POWELL V. WASHBURN: TO THE RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES—AND BEYOND

Joshua Wood*

I. FACTUAL AND PROCEDURAL BACKGROUND

Several property owners in the Indian Hills Airpark subdivision, a "fly-in community"[1] developed by Thomas Washburn, sought to use recreational vehicles ("RVs") as single-family homes on their lots.[2] Indian Hills is, and has always been, zoned as a manufactured home subdivision under the La Paz County zoning code.[3] Neither the zoning code[4] nor the subdivision's Covenants, Conditions and Restrictions[5] ("CC&Rs") explicitly prohibited such use. Nevertheless, Edward

---

* The author thanks Professor Donald Large for his comments on earlier drafts.

1. A "fly-in community" is a residential subdivision developed around an airplane runway. Jeff Wise, *The Jet Set Welcome to Jumbolair, a Fly-in Community Where Everyone's Trying to Keep Up with the Boeings*, FORTUNE, Mar. 17, 2003, at 141. The lot owners often have hangars on their lots and use of the runway. *Id.* Indian Hills included commercial lots as well as residential lots, but the commercial lots were not at issue in this case. Powell v. Washburn, 125 P.3d 373, 374 (Ariz. 2006).

2. Supplemental Brief of Defendants Fivecoat, Neville, Phillips and Wright at 1, *Powell*, 125 P.3d 373 (No. CV-05-0186-PR), 2005 WL 3942346.

3. *Powell*, 125 P.3d at 374.

4. *Id.* at 375.

5. *Id.* at 380. The full text of the relevant portion of the CC&Rs is as follows:

> 2. *USE OF PROPERTY*: Except as otherwise set forth herein, the use and improvement of the Property shall be in accordance with covenants, conditions and restrictions herein set forth, in accordance with applicable governmental law, including without limitation, the zoning ordinances of the County of La Paz, the Rules and Regulations of the FEDERAL AVIATION AUTHORITY as they may be amended or expanded from time to time.
>
> A. Lots 1 through 77 shall be single family residential lots and subject to the following additional restrictions:
>
> (1) No mobile home shall be less than 20 feet in width, no more than one year old at the time of placement on the lot.
>
> (2) No mobile home shall be less than 1,200 square feet of living space.

Powell and other earlier lot-buyers sued to enjoin the RV-users on the theory that the CC&Rs prohibited RV use.[6] On cross-motions for summary judgment, the trial court granted the injunction.[7] The court of appeals reversed in a memorandum opinion.[8]

II. ARIZONA SUPREME COURT DECISION

The Arizona Supreme Court reversed the court of appeals and affirmed the trial court.[9] The court relied heavily on the fact that in 1988, when the CC&Rs were adopted, the La Paz County Zoning Code permitted only three types of residences in a manufactured home subdivision: ordinary single-family ("stick-built") homes, manufactured homes, and mobile homes.[10] Not until 1996 did amendments to the Zoning Code allow the use of RVs as single-family residences in manufactured home subdivisions.[11]

In reaching its decision, the court announced its adoption of the Restatement (Third) of Property: Servitudes section 4.1.[12] According to the Restatement, courts should read restrictive covenants to give effect to the intent of

---

> (3) All mobile homes moved onto a lot in this subdivision shall be affixed on a permanent foundation.
> (4) All mobile home units are required to have exteriors of fir, exterior plywood, painted hardboard (masonite) or lapsiding or stucco.
> (5) All mobile homes are required to have tile, cedar, shake or composition roofs.
> (6) Within one year after placement of mobile home on the lot the owner shall cause to be constructed on the lot a hangar 40 feet wide by 30 feet deep, to be approved by the Architectural Committee.
> (7) Any constructed home placed on any lot within this subdivision shall have a minimum square footage of 1,200 and be compatible with the mobile himes [sic] or other structures in the subdivision. All plans are subject to prior approval of the Architectural Committee.
> (8) Within one year after placement of constructed home on the lot the owner shall cause to be constructed on the lot a hangar 40 feet wide by 30 feet deep, to be approved by the Architectural COmmittee [sic].
> (9) No hangar shall be less than 40 feet wide by 30 feet deep and are subject to prior approval of the Architectural Committee.
> (10) A HANGAR-HOUSE shall be a minimum of 40 feet wide by 30 feet deep of hangar space and a minimum of 800 square feet of living space, all to be included under one roof, to be approved by the Architectural Committee.

