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BUILDING RESTRICTIONS — CONTRACTS OR SERVITUDES

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INTRODUCTION

Before the universe was created, there was chaos. Then an ordered universe sprang into being. In time, private restrictions on land use began to appear. In 1926, zoning became valid,[1] and chaos reappeared. For this author, the problems of chaos in the law of zoning must await another day. Immediately at hand is the chaos that continues to pervade the area of private land use restrictions.

The columnist Westbrook Pegler characterized the twenties as "the era of wonderful nonsense." This phrase is a particularly apt characterization of the much earlier era of covenants run-

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1. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Consider, for example, the situation where a zoning ordinance forbids residential uses in commercial and industrial zones, while an earlier recorded private deed restriction permits only residential uses. *See, e.g.*, Grubel v. MacLaughlin, 286 F. Supp. 24 (D. V.I. 1968); Key v. McCabe, 54 Cal. 3d 736, 8 Cal. Rptr. 425 (1960); 1.77 Acres of Land v. State, 241 A.2d 513 (Del. 1968); Blakely v. Gorin, 365 Mass. 590, 313 N.E.2d 903 (1976). Many decisions continue to announce the doctrine that a city is powerless to adopt zoning that abrogates prior private building restrictions. *E.g.*, Ridge Park Home Owners v. Pena, 88 N. M. 563, 544 P.2d 278 (1975); City of Gatesville v. Powell, 500 S.W.2d 581 (Tex. Civ. App. 1973). In stating the rule so broadly, courts tend to overlook the fact that zoning has changed character recently. Early zoning ordinances were non-exclusive. Thus, homes were permitted in industrial zones. Today's exclusive zoning ordinances forbid residential construction in industrial zones. People v. Morton Groves, 11 Ill.2d 183, 157 N.E.2d 33 (1959); Roney v. Bd. of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (1956); Lamb v. City of Monroe, 358 Mich. 136, 99 N.W.2d 566 (1959). Where there is this confrontation between zoning and prior land restrictions, the zoning must prevail. Village of Euclid v. Ambler Realty Co., *supra*, established the principle that reasonable zoning prevails over prior property rights, including fee simple titles. Obviously, the same principle is applicable to lesser property rights, such as equitable servitudes created by a general plan of building restrictions. 2 AMERICAN LAW OF PROPERTY § 9.40 (A.J. Casner ed. 1952). The literature is extensive. *See, e.g.*, Berger, *Conflict Between Zoning Ordinances and Restrictive Convenants*, 43 NEB. L. REV. 449 (1964); Comment, *Legal and Policy Conflicts: Between Deed Covenants and Subsequently Enacted Zoning Ordinances*, 24 VAND. L. REV. 1031 (1971); Comment, *The Effect of Private Restrictive Covenants on Exercise of the Public Powers of Zoning and Eminent Domain*, 1963 WISC. L. REV. 321.

ning with the land at law. An exceptionally revolting but highly relevant exhibit is *Wheeler v. Schad*.[2] Today when one observes, in this context, that "in the beginning was the word," one usually means the word of *Tulk v. Moxhay*.[3] Equity enters the scene, and glimpses of a rational order of private land use restrictions begin to appear.

It would be too much to hope that *Tulk's* new concept of a general plan of building restrictions enforceable in equity against purchasers with notice would lead the profession out of the thicket of conceptual riddles that antedated *Tulk*.[4] After all, it is an article of faith in our profession that every rule deserves its own pigeon hole. If the facts don't fit, that's too bad for the facts. They must be pounded into the shape and size of *some* pigeon hole. Jerome Frank liked to refer to this as the phonographic theory of the law. This theory is that all the law that exists or ever will exist is on phonograph records, and a lawyer's task is simply to find the right record. Under the rules, a lawyer must wait until he is elected or appointed to the judiciary. Then he gets to play the records.[5] The phonographic theory of the law is exemplified in the law relating to the practice of a subdivider using deeds to create restrictive covenants. From this detestable practice come most of the conceptual problems of building restrictions. Why use deeds to create restrictions? That's the way it's always been done. The law is on the phonograph records. It's

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2. 7 Nev. 204 (1871) (where the parties neglected to insert the covenant in their deed of conveyance and drew it up six days later after discovering their oversight, the court held that it was unenforceable because at the time of making the covenant, there was no "privity of estate" between the covenanter and the covenantee).

3. 2 Phil. 774, 41 Eng. Rep. 1143, 1144 (1848) ("[t]he question does not depend upon whether the covenant runs with the land . . .; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased").

