

LEGAL REVIEW NOTE

Bill No.: SB 300

LC#: LC2998, To Legal Review Copy, as of February 19, 2019

Short Title: Generally revise property laws to protect property rights

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Date: February 19, 2019

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

LC2998, as drafted, may raise potential constitutional issues associated with Article II, section 31, of the Montana Constitution and Article I, section 10, of the United States Constitution. Article II, section 31, of the Montana Constitution provides: "No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature." Article I, section 10, of the U.S. Constitution provides in pertinent part that no state shall, without the consent of Congress, pass

any law impairing the obligation of contracts.

Restrictive covenants are "construed under the same rules of construction as other contracts." *Bordas v. Va. City Ranches Assn.*, 2004 MT 342, 324 Mont. 263, 102 P.3d 1219. "Each purchaser in a restricted subdivision is both subjected to the burden and entitled to the benefit of a restrictive covenant." *Town & Country Estates Assn. v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987). The Montana Supreme Court has already found this type of restrictive covenant -- a restrictive covenant that binds a nonconsenting landowner to a new or different use -- to be a validly enforceable contract. In *Windemere Homeowners Assn. v. McCue*, 1999 MT 292, 297 Mont. 77, 990 P.2d 769, the Montana Supreme Court found that restrictive covenants, depending on the language of the covenant, could be amended to bind a nonconsenting landowner to a new or different use. The Supreme Court stated that "the clause of the restrictive covenants allowing for amendment [validly] authorized the creation of new or unexpected restrictions not contained or contemplated in the original covenants." *Id.* at 83, 990 P. 2d at 793.

The United States Supreme Court in *U.S. Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977), has held that a contract impairment will be held unconstitutional if: (1) the impairment is a substantial impairment; and (2) the government enacting impairing legislation does not first at least seriously consider nonimpairing or lesser impairing legislation. The Montana Supreme Court has held that there is a three-part test employed when analyzing a contracts challenge. First, the courts ask whether the state law is a substantial impairment to the contractual relationship. Second, the courts inquire into whether the state has a significant and legitimate purpose for the law. Finally, the courts analyze whether the law imposes reasonable conditions reasonably related to achieving the legitimate and public purpose. *Seven Up Pete Venture v. Mont.*, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009.

Although decided on other grounds (takings) as well as contractual grounds, the Montana Supreme Court has found that a statute requiring owner consent that otherwise impaired a private party's contractual rights to be unconstitutional. *Western Energy Co. v. Genie Land Co.*, 227 Mont. 74, 737 P.2d 478 (1987).

LC2998, as drafted, specifies that a homeowners' association may not "enforce a covenant or condition in such a way that imposes more onerous restrictions on a member's basic [property] rights . . . than those restrictions that existed when the member acquired the member's interest in the real property, unless the member who owns the affected property expressly agrees to the restriction in writing at the time of the adoption or amendment of the covenant or condition." New Section 1(1). Although the draft states that it does not "invalidat[e] existing covenants", by its terms, as of the effective date of [the act], the draft prohibits a homeowners' association from enforcing any covenant, even an otherwise valid covenant, if it did not exist at the time when the member acquired the affected property.

Consequently, a potential issue is whether a statutory prohibition forbidding a homeowners' association from enforcing otherwise valid restrictive covenants or conditions substantially impairs the homeowners' association's contractual rights. Therefore, this provision may conflict with Article II, section 31, of the Montana Constitution and Article I, section 10, of the U.S.

Constitution insofar as it prohibits the enforcement of existing covenants as of the effective date of [the act] or otherwise prohibits homeowners' associations from amending their covenants within the scope of authorizations validly granted to the homeowners' association.

Requester Comments: