contracts becomes in the purchaser with notice a specific duty to perform the covenant. (2) The other theory explains the enforcement of restrictive equitable servitudes as an extension of the legal doctrine of negative easements to new situations. Few if any courts follow either the "contract" theory or the "property" theory of equitable servitudes consistently, but the general view that one takes of the theories may affect results. Thus, the fact that the English courts came not to apply *Tulk* to affirmative covenants and, as we shall see *infra*, p. S444, did not allow the benefit of equitable servitudes to be held in gross, may reflect [p*962] a "property" theory of equitable servitudes. In England, as we have seen *supra*, p. S418, the benefit of an easement may not be held in gross, and courts throughout the Anglo-American world have had difficulty with enforcing easements that compel the holder of the burdened land to do something. *See* note 3, *supra*.

Other questions the answers to which might depend on whether one espoused a "contract" or a "property" theory of equitable servitudes are: (1) Is the original convenantor still bound on the contract after he or she has sold the land? (The original covenantor is bound as surety where the covenant is contained in a lease. *See* DKM3, p. 693. By and large, the original covenantor is not bound after he or she has conveyed away a fee estate. 2 A.L.P. § 9.18.) (2) What formalities must be followed in creating the covenant? (You will recall that the Statute of Frauds has different requirements for contracts concerning land and conveyances of interests in land. 2 A.L.P. § 9.25. In the case of the former most statutes require simply a "sufficient memorandum," which is generally thought to require less than what is required for a conveyance.) (3) If the land is taken by eminent domain, must the holder of the benefit of the servitude be compensated? (*See* p. S409 *supra*.) [p*969]

3.Enforcement by One Other Than the Promisee: "The Covenants and Restrictions . . . Shall inure to the Benefit of and Be Enforceable by the Association, Any Owner, Their Respective Heirs, Successors, and Assigns"

We now turn to the other side of the promise, the benefit side. Assuming the existence of restrictions capable of binding subsequent holders of the covered property, it becomes important to know who can enforce them. The covenantee surely can. (Or can he? *See* p. S445 *infra*.) But any number of alternative plaintiffs may come forward: a municipality which required the restrictions as a condition for subdivision approval or rezoning, other owners in the subdivision (including those owning lots conveyed by the developer before or subsequent to the lot in question), a homeowners' association purporting to represent the neighbors collectively, or some other party designated in the original declaration. The setting for the question need not be litigation. Instead the owner burdened by a particular restriction, desiring its removal and willing to pay, may be inquiring, "With whom must I bargain?"

CHARPING v. J.P. SCURRY & CO.
Court of Appeals of South Carolina
296 S.C. 312, 372 S.E.2d 120 (1988)

CURETON, J. This is an appeal from an order granting summary judgment to J.P. Scurry and Company, Inc., and dismissing the complaint [p*970] of William P. Charping with prejudice. The dispute involves real property. The issue is whether a restrictive covenant contained in a deed is a real or a personal covenant.

Mary Lemon Owens Townsend acquired title to two contiguous parcels of land in Columbia, South Carolina, during 1976. One parcel contained five unimproved lots and faced Forest Drive. The other parcel contained three lots with a residence and faced Stratford Road. The properties abutted along a part of their rear common boundary.

In 1980, Townsend sold the Forest Drive property containing the five lots to a partnership. The deed contained a restriction stating "[t]he above property is to be developed into a maximum

of four (4) residential lots, each of which is to be used solely for the construction of a single family residence." In 1983, Townsend sold the Stratford Road property to William Charping. At the time of closing she told Charping about the residential restriction on the Forest Drive property, but the deed to Charping made no reference to the restriction. Thereafter, in August 1985, Townsend executed a "Modification of Restriction" which purportedly modified the restriction on the Forest Drive property to increase the number of residential lots from four to six. At that time, she had no ownership interest in either parcel. The partnership conveyed the Forest Drive property to J.P. Scurry & Company, Inc., in late 1985. Charping filed a complaint seeking a declaratory ruling holding the Forest Drive property was subject to the four-lot restriction and requesting an injunction to prevent development by Scurry beyond that number. The record contains no indication Scurry plans to develop the property for non-residential uses. As we view the record, the issue is limited to the question of the maximum number of residences that may be built on the lots.

Scurry filed a motion for summary judgment on the ground Charping had no standing or right permitting him to enforce the four-lot restriction. The court considered the pleadings, certain stipulated facts, five requests for admission, and the "Modification of Restriction" in making its determination. The trial court concluded Townsend's intent was to create a personal covenant as opposed to a covenant running with the land. The court granted Scurry's motion.

Charping states in his brief and both parties contended at oral argument that the facts are undisputed. Both parties specifically argue there is no genuine issue of material fact regarding Townsend's intent. Basically, Charping argues the stipulated facts support his contention Townsend's intent was to create a covenant running with the land as opposed to the opposite argument of Scurry that Townsend's intent was to create a personal covenant.

South Carolina recognizes a historical disfavor for restrictive covenants based upon the view that the best interests of society are advanced by the free and unrestricted use of land. [Citation omitted.] Courts tend to strictly interpret restrictive covenants and a party seeking to enforce a covenant must show the covenant applies to the property either by its express language or by a plain and unmistakable implication. [Citations omitted.]

Charping was not a party to the 1980 deed between Townsend and the partnership. He seeks to enforce the covenant by claiming it is a covenant running with the land, and as a subsequent purchaser of Townsend's property, he may enforce it. Given the rule in South Carolina of strictly construing restrictive covenants and favoring unrestricted use of land, the [p*971] burden was on Charping to prove Townsend's clear intention to create a covenant that would run with the land. [Citations omitted.]

A restriction limiting the use of property to residential purposes will ordinarily be construed to touch and concern the land. *Cf. Epting v. Lexington Water Power Co*., 177 S.C. 308, 181 S.E. 66 (1935). However, this is only one of the tests for determining whether a covenant runs with the land. As the parties recognize, there must also be an indication that the parties intended for the covenant to run with the land. [Citation omitted.] In this case, the intention of the parties in placing the restrictions on the lots must be determined as of the time Townsend conveyed title to the partnership. [Citation omitted.] The language of the subject covenant does not express such an intention. The covenant does not refer to Townsend's remaining property, nor does it indicate that it should benefit her heirs, successors and assigns.

In the absence of express language of intention, Charping claims the benefit of a presumption at law. This presumption, he argues, implies that absent facts showing a contrary intent, when the owner of realty sells a portion of his land and imposes use restrictions upon the portion conveyed, such restrictions are presumed to be imposed for the benefit of the retained land. [Citation omitted.]

Although not expressed in exactly the same language, a similar argument was made in *Edwards v. Surratt*, [228 S.C. 512, 516, 90 S.E.2d 906, 908 (1956)]. The plaintiffs argued a restriction for residential use placed in a deed conveying approximately three acres was intended to be for the benefit of the remaining property of the grantor and thereby enforceable by subsequent grantees of the remaining property. *Id*. The Supreme Court held the burden of proof was on the subsequent grantees to show the grantor's intention and they failed to meet the burden of demonstrating intention by plain and unmistakable implication. *Edwards*, 228 S.C. at 521, 90 S.E.(2d) at 911. The court did not discuss the presumption of intent as argued by Charping, but looked for evidence of the grantor's intent from the surrounding circumstances. We therefore reject the presumption urged by Charping.

When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing there is a genuine issue of material fact for trial. [Citation omitted.] In the context of this case, Charping must show by affidavit or otherwise facts regarding the grantor's intention to benefit the land now owned by him when she restricted the property sold to the partnership.[1]

Charping has failed to produce any evidence of Townsend's intent as would constitute a genuine issue of fact. The stipulated facts indicate Charping entered into the contract to purchase in ignorance of the restriction and did not learn of the restriction until Townsend mentioned it at closing. Charping's argument that Townsend's remarks to him at the closing regarding her having restricted the Forest Drive property to residential use constitutes sufficient evidence of Townsend's intention is without merit. An unappealed finding by the trial court states, "Townsend did nothing [at the closing] to affirm or reaffirm that the restriction was to run with [Charping's] land and was for [his] benefit." The record is devoid of [p*972] further evidence which might assist in determining Townsend's intent at the time of the creation of the covenant.

Under the evidence in this record, the decision of the trial court is

Affirmed.

GOOLSBY, J., concurs.

GARDNER, J., (dissenting). . . .

The restriction of this case is simple; the import of the language used is clear and easily understood. It simply limits the use of the Forest Drive property to a maximum of four single-family residences. All parties to this action agree that the words used constitute a restriction. The issue of the case is whether the words constitute a real restrictive covenant, that is, one which runs with the land. The criteria for determining whether a restriction is a real or personal restrictive covenant are established by the case of *Epting v. Lexington Water Power Co*., 177 S.C. 308, 181 S.E. 66 (1935). As will later be noted, I would hold that the subject restriction is a real restrictive covenant because it affects the use of the subject land; it [a]ffects the quality and mode of enjoyment of the land and it concerns the interest in the land which was conveyed; its purpose is to alter the legal rights which otherwise would flow from the ownership of the land. And by the simplicity of the words used all this is to me abundantly clear.