4. *See, e.g.*, Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 250, 15 N.E.2d 793, 795 (1938). The confusion between enforcement at law and in equity is evident. This case exemplifies the concern of some post-*Tulk* courts with the requirements of covenants running with the land at law. In addressing the issue of whether plaintiff could enforce a covenant, the court set out what it called the "age-old essentials of a real covenant:"

> 1. It must appear that grantor and grantee intended that the covenant should run with the land;
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> 2. It must appear that the covenant is one "touching on" or "concerning" the land with which it runs;
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> 3. It must appear that there is privity of estate "between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant."

Id. at 250.

5. J. FRANK, LAW AND THE MODERN MIND 418 (1930).

much easier than thinking. This practice opens up a Pandora's box. The possibilities for mischief are endless. The subdivider might insert the covenants in some deeds, but not in others. The covenants might lack uniformity. The subdivider might tire of trying to sell lots to individual buyers and, instead, sell all the remaining lots to a third party by a deed containing no covenants. Again, if we treat the general plan as being created by uniform deeds, how fares the first purchaser, who bought when there was only one deed, namely his deed?[6]

To begin, there are at least two theories as to the nature of enforcement rights where a general plan of private building restrictions exists. In one view, the restrictive coveant is nothing but a contract, relating to the *use* of land, and equity is merely granting specific performance of that contract. In the other view, the general plan creates equitable servitudes, similar to easements, and these are interests in the land itself. In comparing the two theories, the soundness of the equitable servitudes theory becomes apparent. Let us begin by looking at a number of the problems created by the contracts theory.

THE CONTRACTS THEORY

Recording Problems

If the restrictive covenant is a mere contract, it may not be entitled to recording.[7] A right that is not entitled to recording is a precarious right, since all agree that restrictive covenants can only be enforced against those who acquire their land with notice of the restrictive covenant.[8] Therefore, if the contract cannot be recorded, the purchaser of that property will not have received adequate notice and the contractual right will not be enforceable.

Suppose, however, we regard this particular right as more than a mere contract right. It could be regarded as a contract with the first purchaser to create equitable servitudes good

6. Many of the conceptual difficulties which arise in the field of private restrictions on land use are discussed in other texts and articles and therefore need not be discussed at length here. *See, e.g.*, 2 AMERICAN LAW OF PROPERTY §§ 9.24-9.40 (A.J. Casner ed. 1952); Reno, *The Enforcement of Equitable Servitudes in Land* (pts. 1-2), 28 VA. L. REV. 951, 1067 (1942).

7. Most recording laws are of ancient vintage. Often they speak of "conveyances" as being the only recordable documents. *E.g.*, MASS. GEN. LAWS ANN. ch. 183, § 4 (1973). Of course, the courts have turned handsprings to broaden this archaic expression. The results have been uneven. *See, e.g.*, 66 AM. JUR. 2d *Record and Recording Laws* §§ 54, 105, 123 (1973); 6 POWELL REAL PROPERTY § 914 (1977).

8. Indeed, the philosophy of Tulk v. Moxhay, 2 Phil. 774, 41 Eng. Rep. 1143 (1848), is that a person who takes with notice of a restriction cannot in equity and good conscience be permitted to violate that restriction.

against all lot purchasers and thus, all restrictions would become entitled to recording, just as a contract for the sale of land is entitled to recording in most states. It would be treated as a "conveyance." This is a sneaky way of creeping into the other guy's pigeon hole.

Implied Assignment Theory

But if these restrictive covenants are basically contracts, and conceding, for the sake of argument that each original grantee from the subdivider automatically acquires a right of specific performance, what about the grantee of the first purchaser? What about later purchasers? How do the contract benefits of the restrictive covenant pass from one landowner to another? Another concept must be invented. Under this concept, each deed is regarded as an implied assignment of the contract rights of the grantor.[9] The doctrine that contract rights are capable of *implied* assignment with the benefited land is an innovation.[10] In addition it is certainly an oddity. An assignment of a chose in action transfers an in personam right to bring an action at law. By the contract theory, an implied assignment by deed transfers a right to sue *in equity* to enjoin a breach of the restrictive covenant. We are definitely now in the midst of a bit of a puzzle.

Pursuing the implied assignment theory we encounter other problems. There are decisions, all questionable, holding that an assignee of a contract cannot obtain specific performance unless, by the assignment, he personally assumes all obligations of his assignor. Absent this, the party with whom the assignor originally contracted would not have the same rights against the assignee as he had against the assignor; mutuality of remedy therefore, would be lacking.[11] Of course, the notion that mutual-

9. Reno, *The Enforcement of Equitable Servitudes in Land* (pt. 2), 28 VA. L. REV. 1067, 1068 (1942). Under the contract theory, the rights of the promisee are said to be impliedly assigned along with the transfer of the benefited land.

10. *Id.* Professor Reno states that it is an innovation that should not be extended in the absence of evidence of such an intention on the part of the parties to the contract.

