

Negative Covenants in Densification Projects - Cadastral Challenges

Helén Elisabeth ELVESTAD, Norway

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SUMMARY

While under the current zoning system and public law provisions a densification project is permissible, but at the same time it can also be in breach of the covenant system and private law rules. Since a negative covenant is not necessarily annulled in the event of a conflict between the covenant and project plan, it can therefore prevent publicly approved development projects from going ahead. The challenges associated with negative covenants and zoning plans, and thus the implementation of housing policy, have been the subject of several Supreme Court decisions.

The article's most important finding is that the Norwegian system for dealing with negative covenants is costly in terms of time and resources. It takes considerable time simply to find information on negative covenants. The developer may therefore feel justified in assuming that the right holder has no knowledge of the covenant and proceed with the construction on that basis.

Given this situation, the article outlines two possible ways of resolving the challenges identified in the analysis in terms of densification policy. The first is to establish a direct link to the documents by clicking on the covenants listed in the land register and land charges register, and also to clarify the covenants' actual content. The second is to introduce a provision allowing covenants older than 50 years to cease, unless the right holder does not actively say that he wants the covenant(s) to continue.

1. INTRODUCTION

As in many other cities throughout the world, negative covenants used to form the backbone of suburban development in Norway, from late 19th century to the enactment of first modern planning law in 1924. By the mid-1990s, densification of the urban fabric had become the stated Norwegian national policy for urban development, primarily due to an awareness of the adverse impact of combined land-use and transportation practices on the environment. Densification and the transformation of suburban hubs and stations on the public transport system have been one of the prescribed approaches in the land-use plans.

The suburban areas surrounding the hubs and stations were frequently subdivided and developed – in the absence of comprehensive planning tools in planning law – through the use of negative covenants. Today, these negative covenants are still legally binding on the owners of plots in development areas, even if newer land-use plans, which also are legally binding on new developments, show other land uses, density levels and types of activity, etc.

Negative covenants are unlike ordinary covenants, which usually have one burdened property and one superior property. They typically exist concurrently as both burdened and superior properties regarding the negative covenant within the larger property from which they were once subdivided. Every property has a claim on all the other properties in the area, and must honour the claims of the other properties towards it. As early as 1943, negative covenants were being described as the “cause of many difficulties in the practice of the law” (Stang 1943:249). Negative covenants have been the subject of several Norwegian Supreme Court rulings since the first ruling in 1929 (Supreme Court of Norway, decision RT 1929/263).

Land-use plans, such as local zoning plans, are legally binding in Norway, hence determining how an area can be used. The development of a parcel must comply with the zoning map and written zoning statements. Uncertainty regarding whether the project owner has the necessary entitlements is not sufficient reason to reject a planning application. Current Norwegian legislation requires neither local councils nor developers to conduct extensive investigations to identify private law issues when drafting plans.

A negative covenant is an arrangement that affects private parties. It is up to the individual right-holders to try and effectuate their rights and it is the court’s task to settle any disputes. The burden of proof – and burden of litigation – falls on the person claiming the covenant violation. A planning permit may be legal in terms of public law, but at the same time illegal or contradictory in terms of private law.

It takes a lot of time to investigate the covenants and developers tend to assume that right holders are unaware of the covenants (Elvestad 2017; Elvestad 2018). The article asks why it takes such a long time to locate the covenants and looks at what can be done to make it easier to access information about the covenants.

2. CHALLENGES ARISING FROM THE CURRENT SYSTEM

One of the main reasons a developer would choose to ignore a covenant is that there is so little available information about them. And since information is hard to come by, it is not uncommon, especially for private persons, to acquire properties without knowing whether a negative covenant is attached to the property or not. Indeed, a right-holder does not necessarily need to be aware of a covenant at all.

To understand why it can be difficult to find the covenants, it would help to know something about how the Norwegian property register is arranged. The property

registration system is an important component of the institutional framework, carrying important information on real property, right-holders and the relationship between right-holders and properties. The register therefore has a lot to say for transactions with, restrictions on, and regulation of land resources.