The majority emphasizes that (1) restrictive covenants are historically disfavored, (2) courts favor the free use of land and (3) a restriction is considered a real restrictive covenant only if it is clear that it was the intent of the grantor as evidenced by the language used in the instrument

[1] We have considered remanding for further development of the facts. However, Charping's attorney stated at oral argument that the parties had stipulated to all of the facts regarding Townsend's intent. Thus, it would serve no useful purpose to remand.

creating the covenant. Despite all of these platitudes, restrictions meeting the test of *Epting*, *supra*, are uniformly *enforced*. [Citations omitted.]

Epting is the only South Carolina authority which deals with how to determine if a restrictive covenant is real or personal. *Epting* is quick to emphasize that the language creating the restriction must clearly reflect a[n] intent by plain language to create a restrictive covenant. If this be so, as it is in the instant case, according to *Epting*, the restriction is a restrictive real covenant if it relates to the realty demised, having for its object something annexed to, or inherent in, or connected with the land; its performance or nonperformance must affect the nature, quality or value or mode of enjoyment of the demised premises; it must have relation to the interest or estate conveyed and the act to be done must concern the interest created or conveyed.

Other authorities have reduced the rule to simply whether the restriction is one which touches and concerns the land itself. [Citations omitted.]

And I observe that in determining whether restrictions "touch or concern" the subject land, courts must decide in each case whether the purpose of the restriction is to alter the legal rights that otherwise would flow from the ownership of the land. [Citation omitted.]

Applying the above principles to the case before us, I would hold that the subject restriction does alter the legal rights which flow from the ownership of the Forest Drive property. Simply stated this land was restricted in its use to a maximum of four single-family dwellings. The language is clear; only dwelling houses can be erected on the property and the language is equally clear that the Forest Drive property is limited to a maximum of four lots. The language is susceptible of only one reasonable meaning and that is to alter the use of the land in the two concepts mentioned. The two concepts have as their object the inherent use of the [p*973] land and are connected with the land and otherwise meet the test of *Epting*. I would therefore hold that the subject restriction is a real restrictive covenant. And, accordingly, I would hold that the appealed order was erroneous in holding the restriction to be personal. *Epting* clearly holds that a personal covenant is one which has no relation to the land conveyed, a concept patently antithetic to the situation before us. . . .

I would also hold that Charping, as Townsend's grantee and successor in interest, is entitled to enforce the covenant. . . .

Does not the very fact that at the time of closing Mrs. Townsend told Charping about the restrictive covenants imposed upon the Forest Drive property constitute evidence that at the time she imposed the restriction she intended it to be a benefit to her home tract located on Stratford Drive? Of course it does. There would have been no other reason for her to tell Charping about the restriction at the very time she was conveying her home tract to Charping, who ostensibly was to use the property as his home. . . .

In all due deference to my dear colleagues of this court, I respectfully dissent.

Notes and Questions

1. Albright v. Fish, 136 Vt. 387, 394 A.2d 1117 (1978), involved facts similar to those in the principal case, except that the covenantees were suing only for damages. The deed to the covenantor had said: "The above-described premises are hereby conveyed subject to the following covenants, conditions, and restrictions, which shall run with the land and be binding on the Grantees, their heirs and assigns for a period of 50 years from the date of the within deed: 1. The premises herein conveyed shall not be subdivided into lots of less than 10 acres." The covenantor obtained a release from the original grantor and then proceeded to subdivide the parcel into a ten acre and an 8.9 acre lot. In holding that the covenant was intended to benefit the owners of two parcels adjacent to the land to which the covenant applied and which had been owned by the grantor-covenantee at the time the easement was imposed, the court said:

> Some promises are so intimately connected with the land as to require the conclusion that the necessary intention for the running of the benefit is present absent language clearly negating that intent. Examples are covenants to repair a building, or to plow up a meadow, or to refrain from building on land. [Citations omitted.] The covenant in the instant cause also belongs in this category. Additionally, factors are present here that are traditionally considered strong evidence of an intention that the benefit shall run with the land. The covenantees, Reilly and Little, retained adjacent land at the time the covenant was made. Also, two of the conveyances of property north of Jericho Road contained the covenant, while in the third conveyance the covenant was contained in the chain of title, evidencing a common scheme as to the property [a reference to the fact that the covenant was not contained in the deed from an intermediate grantee to one of the plaintiffs in the case]. The covenant further renders the lands of the [plaintiffs] somewhat more valuable by insuring that open spaces remain surrounding it. [Citation omitted.] The intent element necessary for the benefit to run with the land is present on these facts.

Id. at 393–94, 394 A.2d at 1120–21. Why does the principal case come out differently from *Albright*? *See generally* Annot., 51 A.L.R.3d 556 (1973).

2. As both the principal case and *Albright* make clear it is as essential for the "running" of the benefit of a promise as the "running" of its burden that such a result appear to be intended. What evidence does the court in the [p*974] principal case use to find that the right to enforce the covenant was not intended to pass to the promisee's successors in title?

3. The *Albright* case, note 1 *supra*, refers to a "common scheme." The existence or non-existence of such a common scheme may not only bear on the question of intent but carry additional consequences. *See* § 3B4 *infra*.

STREAMS SPORTS CLUB, LTD. v. RICHMOND

Appellate Court of Illinois, Second District
109 Ill.App.3d 689, 440 N.E.2d 1264., 65 Ill.Dec. 248 (1982)

SEIDENFELD, P.J. The Streams Sports Club, Ltd., an Illinois corporation, claimed a lien which it sought to foreclose against the owner of a condominium unit who refused to pay dues to the sports club. The club appeals from a final order dismissing its amended complaint. . . .

The appeal focuses on the validity and applicability of a clause in the declaration of condominium ownership which requires all owners of condominium units in a particular complex to become members of and to pay annual dues to a recreational club, located adjacent to and owned and operated by the developer of the complex, and which imposes a lien on the condominium unit for failure to pay the annual dues. The club is a successor in interest to Shannon, Inc., the developer of a condominium complex known as "The Streams Condominium No. 3," and owner of the Streams Sports Club. The defendant Donna Richmond is the beneficial owner of a condominium unit located in "The Streams Condominium No. 3." . . .

. . . [T]he Club relies on article 15 of the declaration of condominium ownership. This provides generally that the club will be owned by the developer and operated for profit by the developer, its assignees, vendees or designees; the authority to determine what facilities will exist from time to time are reserved to the title holder, owner and operator of the club; each owner of any condominium unit upon acquisition of title becomes a member of the club without any membership or initiation fee and may exercise and enjoy facilities upon compliance with the regulations of the club and upon payment of annual membership fees; in the event that any condominium unit is transferred the right to club membership of the subsequent owner is subject to the payment of a transfer fee and compliance with the regulations of the club. "The breach, violation or default on the part of any Owner or his invitee or guest of any By-Law, rule or regulation then in effect with respect to such Club, or the failure or refusal of any such Owner to

pay the annual membership fee or any other charge which he has voluntarily incurred by the use of the Club's facilities, shall entitle the Owner of said Club, * * * to either suspend, * * * or terminate the privilege or license * * * but not to exceed one year. * * * Notwithstanding such suspension the annual membership dues shall continue to accrue and be a charge and lien against the interest of the Unit owned by the Owner. All unpaid charges shall be a lien against said Unit * * *. The Club shall have the right, in addition to any other remedy, to enforce its lien by foreclosure, * * *."

The first question raised . . . is whether a successor in interest to a developer may enforce a lien against a condominium unit owner who fails to pay annual recreation dues. Defendant argues that article 15 of the declaration regarding the Sports Club creates personal covenants which may only bind the original grantor and grantee; thus, that the plaintiff as assignee of [p*975] the original developer could not assert rights which were personal to the developer. In addition, defendant contends that the type of lien sought to be foreclosed is not expressly provided for in the Condominium Property Act, and the contract set forth in article 15 of the condominium declaration is unconscionable and unenforceable since it provides that services and facilities of the club can be continued, altered, changed or terminated at the sole discretion of the club, allows the club to impose fees in an amount it alone deems reasonable and to suspend, limit, curtail or terminate membership without a hearing and provides that fees shall never be decreased even if the club reduces its services or facilities. Defendant also argues that the contract is unenforceable because its terms are vague and uncertain and lack mutuality. Defendant also argues that it is not binding under any theory of promissory estoppel.

While we agree that the Condominium Property Act (Ill.Rev.Stat.1979, ch.30, pars.309, 309.1) does not expressly provide for the type of lien asserted here, it is equally true that the Act does not specifically or impliedly exclude the creation of liens which are not expressly provided. A lien may be created by agreement or by statute. [Citations omitted.] "[I]f an express contract sufficiently manifests the intention that some particular property or fund is to be security for a debt, then an equitable lien may be imposed upon the property or fund so identified." [Citation omitted.] Here the fact that the notice of lien makes specific reference to the Condominium Property Act is not of great import in light of the fact that said notice also indicates that it arises pursuant to the condominium declarations.

We also conclude that the contract is not unenforceable for unconscionability. A contract is unconscionable when it is improvident, totally one sided or oppressive. [Citation omitted.] An absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party is unconscionable. [Citation omitted.] Although it appears that some of the provisions of article 15 are unduly favorable to the developer, we are at the pleading stage and there is no showing that, as a matter of law there is fraud, mistake or duress or even disparity of bargaining power. In the absence of fraud, mistake or duress, courts are reluctant to strike down contracts since "'[p]eople should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain.'" [Citation omitted.] Moreover, article 15 does not create a separate and independent contract, but is a section of a much broader contract which grants rights and liabilities to both parties, with no indication that the condominium contract, as a whole, is unconscionable.