Id. at 380 app. Item 10 was added by a 1992 amendment. *Id.* at 375.

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 380.
10. *Id.* at 374–75.
11. *Id.* at 375.
12. *Id.* at 374.

the parties.[13] This approach contrasts with one that shows a preference for construing restrictive covenants in favor of free use of land.[14]

The court cited both general policy reasons for adopting the Restatement[15] and particular reasons for favoring the prior owners in this case.[16] In fact, it is doubtful that the Restatement supports the result in *Powell*. Rather, it appears that with the *Powell* decision Arizona has adopted the most liberal and least predictable covenant-interpretation policy in American law.[17]

A. The Court's Reasons for Adopting the Restatement

The court gave three broad reasons supporting its decision to adopt the Restatement.[18] First, the court noted the Restatement's agreement with a putative rule in Arizona favoring liberal interpretation of restrictive covenants.[19] The court dismissed prior conflicting cases, describing as dicta any language in those cases favoring free use of land;[20] yet two recent decisions by the Arizona Court of Appeals belie the strength of the rule of liberal construction. Each of the two divisions of the court of appeals announced an opinion in late 2005 relying on Arizona's rule favoring free use of land.[21] The Arizona Supreme Court cited neither of these decisions in its opinion.[22]

Second, the court said that because restrictive covenants are contracts, courts should interpret them to give effect to the intent of the parties.[23] The court did not discuss, however, the special nature of covenants, which become part of the property after the first transaction.[24] Nor did the court touch upon the fact that covenants are contracts of *adhesion*,[25] which courts have construed less liberally

---

13. *Id.*
14. *Id.*
15. *Id.* at 377.
16. *Id.* at 378.
17. *See infra* Section III and accompanying notes.
18. *Powell*, 125 P.3d at 377.
19. *Id.*
20. *Id.*
21. Vales v. King Hill Condo. Ass'n, 125 P.3d 381, 388 (Ariz. Ct. App.-Div. 1 2005); Wilson v. Playa De Serrano, 123 P.3d 1148, 1151 (Ariz. Ct. App.-Div. 2 2005). Credit is due Joshua R. Forest, Esq., of Mitchell & Forest, P.C. for making this point in a case summary on the firm's website. Joshua R. Forest, *Recent Cases Construing CC&R's in Arizona*, Mar. 22, 2006, http://www.mitchelllaw.com/Ariz%20CCRs.htm.
22. *Powell*, 125 P.3d at 377.
23. *Id.* at 376–76.
24. Federoff v. Pioneer Title & Trust Co. of Ariz., 803 P.2d 104, 108 (Ariz. 1990) (giving four conditions for a covenant to run with the land: "(1) there is an enforceable promise between the original parties; (2) the promise touches and concerns the land; (3) the parties intended to bind their successors; and (4) the successors have notice of the restriction").
25. The essence of a contract of adhesion is a standardized contract offered on a "take it or leave it" basis. Burkons v. Ticor Title Ins. Co. of Cal., 798 P.2d 1308, 1320 (Ariz. Ct. App. 1989), *rev'd on other grounds*, 813 P.2d 710 (Ariz. 1991). In *Powell*, as is typical, buyers of property with covenants attached had no power to negotiate terms. In fact,

than "meeting-of-the-minds" contracts.[26] Perhaps most importantly, even in "meeting-of-the-minds" contracts, a determination of the parties' intent rests on the objective manifestation of that intent, such as an expression of that intent within the document.[27] Yet even when the *Powell* court did look for intent in the language of the CC&Rs, it apparently considered only the intent of the developer and the early lot-buyers; the RV-users' intent did not appear to enter into the court's calculus.[28]