The current Norwegian property registration system is divided into an object register (the cadastre) and a rights register (land register). See Mjø̄s (2016) for details on the Norwegian system. The cadastre contains information on property boundaries and the physical characteristics of the property, while information relating to ownership and rights can be found in the land register. Registration in the land register proceeds on the basis of the information contained in the submitted document. However, the document is not reproduced in its entirety. It is normal practice, when registering, to use codes and standard texts (Hegstad 2003: 175). It is nevertheless the case that the entire document is registered, not just what is stated in the extracts from the land register. These standard texts also describe the substance of the land charges (Høgetveit Berg and Bråthen-Otterbech 2010: 76).

There are no clear guidelines explaining how land charges should be entered into the land register, as regards the use of designations/terms to describe the attributes of the charge. This is up to the individual registrar. Examples of such texts include collective terms such as “stipulated fence maintenance. With further stipulations”. Such collective terms can also include stipulations on buildings, for example a villa clause, without it being stated in the land register other than under the text “With further stipulations”. If it is necessary to access the entire text of the document, duplicate records (mortgage book) where all registered documents are collected will have to be consulted. However, simply gaining access to the whole text of the document is a complicated process. The land register contains brief descriptions of, and references to, the registered documents. Furthermore, the listed documents will be accompanied by a number, i.e. a reference to the document in the mortgage book. By using this number it should be possible to find the registered document in the mortgage book.

Following changes undertaken in the period 1989–1993, the land register was digitised. Prior to this, changes to the land register were done manually. At the start of the work to digitise the land register, the Ministry of Justice decided that covenants that were registered on the main property should not appear visually in the partitioned property’s folio in the land register. Instead, standard texts, as mentioned above, are copied into the partitioned property’s folio in the land register. Covenants can therefore be found in the entry in the land register on the superior property (main farm unit) from which the land was partitioned. Covenants that predate the creation of a partitioned property are not therefore transferred in writing to partitions formed at a later date. The consequence in practical terms is that a property’s folio in the land register will not necessarily provide information on every right pertaining to the property. In order to find out whether covenants were registered before a partition of potential significance to a property, such as an older negative covenant, it will be necessary to go to the original main farm unit.

However, after a statutory amendment that came into force in April 2017, covenants must now accompany the partition.

So not is it only difficult to find the negative covenants, they can moreover be hidden behind misleading standard texts and terms.

There is nothing automatic in the fact that lapsed covenants are deleted from the land register. This to a large extent must be done at the request of the right-holder. Another challenge presented by the current real property register is therefore that many of the registered covenants are no longer in force. This can apply to covenants which, due to developments in the area, are no longer viable. For example, a negative covenant that requires villa-type housing in the area will be considered to have lapsed if the area today is given over to industry and manufacturing plants. It is the same situation for all types of covenants. There may be a right to pasture in an area where there today is a crossroads. Obviously, such a right will have lapsed, but until it is manually removed, it will appear in the land register. So whenever land is developed, it will be necessary to study all the covenants entered in the land register.

Norwegian law currently provides for the erasure of covenants that no longer exist or have obviously lapsed. In such cases, the covenant can be deleted pursuant to the rules set out in the Land Registration Act. It can, of course, also be deleted if the right-holder(s) give their consent. The rules on deletion of land charges can be found in sections 31 to 32a of the Land Registration Act. It is also possible to delete the entry following a court judgement, cf. section 13, fourth paragraph of the Land Registration Act. The covenant is then deleted in accordance with the judgement. Deletion can only be executed by the Land Registry Authority (Mapping Authority). The Land Registry Authority, however, does not examine the land register for covenants that have manifestly ceased to exist on its own initiative. The rules on deletion in the Land Registration Act are therefore not particularly apposite if the purpose is to remove covenants no longer in force.

The developer must go through all the covenants that are attached to a property to make sure they contain nothing of significance for the planned development. If outdated covenants are removed from the land register, it will reduce the number of documents to be examined and also the transaction costs.

The most important parties, in respect of this article's focus, are the developers and right-holders. They have different roles and operate under different institutional and financial conditions. This has an impact on how the covenants are handled in practice. The developer plays a key role in the handling of negative covenants. In high-demand areas, property developers and professional market players manage and finance much of the work to draft the detailed plans, and most of the zoning plans in Oslo are drafted by private sponsors. A total of 47 out of 49 detailed zoning plans were initiated by private parties in Oslo in 2017, according to Statistics Norway (2017). Developers thus play a crucial role in putting the municipal densification policy into effect. If there is any uncertainty as to whether a covenant can hamper the development, it must clearly be examined and clarified before construction can start. The most serious players, it can be assumed, will refuse to act disloyally and unlawfully in most types of contractual

relationships. There is therefore reason to ask why some developers seem to do just that when they come across negative covenants. Part of the reason can be found in the challenges already outlined such as the difficulty of accessing information and high transaction costs. This brings us to a review of possible steps one could take to ease access to information on covenants.