Nor can we agree that the contract lacks mutuality in that only the plaintiff is given the right to terminate its services and the covenants do not specifically delineate the services to be provided. Again the defendant culls out one portion of the declaration. Article 17 provides, however, that the declaration "may be changed, modified or rescinded by an instrument in writing setting forth such change, modification or rescission, signed by Owners having at least three-fourths (3/4ths) of the total vote * * *."

Defendant does not argue that no services are presently being provided nor that the condominium unit owners are not receiving sufficient value for their annual dues. Thus, the failure to specifically identify the services to be provided does not render the contract void for uncertainty. Where terms of an agreement are in any respect doubtful or uncertain, and parties to it have, by their own conduct, placed upon it a construction which is reasonable, such construction will be adopted by the court. [Citations omitted.] In [p*976] any event, given the strong presumption that the provisions of a condominium declaration are valid, the question of unconscionability should not be decided on a motion to dismiss. [Citations omitted.]

We then consider defendant's contention that, even if the covenant is held to be enforceable generally, it is a personal covenant which may not be enforced by the successor in interest to the original developer. We cannot agree.

The club as the successor to the interest of the original developer is the real party in interest. It has the apparent duty to pay for the occupancy of the recreational land and is plainly the intended beneficiary of the covenant created by article 15 of the condominium declaration. If a contract is entered into for the direct benefit of a third person he may sue for its breach. [Citations omitted.] In Illinois, a party seeking enforcement of a covenant need not own the property to be benefited by enforcement, nor in fact, any property. (*VanSant v. Rose*, (1913) 260 Ill. 401, 407, 103 N.E. 194.) This is so because the right to enjoin the breach of a restrictive covenant does not depend on whether the covenantee's property will be damaged by the breach, it is the right to specific performance of the bargain which the parties have made between themselves. (*VanSant v. Rose*, (1913) 260 Ill. 401, 407–08, 103 N.E. 194). Even where the holder of a benefited land is the one who may enforce a covenant, a successor to the owner's interests as the real party in interest may likewise enforce a recreational covenant. [Citation omitted.]

Although our conclusion that the club is entitled to enforce its rights as a third-party beneficiary of the contract between the original developer and the condominium owners makes the question of whether the covenant is one which runs with the land redundant, we will briefly discuss the issue.[1] Initially we conclude from the record, contrary to the argument of the defendant, that the question was fairly raised in the trial court. A covenant to pay fees, giving plaintiff a lien on property for unpaid fees, runs with the land. In *Mathis v. Mathis*, (1948) 402 Ill. 60, 66, 83 N.E.2d 270, the supreme court stated that "[w]here land is conveyed in consideration of a covenant by the grantee to support the grantor, or other persons designated, the covenant runs with the land and is binding upon subsequent owners." The court held that a covenant, in which the grantee in partial consideration for the transfer agreed to pay a third party a certain sum of money and give the third party a lien against the property for unpaid amounts, ran with the land. Other jurisdictions have likewise held that covenants similar to the one before us which exact charges for the upkeep of property other than the owner's, run with the land. See, *e.g.*, *Neponsit Property Owners' Ass'n v. Emigrant I. Sav. Bank*, (1938) 278 N.Y. 248, 15 N.E.2d 793; [further citations omitted.]. . . .

Defendant also asserted in her motion to dismiss that even if the lien were enforceable when the declaration was originally recorded, a 1978 amendment to the condominium declaration effectively negated the effect of article 15 with respect to defendant. This amendment, recorded prior to defendant's purchase of her unit, was passed pursuant to article 17 of the declarations and provided for a permissive rather than mandatory membership in the Sports Club. [p*977]

---

[1] The issue of whether the covenant runs with the subject property would be relevant to a determination of whether it can be enforced against subsequent as well as original purchasers. The record is not clear on whether Donna Richmond is an original or subsequent purchaser. However, as defendant has not raised this issue in the motion to dismiss or on appeal and we find that the covenant does run with the land, whether Richmond is an original or subsequent purchaser is here not material.

Plaintiff asserts that article 17 is not part of the contract between the parties and, as such, the purported amendment has no effect. It claims that if article 17 were applied to article 15 then the condominium owners could amend any portion of the parties' agreement without the consent of the plaintiff. In this view article 17 would lack mutuality and therefore must fall. It seems incongruous that plaintiff should attempt to deny the effect of article 17 as lacking mutuality in order to preserve the provisions of article 15 which, in and of themselves, might also be argued to lack mutuality when not considered in the text of the whole agreement. There is no basis for culling out article 15, however, and creating a separate and independent contract between the parties. The declarations must be construed as a unified contract. We note that an amendment provision such as the one in the present case was approved by this court in *Crest Builders v. Willow Falls Improvement*, (1979) 74 Ill.App.3d 420, 423, 30 Ill.Dec. 452, 393 N.E.2d 107.

Plaintiff also contends that the 1978 amendment fails to comply with the provisions of article 17. Article 17 provides that the amendment must be signed by three-fourths of the condominium owners, certified by the secretary of the board, and all lienholders of record must have been notified. Plaintiff claims that none of these three requirements have been met.

No evidence was taken to determine whether the amendment was passed by three-fourths of the unit owners. A certification by the secretary of the board would have substantiated this fact, but no certification is attached to the amendment. Also, there is no indication that all lienholders of record were notified. It would appear that the amendment would be valid and defeat the cause of action under any count if passed in accordance with the requirements. Proof must be adduced on this issue upon remand. . . .

Notes and Questions

1. In the principal case it is no place said that the plaintiff owned the land on which the club was located, and it is clear from the opinion that it would have made no difference if it did not. For this proposition the court relies on the celebrated Illinois case of Van Sant v. Rose, 260 Ill. 401, 406, 103 N.E. 194, 196 (1913):

> True, a bill to enjoin the breach of restrictive covenants cannot be maintained by one having no connection with or interest in their enforcement, but we cannot agree that complainants had no interest. They were the original covenantees and by their conveyance of the property reserved an interest in it. They conveyed the property subject to that interest. They had a right to reserve such interest, and this right was not dependent upon the covenantees having other property in the vicinity that would be affected by a breach of the covenants or that they should in any other manner sustain damages thereby. This court has held, in harmony with the prevailing rule in other jurisdictions, that the right to enjoin the breach of restrictive covenants does not depend upon whether the covenantee will be damaged by the breach, but the mere breach is sufficient ground for interference by injunction. [Citations omitted.] It would seem inconsistent, then, to say, as the covenantees had no other land in the neighborhood they had no interest in the performance of the covenants. The only purpose their having other land in the vicinity could serve would be to show that they would be injuriously affected, that is, damaged,—by a violation of the contract. But as their right does not necessarily depend upon their being damaged by the breach, it would seem it would not necessarily depend upon their owning other land in the vicinity. Bispham, in the paragraph above referred to, says it is no answer to an action of this kind to say the breach [p*978] will inflict no injury upon the complainant or even that it will be a positive benefit.

Is the principal case nothing more than an application of *Van Sant*?

2. London County Council v. Allen, [1914] 3 K.B. 642, is the polar opposite of *Van Sant*. In that case the Council conveyed property to Allen and extracted a covenant purporting to bind him and his successors that the land not be built upon. Allen conveyed the property to his wife (and

there was no question that she had notice of the covenant), and she proceeded to build on the land. The court, nonetheless, held that the covenant could not enforced against the wife because the council "never had any land for the benefit of which this 'equitable interest analogous to a negative easement' could be created."

3. Most American cases lie some place in between. Christiansen v. Casey, 613 S.W.2d 906 (Mo.App.1981), is typical. In that case developers sought to enforce an architectural control covenant after they had sold all the land in the development. The grantees concededly had notice of the covenant, and, indeed, had attempted to obtain the developers' approval of their proposed fence. The court acknowledged that the question whether the original grantors could sue on the covenant after they had parted with all control of property in the development was an open one in the United States. The court concluded:

> Consideration of the surrounding circumstances at the time this covenant was made must include the fact that the sixty-three lots against which these restrictions were filed were part of a larger adjacent neighborhood in which the Christiansens owned property. Their nearby land provides the Christiansens with a continuing interest which would seem to support the concept that even if the grantor has divested himself of fee simple interest in the lots covered by the restrictions, he retains a property interest in their enforcement. [Citation omitted.] Moreover, as indicated above, we see no reason why equity should not allow these plaintiffs to enforce the covenant, be it real or personal. [Citation omitted.]

Id. at 912. *Compare* Kent v. Koch, 166 Cal.App.2d 579, 333 P.2d 411 (1958) (holding it "well settled in this state that restrictive covenants made for the benefit of other property retained by the grantor can not be enforced by the grantor after he no longer owns any of the property benefited"). *But see* Stegall v. Housing Auth., 278 N.C. 95, 178 S.E.2d 824 (1971).

4. Would the Missouri court in *Christiansen* allow enforcement in a case similar to *London County Council v. Allen*, note 2 *supra*? Enforcement of private restrictions by public bodies has been a matter of special legislative concern. *See, e.g.*, WIS.STAT. § 236.293 (1987):

> Any restriction placed on platted land by covenant, grant of easement or in any other manner, which was required by a public body or which names a public body or public utility as grantee, promisee or beneficiary, vests in the public body or public utility the right to enforce the restriction at law or in equity against anyone who has or acquires an interest in the land subject to the restriction. The restriction may be released or waived in writing by the public body or public utility having the right of enforcement.