11. *E.g.*, Lunt v. Lorseheider, 285 Ill. 589, 121 N.E. 237, 239 (1918) (where assignees of an executory contract for the sale of property did not assume any of the obligations of such contract, they were not bound to perform, and consequently could not bring suit for specific performance against the original parties to the contract for exchange). *Cf.* Lewis v. McCreedy, 378 Ill. 264, 38 N.E.2d 170 (1941) (assignee of the purchaser's interest in a contract for sale of realty would not be denied specific performance of the contract on the grounds that she had not assumed all of the obligations of the original contract and hence, a lack of mutuality where the assignee made a tender of the full amount due upon the contract during the time the contract was effective between the original parties).

ity of remedy must be present is dying. But it is entitled to a passing glance before final interment.

In contract theory, an assignee who claims the benefit of an assignment ought to be able to establish that, at the time of the assignment, he had knowledge of the benefits of the implied assignment.[12] Is the grantee in a deed of restricted land truly aware that he is an implied assignee? Certainly doubts exist.

Under the contract theory, doubts inevitably arise as to the identity of those who are to be regarded as implied assignees of the benefit of the restrictive covenant. A grantee in a deed offers no great problem, assuming he acquired title with knowledge of the assignment implied in the deed. But how about a party having an interest less than the fee simple title, such as a sublessee? The doctrine of implied assignment of contract rights is apparently limited to transfers by the covenantee of an estate sufficient to create privity of estate. Thus, the sublessee of a covenantee can acquire no rights in his sublessor's covenants.[13] No solution to this problem has been suggested.

Other Conceptual Problems

There is also the problem of how the *burden* of the contract is fastened upon subsequent purchasers of lots in the restricted subdivision. In contract theory, rights are assignable. Liabilities are not assignable. There is a minority view that an assignee acquires, along with the rights assigned, the liabilities of the assignor.[14] Oddly, this view is never mentioned in the contract theory cases, possibly because it relates basically to *in personam* liability rather than *in rem* liability.

Then there is the problem of the Statute of Frauds. Looking at the *benefits* side of the contract and treating the early deeds as contracts to impose equitable servitudes does not escape the requirement that contracts creating an interest in land and contracts not enforceable within a year must be evidenced by a memorandum in writing signed by the party sought to be charged. Plainly, such a memorandum is never present in the

12. 2 AMERICAN LAW OF PROPERTY § 9.29 (A.J. Casner ed. 1952); Reno, *The Enforcement of Equitable Servitudes in Land* (pt. 2), 28 VA. L. REV. 1067, 1077 (1942).

13. Reno, *The Enforcement of Equitable Servitudes in Land* (pt. 2), 28 VA. L. REV. 1067, 1068 (1942). Since the sublease cannot pass privity of estate to the subtenant, the implied assignment of contract rights would stop with the sublessor.

14. *See, e.g.*, Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973) (assignee under a general assignment of an executory, bilateral contract, in the absence of circumstances showing a contrary intention, becomes the delegatee of his assignor's duties and impliedly promises his assignor that he will perform such duties).

restrictive covenant cases. The doctrine of part performance as taking a case out of the statute can be stretched to include acts done in reliance on oral agreements to impose uniform restrictive covenants where refusal to enforce will lead to irreparable injury.[15] The conceptual Leaning Tower of Pisa is now acquiring a truly dangerous list. Never mind. More is coming.

Looking again at the *burden* side of the restrictive covenant, we find no memorandum signed by the party to be charged, the grantees in the deeds containing the restrictive covenants. The contract theory resorts to another real property exception. Acceptance of the deed can be regarded as a promise by the grantee to be bound by the covenants.[16] The acceptance of the deed by the grantee amounts to an adoption of the signature of the grantor as that of the grantee![17] True, this is another exception under the Statute of Frauds. But by this time the contract theory has been so riddled with real property exceptions that it is hardly recognizable as a contract theory. One more exception will do no great harm.

There remains the question of identifying the parties bound by the restrictive covenant under the contract theory. This is solved by implying a duty against the community not to interfere with performance of the contract. "It is the breach of this duty, by acquiring possession of the land with notice and thereafter doing or omitting something contrary to the agreement, that creates a secondary right *in personam* against the possessor of the land."[18] If you are getting the feeling that all this is a mare's nest of conceptual nonsense, you could be right.

Under the contract theory, it has been held that even if the character of the neighborhood has so changed that equity will decline to enforce the restrictive covenant by injunction, there is a residual contract personal liability resting on each lot owner that renders title unmarketable.[19] There is simply no end to the

15. Some states have extended the doctrine of part performance this far. 2 AMERICAN LAW OF PROPERTY § 9.25 (A.J. Casner ed. 1952).

