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RESTRICTIVE COVENANTS AND LAND USE CONTROL: PRIVATE ZONING

Wilford Lundberg*

Promises concerning the use of land, once they have been elevated to "covenants that run with the land," can and often do have a substantial impact on the manner in which the state regulates land development. While these covenants are the result of private bargaining between individuals who hold interests in real property, the state plays the most significant role. State law determines which covenants are enforceable; state courts are called upon to prescribe the manner of their enforcement. When a court enforces a covenant within a grant, it is placing the power of the state behind a regulation that was initially promulgated in the private sector. In making this decision whether or not to enforce a given covenant, there is often this dilemma: on the one hand is the general policy that favors the orderly development of land; on the other, a natural reluctance to enforce promises against persons who never made them. The common law rules resulting from nearly 400 years of litigation and statutory reform seek to chart the course.

TO TOUCH OR NOT TO TOUCH

Basic to the enforcement of a covenant is the question of the running of the burden. In Spencer's Case, decided in 1583,¹ this issue was faced directly. An action was brought against an assignee of a lease which contained a promise to build a brick wall. Two principles emerged from the decision. First, assignees must be expressly bound by the original agreement if the promise concerns something not yet in existence at the time the promise was made. This principle had an early following in this country and was codified by David Dudley Field, a codification adopted in Montana,² as well as in California.³ The second principle has had a far more substantial impact on the development of the law: "but although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there

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²Section 58-308, R.C.M. 1947 provides that:
   A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenanter expressly for his assigns or to the assigns of the covenantee, runs with the land so far as the assigns thus mentioned are concerned.

*Professor of Law, University of Montana. J. D. University of Southern California Law Center, 1966.
the assignee shall not be charged." The determination of which covenants run with the land has in part then, for the past four centuries, been directed towards the question whether or not a given promise touches or concerns the land. Again the Field Code sought to simplify; again Montana adopted its approach. It is submitted, however, that a covenant which is made for the "direct benefit of the property or some part of it then in existence"—language found in § 58-306, R.C.M. 1947—is not significantly different from the test of "touch or concern." The discretion given the court in either case is just as broad. The Restatement of Property is some help; case law, admittedly not always clear, offers a rich background against which a question may be considered.

Whether or not a given burden runs with the land is further refined by making a distinction between those burdens that impose restrictions on the use of the land and those burdens which impose affirmative duties on the owners of land. It is with these affirmative duties that the courts have had the greatest difficulty in finding that the burden touches or concerns the land. An example of this can be found in the 1913 case of Miller v. Clary. The court there summarily announced that any covenant which imposes an affirmative duty, as distinguished from compliance with a mere restriction, does not run with the land. At issue was a promise to construct and maintain a shaft for purposes of carrying electrical power. The court, forced to distinguish its decision from earlier authority, recognized exceptions to its announced rule. These exceptions related to covenants to build fences, covenants relating to party walls, covenants to provide railroad crossings, covenants to pay rent, and covenants to make repairs. It has been suggested that during the twenty-five years that separated

'Spencer's Case, supra note 1 at 72.

The Field Code codification is contained in the following three statutes:

1. Section 58-305, R.C.M. 1947 provides that: "The only covenants which run with the land are those specified in this chapter, and those which are incidental thereto."

2. Section 58-306, R.C.M. 1947 provides that: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land."

3. Section 58-307, R.C.M. 1947 provides that: "The last section includes covenants of warranty, for quiet enjoyment, or for further assurance on the part of the grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of the grantee."

The Restatement of Property § 537 (1944) describes the "touch or concern" test as follows:

The successors in title to land respecting the use of which the owner has made a promise can be bound as promisors only if

(a) the performance of the promise will benefit the promisee or other beneficiary of the promise in the physical use or enjoyment of the land possessed by him, or

(b) the consummation of the transaction of which the promise is a part will operate to benefit and is for the benefit of the promisor in the physical use or enjoyment of land possessed by him, and the burden on the land of the promisor bears a reasonable relation to the benefit received by the person benefited.

Miller v. Clary, 210 N.E. 127, 103 N.E. 1114 (1913).
Miller v. Clary from Neponsit Property Owners Association v. Emigrant Industrial Savings Bank, the lower courts generally interpreted the facts before them so as to avoid the rule of Miller. Neponsit involved an action to foreclose a lien brought by a homeowner's association against a property owner for charges which had been assessed against the property pursuant to a covenant in the chain of title which allowed the association to make assessments for purposes of maintaining roads, paths, parks, beaches, sewers, and "such other public purposes as shall from time to time be determined." The court concurred with Judge Charles E. Clark with respect to the difficulty of applying the touch or concern test: "it has been found impossible to state any absolute test to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case." Coming to grips with the decision that had been made in Miller v. Clary, the Neponsit court, after referring to the exceptions and limitations that had been placed upon the rule, said:

It may be difficult to classify these exceptions or to formulate a test of whether a particular covenant to pay money or to perform some other act falls within the general rule that ordinarily an affirmative covenant is a personal and not a real covenant, or falls outside the limitations placed upon the general rule. At least it must touch or concern the land in a substantial degree, and though it may be inexpedient and perhaps impossible to formulate a rigid test or definition which will be entirely satisfactory or which can be applied mechanically in all cases, we should at least be able to state the problem and find a reasonable method of approach to it.