Third, the court noted the protective rights that restrictive covenants give each landowner as against the others.[29] It is not clear, however, what specific harm the court had in mind. Because *Powell* came before the court on a summary judgment posture, no facts entered into the analysis concerning how using RVs as single-family dwellings in Indian Hills might harm the plaintiffs.[30] Had the court considered the facts of the case, the amendments to the La Paz County Zoning Code allowing RVs to be used as single-family dwellings in manufactured home subdivisions might have provided evidence that such use did not constitute harm to other property owners in such subdivisions. [31]

The court relied on an illustration from comment (i) to section 4.1 to support its adoption of the Restatement in this case.[32] The analogy between the illustration and the facts in *Powell*, however, falls short.

> Deed restrictions in Sandy Acres, a 200-lot subdivision originally developed with single-family homes, prohibit "apartment houses." A developer who has acquired 10 contiguous lots plans to construct a 10-story condominium complex on the property. Condominiums

---

if each buyer did have that power, it would negate the usefulness of covenants, namely their reciprocal nature.

26. Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 282–83 (Ariz. 1987) (recognizing adhesion contracts as a "different creature" than the traditional bargained-for exchange of terms that call for meeting-of-the-minds contract rules).

27. Johnson v. Earnhardt's Gilbert Dodge, Inc., 132 P.3d 825, 828 (Ariz. 2006). The parties' intent is ascertained from objective evidence and not the hidden intent of the parties. *Id.*

28. *See* Supplemental Brief of Defendants Fivecoat, Neville, Phillips and Wright at 3, *Powell*, 125 P.3d 373 (No. CV-05-0186-PR), 2005 WL 3942346. According to the brief for the RV-users,

> [d]efendants purchased their lots only after reading the CC&Rs. When they decided to purchase their lots, the [sic] did so in reliance on the clear language of the CC&Rs, which permits single family residential homes including recreational vehicles which are very commonly used as single family residential homes. Defendants would not have purchased their lots had they believed that Plaintiffs would now be able to rewrite the CC&Rs without approval of the other homeowners to permit certain styles of single family residential homes, while prohibiting other types of single family residential homes.

Id.

29. *Powell*, 125 P.3d at 377.

30. *Id.* at 376.

31. *Id.* at 375.

32. *Id.* at 379.

> were unknown in the jurisdiction when the restriction was created. The restriction should be interpreted to prohibit the proposed condominium complex because it presents density problems similar to those created by apartment houses. The servitude will not serve its purpose if interpreted literally.[33]

The Restatement stands for the premise that, where the covenants have explicitly prohibited a certain use, previously unknown uses that share the same characteristic should be similarly prohibited. In the illustrated case, the unforeseen use, condominiums, have the same characteristic (causing density problems) as the explicitly prohibited use, apartments. But in *Powell*, the unforeseen use (RVs) cannot be said to resemble an explicitly prohibited use because there are *none*. Worse, the use arguably most similar to RVs—mobile homes—is one of the (implicitly[34]) *permitted* uses. By parity of reasoning, the Restatement rule would *allow* an unforeseen use similar to a permitted use.

B. Particular Reasons to Interpret the CC&Rs to Prohibit RV Use

In addition to the general rationale for adopting the Restatement, the court gave particular reasons to interpret the *Powell* covenants broadly.[35] The court based its interpretation on three grounds.[36]

First, the CC&Rs impose restrictions on only the enumerated types of homes.[37] No provision applies to un-enumerated dwellings; there is no "catch-all" provision.[38] Thus, reasoned the court, if other uses were allowed in the subdivisions, there would be no appearance or quality of construction limitations on un-enumerated dwellings, which would be absurd.[39]

In truth, the result would be far short of absurd. There would still be limits. For one thing, there is no reason nuisance law would not apply.[40] In addition, the property would remain subject to the La Paz County manufactured home subdivision zoning requirements.[41] As the CC&Rs themselves claim only to

---

33. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 cmt. i, illus. 5 (2000). Other courts have worried about this comment in the Restatement. *See, e.g.*, Fisher v. Va. Elec. & Power Co., 243 F. Supp. 2d 538, 554–55 (E.D. Va. 2003) (finding "particularly troubling" the contradiction between comment (i) and comment (d), which places "heavy emphasis" on written expressions of intent). Other cases relying on comment (d)—and not comment (i)—include *Simone v. Miller*, 881 A.2d 397, 405 (Conn. App. Ct. 2005); *Twomey v. Commissioner of Food & Agriculture*, 759 N.E.2d 691, 696 (Mass. 2001); and *Blackhawk Development Corp. v. Village of Dexter*, 700 N.W.2d 364, 379 (Mich. 2005).

34. There are no explicitly permitted uses. *See supra* note 5 (Indian Hills Airpark CC&Rs).

35. *Powell*, 125 P.3d at 378.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Cf.* Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs., 712 P.2d 914, 922 (Ariz. 1985). The inquiry in a nuisance claim is not whether the activity is lawful but whether it is reasonable under the circumstances. *Id.*

41. *Powell*, 125 P.3d at 379.

be "additional" limitations, they acknowledge by their own words that there are prior limitations, even mentioning and incorporating the zoning code itself.[42]

Second, the court noted that the CC&Rs require each listed home type to have a hangar on the same lot, but if RVs were permitted, the CC&Rs would not require those lots to have a hangar.[43] This, according to the court, would be inconsistent with the stated purpose of the CC&Rs, which is to encourage an aviation-related residential and commercial center.[44]

Why are hangars necessary to encourage an aviation-related residential and commercial center? Nothing in the CC&Rs (or anywhere else for that matter) suggests this. If the drafters had really believed hangars were vital to Indian Hills, an unambiguous way of expressing the idea would have been to make one of the requirements: "Each lot shall be developed with a hangar." Instead, the drafters stated the requirement once for each type of home.[45] The court nevertheless concluded that the CC&Rs require uniformity. There are two problems with this conclusion. For one thing, uniformity in general is simply not reflected in other land use patterns: Not every lot in a residential area must be residential (or have a garage)—it might also be a park or a fire station.[46] More importantly, however, as long as the court was willing to infer uniformity in the CC&Rs, why not simply infer the requirement that every lot have a hangar, a lesser assumption that might have preserved the RV-users' rights?

Finally, the court noted that the CC&Rs explicitly claim to be more restrictive than the otherwise applicable law.[47] Thus, the court reasoned, an amendment to a *less* restrictive limitation (the zoning code) need not affect the *more* restrictive limitation (the CC&Rs).[48] While the court makes a valid point, it does not help to resolve the question of the meaning of the CC&Rs. Acknowledging that the CC&Rs are more restrictive than the zoning code does not help answer the question, "Do the CC&Rs prohibit RV use?"

The court's analysis does not touch on this question, which is at the heart of the result in *Powell*. How, then, did the Arizona Supreme Court conclude that the Indian Hills CC&Rs prohibited RV use? The court's presentation of the facts gives a clue as to its reasoning: "Hangar-houses . . . were added to the CC&Rs as a permissible use in 1992."[49] This statement is striking because, in fact, the CC&Rs do not expressly permit or prohibit any specific uses.[50] The 1992 amendment to the

---

42. *See supra* note 5 (Indian Hills Airpark CC&Rs § 2.A).

43. *Powell*, 125 P.3d at 379.

44. *Id.*

45. *Id.*; *see supra* note 5 (Indian Hills Airpark CC&Rs §§ 2.A.(6), (8)).

46. *See*, *e.g.*, TUCSON LAND USE CODE §§ 2.3.4.2(C), (D) (permitting, in a single-family residential zone, schools, fire stations, churches, and day care facilities).

47. *Powell*, 125 P.3d at 379.

48. *Id.*

49. *Id.* at 375.

50. *See supra* note 5 (Indian Hills Airpark CC&Rs). Although the court recognizes that "the CC&Rs neither expressly prohibit nor permit RVs as residences," it fails to recognize that they do not expressly prohibit or permit any other use. *Powell*, 125 P.3d at 378.

