L. c. 184, § 27(b), the provision under which the property owners sought to extend the restrictions, only allows the imposition of a restrictive covenant for more than thirty years where the original instrument includes a provision for extensions. In this case, the

original agreement set a 30 year time limit for the restrictions, and allowed for amendments during that term by a vote of two-thirds of the owners, but did not expressly allow for extensions of the restrictions. The Court found that simply allowing for amendments is not sufficient to meet the extension provision requirement of G.L. c. 184, § 27(b). The Court's rationale was that anyone in possession or coming into possession of one of the lots subject to the agreement would be on notice that a vote of two-thirds of the other property owners could change the terms of the restrictive covenants on his or her property, but understanding that period of control would end after thirty years.

The Court reads G.L. c. 184, § 27(b) to ensure that, after thirty years, no owner is bound by a restriction unless that owner expressly agreed that such a restriction could be extended whenever he or she bought the lot in question. If a method to extend the restriction does not appear in the original agreement, it cannot be added by a later vote of less than one hundred percent of all property owners subject to the restriction. The Court also notes that G.L. c. 184, § 28, which applies to restrictions imposed before January 1, 1962, does not include the requirement that a provision for extension be made in the instrument imposing the restriction, whereas G.L. c. 184, § 27, which applies to restrictions imposed after January 1, 1962, includes that requirement, thereby putting drafters after 1962 – including the drafters of this restrictive covenant in 1980 – on notice of the necessity to include a provision for extensions.

### **The Takeaway**

When drafting restrictive covenants (or interpreting restrictions that became effective after January 1, 1962) property owners should be aware that extensions beyond thirty years will only be allowed if: (1) all property owners subject to the restriction agreed to an extension of the restriction; or (2) the original instrument creating the restrictions explicitly contemplated and provided a mechanism for such extensions. Therefore, to the extent property owners desire the option to extend restrictive covenants beyond thirty years, they should explicitly provide for an extension in the original document creating the restriction.