16. *Id.*

17. *Id.*

18. Reno, *The Enforcement of Equitable Servitudes in Land* (pt. 1), 28 VA. L. REV. 951, 974 (1942).

19. Bull v. Burton, 227 N.Y. 101, 124 N.E. 111 (1919). The *Bull* court dealt with the question of whether the restrictions included in a deed to a predecessor in title of the seller of property constituted an encumbrance which would justify the purchaser's refusal to carry out the contract to purchase. The court found that the restriction constituted an encumbrance and that since the purchaser would be subject to an action at law for damages if he violated the encumbrance, it would not compel specific performance. Elsewhere courts will not enforce restrictions on land use after their purpose has been achieved. *E.g.*, Independent Congregational Soc'y v. Davenport, 381 A.2d 1137 (Me. 1978); Annot., 4 A.L.R.2d 1111 (1949) (where enforcement

nonsense that courts can invent. Also, it should not be forgotten that the advocates of this view selected it as against the equitable servitudes doctrine that regards the restrictive covenant as creating an interest in land.

EQUITABLE SERVITUDES THEORY

In General

The contracts-specific performance theory of restrictive covenants, the minority view just discussed, has some distinguished supporters.[20] In contrast, the majority view is that a general plan of building restrictions creates equitable servitudes in the nature of easements, the benefit and burden running with each restricted lot as naturally as easements appurtenant run with the land. Indeed, equitable servitudes have been analogized to easements.[21] Likewise the equitable servitudes theory has formidable advocates.[22] As will be seen, the equitable servitudes theory is simple and practical. The doctrine of equitable servitudes is one that the courts themselves have molded from typical considerations of fairness and justice.[23] By using this doctrine, virtually all the pitfalls of the contracts theory can be avoided.

Creation of restrictions by a plat of the subdivision is the simplest form of implementing the equitable servitudes theory. The scheme of restrictions is included in the recorded plat of the subdivision. The entire scheme of restrictions appears on the plat, usually preceded by some phrase such as: "All lots, parts of lots, or other areas included in this subdivision are subject to the following restrictions."

This method has the obvious effect of explicitly creating a general plan. That notion is clearly expressed. It cannot be mis-

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would be pointless). The rule for covenants is the same as the rule regarding conditions. Barnett v. County of Washoe, 86 Nev. 730, 476 P.2d 8 (1970). Restrictions are limited in duration despite language like "forever." Ferguson v. Zion Evangelical Lutheran Church, 200 Okla. 41, 190 P.2d 1019 (1948); Edney v. Powers, 224 N.C. 441, 31 S.E.2d 372 (1944); Comment, *Duration of Restrictive Covenants*, 1 DRAKE L. REV. 14 (1951).

20. Ames, *Specific Performance for and Against Strangers to the Contract*, 17 HARV. L. REV. 174 (1904); Giddings, *Restrictions upon the Use of Land*, 5 HARV. L. REV. 274 (1892); Stone, *Equitable Rights and Liabilities of Strangers to a Contract* (pt. 2) 19 COLUM. L. REV. 177 (1919); Stone, *Equitable Rights and Liabilities of Strangers to the Contract* (pt. 1), 18 COLUM. L. REV. 291 (1918).

21. *See* cases cited in 26 C.J.S. *Deeds* § 167 at 1141 n.97 (1956).

22. C. CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 174 (2d ed. 1947); Pound, *The Progress of the Law 1918-1919*, 33 HARV. L. REV. 813 (1919).

23. BEUSCHER, WRIGHT & GITELMAN, LAND USE 138 (1976).

understood. The reference to "other areas" includes streets that might later be vacated. Also, the plat has a double operation. Since it covers the entire subdivision, it is apparent that the plan of restrictions is a general plan.[24] Since the plat is a recordable instrument, it imparts constructive notice of the restrictions to all persons subsequently acquiring an interest in the platted land.[25] Every deed describing a lot as falling in a recorded plat automatically incorporates the plat by reference. This is simple hornbook law.

General Plan—Declaration of Restrictions

All the lettering on a subdivision plat is done by the surveyor who surveyed the land. However, where a scheme of restrictions is lengthy, as is a common occurrence, it is impractical to put all this lettering on the face of the plat. Rather, the plat bears a legend to the effect that all the land in the subdivision is subject to restrictions set forth in a "Declaration of Restrictions recorded contemporaneously herewith." The *declaration of restrictions* is typed, identified as the Declaration to which the plat refers, signed and acknowledged by the landowner, and handed to the recorder's filing clerk simultaneously with the plat. The validity of this arrangement rests on the universally accepted recording rule that one recorded instrument may refer to and incorporate by reference another instrument recorded in the same office.[26]

Careful lawyers, nevertheless, include in the subdivider's first deed of each lot a lengthy clause referring to and incorpo-

24. *E.g.*, Case v. Morisette, 475 F.2d 1300 (D.C. Cir. 1973). The court noted two prerequisites for equitable enforcement of property servitudes. First, the servitude must be engrafted on one parcel of land with the purpose of benefiting one or more other parcels. Second, there must be notice of the servitude to the party against whom enforcement is sought at the time he took the burdened property. In this case, the court found the requisite notice in the description contained in defendant's deed that referred to the lot as a parking area as shown on the revised plat recorded with a declaration of covenants. Thus, the defendant had constructive notice of the inscription indicating that the lot in question was subject to a parking servitude. "There can be no question as to the legal sufficiency of an inscription on a plat to impose an equitable servitude on the land when the intention to do so is manifest." *Id.* at 1311.