CC&Rs placed a *restriction* on hangar-houses, namely that they meet certain minimum dimensions.[51]

One interpretation of the court's reasoning concerning why hangar-houses were "permitted" in the Indian Hills subdivision after 1992 might be that they had never been explicitly *prohibited*, and hangar-houses complied with the other incorporated provisions, like the county zoning code. But this could not be the rule of *Powell*. If it were, the RV-users would have prevailed. The court, then, must favor another theory.

Only one amendment addressed hangar-houses,[52] so this amendment must have done the work. The amendment did not purport to *add* a use, however, but to *restrict* one.[53] The court's rule, then, appears to be: *Only that which is restricted is permitted* (the "Restriction Rule"). The question in *Powell* is whether RVs are permitted in Indian Hills. The court's answer is that RVs are not permitted by the CC&Rs because they are not restricted by the CC&Rs.[54]

Does the Restriction Rule derive from the Restatement or from the Indian Hills CC&Rs? It does not appear explicitly in either place. According to the court, it emerges from the application of the Restatement *to* the CC&Rs.[55] By using the Restatement as an interpretive tool, the court found in the Indian Hills CC&Rs the intention to create the Restriction Rule.[56] This is a surprising enough result on the facts of *Powell*, but is it universal? Given the relatively weak language that the court found sufficient for such intention,[57] has every home owners' association ("HOA") in Arizona adopted the Restriction Rule?

III. IMPLICATIONS OF *POWELL*

Powell purports to adopt the Restatement by interpreting covenants to effect the intent of the parties. In fact, the reasoning of the Restatement does not support the result in *Powell*. The apartment house illustration[58] gives no guidance to courts on when they should determine that a CC&R implicitly prohibits a property use. Whether or not this was the intent of both parties when Washburn sold his first fly-in community lot, it can hardly be said to be the intent of both parties when the *RV-users* purchased their lots.[59]

The reader of *Powell* is left to wonder what would have constituted due diligence for the RV-owner lot-buyers. Should they have not only consulted the zoning code and the CC&Rs, but checked the history of amendments to both documents? How else but with an understanding of such a history could a person reasonably conclude that RVs were not a permitted use?

---

51. *See supra* note 5 (Indian Hills Airpark CC&Rs § 2.A(10)).
52. *See supra* note 5 (Indian Hills Airpark CC&Rs § 2.A(10)).
53. *See supra* note 5 (Indian Hills Airpark CC&Rs § 2.A(10)).
54. *Powell*, 125 P.3d at 378–80.
55. *Id.*
56. *Id.*
57. *See supra* note 5 (Indian Hills Airpark CC&Rs).
58. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 cmt. i, illus. 5 (2000).
59. *Id.* § 4.1 cmt. d.

Worse, municipalities are left to wonder about their power to modify their zoning codes. After *Powell*, every subdivision with CC&Rs arguably has a unique zoning that reflects the state of the code as it stood on the date of the adoption of that subdivision's CC&Rs. This cuts against efficiency and equity in enforcing the zoning code, because each neighborhood will effectively have its own zoning. Furthermore, it weakens the ability of the public zoning board to control land use and respond to change.[60]

When the Arizona Supreme Court adopted the Restatement and rejected the principle of interpreting covenants to favor free use of land, it not only asserted a land policy but it promulgated an interpretive scheme for covenants. Practitioners are already beginning to realize that the rules have changed.[61] If, contrary to *Powell*, the drafters of covenants knew that their language would be strictly construed against restrictions, they would be careful to make the restrictions explicit. If the Indian Hills restrictions had been explicit, the RV-owners would have never reasonably relied on them. But if the drafters know that they will always be able to imply restrictions later, covenants will be sloppier[62] and will tend to create traps, not only for the unwary, but for the wary as well.

