

**From:** Mark McIff <[markmciff2014@gmail.com](mailto:markmciff2014@gmail.com)>  
**Subject:** Re: private deed restrictions  
**Date:** December 17, 2019 at 10:06:44 AM MST  
**To:** Curtis Oberhansly <[curtis@bbmesa.com](mailto:curtis@bbmesa.com)>  
**Cc:** Steve Cox <[scox7550@gmail.com](mailto:scox7550@gmail.com)>

Curtis,

Generally speaking, government bodies should not take on the role of enforcing restrictions written in deeds. As you say, it would require that the government act in a judicial type role because it requires an interpretation of the language and a determination as to whether such is being violated in any given circumstance. A possible exception might exist where the government body is the entity which required the developer to place the restriction in the deed or covenant in the first place. In that circumstance, perhaps the government's interest is being protected by the restriction, and it may be appropriate for the government to enforce it. Otherwise, it is not a good idea because the government is advancing private interests, rather than its own.

Quite appropriately, the law favors the ability of landowners to do what they want with their own property. The government is allowed a very limited ability to impose restrictions on the use of land. Such restrictions must be carefully imposed. If the restrictions are reasonable under existing law and a proposed use clearly violates the restriction, then courts will normally allow the restriction to stand. However, if the requested use is not clearly forbidden by the restriction, the landowner has the right to an approval. This is set forth in section 10-9a-306 of the Utah Code, which reads as follows:

(2) If a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application.

In short, I don't think we can defend denying an application which we have not clearly outlawed. I know that most cases do not go to court, but we would lose this one. On the other hand, let's suppose that we grant the application, and someone wants to take that to court and

blame us for granting the application. We almost certainly would win that case. It's easy to defend. The cases that usually go to court are the ones where the landowner has tried everything possible to use his own land, and the government won't let him. So he eventually turns to the court. We don't want to be there trying to explain why we are trying to enforce a provision which doesn't apply to us and which probably doesn't apply in this circumstance anyway. That's a bad position for us to be in.

Please let me know what happens with this.

-Mark McIlff