25. *E.g.*, Exch. Nat'l. Bank of Chicago v. City of Des Plaines, 32 Ill. App. 3d 722, 336 N.E.2d 8 (1975). Here, an owner of property was prevented from using it for commercial purposes because of a "single-family dwelling" restriction created by a subdivision plat recorded in 1938. In its holding, the court stated: "Once the plat with restrictions is recorded, every subsequent lot purchaser has constructive notice of the restriction. Thus lot owners may enforce the restrictions against any other lot owner." *Id.* at 732, 336 N.E.2d at 15.

26. *See* Leverton v. Laird, 190 N.W.2d 427 (Iowa 1971).

rating the declaration.[27] However, there is a substantial body of law to the effect that the declaration referred to in the plat, in and of itself imparts constructive notice.[28] Of course, some argument can be made that the restrictions do not spring into being until the subdivider signs the first deed, for until that time, he owns all the land and cannot have any rights as against himself.[29] That objection, however, has little consequence since all the litigation occurs after that deed has been recorded. Still, it is worthwhile to look at that first deed. The plat and declaration cover all the land in the subdivision. Therefore, when the first deed is executed, it has a double effect. The land sold is restricted, *but all the land retained by the subdivider is also restricted.*

Land use restrictions can still be effective even though the *declaration of restrictions* is recorded after the plat of the subdivision. In these cases, the plat itself is devoid of any reference to building restrictions. Later, when the subdivider becomes aware of this oversight, he records a *declaration of restrictions.* If the first deeds by the subdivider refer to the declaration, there is no problem. The declaration is incorporated into the deed by reference. But if the deeds make no such reference, a problem is present. According to one view, the declaration is without legal effect until the deeds breathe life into it.[30] The contrary view treats the declaration as a recordable muniment of title incorporated into the deeds even in the absence of reference thereto in

27. R. KRATOVIL, REAL ESTATE LAW § 603 (6th ed. 1974).

28. Spencer v. Poole, 207 Ga. 155, 60 S.E.2d 371 (1950) (defendant was put on notice where a deed refers, on its face, to a map or plat that is recorded, and the plat listed the restrictions); Davis v. Hugenor, 408 Ill. 468, 97 N.E.2d 295 (1951); Kosel v. Stone, 146 Mont. 218, 404 P.2d 894 (1965) (the filing of a subdivision plat which referred to the declaration of restrictions constituted constructive notice of the content to subsequent purchasers); Strickland v. Overman, 11 N.C. App. 427, 181 S.E.2d 136 (1971) (defendant unable to place a mobile home where the deed recited that the property was subject to all restrictive covenants of record).

29. Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972). Homeowners sought an injunction and declaratory relief for enforcement of certain restrictions and protective covenants limiting a tract housing development to single family dwellings for residential use. The court held that where the first conveyance from a subdivider to the first grantee (defendant's predecessor in title) clearly recited that it was subject to restrictions of record, at that point the servitude comes into existence, and the fact that there is no reference to the restriction in the defendant's deed does not operate to extinguish the restriction. *See also* Moss Dev. Co. v. Geary, 41 Cal. App. 3d 1, 115 Cal. Rptr. 736 (1974) (restrictions do not spring into existence until the first lot in the development is sold).

30. Smith v. Rasqui, 176 Cal. App. 2d 514, 1 Cal. Rptr. 478 (1959) (a plan of restrictions does not become binding and enforceable unless those restrictions are stated in the deeds of conveyance to the purchasers).

the deeds.[31] In any event, a brief reference in the deed will suffice.[32]

General Plan—Deeds

At times, a general plan of building restrictions is created by deeds. This is the oldest method; moreover, it is the worst method. The most obvious problem relates, as one might expect, to the inclusion of restrictions in some deeds but their omission in others.[33] This problem becomes impossible of solution when the language of the deed is ineptly drawn, as is usually the case when this clumsy, antiquated method is used. For example, take the situation where the subdivider uses a printed form containing such language as: "The above described lot is subject to the following restrictions." Instantly, the problem becomes apparent. No *intent* to bind the other lots retained by the subdivider is evident; only when all the lots are conveyed does the general plan become apparent. Certainly, before all the lots in the subdivision have been sold, the existence of the scheme is not disclosed in the instruments of conveyance made by the common grantor. In some jurisdictions, this is fatal to the existence of a general plan.[34] In other jurisdictions, the intent to establish a common scheme shown by any relevant evidence may suffice to create a general plan.[35] Such evidence as exhibiting a map or blueprint in the subdivider's sales office may do.[36] An oral representation that all lots will be conveyed by deeds having identical covenants may suffice.[37] Likewise, a showing that a tacit