Fourteen years after the decision in *London County Council v. Allen*, Parliament enacted a housing law which expressly authorized local authorities to enforce covenants on land acquired and sold pursuant to the act "notwithstanding that the authority are not in possession of or interested in any land for the benefit of which the covenant was entered into." Housing Act of 1925, 15 Geo. 5, c. 14, § 110. [p*979]

Texas has gone a step further. By statute it has authorized municipalities without a zoning ordinance to sue to enforce all restrictive covenants within their boundaries as if they were the owner of benefited property. TEX.LOCAL.GOV'T.CODE.ANN. ch.230 (Vernon 1988 & Supp.1991). Although doubts have been expressed about its constitutionality, the law has been extensively used by Houston, the only major U.S. city without zoning. *Compare* Susman, *Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land-Use Control*, 44 TEX.L.REV. 741 (1966) *with* Note, *The Municipal Enforcement of Deed Restrictions: An Alternative to Zoning*, 9 HOUSTON L.REV. 816 (1972). *See generally* B. SIEGAN, LAND USE WITHOUT ZONING (1972); Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON., 71, 77 (1970).

5. Neponsit Property Owners' Ass'n v. Emigrant Indus.Sav.Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938), cited in the principal case and discussed in DKM3, p. 979, involved a somewhat different problem:

> . . . Though between the grantor and the grantee there was privity of estate, the covenant provides that its benefit shall run to the assigns of the grantor who "may include a Property Owners' Association which may hereafter be organized for the purposes referred to in this paragraph." The plaintiff has been organized to receive the sums payable by the property owners and to expend them for the benefit of such owners. Various definitions have been formulated of "privity of estate" in connection with covenants that run with the land, but none of such definitions seems to cover the relationship between the plaintiff and the defendant in this case. The plaintiff has not succeeded to the ownership of any property of the grantor. It does not appear that it ever had title to the streets or public places upon which charges which are payable to it must be expended. It does not appear that it owns any other property in the residential tract to which any easement or right of enjoyment in such property is appurtenant. It is created solely to act as the assignee of the benefit of the covenant, and it has no interest of its own in the enforcement of the covenant.

Id. at 260, 15 N.E.2d at 797.

While the court considered the possibility that privity might not apply when the enforcement of the covenant was being sought in equity, it also recognized that the contents of the covenant were not such as had been traditionally enforced in equity without privity. It ultimately concluded, however, that the homeowners' association could enforce the covenant:

> The corporate plaintiff has been formed as a convenient instrument by which the property owners may advance their common interests. We do not ignore the corporate form when we recognize that the Neponsit Property Owners Association, Inc., is acting as the agent or representative of the Neponsit property owners. . . . Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend. Every reason which in other circumstances may justify the ancient formula may be urged in support of the conclusion that the formula should not be applied in this case. In substance if not in form the covenant is a restrictive covenant which touches and concerns the defendant's land, and in substance, if not in form, there is privity of estate between the plaintiff and the defendant. . . .

Id. at 262, 15 N.E.2d at 798. [p*980]

Neponsit has been followed in a number of decisions allowing enforcement by an association, despite its failure to own property in the development. *See*, *e.g.*, Merrionette Manor Homes Improvement Ass'n v. Heda, 11 Ill. App.2d 186, 136 N.E.2d 556 (1956). In his original declaration the developer of Merrionette Manor attempted to reserve the option of assigning the benefit of its covenants to a homeowners' association should one be established. One was and he did assign the covenants. Although the association itself owned no property in the development, the Illinois court held the organization could enforce a restrictive covenant barring lot owners from adding a vestibule to their houses. This conclusion is obviously helped by *Van Sant v. Rose*, *supra* note 1. *See* Bessemer v. Gersten, 381 So.2d 1344 (Fla.1980); *cf.* Birchwood Lakes Community Ass'n v. Comis, 296 Pa.Super. 77, 442 A.2d 304 (1982); Kell v. Bella Vista Village Property Owners' Ass'n, 258 Ark. 757, 528 S.W.2d 651 (1975).

The *Neponsit* covenants provided explicitly for assignment to a homeowners' association. Is that essential? *Compare* Starkey Point Property Owners' Ass'n v. Wilson, 96 Misc.2d 377, 409

N.Y.S.2d 376 (1978) (reference to assignment not essential) *with* Beech Mountain Property Owners' Ass'n v. Current, 35 N.C.App. 135, 240 S.E.2d 503 (1978) (ass'n that owns no property in the area may not enforce covenants unless, perhaps, as agent of the owners, which agency must (semble) be expressed in the instrument). Suppose a corporate developer retains exclusive enforcement rights, purportedly assignable to a homeowners' association. After selling all lots in the development, the developer "folds" without assigning its enforcement rights. Who, if anyone, can enforce? *See* Scott v. Rheudasil, 614 S.W.2d 626 (Tex.Civ.App.1981).

In most large scale developments, some common lands are transferred to the association. Is there any question of association enforcement in such a case? *See, e.g.*, Brookside Community, Inc. v. Williams, 290 A.2d 678 (Del.Ch.1972), *aff'd*, 306 A.2d 711 (Del.1973).

6. Arguably, public bodies and homeowners' associations are special cases. Should other promisees or assignees with no immediately benefited property be permitted to enforce covenants against a successor to the promisor? The question has already been addressed tangentially; *see* p. S422–424 *supra*. Consider also Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 492 (1955). Plaintiff in that case was given the right under an agreement with one Larochelle to install a jukebox in a "permanent and convenient part of [Larochelle's] place of business" and to keep it there for fourteen years, six months. The agreement stipulated further that plaintiff would receive forty percent of its receipts and that "no similar equipment nor any other kind of coin-operated machine will be installed or operated on said premises by anyone else." Subsequently, Larochelle sold his business including his interest in the real estate to the defendant. Defendant may have known of the plaintiff's agreement with Larochelle but did not expressly agree to accept the latter's obligations under it. The New Hampshire Supreme Court held that if defendant had notice he was bound. The decision was criticized in Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV.L.REV. 1250 (1956). The court was unpersuaded. *See* Pratte v. Balatsos, 101 N.H. 48, 132 A.2d 142 (1957). *But cf. Todd v. Krolick*, p. S422 *supra*.

7. The issues in the principal case are not exhausted by the court's holding that the plaintiff could sue to enforce to enforce the covenant. Did this covenant "touch and concern" the defendant's land? In some circumstances covenants to pay money may be allowed to run if they provide for enforcement by way of lien. The leading case in this regard, [p*981] however, *Neponsit*, Note 5 *supra*, carefully spells out how the use of the assessment was related to the property that was burdened. Is there such a relationship in this case? To put the question more bluntly, why should Ms. Richmond have to pay for membership in a club that she did not choose to join, when the membership has nothing to do with the maintenance, repair or facilities servicing her condo?

Some courts require that for a monetary assessment to "touch and concern" the use of the funds be carefully spelled out in advance. In Nassau County v. Kensington Ass'n, 21 N.Y.S.2d 208 (Sup.Ct.1940), enforcement was denied because the arrangement did not require the association to use the money to the direct benefit of the land in question. The North Carolina courts have been particularly strict in this regard. *See* Beech Mountain Property Owners' Ass'n v. Seifart, 48 N.C.App. 286, 269 S.E.2d 178 (1980); Snug Harbor Property Owners' Ass'n v. Curran, 55 N.C.App. 199, 284 S.E.2d 752 (1981), *review denied*, 305 N.C. 302, 291 S.E.2d 151 (1982). *But see* Figure Eight Beach Homeowners' Ass'n v. Parker, 62 N.C.App. 367, 303 S.E.2d 336 (1983), *review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983), *noted in* 7 CAMPBELL L.REV. 33 (1984) (notable not only for its relaxation of the specification requirement but also as the first recognition in N.C. that an affirmative covenant to pay an assessment may be enforced by someone other than the original grantor).

As the "categorical" requirements for allowing covenants to run become more and more relaxed, issues such as those suggested by Ms. Richmond's arguments concerning touch and concern and unconscionability are likely to come more and more to the fore. For conflicting

views on the wisdom of active judcial intervention on the basis of the content of covenants, see Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S.CAL.L.REV. 1353, 1361 (1982) (judicial intervention creates dead weight losses by increasing front end transactions costs); Reichman, *Toward a Unified Law of Servitudes, id*. 1179, 1233 (judicial intervention necessary to prevent landowners from creating modern versions of feudal serfdom); Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 971–74 (touch and concern doctrine promotes efficient outcomes and its obscurity is useful); Alexander, *Freedom, Coercion and the Law of Servitudes*, 73 CORNELL L.REV. 883 (1988) (judicial intervention necessary to prevent coercion and promote genuine community).

4. The Importance of a Common Plan

RILEY v. BEAR CREEK PLANNING COMMITTEE
Court of Appeal of California, Third District
50 Cal.App.3d 335[1], 123 Cal.Rptr. 330 (1975)

PUGLIA, P.J. . . . Central to the disposition of this appeal is the question whether or not plaintiffs' property is burdened by an equitable servitude for the benefit of other lots in the tract of which plaintiffs' property is a part.