The court went on to point out that a promise to pay for something to be done was not really distinguishable from a promise to do something on the land. Therefore, unless technical form were to be exalted over substance, the distinction between covenants which can be enforced as running with the land and those which are merely personal to the covenantor must depend upon the effect that the particular promise has on the legal rights which otherwise would flow from the ownership of the land and which are connected to the land. The question that had to be answered was: "... does the covenant in purpose and effect substantially alter these rights?" Judge Clark's influence upon this decision was enormous. Heavy reliance was, however, placed upon Professor Bigelow who, according to

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10C. BERGER, LAND OWNERSHIP AND USE 434 (1968). The author acknowledges his indebtedness to Professor Berger for his masterful organization of materials relevant to this paper.
11C. CLARK, COVENANTS AND INTEREST RUNNING WITH LAND 96-97 (1947).
12Neponsit Property Owners Association v. Emigrant Industrial Savings Bank, supra note 8 at 796.
13But, "the ghost of Miller v. Clary dies hard." See, LAND OWNERSHIP AND USE, supra note 9 at 46.
Clark, "set forth a scientific method of approach to the problem which seems to afford the most practical working test for the court to employ." This scientific method of Professor Bigelow's is to

... ascertain the exact effect of the covenant upon the legal relations of the parties. In effect it is a measuring of the legal relations of the parties with and without the covenant. If the promissor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns the land; if the promisssee's legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches or concerns that land. It is necessary that this effect should be had upon the legal relations of the parties as owners of the land in question, and not merely as members of the community in general.

While it is true that the court in Neponsit found this test helpful, there still remains a nagging question. Assuming a covenant which imposes an affirmative duty will run with the land because it touches or concerns the land when the covenant substantially alters the legal rights that flow from ownership in the land, the question arises: when are those legal rights substantially altered? Can it be said that persons who enter into an unenforceable contract have substantially altered their legal rights? Is it not true that these legal rights become altered only when the contract itself has become enforceable in a court of law? Perhaps an extension of Professor Hohfeld's right-duty relationship can be used to explain the existence of a legal right which has become substantially altered by the existence of a promise even before a court has announced that that promise is legally enforceable. It is submitted, however, that the Bigelow test as used in Neponsit is in reality saying that once a court has decided that a particular promise is enforceable, then it has by its decision altered the legal rights—thereby fulfilling the test. There is no doubt that such a test allows a court to adopt a liberal approach when faced with questions of this nature, uninhibited by the reasoning in Miller v. Clary, but it is less likely that such a test furnishes a court with a large measure of guidance.

PRIVITY OF ESTATE

The existence of a promisssee and a promissor assumes privity of contract. If the promise, even though it does touch or concern the land, is to be enforced against the owner of the land to which the promise

26Covenants and Interest Running with Land, supra note 10 at 97.
27Id. at 97-98.
28See, Note, Affirmative Duties Running with the Land, 35 N.Y.U.L. Rev. 1344 (1960) at 1365-1369 for a summary of the manner in which states treat affirmative duties either by statutes or decisions. The helpfulness of this annotation can, in part, be measured by the way in which Montana is treated at 1366-67:

has attached, an owner who was not the original promissor, there must also be privity of estate. This is a requirement with which Judge Clark took exception.

As a matter of policy and reason, the requirement seems an anomaly. The requirement of privity is designed to furnish a connecting link between the parties. That is already supplied between the covenantor and the convenantee by the promise itself. The need is to justify the transfer of the right or duty created by the promise not to justify the promise itself. The practical effect of requiring such privity is that there should be a conveyance between covenantor and convenantee at the time of making the covenant.16

What Judge Clark was postulating was that the logical extension of the privity of estate requirement was that no privity of estate could be found with respect to a promise unless that promise was in fact made at a time when a tenurial relationship existed. This particular requirement was the basis for the so-called horizontal privity of estate which is exemplified by the 1871 case of Wheeler v. Schad.17 In Wheeler the burden was unenforceable because the covenant had not been inserted in the deed but had been drawn up six days later between the grantor and grantee. One can only agree with Judge Clark that such a decision surely cannot be justified. California responded to this privity requirement by enacting CAL. CIV. CODE § 1468 (West 1954).18 It is at least arguable that had not the requirement of Wheeler v. Schad been made, this particular section would not have been necessary. This legislative solution gave California courts another problem in Marra v. Aetna Construction Company,19 a case in which the assignee of the grantor tried to enforce building restrictions. In a reverse twist of Wheeler v. Schad, the California Supreme Court refused to enforce the restrictions because they were not agreed upon between landowners, but rather between grantor and grantee, the grantee being the promissor.20 The court

16COVENANTS AND INTEREST RUNNING WITH LAND, supra note 10 at 117.
17Wheeler v. Schad, 7 Nev. 863 (1871).
18This section, which has no counterpart in Montana, provides:
Covenants running with land of both covenantor and convenantee. A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the convenantee, and which is made by the covenantor expressly for his assigns or to the assigns of convenantee, runs with both of such parcels of land.
20CAL. CIV. CODE § 1468 (West 1973 Supp.) was amended in 1968 and 1969 and it now provides:
Covenants running with land of both covenantor and convenantee; successive owners. Each covenant, made by an owner of land with the owner of other land or made by a grantor of land with the grantee of land conveyed, or made by the grantee of land conveyed with the grantor thereof, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the convenantee, runs with both the land owned by or granted to the covenantor and the land owned by or granted to the convenantee and shall, except as provided by Section 1466, or as specifically provided in the instrument creating such covenant, and notwithstanding the provisions of Section 1465, benefit or be binding upon each successive owner, during his ownership, of any portion of such land affected thereby and upon each person having any interest therein derived through any owner thereof, where all of the following requirements are met:
in Marra found that the covenant, if it was to be enforced at all, had to be enforced under Cal. Civ. Code § 1462 (West 1954), the parent of § 58-306, R.C.M. 1947. Since it was determined that the covenant was of no benefit to the land, the court refused to enforce it, giving as one of the reasons the fact that the property and the neighborhood in general had changed substantially since the promise was made. It seems that the court found that the covenant in form was a covenant which ran with the land, but that its enforceability was lost due to changed conditions. In any event, the existence of § 1468 proved fatal to the plaintiff in Marra, and as such, it is another argument against any retention of the requirement of horizontal privity of estate. It has been generally accepted that this particular requirement is now dead, even though it has been incorporated into the Restatement of Property.

If logic dictates that the requirement of privity of estate leads to the decision in Wheeler v. Schad, then logic must either be disregarded or modified when attempting to define privity of estate in some workable fashion. It may well be that the requirement will be relaxed when social policy dictates that a particular promise ought to be performed. If that is the case, the examination as to whether or not privity exists ought to be made with respect to the persons who are before the court pursuant to the enforceability of a given promise. If they are the original promissor and promissee, there is no problem. If they are successors in interest to a promissor and promissee who are also grantor and grantee, then again, even according to the strictest view, there is no

(a) The land of the covenantor which is to be affected by such covenants, and the land of covenantee to be benefited, are particularly described in the instrument containing such covenants;
(b) Such successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee;
(c) Each such act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof;
(d) The instrument containing such covenants is recorded in the office of the recorder of each county in which such land or some part thereof is situated. Where several persons are subject to the burden of any such covenant, it shall be apportioned among them pursuant to Section 1467, except that where only a portion of such land is so affected thereby, such apportionment shall be only among the several owners of such portion. This section shall apply to the mortgagor, trustee or beneficiary of a mortgage or deed of trust upon such land or any part thereof while but only while he, in such capacity, is in possession thereof.

(Note) The decisions actually applying the requirement to defeat a recovery are comparatively few. Covenants and Interest Running with Land, supra note 10 at 116.

The Restatement of Property § 534 (1944) provides that:
The successors in title to land respecting the use of which the owner has made a promise are not bound as promisors upon the promise unless
(a) the transaction of which the promise is a part includes a transfer of an interest either in the land benefited by or in the land burdened by the performance of the promise; or
(b) the promise is made in the adjustment of the mutual relationships arising out of the existence of an easement held by one of the parties to the promise in the land of the other.

For a discussion of the Marra problem and subsequent history of § 1468, see, Note, California's New Legislative Approach to Covenants Running with the Land, 9 Santa Clara Law 285 (1968).
problem. To cover other situations, privity may be examined from another point of view. For example, there is the Massachusetts view holding that privity of estate exists when there is a simultaneous existence of interests in both parties in the same land.\textsuperscript{24} This means that a covenant is enforceable if it is made between the covenantor and covenantee at the time when each holds an interest in the property to which the promise attaches. This rule seems more implicit than explicit in the leading case of \textit{Morse v. Aldrich},\textsuperscript{25} and seems to require the existence of something like an easement before a promise can be enforceable. If there really is an easement, obviously privity of estate exists. Judge Clark has suggested that what the Massachusetts rule does is merely shut out covenants which are really either benefits or burdens held in gross.\textsuperscript{26} If that is true, the Massachusetts rule goes about half way in furthering the policy of striking promises which encumber titles, but, as has been suggested by Professor Powell, can lead to harsh results.\textsuperscript{27} Furthermore, the Massachusetts rule has to be viewed with respect to the fact that there has been in that jurisdiction a surprising development of affirmative or "spurious" easements.\textsuperscript{28}

Another approach to the problem of defining privity is to view it as existing when there has been a succession of interests between the promissor and promissee. Judge Clark took this view to task in \textit{165 Broadway Bldg. v. City Investing Company}:

\begin{quote}
[T]hat the parties to an action to enforce a covenant, if not themselves makers of the contract, must each have succeeded by privity to the estate of one of such makers is good enough sense; it is why we say a covenant runs with such estate. But to go further and require that there must be some such succession between the covenanting parties themselves—that there must have been a grant or conveyance between them at the time of the covenant or possibly some continuing interest of tenure, easement or otherwise—is supported neither by ancient law nor by modern policy.\textsuperscript{29}
\end{quote}

Judge Clark’s view was that privity of estate requires “only that the person presently claiming the benefit or being subjected to the burden, shall be shown to be the successor to the interest of the original person so benefitted or burdened.”\textsuperscript{30} This view was adopted by the Restatement of Property with respect to the running of the benefit of a promise.\textsuperscript{31}

\begin{footnotes}
\item Morse v. Aldrich, 36 Mass. 449 (1837).
\item Covenants and Interest Running with Land, supra note 10 at 134.
\item See, discussion of \textit{Consolidated Ariz. Smelting Co. v. Hitchman}, 212 F. 813 (1st Cir. 1914), a case which refused to enforce a promise to pay a share of the profits of a mining operation until the purchase price of the property had been satisfied on the ground that the promise did not pass to successors of the promissor, in R. Powell, \textit{Real Property}, supra note 24 at 715.
\item Covenants and Interest Running with Land, supra note 10 at 135.
\item 165 Broadway Bldg. v. City Investing Company, 120 F.2d 813, 816-817 (2d Cir. 1941).
\item R. Powell, \textit{Real Property}, supra note 24 at 715.
\item Restatement of Property §§ 547 and 548 (1944). Section 547 provides: "The benefit of a promise respecting the use of land of the beneficiary of the promise and the land only to the one who succeeds to some interest of the beneficiary in the use of the land." For further discussion of this restatement, see collected in R. Powell, \textit{Real Property}, supra note 24 at 715.
\end{footnotes}
The Restatement then took another position with regard to the running of the burden—privity can only be met by either the Massachusetts doctrine of simultaneous interests or the presence of a succession of interests between the promising parties. Judge Clark took vigorous exception to making a distinction between the running of benefits and of burdens.

The statutory rules on the privity requirement in Montana are found in Chapter 3 of Title 58, R.C.M. 1947. Since privity of estate is not expressly defined in this chapter, it becomes necessary to pair the statutory provisions for purposes of deciding whether or not the statutory material even contemplates the requirement. Section 58-304, R.C.M. 1947, for example, states that "certain covenants, contained in grants of estates in real property, are pertinent to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them." Additionally, § 58-306, R.C.M. 1947, which codified the touch or concern requirement from Spencer's Case, refers to covenants as "contained in a grant of an estate in real property." The third section is § 58-309, R.C.M. 1947 which states: "a covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property." It can be argued that § 58-309, R.C.M. 1947 expresses the Montana privity requirement: a covenant binds anyone who acquires land to which a promise is attached. A promise attaches when it is made for the direct benefit of the property or when it comes within § 58-307, R.C.M. 1947. A problem, how-

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in the land respecting the use of which the promise was made." Section 548 provides: "It is not essential to the running of the benefit of a promise respecting the use of land of the promisee or other person entitled to the benefit of the promise that there be any privity between the promisor and the promisee other than that arising out of the promise."

RESTATEMENT OF PROPERTY § 534 (1944) provides that:

The successors in title to land respecting the use of which the owner has made a promise are not bound as promisors upon the promise unless

(a) the transaction of which the promise is a part includes a transfer of an interest either in the land benefited by or in the land burdened by the performance of the promise; or

(b) the promise is made in the adjustment of the mutual relationships arising out of the existence of an easement held by one of the parties to the promise in the land of the other.

After excluding party-wall cases, Professor Powell concludes that the law with regard to this distinction indicates that

[T]here are decisions in twenty-seven jurisdictions which support or tend to support some requirement of privity in the running of burdens, more rigorous than is consistent with Judge Clark's position. In Massachusetts, there is the tight requirement of the simultaneous existence of interests on both parties in the same land. In the four states of New Jersey, New York, Virginia, and West Virginia the requirement connotes a tenurial relation between promisor and promisee. In twenty-two states, the requirement is phrased either in the Massachusetts form, or in terms of a succession in interest between the promisor and promisee. In contrast to these twenty-seven states, which to some degree support the Restatement's insistence that the requirement of privity is not extinct, there are decisions in three states which support, or tend to support, Judge Clark's position. R. POWELL, REAL PROPERTY, supra note 24 at 716.
ever, lies in the fact that both §§ 58-304 and 58-306, R.C.M. 1947 expressly require that a covenant, before it can attach, must be contained in a grant. A strict reading of the statutes would indicate that Montana's concept of privity of estate is as strict as that of *Wheeler v. Schad*. Support for this interpretation can be inferentially gained from the California experiment, discussed above. Since California has a statute identical to § 58-306, R.C.M. 1947, why was it necessary for California to enact additional legislation which expressly provided for privity of estate between adjoining landowners who enter into agreements? The difficulty California has had with that section has already been discussed. One authority has cited a Montana case, *Herigstad v. Hardrock Oil Co.*, for the proposition that no grant is necessary for privity of estate to exist. But it is important to note that this case involved the extraction of a promise in an operating agreement pursuant to a permit to prospect for oil and gas prior to the securing of a lease by the promissee. The court went to great length to point out that a permit for prospecting for oil and gas was a valuable right which took on the character of an interest or an estate in land. Furthermore, the court pointed out that the operating agreement, the document in which the promise had in fact been included, was more than a mere license. In fact, the court labelled the agreement a lease which had the effect of vesting exclusive control of the premises in the grantee. The court did not say that a grant of an estate is necessary to satisfy the privity requirement, but this seems implicit in the finding of the existence of a grant even though the grant was less than a fee. *Herigstad* does not really come to grips with the question whether or not Montana statutes recognize only one kind of privity, or conversely, whether privity may exist where there has been no grant.

**ENFORCEABILITY IN EQUITY**

Since the 1848 case of *Tulk v. Moxhay*, courts have expanded equitable jurisdiction for purposes of enforcing promises without carefully inquiring into the existence of either the privity of estate or the touch or concern requirements. Basic to equitable enforcement of these promises is the principle that courts will enforce promises concerning the use of a piece of land against persons who took with notice of the promise. These promises have been found to be enforceable in many areas, but most particularly in situations in which the land has been a part of a general building scheme. Operative facts which are necessary to justify the finding of a general building development scheme are:

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*CAL. CIV. CODE § 1462 (West 1954).*

*Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute, 30 Corn. L. Q. 1, 32 (1944).*

*Herigstad v. Hardrock Oil Co., 101 Mont. 22, 52 P.2d 171 (1935).*

*Tulk v. Moxhay, 41 Eng. Rep. 1, 143 (1848).*

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An intent on the part of the original grantor to establish a plan must be found from his language and conduct, read against the background of existing circumstances. The area covered by the scheme must be so defined as to be clearly ascertainable. There must be reasonable mutuality of benefit in applying the restriction to the separate parcels within the defined area. The restrictions need not be identical and do not have to apply to every lot in the affected area, but there must be a reasonable uniformity in their applicability.

In these situations, the subsequent purchaser from a common grantor can enforce the restrictions against prior purchasers if the restrictions existed at the time of the prior purchase. The prior purchaser can then enforce restrictions against subsequent purchasers if the building development scheme existed at the time of the prior purchase. The reason for this is often found in the fact that courts find that the existence of the scheme imposes a servitude or easement upon the retained land, allowing successors in interest to the retained land who take with notice of the restriction to be either burdened or benefitted thereby. In some instances, the holder of land so burdened may in fact find himself liable on the promise even though he subsequently parts with control of the land. This question has been answered differently in Montana, however, where by statute it is provided: “No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for breach of the covenant before he acquires the estate, or after he has parted with it or ceased to enjoy its benefits.”

The existence of the remedy of enforcing promises against takers of land with notice of the promise is generally based upon the court’s finding of an equitable servitude. This requires that Tulk v. Moxhay, a case in which a promise to maintain a park was enforced against successors in interest to the original promissor even though the court specifically excluded from its consideration the question as to whether or not the covenant ran with the land, be interpreted as a property rather than a contract theory case. Under the property theory,

Continuing, Professor Powell states:

Some circumstances help to establish the existence of a building development scheme. These include: (1) The fact that the common grantor sells or states his intention to put on the market an entire tract of land; (2) The exhibiting of a map or plat of the entire tract at the time of the sale of one of the parcels of land involved; (3) The actual development of the tract in accordance with the claimed restrictions; and (4) A substantial uniformity in the restrictions imposed in the deeds executed by the common grantor. R. Powell, Real Property, supra note 24 at 726-727. See also, W. BURRY, REAL PROPERTY 104 (3d ed. 1965).
abstain from using the land in a manner inconsistent with the contract, unless he can bring himself within the equitable defense of purchaser without notice.41

This justifies the enforcement of promises which are negative in nature, but it does not provide a justification for the enforcement of affirmative duties. A contract theory could explain the enforcement of affirmative duties through the doctrine of specific performance of contracts; the only way in which a property theory can explain the existence of such an enforcement right is by attaching to the burdened land a real obligation which passes to all subsequent possessors who take with notice. This obligation which attaches is a servitude or "spurious" easement, transformed into a duty when a promissee seeks its enforcement.42 Whether the duty attaches to the land as an equitable servitude by force of a court's decision in enforcing the duty, or whether the duty attaches as an easement by force of the promise itself is an interesting question. That question was raised in Trustees of Columbia College v. Lynch43 which followed Tulk v. Moxhay by about 30 years. The court said:

[A] covenant by the owner, upon a good consideration, to use, or to refrain from using, his premises in a particular manner, for the benefit of premises owned by the covenantor, is, in effect, a grant of an easement, and the right to the enjoyment of it will pass as appurtenant to the premises in respect of which it was created."44

THE PROMISE AS AN EASEMENT

The distinction between negative easements and equitable servitudes may be more conceptual than real. If, as in Columbia College, a promise is viewed as a grant of an easement, whether that easement be a grant of a right to use property or merely a grant of a right against another piece of property that it be used or not be used in a certain way, then there is no question but what there has come into existence by virtue of the promise the dominant and servient tenements to which both the benefit and the burden may attach as if a negative easement were in fact created.

It can be argued that since easements are interests in land, they can only be created by some form of a grant in writing.45 Any strict requirement of a writing to create an easement, however, must conflict with common law tradition. Easements by necessity, for example, have always been allowed at common law. An easement by necessity is found to exist where there was originally unity of ownership and a real necessity exists to use the servient parcel for the benefit of the dominant

42Id. at 977.
43Trustees at Columbia College v. Lynch, 70 N.Y. 440 (1877).
44Id. at 447.
45This seems implicit in Simonson v. MacDonald, 181 Mont. 494, 311 P.2d 982 (1957).
parcel. The usual argument in cases involving this question revolve around the degree of necessity. Additionally, there are easements by implication. Often easements by necessity and easements by implication are lumped together, creating problems by failing sufficiently to take into account the unique function of an easement by necessity. One of these problems was highlighted in the Montana case of Simonson v. MacDonald. By strictly interpreting § 67-1616, R.C.M. 1947, the court held that there can be no implied easements in Montana. The effect of the decision in that case, however, was to refuse a request for an easement by necessity. Had the distinction between the two easements been recognized, the problem of implied easements could have been avoided.

The holding in Simonson was later reconsidered in Thisted v. Country Club Tower Corporation. This case concerned the classic negative easement situation. A builder who was constructing a high-rise building pursuant to a general building development scheme sold units to early purchasers who took pursuant to a contract which contained promises that the building was to be devoted to residential apartments. Later the builder decided to change his mind and convert some of the units into commercial units. The question was whether the prior purchasers could enforce the promises against the successor to the builder. Should the promises be enforced as covenants that run with the land? Should the promises be viewed as implied negative easements which attach to the land that the seller retained? Should equity enforce a promise against a successor who took with notice of the restriction and thereby impose

*R. Powell, Real Property, supra note 24 at 545.

The Restatement of Property § 476 (1944) takes this position by providing:

Factors Determining Implication of Easements. In determining whether the circumstances under which a conveyance of land is made imply an easement, the following factors are important:

(a) whether the claimant is the conveyor or the conveyee,

(b) the terms of the conveyance,

(c) the consideration given for it,

(d) whether the claim is made against a simultaneous conveyee,

(e) the extent of necessity of the easement to the claimant,

(f) whether reciprocal benefits result to the conveyor and the conveyee,

(g) the manner in which the land was used prior to its conveyance, and

(h) the extent to which the manner of prior use was or might have been known to the parties.