31. Stewart Transfer Co. v. Ashe, 269 Md. 74, 304 A.2d 788 (1973); Kosel v. Stone, 146 Mont. 218, 404 P.2d 894 (1965).

32. Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); Davis v. Huguenor, 408 Ill. 468, 97 N.E.2d 295 (1951) (subject to restrictions of record).

33. This problem is dealt with at some length in Annot., 4 A.L.R.2d 1364 (1949).

34. *See* Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 199 (1970).

35. *Id.* at 198.

36. Utujian v. Boldt, 242 Mich. 331, 218 N.W. 692 (1928) (before the sale to the plaintiffs, the defendants furnished them with a blueprint of the proposed plat, showing the size of the lots, and the sale was made with reference to this blueprint; but the claim of the plaintiffs that during the negotiations the defendants promised that no lots less than one acre in size would be sold was disputed so the court refused to grant an injunction against the defendants' sale of such lots).

37. McComb v. Hanley, 128 N.J. Eq. 316, 16 A.2d 74 (1940), *rev'd* 132 N.J. Eq. 182, 26 A.2d 891 (1942) (oral representation by the common grantor who mapped, planned, and sold the lots that such lots would be conveyed subject to like covenants for the common benefit of all subsequent grantees; on reversal, the court said it would be a dangerous rule that purchasers of lots may accept deeds containing a covenant or restriction imposed on the land conveyed, limiting such covenant to the particular land described in the

understanding existed may be enough.[38] But obviously this is not the proper way to create interests in land. If *all* the lots are ultimately conveyed out by deeds containing identical covenants, then arguably writings exist that evidence a general plan. The fact that the deeds are not signed by the grantee, although at times he is the party to be charged, is a hurdle the courts leap lightly.[39]

And how stands one of the early grantees? No general plan was evident when he acquired his title. Here the courts throw up their hands in defeat. They simply say that these early grantees have so often been granted protection, that retreat is impossible.[40] The rationale of the rule that protects prior purchasers is not easy to find.[41] Other problems remain unresolved. How stands the grantee whose deed contained no restriction? Does he have a right of enforcement? Is the restriction enforceable

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deed, and then they or their successors in title subsequently be allowed to come in with oral testimony tending to subvert the terms of such covenant); Burgess v. Putnam, 464 S.W.2d 698 (Tex. Civ. App 1971) (representations made by the vendors to the purchasers of the lots in the subdivision relative to the vendors' plan of development of the subdivision were not fraudulent where the change in the plan of development was occasioned by the diminished real estate market; but, since such representations were material, they nonetheless brought into existence an equitable right on the part of the purchasers to compel the vendors to similarly restrict the use of any remaining property).

38. Foro v. Doetsch, 66 Misc. 2d 288, 320 N.Y.S.2d 778 (1971) (based upon inclusion of various identical restrictions in all deeds by which grantor conveyed title to lots out of his parcel of land, his employment of a surveyor to prepare a map showing the proposed lots and streets, and the inclusion of a grant of a right-of-way over a proposed street in one of the deeds; grantor could be found to have had a general plan of development for his property and an intent to impose uniform restrictions upon all the property, held enforceable against grantor's successor in title).

39. 2 AMERICAN LAW OF PROPERTY § 9.25 (A.J. Casner ed. 1952). The acceptance by the grantee of a deed signed by the grantor amounts to an adoption of the signature of the grantor as that of the grantee so that the requirement of the Statute of Frauds is considered to be satisfied.

40. *E.g.*, Snow v. Van Dam, 291 Mass. 477, 485, 197 N.E. 224, 228 (1935). Though the court recognized the difficulty of finding a sound rationale for its ruling, it nevertheless allowed an early grantee to enforce a single family dwelling restriction against a later grantee of nearby property. This was allowed even though the restriction in the first grantee deed made no reference to the other property which was not even subdivided until twelve years after the subdivision of the property of which the earlier grantee's property was a part.