Arizona is not the only state to have rejected strict construction of restrictive covenants.[63] New Hampshire, in particular, is notable, and widely cited.[64] Among the cases *Powell* relies on is *Joslin v. Pine River Development Corp.*,[65] a New Hampshire case which held that, notwithstanding the lack of an explicit prohibition, a landowner could not convert a single-family lakeside lot into a beach and harbor for the use of 161 land owners outside the subdivision.[66] What the Arizona court failed to note is that New Hampshire subsequently limited the holding of *Joslin*, distinguishing it as a case more about the substantial overburden

---

60. *See* David Weissmann, *Removing Restrictive Covenants as Burdens to a Disaster Response*, PROBATE & PROPERTY, Sept.–Oct. 2006, at 45 (discussing restrictive covenants as impediments to redevelopment of New Orleans in the wake of Hurricane Katrina).

61. *See* Jonathan Olcott, *Arizona HOAs: Square Peg in a Round Hole?*, LEWIS MANAGEMENT RESOURCES NEWSLETTER, Vol. 3, 2006, at 3, *available at* http://www.lmri.org/FolderSetup/15_LMRI_19/LMR3Qtr2006.pdf. Mr. Olcott, an attorney for some home owners' associations and a member of the plaintiff's law firm in *Powell*, calls the opinion "landmark" and reports initially expecting "overnight" judicial support for HOAs, before "waking up" to the reality that HOAs will remain unpopular in Arizona. *Id.*

62. The brief 10-point list of restrictions in Indian Hills alone features two prominent typos, even after amendment. *See supra* note 5 (Indian Hills Airpark CC&Rs).

63. Kentucky, for instance, rejects strict construction because it sees restrictive covenants as protection for the property owner and the public. Highbaugh Enters. Inc. v. Deatrick & James Constr. Co., 554 S.W.2d 878, 879 (Ky. Ct. App. 1977). Washington likewise seems to favor liberal construction. Riss v. Angel, 934 P.2d 669, 675–76 (Wash. 1997).

64. *See, e.g.*, *In re* Ames Dept. Stores, Inc., 316 B.R. 772, 787 & n.58 (Bankr. S.D.N.Y. 2004) (noting the trend in New Hampshire against strict construction of covenants).

65. 367 A.2d 599 (N.H. 1976).

66. *Id.* at 601–02.

of land than about intent.[67] Other cases that rely on the *Joslin* line of argument also run contrary to *Powell*, suggesting that *Joslin*, in the end, is cold comfort for the Arizona court.[68]

CONCLUSION

A good reason to interpret restrictive covenants strictly is that if an issue was not important enough to be written down and expressed clearly, it is probably not important enough to be judicially imposed. When the Restatement speaks of interpreting so as to satisfy the parties' intent, it means—as the illustration shows—extending explicit prohibitions to unforeseen uses. It does not stand for reading into a covenant implicit prohibitions where there are no explicit ones. *Powell*, however, does stand for this principle. Thus, after *Powell*, Arizona law has something much stronger than the Restatement: It has a case that stands for restricting land use by implication, and it has a new rule of covenant interpretation. *Only that which is restricted is permitted.*

---

67. Voedisch v. Town of Wolfeboro, 612 A.2d 902, 905 (N.H. 1992). In *Voedisch*, the court upheld the actions of a landowner who attempted the same transaction as the landowner in *Joslin*, only on a smaller scale. *Id.*

68. *E.g.*, Shaff v. Leyland, No. 2005-848, 2006 WL 3498459, at *3 (N.H. Dec. 6, 2006) (citing *Joslin* for the principle that the court should determine the parties' intent at the time of creation of the covenants). This is problematic for the reasoning in *Powell* because the RV-buyers could not have made a covenant until they purchased their lots. The cases cited earlier are no better support for *Powell*. In *Highbaugh*, the court held that a concrete pad was a "structure" for the purposes of a covenant requiring plan approval for their construction. 554 S.W.2d at 879. The Washington case lends even less support. *Riss* actually upheld the individual lot owners' right to use their property as against the collective homeowners' interpretation of the covenants. 934 P.2d at 679. In short, none of these cases comes close to the position in *Powell* that some uses are permitted under the zoning code but are nevertheless implicitly prohibited by CC&Rs that fail to mention those uses.