This section provides:

From the use of the word 'grant' in any conveyance by which an estate of inheritance or fee simple or possessory title is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.

2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

RESTRICTIVE COVENANTS

The promise was enforced, but the court used language which makes it difficult accurately to determine which theory was utilized. It also overruled *Simonson* insofar as that case might be inconsistent with *Thisted*'s holding. It may well be that the *Thisted* decision is not at all inconsistent with *Simonson*. If the *Thisted* case is viewed as a case in which the prior purchaser from a common grantor is merely seeking to enforce a restriction against a subsequent purchaser who took with notice, then he may do so by showing that the restriction existed in the general building development scheme at the time that he took his property interest. Such a restriction can be enforced either on the basis of an implied negative easement or on the basis of an equitable servitude under the theory of *Tulk v. Moxhay*. If the restriction is a negative easement, it can be raised by implication since the grantor has made a conveyance extracting a promise from his grantee, a promise which is for purposes of implementing the general building scheme. The same promise is then levied against the land retained by the grantor, and becomes enforceable against successors in interest to the grantor. As the grantor parts with his interest in the property, usually to several successors, he ceases to be liable on it pursuant to §§ 58-309 and 58-310, R.C.M. 1947, and the burden becomes apportioned among the persons who acquire his interest.

NEGATIVE EASEMENTS OR EQUITABLE SERVITUDES: EITHER/OR?

If the negative easement theory is the theory of *Thisted*, it is extremely difficult to find any real relationship between it and the fact situation that was posed in *Simonson*. Easements by necessity are different from reciprocal negative easements, whether those negative easements are imposed by grant or whether they are raised by implication from a grant. But what of the difference between implied easements and equitable servitudes? As noted previously, courts have on occasion found it relatively simple to convert a promise into a grant of an easement for purposes of enforcing what would otherwise be considered an equitable servitude. There is, however, a very real difference between the two, even though once the promise is enforced, the practical effect is to obliterate the distinctions. It is in the enforcement of the promise where the difference becomes clear. If the promise is actually an easement, whether that easement is termed one which has

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50 See, Note, "Reciprocal Negative Easement" Implied from Contract, Deed, and General Building Plan, 27 Mont. L. Rev. 91 (1965). See also, Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937), where the court found that the presence of a restrictive covenant created a negative easement.

51 Section 58-311, R.C.M. 1947, provides:

Where several persons, holding by several titles, are subject to the burden or entitled to the benefits of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity.
been raised by grant, by implication, or in some other fashion, then there is ready enforcement of it in courts of law as any interest in property is enforced. If, however, the promise is viewed as a possible equitable servitude, a court sitting in equity must find it enforceable. This means that the usual requirements for equity jurisdiction must be met. Furthermore, the equitable defenses of taker without notice, laches, unclean hands, etc. become operative in enforcing equitable servitudes. Equitable servitudes are imposed after the fact; it is by the finding of the enforcement of the promise that the equitable servitude becomes enforceable. The easement was always enforceable—the court merely provides a legal remedy to enforce a right held by one person against someone else who holds a corresponding duty to him.

Whether a covenant is an easement by virtue of its own impact or by virtue of some later judicial decree of a court sitting in equity is of little importance once its enforcement has in fact been granted. It is, however, of importance to developers who are concerned with the orderly and predictable development of property. When a typical developer carves out a piece of ground upon which he visualizes some sort of community emerging in the future, his concern must center around the certainty with which his restrictions will be enforced in the future. It is a relatively simple process for him to insert within his deeds restrictive covenants which are couched in proper form; that is, form which recites the necessary intention to run with the land as well as form which raises the promise so that it will meet the test of touch or concern. Our recording statutes offer him an opportunity to insure that his promises are on record notice for the entire world. Should he run into financial difficulty before the development is completed, then he is faced with the problem of the possible implication of easements on his retained property. That is one of the risks that he assumes, and it is implicit in the Thisted case.

What happens, though, when the developer has conveyed all of his interest in the tract and he seeks to enforce promises within his conveyances, promises which are being broken by his grantees but which are not being enforced by any of the other grantees? Normally, such a grantor is not entitled to enforce the covenant because to do so would be to lend enforceability to covenants in gross. There is, however, the case of *VanSandt v. Rose*, in which a grantor was allowed to enforce a promise against his grantee even though the grantor had retained ownership in no surrounding land. Admittedly, this is an extreme position, but viewed with *Neponsit* it can no longer be taken as axiomatic that covenants in gross are unenforceable in the United States. A covenant which raised an affirmative duty was enforced in *Neponsit*

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5 The English view at least, has been that benefits may not be held in gross. *Land Ownership and Use*, supra note 9 at 481.

by a property owners' association, a corporate body which had been organized to receive money assessed against the property owners, even though this association had at some prior time conveyed away the property for which the assessments had been made. The streets, parks, playgrounds, and beaches had been dedicated to the public. The court sought to compare its holding with that in *Columbia College*, because in that decision it was held that there was no need for privity of estate to exist. It is to be remembered, however, that *Columbia College* found the existence of an equitable servitude which had been formed by an agreement entered into between adjoining property owners. No equitable servitude was found in *Neponsit*. Arguably, the case does support the proposition that covenants in gross may be enforced.  