3. POSSIBLE SOLUTIONS

In order to improve access to information, there are two steps in particular that can be taken. One is a purely technical solution, while the other will result in substantive improvements.

First, let us look at a possible technical solution. A link should be established directly to the documents after clicking on the land charges listed in the folio(s) in the land register. As previously mentioned, registration in the land register is done on the basis of information contained in the submitted document, but then largely in the form of codes and standard texts. It would save time for anyone wanting to see the documents at first hand if a method of direct access could be introduced by adding link in the folio(s) in the land register.

This type of arrangement exists already in the Mapping Authority, and has been in service for about five years. It should therefore be possible to organise a similar procedure for the public. However, in order to create this link to the relevant documents, all the documents will have to have been scanned electronically. This process has begun, but is still not complete.

The second step, resulting in more substantive improvements, is to clarify the contents of the land charge in relation to the designation stated in the land register. When negative covenants end up under designations such as fence maintenance obligations etc., it is misleading. It would doubtless be of benefit to the developer if all land charges affixed to the property were checked, regardless of the designation in the folios in the land register, just to get an idea of how they may affect construction. In view of the developers' real estate expertise, they are arguably aware that much more may hide behind collective terms of the type "fence maintenance obligations" than the actual rules on fence maintenance. The same insight could not be expected of a private individual. Any private individuals attempting to navigate their way through all the rights adhering to a property may quickly come to believe that there are no provisions on buildings and construction under a land charge when the designation simply refers to fence maintenance duties, etc.

By dividing such collective terms into several separate items, each of which details the provisions and rules set out in the land charges, it will be easier for people to find the provisions they are actually looking for. And more people will become aware of what rights they actually enjoy.

If the registrar, in updating the land register, has only referred to the fencing maintenance rule, while the registered document also contains provisions on roads and buildings, then the “provision on property rights to roads” and “provision on buildings/construction” can be added to the reference text under the old document number. It would not amount to a material change. A complete listing of what is registered is given in the document itself, cf. RT 2004/1971. It is therefore the document itself that is decisive for what is registered, not the entries in the land register. Nor will there be any talk of interpreting the document, only an explanatory note saying that the document contains more provisions than the fence maintenance obligation. Whenever entries are made in the land register, however, whatever is registered shall not be subject to interpretation, cf. LG-1994-1469. See also LB-2010-44523.

Easing access to information by highlighting negative covenants would undoubtedly benefit all parties involved. If relevant information on negative covenants were more readily available, it would also make it easier for local authorities to find out whether negative covenants are attached to development land.

This, however, will not resolve the challenges associated with the lapsed covenants contained in the land register. In order to bring the contents of the land register up to date, it would be worth considering the introduction of a provision whereby covenants older than 50 years will be assumed to have lapsed, unless the right-holder states that he wishes them to continue. Such a provision will mean that the right-holders themselves must actively decide whether they want to retain existing covenants. It would help in the removal of old covenants that have lost any relevance, or if the right-holders for other reasons have no desire to maintain them. There are certainly many lapsed covenants in Norway, and it would have been better if they had been removed from the land register, ensuring as accurate a land register as possible.

A similar provision was introduced in Sweden by the Swedish Renewal Act. The Renewal Act, which came into force 1 July 2013, is a kind of pre-emptive law. Under the Act, certain types of covenant (including negative covenants), established before 1 July 1968, must be renewed by the end of 2018 to prevent their removal from the Swedish property register. As the Swedish preparatory works (Regeringens proposition 2012/13:76, p. 20) indicate, a similar renewal requirement was enacted in 1968, suggesting that the earlier laws on the renewal of older rights were a success. The preparatory works also noted that according to available data, about 90 percent of the rights in question could be removed after the end of the renewal period. According to Swedish law, however, only the legal protection against third parties disappears.

