

RESTRICTIVE COVENANT GUIDANCE

August, 2003

Often, developers of residential or commercial subdivisions subject the property on which the subdivision is built to restrictive covenants, that include provisions such as setbacks, types of homes/buildings that can be built, etc. If the District has determined that restrictive covenants are acceptable as a means of preserving mitigation property, the following language can be added to those restrictive covenants:

“The areas shown on the recorded plat (*identify the plat by title, date, and recording data*) as conservation areas shall be maintained in perpetuity in their natural or mitigated condition. No person or entity shall perform any of the following activities on such conservation area:

- a. fill, grade, excavate or perform any other land disturbing activities
- b. cut, mow, burn, remove, or harm any vegetation
- c. construct or place any roads, trails, walkways, buildings, mobile homes, signs, utility poles or towers, or any other permanent or temporary structures
- d. drain or otherwise disrupt or alter the hydrology or drainage ways of the conservation area
- e. dump or store soil, trash, or other waste
- f. graze or water animals, or use for any agricultural or horticultural purpose

This covenant is intended to ensure continued compliance with the mitigation condition of a Clean Water Act authorization issued by the United States of America, U.S. Army Corps of Engineers, Wilmington District, Action ID , and therefore may be enforced by the United States of America. This covenant is to run with the land, and shall be binding on the Owner, and all parties claiming under it.”

Usually, restrictive covenants have a provision that the property owners (either all of them or some percentage of them) can amend or modify the restrictive covenants. If that is the case, that provision needs to provide that our required paragraph (usually identified by paragraph number) cannot be amended without the express written consent of the U. S. Army Corps of Engineers, Wilmington District.

The permit condition should state that the permittee will record restrictive covenants, acceptable to the Corps of Engineers, for the purpose of maintaining the mitigation areas in their natural state in perpetuity, prior to the sale or conveyance of any lots or other property within the subdivision. It is important that the restrictions be recorded prior to the sale of any property within the subdivision (or phase, if it is being developed by phase). If they are not, then any property sold prior to the recording of the restrictive covenant are not subject to those covenants. Suggest the following:

“Permittee shall execute and cause to be recorded in the _____ County Register of Deeds restrictive covenants acceptable to the Corps of Engineers for the purpose of maintaining the conservation areas, as shown on the recorded plat* (*identify by title, date, and recording data*), in their natural state in perpetuity, prior to the sale or conveyance of any lots or other property within the subdivision. The permittee shall enforce the terms of the restrictive covenants and, prior to conveyance of the property, shall take no action on the property described in the covenants inconsistent with the terms thereof. The permittee shall provide a copy of the recorded restrictive covenants to the Corps of Engineers within 15 days of recording.”

* It is possible and acceptable that the plat may not be recorded at the time of the issuance of the permit. If that is the case, delete the word “recorded” and be sure you have a copy of a plat showing the conservation areas in the file, and identify it in the permit condition by title and date. The plat, however, must be recorded at the time the restrictive covenants are recorded, and prior to the sale of any lots in the subdivision.