A developer's best prospect is probably to enforce the promise as an equitable servitude. Assuming he can overcome the obstacles of equity jurisdiction, he need only show that the promise was one with which the particular defendant took with notice. As noted previously, a promise may be converted into a grant of a servitude. Enforcement of a covenant in its pure form still requires privity of estate as well as a purpose that touches or concerns the land. True, the touch and concern requirement has been diluted to a point where it is arguable whether it still exists. Furthermore, whether to continue the privity requirement, particularly as it relates to burdens, may in the words of Professor Powell depend

... on the decision of the question of social value. If one believes the burdens to be generally objectionable, since they impose restrictions on persons who never made a promise, and since they restrict the free use and alienability of land, the continuance of a prerequisite of privity will lessen their importance. If, on the other hand, one believes that the burdens generally serve socially useful ends, and aid rather than hinder the alienability of land, the result will be a readiness to minimize or to emasculate the prerequisite of privity, so that more can run as to burden.  

In reality, it is probably better to look at the promise that is sought to be enforced from the point of view of whether the particular promise does in fact aid in the orderly development of land. In the public sector, for example, the general zoning power is circumscribed within the parameters of the police power. To promote public health, safety, welfare, morals and convenience is one way of saying that the state may not exceed certain bounds when it exercises its power for purposes of regulating the use of private property. Granted these limits are vague, but the concept of police power has provided a workable framework within which a balance can be struck between the concept of private property and the interest of the state in regulating its use. Certainly no one will argue that simply because he owns a piece of property, he has a vested interest in a given regulation at a given

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44*Land Ownership and Use, supra note 9 at 482.

point in time. The state may repeal, modify, or in any other way alter its regulations so long as it stays within the general limits of the police power. The owner assumes a risk with respect to what the state might or might not do at some point in the future. Another example, admittedly tangential, can be found in the body of negligence law. Since it is unthinkable to make a person liable for all the consequences of all his acts or failures to act, the law has imposed limits. In general, the reasonable foreseeability test, both as it applies to risk and causation, is a device for the purpose of circumscribing the ambit of liability. While on the one hand there is the social policy of making victims whole, there is also an interest in guaranteeing that persons have a reasonable degree of freedom of movement without fear of liability. Can it be said, then, that just as the police power limits the ambit of authority in the zoning area, just as the reasonable foreseeability test limits the ambit of liability in negligence law, the privity of estate and the touch or concern requirements act to limit the liability of persons who took land subject to promises which they never made? If this is the case, then, the importance of providing delineating elements in some absolute sense diminishes. The court must first look to the purpose of the promise and its reasonable degree of effectiveness in accomplishing that purpose. It must weigh that promise against the chance that it will impose an unreasonable burden upon the titles, that it will impose an unreasonable restraint upon alienation, and that it will impose an unfair burden upon persons who took subject to, but who never made the promise in the first instance. The court must balance the conflicting social values, come to a conclusion, and then, if it chooses, rationalize its conclusion in traditional, legal terms. There is certainly nothing novel about this approach.

WHAT'S A DEVELOPER TO DO?

The developer, however, must have a reasonable degree of security that his promises will in fact be enforced in the future. If he chooses to rely upon the state to regulate its development through the exercise of the zoning power, he runs the risk that any commitment to democracy involves. By relying upon covenants, he must be aware of the dangers inherent in their future enforceability. Additionally, there is the possibility that covenants may cease to be enforceable because of the doctrine of changed conditions, or because of some kind of governmental action. Even if the covenant gives rise to an easement, there is no guarantee that the easement will last forever. Easements can

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64 See, for example, Hirsch v. Hancock, 173 Cal. App. 2d 745, 343 P.2d 959 (1959).
65 An inconsistent zoning ordinance nullifying a restrictive covenant is hard to imagine since the ordinance usually allows uses which the covenant does not. Obviously, however, a more restrictive ordinance would take precedence over a less restrictive covenant. See, Kosel v. Stone, 146 Mont. 218, 404 P.2d 894 (1965); R. Powell, Real
terminate. Their termination can result from some express agreement between the parties at some future date, a contingency which the developer will find difficult to prevent, and they can terminate from abandonment and misuse as well.\(^5\)\(^\text{8}\)

The usual response is for a developer to set forth clearly his restrictive covenants in an agreement which becomes part of the deed. Some type of homeowners’ association is then organized which is empowered to establish other reasonable rules and regulations as needs may require. The developer may or may not remain active in such an association or may or may not retain control over some of the property within the development. If he does, he remains in a position of being able to enforce the covenants. If he does not, he is by act of faith assuming that his successors in interest will do the enforcing. Some developers, however, have gone one step further. They have included in their scheme of restrictive covenants a provision for enforcement by self-help. Usually the privilege of exercising self-help to correct a violation of the restrictive covenants is accompanied with a notice requirement. Considering the reluctance the courts have had recently with respect to their willingness to accept these provisions as permissible remedies, these attempts at guaranteed enforcement must be looked at with some suspicion.\(^5\)\(^9\)

\(^{5\text{8}}\)Crimmins v. Gould, 149 Cal. App.2d 666, 308 P.2d 786 (1957), was a case in which a court found that misuse of an easement constituted an extinguishment. Professor Powell suggests that termination is unnecessary since the servient tenant can protect himself by self-help, a trespass action, or injunctive relief. R. Powell, Real Property, \(\text{supra}\) note 24 at 576. Professor Tiffany disagrees. H. Tiffany, Real Property, \(\text{supra}\) note 24 at 350-351.