The main purpose of the Norwegian property registration system is to provide statutory protection of registered land rights. When a document is entered in the land register, it will typically enjoy statutory protection against all documents that were not registered before, cf. section 20 of the Land Registration Act. This legal protection, however, only extends to persons acting in good faith. If the statutory protection disappears, disputes related to, for example, whether a third party was in good faith, are likely to arise. Part of

the benefit one wishes to achieve by a more correct land register would therefore disappear, suggesting that the covenant should also materially cease if it is not extended.

4. CONCLUSION

As the article shows, accessing information on covenants is currently a very arduous procedure. It takes considerable time to go through every documents of potential importance to the property. In view of the fact that a negative covenant that is able to prevent a development from going ahead may lie “hidden” beneath a collective term for, for example, a duty to maintain a fence, the parties involved will have to read through all the covenant documents to determine which land charges are attached to a property. If the matter concerns the development of a larger area, it could end up being a very time-consuming task. If this information were more readily available, it would clearly have a positive effect on transaction costs. A technical solution such as a direct link to the document may be put in place sooner or later. But it will be a significantly more demanding task to create a procedure to divide the collective terms of all the registered documents, in view of the time required and costs involved. However, it may be possible to alter procedures and guidelines so that the most important provisions looking ahead will be enumerated under the collective designation of the registered documents.

By introducing a provision on extending the lifetime of the covenants, it should be possible to delete a great amount of covenants from the land register, creating a more up to date register. If the number of land charges associated with a property decreases, transaction costs associated with finding the relevant information will also fall. These latter transaction costs can, as previously mentioned, be high and will ultimately result in higher sales prices for the completed projects, a cost the buyer must bear.

There is a risk, according to Ekbäck (2000: 19), that compliance with rules and decisions made by the judicial system may be threatened, insofar as the rationality of the parties is assumed to be limited and they are assumed to have a tendency to behave opportunistically. A provision allowing an extension of the lifetime of covenants will help raise awareness of the rights that are actually attached to a property, increasing the risk for a developer to assume that a right-holder is unaware of the rights attached to the property. It will thus diminish the likelihood of opportunistic behaviour, and create a greater incentive for the developer to determine the contents of the covenants likely to have an impact on the development project.

The solutions outlined above should be viewed in light of each other. If covenant-related information is more readily available, it will have a positive impact on the possibility of realizing a continuation clause. Easier access to information will reduce transaction costs associated with determining the covenants for the individual right-holder. Easier access to information compared to the current situation will make it less complicated for private persons to defend their interests.

Having said that, the process of deleting every lapsed covenant will place a considerable burden on the Mapping Authority. The costs and disadvantages must be balanced against the benefits to society of having a land register that is as up to date and accurate as possible. It also appears from the preparatory works on the Land Registration Act that it would serve the interests of both the public and private sectors to have obsolete land charges removed from the land register. So-called transitory laws have been enacted from time to time for the purpose of removing obsolete land charges from the real registers. These laws were not considered sufficiently effective and it was therefore found necessary to impose in the new law a duty on “the registration judge to continually remove from the land registers of all dead matter” (Ot.prp. nr. 9 (1935- 36) p. 27). The duty under the Land Registration Act § 31 to delete land charges under the right conditions, is based on an understanding in the preparatory works of the need to carry out a “cleansing” of the registers. The cleansing idea on which the article’s proposed solutions are based is therefore in line with the legislature’s idea of a continuous process of cleansing. And a clearer and up-to-date land register will undoubtedly be of great benefit.

It takes a long time to draft a development plan, and attempts have been made to simplify and streamline the administrative processing of zoning and building matters. Perhaps one should try to look beyond changes in the zoning procedures in the quest to improve efficiency. A national and complete cleansing of the registers, as outlined above, is precisely an example of such an approach.

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Helén Elisabeth Elvestad (Norway)

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BIOGRAPHICAL NOTES

Helén Elisabeth Elvestad holds a masters degree and a Ph.D in land consolidation from the Norwegian university of life sciences. She is associate professor at Department of property and law.

CONTACTS

Associate professor Ph.D. Helén Elisabeth Elvestad
Norwegian university of life sciences
Faculty of landscape and society
Department of property and law
P.O.B. 5003 NMBU
N-1432 Aas
NORWAY
Tel. + 47 67231237
Email: helen.elvestad@nmbu.no
Web site: <https://www.nmbu.no/emp/helen.elvestad>