41. Bristol v. Woodward, 251 N.Y. 275, 288, 167 N.E. 441, 446 (1929). In discussing the grounds for affording protection to an early grantee Justice Cardozo said:

> If we regard the restriction from the point of view of contract there is trouble in understanding how the purchaser of lot A can gain a right to enforce the restriction against the later purchaser of lot B without an extraordinary extension of Lawrence v. Fox . . . . Perhaps it is enough to say the extension of the doctrine, even if illogical, has been made too often and too consistently to permit withdrawal or retreat.

against him?[42]

General Plan—Explicit Language

Suppose we alter slightly the language of the subdivider's first deed out. Suppose we let it read: "All lots in this subdivision are restricted to residential purposes." Now the deed has served a double purpose. Not only does it restrict the lot of the grantee, it also restricts all the lots retained by the subdivider.[43] Thus a subdivision containing 500 lots may be subjected to a general plan of building restrictions by the subdivider's first deed.

But the serpent remains in the garden. Is a purchaser of lot 500, whose deed contains no restrictions, required to search the record of all other deeds by the subdivider to determine if they contain restrictions like that quoted? One line of decisions answers the question in the negative.[44] Note the consequences of this doctrine. Absent a protective zoning ordinance, and they are unknown even in large cities like Houston, one who purchases a lot and erects a valuable dwelling may discover that his neighbor has decided to erect a mortuary. Of course, there are decisions to the contrary.[45] This problem seems impossible

42. Annot., 51 A.L.R.3d 556 (1973); 2 AMERICAN LAW OF PROPERTY § 9.30 (A.J. Casner ed. 1952). Both of these sources show that courts persist in going both ways on this question.

43. Brite v. Gray, 377 S.W.2d 223 (Tex. Civ. App. 1964). *See also* 2 AMERICAN LAW OF PROPERTY § 9.25 (A.J. Casner ed. 1952) (the fact that the deed is accepted only, and not signed, is not a problem).

44. Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc., 267 N.Y. 242, 196 N.E. 42 (1935), *noted* in 21 CORNELL L.Q. 479 (1936), *reviewed by* 6 SYRACUSE L. REV. 394 (1955) (a purchaser takes with notice from the record only of incumbrance in his direct chain of title; in the absence of actual notice before or at the time of his purchase or of other exceptional circumstances, an owner of land is only bound by restrictions if they appear in some deed of record in the conveyance to himself or his direct predecessors in title; to have to search each chain of title from a common grantor lest notice be imputed would seem to negate the beneficient purposes of the recording acts).

45. Finley v. Glenn, 303 Pa. St. 131, 154 A. 299 (1931) (if a deed or a contract for the conveyance of one parcel of land, with a covenant or easement affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel; purchasers have a duty to read not only the description of the property to see what was conveyed, but to read the deed in its entirety, to note anything else which might be set forth in it; restrictions of direct predecessors can be enforced). *See also* Annot., 4 A.L.R.2d 1419 (1949); Annot., 16 A.L.R. 1013 (1922):

> The weight of authority is to the effect that if a deed or a contract for the conveyance of one parcel of land with a covenant or easement affecting another parcel of land owned by the same grantor, if duly recorded, the record is constructive notice to the subsequent purchaser of the latter parcel.

of solution.[46]

An Implied Plan—Reciprocal Negative Easements

Although a deed contains express building restrictions referring to the land conveyed, courts have held these restrictions applicable to the land retained by the grantor by resorting to the doctrine of reciprocal negative easements. The leading case on reciprocal negative easements is *Sanborn v. McLean.*[47] There the lots were sold subject to restrictions as follows: "No residence shall be erected upon *said premises* which shall cost less than $2500 and nothing but residences shall be erected upon *said premises.* Said residences shall front on Helene (now Collingwood) Avenue and be placed no nearer than 20 feet from the street line."[48]

It is reasonably clear that these restrictions rest upon *the land conveyed.* There is nothing to indicate that the grantor sought to impose comparable restrictions on the *land retained by him.* Nevertheless by resorting to a mouthfilling but meaningless phrase "reciprocal negative easements"[49] and on the facts of the situation, the court in *Sanborn* found that the grantor had *impliedly restricted* the lots retained by him. There are other cases to like effect.[50] Still other cases state that the rule should be applied with extreme caution.[51] If the deed states that the restrictions apply "only" to the lot conveyed, the doctrine cannot be applied.[52] In other jurisdictions, the doctrine has been rejected in its entirety.[53]

Id. at 1013.

46. Outside of title insurance territory, the statement is close to being literally true. In title insurance territory, any deed creating general plan restrictions against the entire subdivision is automatically recorded in the company's books against the entire subdivision. Many abstracters do likewise.

47. 233 Mich. 227, 206 N.W. 496, 60 A.L.R. 1221 (1925).

48. *Id.* at 230-31 (emphasis added).

49. *Id.* at 229-30, where the court stated the theory of reciprocal negative easements as follows:

> If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold.

50. *See, e.g.*, Turner v. Brocado, 206 Md. 336, 111 A.2d 855 (1955) (citing other cases).