On February 26, 1964, Alpine Slopes Development Company (hereinafter "grantor"), a limited partnership, by grant deed conveyed Lot 101 in Alpine Meadows Estates Subdivision No. 3, located in Placer County, to Ernest H. and Jewel Riley, husband and wife. The deed, recorded March 13, 1964, contains no restrictions upon the use of the plaintiffs' property nor is there any reference therein to any instrument purporting to impose restrictions upon Lot 101. In fact, at the time of the conveyance there was no document of record purporting to restrict the use of Lot 101. [p*982]

On November 25, 1964, exactly nine months after the conveyance to plaintiffs, the grantor caused to be recorded with the Placer County Recorder a document entitled "Declaration of Covenants, Conditions, Restrictions and Reservations on Lots 72 through 116 of Alpine Meadows Estates Unit No. 3" (referred to hereinafter as "declaration"). . . . Preliminarily the declaration recites that grantor is the owner and subdivider of Lots 72 through 116 inclusive (which are particularly described therein by reference to a recorded map); that "it [grantor] has established and does hereby establish a general plan for the improvement and development of said property and does hereby establish restrictions, easements, conditions, covenants and reservations upon and subject to which all of the aforementioned lots and parcels of said real property shall be improved and sold or conveyed by it as such owner, each and all of which is or are for the benefit of the [grantor] and the owner of any part or parcel of said property or interest therein and shall apply to and bind the respective successors in interest of the owner or owners thereof and are, and each thereof is, imposed upon said property as a servitude in favor of each subsequent declarant and of each and every parcel of land therein as a dominant tenement or tenements . . . ." There follow 26 numbered paragraphs in which restrictions, covenants and conditions common to subdivision developments of the type here involved are spelled out which are to remain in full force and effect until January 1, 1983.

It is the plaintiffs' alleged violation of the provisions of paragraph 6 of the declaration that precipitated the instant controversy. Insofar as relevant, paragraph 6 provides: "No dwelling, garage, building, fence, wall, retaining wall or other structure or excavation therefor shall be moved onto, commenced, erected or maintained on said lots, nor shall any addition to, change, or

[1] For the status of this citation, see *infra*, p. S429.

alteration therein, be made until the plans and specifications for same have been submitted to the Bear Creek Planning Committee and the approval of said Committee has been secured, . . ."[2]

At a time not established by the record, the plaintiffs constructed a snow tunnel on their lot. In reaction thereto, on January 12, 1972, the committee recorded a "Notice of Violation of Covenants, Conditions and Restrictions." Referring specifically to Lot 101 and the declaration recorded November 25, 1964, the notice recited the "probable violation" of the provisions of the declaration in that "A covered walkway has been constructed on said lot 101 without prior compliance with Paragraph 6 of the above described recorded restrictions."

Thereafter plaintiffs filed their complaint to quiet title . . . and defendant cross-complained for declaratory relief. The resulting judgment quieted plaintiffs' title to Lot 101 against all claims of defendants and found for plaintiffs and against defendant on the latter's cross-complaint for declaratory relief.

Inasmuch as there is no privity of contract between defendants and plaintiffs, . . . [defendants'] right to enforce use restrictions against plaintiffs depends upon whether or not the restrictions sought to be enforced are comprehended within mutually enforceable equitable servitudes for the benefit of the tract. [Citation omitted.] The issue thus framed, . . . [defendants'] claim founders upon the rule announced in *Werner* v. *Graham* (1919) [p*983] 181 Cal. 174, at pages 183–185 [183 P. 945]: "It is undoubted that when the owner of a subdivided tract conveys the various parcels in the tract by deeds containing appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all the others. The agreement between the grantor and each grantee in such a case as expressed in the instruments between them is both that the parcel conveyed shall be subject to restrictions in accordance with the plan for the benefit of all the other parcels and also that all other parcels shall be subject to such restrictions for its benefit. In such a case the mutual servitudes spring into existence as between the first parcel conveyed and the balance of the parcels at the time of the first conveyance. As each conveyance follows, the burden and the benefit of the mutual restrictions imposed by preceding conveyances as between the particular parcel conveyed and those previously conveyed pass as an incident of the ownership of the parcel, and similar restrictions are created by the conveyance as between the lot conveyed and the lots still retained by the original owner. . . . [¶] [H]ere there is no language in the instruments between the parties, that is, the deeds, which refers to a common plan of restrictions or which expresses or in any way indicates any agreement between grantor and grantee that the lot conveyed is taken subject to any such plan. . . . [¶] The intent of the common grantor—the original owner—is clear enough. He had a general plan of restrictions in mind. But it is not his intent that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them, in this case the deed, constitute the final and exclusive memorial of such intent. It is also apparent that each deed must be construed as of the time it is given. It cannot be construed as of a later date, and in particular, its construction and effect cannot be varied because of deeds which the grantor may subsequently give to other parties. . . . Whatever rights were created by the deed were created and vested [when it was given], and the fact that it later appears that [the grantor] was pursuing a general plan common to all the lots in the tract cannot vary those rights. The same is true of each deed as it was given. Nor does it make any

[2] The record shows only that the Bear Creek Planning Committee is an unincorporated association, in existence at least since 1962, and purporting to exercise architectural control over structures erected in the tract containing plaintiffs' lot. Otherwise, considering that the committee claims control over the erection, placement or alteration of any building in the tract area, the record is remarkably silent concerning the origin, organization, operation and, of primary importance, source of jurisdiction of the committee. . . .

difference that, as claimed by the defendants, [the grantor] gave each grantee to understand, and each grantee did understand, that the restrictions were exacted as part of a general scheme. Such understanding was not incorporated in the deeds, and as we have said, the deeds in this case constitute the final and exclusive memorials of the understandings between the parties. Any understanding not incorporated in them is wholly immaterial in the absence of a reformation. [Citations.] This whole discussion may in fact be summed up in the simple statement that if the parties desire to create mutual rights in real property of the character of those claimed here they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them which constitute the final expression of their understanding." [Citation omitted.]

From the recordation of the first deed which effectively imposes restrictions on the land conveyed and that retained by the common grantor, the restrictions are binding upon all subsequent grantees of parcels so affected who take with notice thereof notwithstanding that similar clauses have been omitted from their deeds. (*Werner* v. *Graham*, *supra*, pp. 183–184, [further citations omitted].) Neither proof nor contention is made that plaintiffs are grantees subsequent to the recordation of such a deed with notice thereof and, quite apart from the rule of *Werner* v. *Graham*, it is manifest that [p*984] acknowledgement and recordation of a declaration of restrictions by the grantor after the conveyance to plaintiffs cannot affect property in which the grantor no longer has any interest.

To surmount the obstacle erected by the rule of *Werner* v. *Graham*, defendants postulate an analysis of the pertinent law dependent upon the following premises: parol evidence is admissible to explain the terms of a deed to the same extent as with contracts generally; the rule of *Werner* v. *Graham* is a function of and predicated upon the parol evidence rule; the modification of the parol evidence rule accomplished by *Masterson* v. *Sine* (1968) 68 Cal.2d 222 [65 Cal.Rptr. 545, 436 P.2d 561], therefore operated in effect to overrule *Werner* v. *Graham sub silentio*. Accordingly, defendants conclude, extrinsic evidence is admissible to establish the mutual intention of the parties to the conveyance to plaintiffs that it be subject to restrictions identical to those contained in the declaration recorded subsequently by the grantor and specifically in paragraph 6 thereof.

In furtherance of this theory, defendants at trial offered extrinsic evidence of the understanding of the plaintiffs and their grantor. The evidence was received provisionally, subject to the trial court's later ruling on plaintiffs' continuing objection thereto and motion to strike based both on the parol evidence rule and the principle (stated in *Werner* v. *Graham*, *supra*, at p. 185) that the evidence was irrelevant as the deed is conclusive of the parties' intention with respect to mutually restrictive covenants. In summary, the challenged evidence tended to prove that the grantor intended to convey and plaintiffs intended to purchase a parcel which both parties assumed to be governed by building restrictions; that prior to purchase plaintiffs' attention had been directed to the existence of the assumed restrictions and for the first several years of their occupancy of the lot, they conducted themselves in compliance with what they understood to be binding controls upon the use of the property. The trial court, regarding *Werner* v. *Graham* as controlling, granted plaintiffs' motion to strike all extrinsic evidence of the intention of the parties. Defendants assign the ruling as reversible error.

We have no quarrel with the initial premise upon which defendants' theory of the case is predicated, i.e., the admissibility of parol evidence where otherwise proper to explain the terms of a deed. [Citations omitted.] However, we cannot agree with the second postulate of defendants' theory, i.e., that the parol evidence rule supplies the exclusive rationale underlying the doctrine of *Werner* v. *Graham*.

The parol evidence rule operates to bar extrinsic evidence which contradicts the terms of a written contract. [Citation omitted.] It "is not a rule of evidence but is one of substantive law. It

does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), *becomes the contract of the parties*. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself." [Citations omitted.]

In contrast to the rationale of the rule barring parol evidence, the "Purpose of the statute of frauds is to prevent fraud and perjury with respect to certain agreements by requiring for enforcement the more reliable [p*985] evidence of some writing signed by the party to be charged . . . ." [Citation omitted.] Thus the statute of frauds excludes proof of certain types of agreements which are not sufficiently evidenced by a writing. [Citation omitted.] Every material term of an agreement within the statute of frauds must be reduced to writing. No essential element of a writing so required can be supplied by parol evidence. [Citations omitted.] Among the types of agreement to which the statute of frauds applies are contracts for the sale of real property or an interest therein [citation omitted] and agreements which by their terms are not to be performed within a year [citations omitted].