\(^{5\text{9}}\)An example of this type of private remedy is to be found in Protective Covenants of Big Sky of Montana, Inc.:

A. In the event of any violation or threatened violation of these covenants, any owner of real property in the premises, or the Committee, may enforce these covenants by legal proceedings in a court of law or equity, including the seeking of injunctive relief and damages. In association with such legal proceedings or as a separate remedy, such legal proceedings or as a separate remedy, such owner or the Committee may enter upon the property in question and remove, remedy or abate the violation or threatened violation after first having given proper notice and a reasonable opportunity for the violator to take action himself to comply with these covenants as set forth below.

B. Notice as required in paragraph 14-A above, shall be in writing and shall be served on the person or entity concerned and shall specify the violation or threatened violation, identify the property, demand compliance with the terms and conditions of these covenants and state the action which will be taken under paragraph 14-A above if the violation or threatened violation is not abated, remedied or satisfied. If such notice cannot be personally served after a reasonable effort to locate the person or entity to be served, service may be had by posting a copy of such notice at a conspicuous place on the property which is the subject of such violation and mailing a copy of the notice by Certified Mail, return receipt requested, to the last known address or address of record, of the violator. Such notice must further provide for a period of 15 days from the date of personal service of such notice, or 30 days from the date of posting and mailing of the same, within which compliance can be had with these covenants before any self-help, abatement, entry or commencement of litigation as provided in 14-A above can be commenced.

C. No owner or member of the Committee shall be liable to any person or entity for any entry, self-help or abatement of a violation of threatened violation of these covenants and all owners or lessees of real property shall be deemed to have waived any and all rights or claims to or for damages for any loss or injury resulting from action taken to abate, remedy or satisfy any violation or
Nonetheless, it is the suspicion of this writer that they are being widely employed. Not only that, examples can be found where the self-help remedy is available for even minor infractions of rules of homeowners’ associations. One wonders what a court will do if it is faced with the problem of a person who reenters his offending neighbor’s property while that neighbor is away on an extended vacation and repaints the house, billing him for the cost of the job. Notice may have been provided by publication, and the neighbor returns to find a bill for a newly painted house. Will the existence of the self-help remedy in the restrictive covenants protect this enforcer? This is an interesting question which, in not quite so extreme a form as this illustration, might well arise in the not-too-distant future.60

There is no reason to suppose that the public sector has a monopoly on wisdom when it comes to exercising land use controls. Indeed, a very valid argument can be made for the case that Euclidian-type zoning is responsible for the sterile nature of our homogeneous suburban tracts. Not only that, public officials are hemmed in by police power standards as to the nature of the controls that they may promulgate. Zoning for aesthetic reasons has not yet gained widespread acceptance. There is furthermore a reluctance to allow flexibility within zoning districts particularly concerning the fact that most zoning statutes still have uniformity requirements built into them.61 A developer interested in some kind of planned unit development or a mixture of various uses in some orderly fashion would find it difficult to fit his plan within conventional zoning enabling statutes. Variances are possible, indeed, often very easy to secure so long as they do not appear to be examples

threatened violation of these covenants. Exception to the above shall exist for loss, injury or damage for intentionally wrongful acts.

D. Actual costs, expenses and reasonable attorneys’ fees connected with correcting, remedying, abating, preventing or removing any violation or threatened violation of these covenants incurred either through litigation, entry or self-help shall constitute a claim by the owner or the Committee initiating such action against the owner of the property which is the subject of such violation or threatened violation. Such claim shall not, however, exceed Five Thousand Dollars ($5,000.00) for any one claim and shall be enforceable through appropriate court action. The owner or the Committee making such claim may file a lien against the subject property in the amount of and for the collection of the claim by filing a verified statement of the lien with the office of the Clerk and Recorder, Gallatin County, Montana. Such lien statement must set forth the names of the claimant, and the owner of record of the property against which the lien is claimed, a description of the property, the amount of the claim, the date of the claim and a brief statement of the manner in which the costs and expenses constituting the claim were incurred. Once filed, the lien shall remain of record as a claim against the property until paid in full or foreclosed in the manner otherwise provided by law, subject to rights of redemption.

For examples of the courts’ reluctance to sanction self-help, at least in the landlord-tenant setting, see, Jordan v. Talbot, 55 Cal.2d 507, 361 P.2d 20 (1961), and Brown v. Grenz, 127 Mont. 49, 257 P.2d 246 (1953). A contrasting note is found in LAND OWNERSHIP AND USE, supra note 9 at 359-360.


Sections 11-2702 and 16-4703, R.C.M. 1947 are examples of typical uniformity requirements. 
of spot zoning or contract zoning. If there is to be some reasonable degree of certainty with respect to architectural controls, aesthetic considerations, and flexibility of use, the developer is likely to place substantial reliance upon the use of the restrictive covenant. He might like to delegate the authority of enforcing these covenants to the public sector, but in the final analysis the enforcement must depend upon either him or his successors assuming the initiative and making certain that the promises are enforced either privately or through the courts. Courts in their desire to preserve free alienability of land must carefully scrutinize these covenants. Yet, it is to be hoped that they will not exalt technical form over substance, that they will not give renewed emphasis to ancient rules of privity, that they will not become ensnarled in semantic gymnastics over the niceties of the touch or concern requirement. The law has developed in such a way as to permit courts wide latitude in determining which covenants are enforceable. Hopefully, this power will be used in such a way that the private sector in the exercise of its own particular kind of wisdom will continue to have a voice in controlling the manner in which land is to be used.

Interestingly enough, this can be accomplished indirectly in Montana. Title 16, Chapter 41, R.C.M. 1947 empowers county commissioners to zone in rural areas, as a result of which restrictive covenants are often codified. Enforcement is by injunctive relief instituted by the county attorney.