51. McCurdy v. Standard Realty Corp., 295 Ky. 587, 175 S.W.2d 28 (1943); Land Developers Inc. v. Maxwell, 537 S.W.2d 904 (Tenn. 1976); Saccomanno v. Farb, 492 S.W.2d 709 (Tex. Civ. App. 1973).

52. McComb v. Hanley, 132 N.J. Eq. 182, 26 A.2d 891 (1942).

53. Price v. Anderson, 358 Pa. 209, 56 A.2d 215, 2 A.L.R.2d 593 (1948) (when a grantor imposes restrictions on parts of a tract which he sells, this raises no inference that he means thereby to restrict the remainder of his

It is difficult to muster much enthusiasm for a doctrine whose advocates feel it should be applied with extreme caution. Conceding that a judge who endeavors to rescue an incompetent lawyer is engaged in a praiseworthy task, there are limits to what a kind-hearted judge can do. He may find it difficult to ascribe an intention to a draftsman who never gave the matter any thought. The explanations of the doctrine simply fail to explain convincingly.[54] Moreover, there is a fatal objection to *Sanborn*, namely, the problem of notice.

Since there were literally no recorded documents in the *Sanborn* case that would impart constructive notice of the existence of a general plan, the court was driven to the expedient of holding that McLean had notice from the uniform character of the residences in the development. This, of course, is sheer nonsense, and the fact that a few other courts have gone down this trail does not make it any less so.[55] There are other cases holding to the contrary.[56] This country has hundreds of thousands of acres improved by buildings virtually identical. These are commonly referred to as tract developments. They owe their existence to the universally recognized fact that this is the least expensive way to build houses. The foundation crews go in at the same time; the masons, the electricians, and the plumbers do likewise. If this practice puts us on notice of a general plan of building restrictions, we are all doomed to spend the rest of our lives looking for such restrictions in the recorder's office.

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property in the absence of evidence reflecting a definite purpose to bind the remaining land, and such purpose is clearly made known to the grantees); *see also* Berger, *A Policy Analysis of Promises Reflecting the Use of Land*, 55 MINN. L. REV. 167, 202 (1970).

54. *See* 2 AMERICAN LAW OF PROPERTY § 9.33 (A.J. Casner ed. 1952) (where an explanation of the doctrine of reciprocal negative easements is given under an alternative name for the doctrine, implied reciprocal servitudes).

55. Annot., 4 A.L.R.2d 1364, 1371 (1949).

56. Dick v. Goldberg, 295 Ill. 86, 128 N.E. 723 (1920) (where the evidence showed the party in question was aware of the following: the general appearance of the locality, the character of the houses in the locality, their location in respect to the street, the use of the houses and character of the neighborhood as residential; still it was held that the party did not have notice of the existence of any restrictions); Weber v. Les Petite Academies, 548 S.W.2d 847 (Mo. 1976) (notice sufficient to charge a purchaser with knowledge of restrictions imposed as a part of a general plan may be either actual or constructive, including knowledge of facts which ought to have put him on inquiry; whether the appearance of the subdivision was such as to bring it within the notice requirement rule is a question of fact; here the defendants could reasonably believe their lot was not a part of any uniform scheme).

CONCLUSION

This area of private land use restrictions is a smokescreen laid by all the terms and theories used by the courts and text writers beclouding what is essentially a simple problem.[57] Speaking of one troublesome aspect of the problem, it has been said that the best solution is to recognize the problem of enforcing these restrictions as being *sui generis* and not based upon any established legal theory.[58] Much confusion would be avoided if the courts would recognize that they are dealing with something which is *sui generis*. Currently, courts in the same jurisdiction shift from contracts theory to equitable servitudes theory and vice versa in order to reach a just and desirable result according to the facts in the particular case.[59]

The tenor of this article must have suggested to all readers the inevitable conclusion. General plan restrictions can be sensibly created by putting into the recorded plat of a subdivision a clear reference to a recorded *declaration of restrictions* and by including a uniform reference to such restrictions in the first deed to each lot conveyed by the subdivider. The rights created should be explicitly declared to be equitable servitudes enforceable by injunction. Simple, easy and legal. Why not use it?

57. Berger, *A Policy Analysis of Promise Respecting the Use of Land*, 55 MINN. L. REV. 167, 203 (1970).

58. 2 AMERICAN LAW OF PROPERTY § 9.30 (A.J. Casner ed. 1952).

59. *E.g.*, Remitong v. Crolla, 576 P.2d 461 (Wyo. 1978); *see* Kelly, *Real Property—Restrictive Covenants— Effect of Expiration of Time Limitation in Deed Under General Plan*, 56 MICH. L. REV. 1363 (1958) (discussing Stanton v. Gulf Oil Corp., 232 S.C. 148, 101 S.E.2d 250 (1957)).