In *Masterson* v. *Sine, supra*, 68 Cal.2d 222, . . . [this court] abandoned the rule that evidence of oral agreements collateral to an agreement in writing must be excluded where the instrument on its face appears to be an integration. Rather, the court held that credible extrinsic evidence of a collateral oral agreement is admissible if, considering the circumstances of the parties, the agreement is one which "'might naturally be made as a separate agreement.'" (P. 228.) Defendants contend that under the rule announced in *Masterson*, the extrinsic evidence which was stricken by the court was credible evidence admissible to show the collateral oral understanding of plaintiffs and their grantor that Lot 101 be subject to the restrictions which defendants seek here to enforce.

. . . [Although certain language in our *Werner* case was susceptible of the conclusion that the principle there announced had its roots in the parol evidence rule, our decision four years later in *McBride* v. *Freeman* (1923) 191 Cal. 152 [215 P. 678], made it clear that other considerations were of greater importance. There, in strongly reaffirming our adherence to *Werner* in the face of a vigorous frontal attack upon it, we stated:] "Any other rule would make important questions of the title to real estate largely dependent upon the uncertain recollection and testimony of interested witnesses. The rule of the *Werner* case is supported by every consideration of sound public policy which has led to the enactment and enforcement of statutes of frauds in every English-speaking commonwealth." (P. 160.) . . .

We recognize that a deed poll such as used here and commonly throughout California does not satisfy the requirement of the statute of frauds that the written memorandum be subscribed by the party to be charged [when that party is the grantee.] [Citations omitted.][3] Notwithstanding the lack of complete congruity of common conveyancing practice in the creation of so-called negative easements to the requirements of the statute of frauds, we are of the view that the doctrine of *Werner* v. *Graham*, though undoubtedly a function in part of the parol evidence rule, is not exclusively so; that independently therefrom it derives vitality from the policies underlying and implemented by the statute of frauds; that as a consequence, it remains a viable "rule of property" [citations omitted] unimpaired and unaffected by subsequent modifications of the parol evidence rule.

---

[3] However, the acceptance by the grantee of a deed poll containing a covenant to be performed by him binds him to performance thereof. [Citation omitted.]

Moreover, there is a practical consideration favoring the rule of *Werner* v. *Graham*. The grantee of property subject to mutually enforceable restrictions takes not just a servient tenement but, as owner of a dominant tenement, acquires a property interest in all other lots similarly burdened for the benefit of his property. That fact significantly affects the expectations of the parties and inevitably enters into the exchange of consideration between grantor and grantee. Even though the grantor omits to include the mutual restrictions in deeds to parcels thereafter severed from the servient [p*986] tenement, those who take such property with notice, actual or constructive, of the restrictions are bound thereby. [Citation omitted.] Thus, the recording statutes operate to protect the expectations of the grantee and secure to him the full benefit of the exchange for which he bargained. [Citations omitted.] Where, however, mutually enforceable equitable servitudes are sought to be created outside the recording statutes, the vindication of the expectations of the original grantee, and for that matter succeeding grantees, is hostage not only to the good faith of the grantor, but, even assuming good faith, to the vagaries of proof by extrinsic evidence of actual notice on the part of grantees who thereafter take a part of the servient tenement either from the common grantor or as successors in interest to his grantees. The uncertainty thus introduced into subdivision development would in many cases circumvent any plan for the orderly and harmonious development of such properties and result in a crazy-quilt pattern of uses frustrating the bargained-for expectations of lot owners in the tract.

[Finally, although defendants in their briefs before the trial court expressly indicated that they placed no reliance on the doctrine of estoppel, we think it appropriate to observe, for the guidance of the courts in future cases, that that doctrine has no application in this area. Equitable servitudes in land may be created in this state only by deed, and the expectations of the parties, reasonable or otherwise, are wholly without relevance in the absence of language in the deed having the legal effect of creating such a servitude. . . .]

The trial court correctly struck extrinsic evidence of the intention of plaintiffs and their grantor.[4]

The judgment is affirmed.

RILEY v. BEAR CREEK PLANNING COMMITTEE

Supreme Court of California, In Bank
17 Cal.3d 500, 551 P.2d 1213, 131 Cal.Rptr. 381 (1976)

[In a *per curiam* opinion the court "adopted" the appellate court's opinion with additions and deletions noted above with elipses and square brackets. For this reason the original appellate court opinion is no longer to be found in the official California appellate court reports.]

TOBRINER, J. [dissenting]. I cannot subscribe to the majority's conclusion that a buyer of a subdivision lot, who takes his deed with actual knowledge of a general plan of mutual restrictions applicable to the entire subdivision and who conducts himself for many years in a manner which demonstrates his belief that such restrictions apply to his property, may thereafter violate all such restrictions with impunity simply because the restrictions were inadvertently omitted from his individual deed. Contrary to the majority's suggestion, we need not decree this inequitable result in order to prevent fraud to maintain security in land titles; the very antithesis—a ruling that a buyer with *actual knowledge* of restrictions is thereby bound—ensures fairness and promotes

[4 Nothing we have said in this opinion should be interpreted to cast any doubt upon the principle, reiterated by us above, that extrinsic evidence may be admissible to explain the terms of a deed. [Citation omitted.] While equitable servitudes restricting the free use of land may be created only by a deed setting forth the restriction (or referring to a recorded declaration of restrictions) and identifying the dominant land or lands, the interpretation of the terms creating such a servitude—in the matter of scope, for instance—is governed by normal principles relative to the admission of extrinsic evidence. [Citation omitted.]]

security in land transactions; it implements the intention [p*987] of both the buyer and the seller. As I shall explain, the majority can sustain their forced result only by ignoring a host of recent decisions of this court which have abandoned the antiquated rule that "property rights" can be ascertained only within the "four corners of a deed."

In the present case, defendants offered proof to establish that (1) prior to their purchase of the lot, plaintiffs received copies of the written restrictions, the bylaw of defendant committee and the real estate commissioner's public report, which stated that the subdivision lots were subject to building restrictions; (2) because of a mistake by the title company, plaintiffs' deed did not contain the restrictions and was recorded prior to recording of the declaration of restrictions; and (3) despite the mistakes of the title company, plaintiffs conducted themselves in accordance with the restrictions for a number of years, seeking defendant committee's approval for the construction of a home and the removal of a tree on their lot. Thus the evidence offered by defendants would demonstrate that plaintiffs took their deed with the understanding that the lot was subject to valid restrictions.

The majority's holding will permit plaintiffs in this case to ignore restrictions designed to preserve natural beauty and property values in a carefully planned residential community. Although the use of all other lots in the community will continue to be restricted, plaintiffs will be free to subdivide their land into any number of small building sites, construct apartments or rent commercial space, ignore building lines and obstruct views from neighboring lots, raise livestock, and strip the land by removing trees and shrubs.

Common sense and substantive justice dictates that the plaintiffs should not be free to violate such restrictions. At the time of purchase plaintiffs had actual knowledge of those restrictions; the restrictions formed a part of the consideration exchanged by the parties. The restrictions continue to enhance the value of plaintiffs' individual lot because all other property owners in the subdivision are bound thereby. . . .

The majority holds that recent decisions of this court modifying the parol evidence rule do not affect the validity of the holding in *Werner* v. *Graham*, because that decision did not rest primarily on the parol evidence rule. The language of *Werner* itself compels a different conclusion. As the majority notes, the parol evidence rule excludes extrinsic evidence as to the terms of an agreement, not because the probative value of such evidence is questioned, but because as a matter of substantive law the writing constitutes the complete agreement between the parties. The language of *Werner* clearly indicates that the decision applied the parol evidence rule; the court stated that "the deeds in this case constitute the final and exclusive memorials of the understandings between the parties. Any understanding not incorporated in them is wholly immaterial . . . ." (At p. 185.) . . .

Contrary to *Werner* v. *Graham*, most states allow proof [of] intent by extrinsic evidence [citations omitted]; these decisions turn on the interpretation of the policies underlying the parol evidence rule [citations omitted], not upon the policies of the statute of frauds. Indeed, despite dictum in *McBride* v. *Freeman* (1923) 191 Cal. 152 [215 P. 678], suggesting that the statute of frauds supplied the rationale for the *Werner* decision, subsequent California cases have recognized that exclusion of extrinsic evidence in interpretation of deeds emanates from the parol evidence rule. [Citations omitted.]

Werner v. *Graham*, then, is based upon the strict parole evidence rule then in effect in California; consequently its holding must be reexamined in light of recent decisions of this court which modify the application of the [p*988] parol evidence rule. In *Masterson* v. *Sine* (1968) 68 Cal.2d 222 [65 Cal.Rptr. 545, 436 P.2d 561], we rejected the principle that parol evidence as to the terms of an agreement is inadmissible simply because the written memorandum appears on its face to be an integration. We recognized that "The crucial issue in determining whether there has

been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement," (at p. 225) and noted that application of the "face of the document" test would "often defeat the true intent of the parties." (At p. 227.) Accordingly, we held that "Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled. The rule must therefore be based on the credibility of the evidence." (At p. 227.) . . .

I believe, therefore, that in light of this court's modification of the parole evidence rule, *Werner* v. *Graham* is no longer a correct application of existing law and should be overruled. The question remains, however, whether, as the majority maintains, the policy underlying the statute of frauds provides an independent basis for rejecting the evidence offered by defendants. That policy, as the majority points out, is to prevent fraud and perjury with respect to certain types of transactions by requiring the most reliable evidence available, a written document. In the present case, however, insistence upon a writing signed by both grantor and grantee is not necessary to prevent fraud, and such a requirement should not be invoked to frustrate the intention of the parties.

The courts of this state have frequently recognized situations in which circumstances surrounding a transaction render the production of a writing signed by both parties unnecessary, and accordingly have established a number of exceptions to the application of the statute. As the majority notes, a deed poll containing restrictions binding upon the grantee does not satisfy the requirements of the statute of frauds, since it is not subscribed by the party to be charged. The courts have held, however, that such deeds are enforceable against the grantee. [Citation omitted.] In the present case, the grantor gave a written document containing the restrictions to the grantee, and the fact that the document was, like a deed poll, not signed in accordance with the requirements of the statute of frauds should not result in the exclusion of the document as evidence of the parties' understanding. The courts have further modified the application of the statute of frauds by holding that once the grantor has given one deed creating restrictive covenants binding on subdivision land to a purchaser, subsequent grantees from the same grantor who have *actual notice* of the restrictions are bound thereby, although no restriction or reference thereto is contained in their individual deeds. [Citation omitted.] Likewise in the present case, plaintiffs took their deed with actual notice of the restrictions at issue.

Moreover, in the area of land transactions, our courts have given effect to oral agreements conveying an interest in land on the basis of the doctrine of part performance. [Citation omitted.] That doctrine represents a recognition of the inequities which will result if the courts refuse to enforce an agreement partially performed by one of the parties. Such part performance must, however, be clearly a performance of the oral contract and not of some other obligation between the parties. . . .

In the present case, both parties have performed acts "unequivocally referable" to their understanding that all the lots in the subdivision, including plaintiffs', were subject to building restrictions. The grantor filed the plat containing the restrictions, and conveyed all subsequent deeds subject to those restrictions. The plaintiffs complied with the restrictions by submitting [p*989] plans for construction on the lot to defendant committee, and by seeking approval of the committee for the removal of a tree from the lot. The only reasonable explanation for this behavior by plaintiffs is that such actions were taken pursuant to the understanding between plaintiffs and their grantor that the lot was subject to subdivision restrictions. The agreement between plaintiffs and their grantor can, therefore, be enforced despite the policy of the statute of frauds favoring formalized writings; indeed, other states have enforced such agreements. . . .

Notes and Questions

1. The facts in Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919), discussed in the principal case, were somewhat different from those in the principal case, and are worth analysis: The developer, one Marshall, subdivided 132 lots and began conveying them out extracting from each lot owner covenants that, in the somewhat quaint form of the day, provided "[t]hat no building to be used as a saloon, or tenement houses known as flats, or livery stable, or store of any kind or nature whatever shall be erected or placed on said premises or any part thereof, nor shall any such business be conducted on said premises or any part thereof at any time within thirty (30) years from the date hereof" and that reasonably expensive residences be build on the property with a uniform set-backs. *Id*. at 177–78, 183 P. at 946. While there were some variations in the covenants, the court found that they were "so uniform and consistent in character as to indicate unmistakably that Marshall had in mind a general and common plan which he was following." *Id*. at 177, 183 P. at 946. The plaintiff's lot was not the first conveyed. After he had conveyed 116 lots, Marshall quitclaimed his interest in the covenants to the plaintiff's predecessor in title. The plaintiff's deed did not contain the covenants. It was alleged that he had notice of them, but the court deemed that fact irrelevant in the light of what it held.

There were thus three types of defendants in the plaintiff's quiet title action: (1) those whose lots had been conveyed before the plaintiff's predecessor in title obtained his lot; (2) those whose lots had been conveyed between the time that the plaintiff's predecessor in title acquired his lot and the time that Marshall quitclaimed to him; and (3) those who acquired their lots after the quitclaim. After first noting that the covenants would not run at law for lack of horizontal privity, the court then proceeded to hold that absent a common plan none of the defendants could enforce the covenants:

> . . . [I]t is quickly evident that as to those lots which Marshall had parted with prior to his conveyance of the plaintiff's lot, there is no equitable servitude. Marshall was no longer interested in those lots and by no possibility can it be said that the covenants in the deed to the plaintiff's lot were exacted by him for the benefit of lots which he did not own.
>
> In like fashion it is plain that there is no servitude over the plaintiff's lot in favor of those lots which Marshall still retained when he gave the quitclaim deed of 1905 and with which he parted subsequently. If a servitude had previously existed in favor of those lots, he as their owner, had the right to surrender it and undoubtedly did so by his quitclaim deed.
>
> The remaining question is as to the existence of a servitude in favor of those lots which Marshall still owned when he sold the plaintiff's lot and with which he parted before he gave his quitclaim deed. This is purely a question of the construction and consequent effect of the deed by Marshall parting with the plaintiff's lot. The situation in this respect is that one, the owner of a tract of land, sells a portion of it, exacting of the grantee restrictive provisions as to its use, but without a word indicating that the [p*990] land conveyed is part of a larger tract, the balance of which the grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of what is an essential element of any such servitude as is claimed, namely, the land which is to be the dominant tenement. Servitudes running with the land in favor of one parcel and against another cannot be created in any such uncertain and indefinite fashion. It is true, the nature of the restrictions is such that, when considered in connection with the fact that Marshall still retained the greater portion of the tract, it is not improbable that he exacted them for the benefit of the portion so retained. But the grantee's intent in this respect is necessary, as well as the grantor's, and the deed, which constitutes the final and exclusive memorial of their joint intent, has not a word to that effect, nor anything whatever which can be seized upon and given construction as an expression of such intent. If such was their intent, it has not been expressed. . . .

Id. at 181–82, 183 P. at 948. The court then goes on hold that there was no enforceable common plan for reasons given in the principal case.

How does the issue in the principal case differ from that in *Werner*?

2. You may recall the reference to a "common scheme" in *Albright v. Fish*, p. S440 *supra*. Focusing on the covenants in the original deed for the plaintiff's lot in *Werner v. Graham*, why is the existence of a general plan important to their enforcement? For the same reason as in *Albright* or additional ones?

3. Both *Albright v. Fish*, p. S440 *supra*, and *Werner v. Graham* concern the ability of neighbors to enforce covenants actually imposed by a developer on the lot in question. Can a general plan ever produce restrictions on a lot when the developer has failed to incorporate them in its deed?

In Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925), the Supreme Court of Michigan held that defendants should be enjoined from building a filling station on lot 86 of the Green Lawn subdivision although that lot had never expressly been restricted by the developer. Fifty-three of the 91 lots in the subdivision fronting on the same avenue as lot 86 were restricted to residential use. According to the Court this created a "reciprocal negative easement" limiting use of lot 86. It explained:

> 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. For want of a better descriptive term this is styled a reciprocal negative easement. . . . It is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land subject to its affirmative or negative mandates. . . . Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. Such a scheme of restriction must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan.

Id. at 229, 206 N.W. at 497.

The requirement that the defendants have actual or constructive notice of the restrictions gave the court little trouble:

> When Mr. McLean purchased on contract in 1910 or 1911, there was a partly built dwelling house on lot 86, which he completed and now occupies. [p*991] He had an abstract of title which he examined and claims he was told by the grantor that the lot was unrestricted. Considering the character of use made of all the lots open to a view of Mr. McLean when he purchased, we think he was put thereby to inquiry, beyond asking his grantor whether there were restrictions. He had an abstract showing the subdivision and that lot 86 had 97 companions; he could not avoid noticing the strictly uniform residence character given the lots by the expensive dwellings thereon, and the least inquiry would have quickly developed the fact that lot 86 was subjected to a reciprocal negative easement . . . . [W]ith the notice he had from a view of the premises on the street, clearly indicating the residences were built and the lots occupied in strict accordance with a general plan, he was put to inquiry, and, had he inquired he would have found of record the reason for such general conformation . . . .

Id. at 232, 206 N.W. at 497.

Sanborn v. McLean, enjoys a wide following. *See, e.g.*, Land Developers, Inc. v. Maxwell, 537 S.W.2d 904 (Tenn.1976); Mid-State Equip. Co. v. Bell, 217 Va. 133, 225 S.E.2d 877 (1976).

See generally RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES § 2.14 (Tent.Draft 1989). Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913), comes out the other way, resting its holding on the statute of frauds. Other jurisidicions are in accord. RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES § 2.14 reporter's note, at 172–73 (Tent.Draft 1989). Now that the California court has decided that *Werner* was a statute of frauds case, should we count California in the *Sprague v. Kimball* jurisdictions? At least one jurisidiction has adopted a middle course, expressly adhering to the doctrine of *Werner* but making exceptions where the non-covenanting landowner estops himself by attempting to enforce the benefit of the covenant or where the circumstances make it clear that the purchaser should have inquired about the possible existence of oral promises made to neighboring landowners that the land would be restricted. Colonia Verde Homeowners' Ass'n v. Kaufman, 122 Ariz. 574, 596 P.2d 712 (Ct.App.1979) (estoppel); Shalimar Ass'n v. D.O.C. Enters., Ltd., 142 Ariz. 36, 688 P.2d 682 (Ct.App.1984) (investor in golf course should have inquired about oral commitments made to adjoining landowners).

4. Snow v. Van Dam, 291 Mass. 477, 197 N.E. 244 (1935), involved a developer who developed in two stages. Somewhat simplified the facts were these: In the first stage of development the developer extracted residential use covenants from his grantees. He also extracted one from the single grantee in the second stage of development and then departed from the scene. Denied the doctrine of "reciprocal negative easements" by *Sprague*, the court held that the prior purchasers could nonetheless enforce the covenants:

> [Despite *Sprague*], the existence of a "scheme" continues to be important in Massachusetts for the purpose of determining the land to which the restrictions are appurtenant. Sometimes the scheme has been established by preliminary statements of intention to restrict the tract, particularly in documents of a public nature [citations omitted], or in a recorded plan. [Citations omitted.] More often it is shown by the substantial uniformity of the restrictions upon the lots included in the tract. [Citation omitted.] In some jurisdictions the logic of the English rule, that the extent and character of the scheme must be apparent when the sale of the lots begins, has led to rulings that the restrictions imposed in later deeds are not evidence of the existence or nature of the scheme. *Werner* v. *Graham*, 181 Cal. 174, 183–186. [Further citations omitted.] In the present case there is no evidence of a scheme except a list of conveyances of different lots from 1907 to 1923 with substantially uniform restrictions. Although the point has not been discussed by this court, the original papers show, more clearly than the reports, [p*992] that subsequent deeds were relied on to show a scheme existing at the time of the earlier conveyances to the parties or their predecessors in title, in [five citations omitted]. Apparently in Massachusetts a "scheme" has legal effect if definitely settled by the common vendor when the sale of lots begins, even though at that time evidence of such settlement is lacking and a series of subsequent conveyances is needed to supply it. In *Bacon* v. *Sandberg*, 179 Mass. 396, 398, it was said, "the criterion in this class of cases is the intent of the grantor in imposing the restrictions." . . .
>
> The existence of a "scheme" is important in the law of restrictions for another purpose, namely, to enable the restrictions to be made appurtenant to a lot within the scheme which has been earlier conveyed by the common vendor. . . . In general, an equitable easement or restriction cannot be created in favor of land owned by a stranger. [Citations omitted.] Nevertheless an earlier purchaser in a land development has long been allowed to enforce against a later purchaser the restrictions imposed upon the latter by the deed to him in pursuance of a scheme of restrictions. [Citations omitted.] . . .
>
> The rationale of the rule allowing an earlier purchaser to enforce restrictions in a deed to a later one pursuant to a building scheme, is not easy to find. [Citation omitted.] The simple explanation that the deed to the earlier purchaser, subject to restrictions, implied an enforceable agreement on the part of the vendor to restrict in like manner all the remaining

> land included in the scheme . . . cannot be accepted in Massachusetts without conflict with *Sprague* v. *Kimball*, 213 Mass. 380. In *Bristol* v. *Woodward*, 251 N.Y. 275, 288, CARDOZO, C.J., 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* (20 N.Y. 268) [a third-party beneficiary case]. . . . Perhaps it is enough to say that the extension of the doctrine, even if illogical, has been made too often and too consistently to permit withdrawal or retreat."

Id. at 482, 197 N.E. at 227–28.

In a jurisdiction not concerned with the statute of frauds problem producing *Sprague v. Kimball*, or, for that matter, in Massachusetts would the inclusion of the following language in the early deeds prevent holders under them from enforcing covenants affecting later sold lots?: "Nothing contained herein should be construed as imposing any restriction upon any land of the grantor not hereby conveyed." Is this different from the issue addressed in *Suttle v. Bailey*, *infra*, p. S459?

5. In many cases, finding a general plan leads to a second difficult question—does the plan encompass the lots in question? As of what point should the geographic scope of the plan be determined? Developers frequently subdivide in stages. When, if ever, is it appropriate to conclude that lots in stage 1 and stage 2 are part of one general plan? Does your answer vary depending on whether the general plan is being used as in *Sanborn v. McLean*, p. S456 *supra*, or *Snow v. Van Dam*? *Compare* Russell Realty Co. v. Hall, 233 S.W. 996, 999 (Tex.Civ.App.1921):

> . . . [P]urchasers' rights under restrictive covenants relating to lots in [the] first plat cannot be extended beyond its borders. They are circumscribed and confined by the territorial limits of the plat with reference to which the purchasers bought, and purchasers cannot be granted relief against the construction of buildings of an obnoxious kind in an adjoining section, even though such buildings are constructed in violation of restrictive covenants, which apply to the adjoining territory. [p*993]

Hall involved an attempt to use the asserted general plan both as the source of a restriction ("reciprocal negative easement") and to permit enforcement of it by the plaintiffs. Holding as it did, the court found it unnecessary to determine whether there were restrictions on the defendants' lots which their neighbors in the second plat could enforce, none of them being plaintiffs in the action. *See also* Note 5, *infra*, p. S460; Duvall v. Ford Leasing Dev. Corp., 220 Va. 36, 255 S.E.2d 470 (1979).

6. In the absence of a general plan but with the clearly expressed intent that the covenant burdening a particular lot is for the benefit of neighboring owners, can those neighbors enforce it? Does it matter whether they are earlier purchasers from the same developer? Does it matter whether they have similar covenants restricting their land? In a jurisdiction with liberal rules allowing contract enforcement by third party beneficiaries the answers to these questions are quite straightforward. *See* Vogeler v. Alwyn Improvement Corp., 247 N.Y. 131, 159 N.E. 886 (1928) in which the New York Court of Appeals considered the question of enforcement in just those terms:

> In some cases there are expressions in the opinions which standing alone might seem to indicate that the right of a prior grantee of one parcel to enforce a restriction imposed upon a subsequent conveyance of another parcel by the same grantor is limited to cases where both parcels were embraced in a general plan for development of a larger tract. A critical examination of these opinions will demonstrate that these considerations have been regarded as decisive only where on the face of the subsequent deed no covenant or restriction is found in favor of prior grantees or where the action has been brought in jurisdictions where courts

> have been compelled to create an exception to a general rule prevailing there that a third party may not enforce a contract made for his benefit.
>
> In the present case no such questions exist. The restriction was imposed for the defendant's benefit under circumstances where the beneficiary of a promise may sue for its enforcement in accordance with the general doctrines prevailing here.

Id. at 136–37, 159 N.E. at 888. *See Streams Sports Club, Ltd.*, p. S441 *supra*. *But cf*. Rodgers v. Reimann, 227 Or. 62, 361 P.2d 101 (1961). What is the situation in a state denying enforcement to donee beneficiaries?

Notes and Questions on Grantor's Retention of Power to Change the Common Plan

1. In 1937, a Mr. and Mrs. Dickason platted and dedicated an addition to the City of Albuquerque, imposing a common scheme of restrictive covenants to last until 1970 but reserving the power to change the covenants by agreement between the grantors and the grantee or the person to whom the property had been conveyed. Around 1960, plaintiffs brought an action seeking an injunction against the maintenance of a business on the defendants' properties in violation of the restrictions. As the court saw it, the issue was "whether a general reservation of the power to dispense with restrictions negatives the purpose of uniform development from which the right of mutuality among lot owners in a platted subdivision is deemed to arise." Suttle v. Bailey, 68 N.M. 283, 285, 361 P.2d 325, 326 (1961). The court does not state which of the number of uses to which the common-plan doctrine can be put was at stake in the case. The general question was one of first impression in New Mexico, but the court found that in other jurisdictions the reservation of such a power did negate the common plan. The court concluded: [p*994]

> It should be noted that Mr. Dickason testified at the trial and . . . appellees make much of the fact that Mr. Dickason exercised the right to alter or change on only one occasion. This, of course, can have no bearing on the general holding of the court, as we cannot concern ourselves with what construction the grantor himself placed upon the reservation, but we must construe the same as it is written. It is the language used together with the circumstances surrounding the transaction which are controlling. [Citations omitted.] The right was reserved to the grantor, and the fact that it was not exercised except in the one instance does not destroy the substance of the right. No subsequent grantee had any assurance, other than the personal integrity of the original grantor, that the restrictions on any adjacent lot or lots in the subdivision might not be altered or annulled at any time without his consent. Therein lies the lack of mutuality or reciprocity so necessary to create a covenant which will run with the land and inure to the benefit of all subsequent owners. We therefore, hold that the reservation included in the covenant made it a personal covenant between the grantor and his individual grantees, and that there is no right as between the individual grantees to enforce the restrictive covenants; that the right is one which is vested only in the grantor, and does not run with the land.

Id. at 287, 361 P.2d at 327.

2. *Compare* Graham v. Beermunder, 93 A.D.2d 254, 462 N.Y.S.2d 231 (1983) (the presence in a covenant of a reservation of some consensual power to the grantor is but one factor to consider in determining whether there is a common scheme of development); Loch Haven Homeowners' Ass'n v. Nelle, 389 So.2d 697 (Fla.Dist.Ct.App.1980), *aff'd sub nom.* Nelle v. Loch Haven Homeowners' Ass'n, 413 So.2d 28 (Fla.1982) (same); Kreppel v. Tucker, 220 N.Y.S.2d 15 (Sup.Ct.1961) ("The instrument, in the introductory clauses, declares that the restrictions upon each lot are 'for the mutual benefit of all lots.' That is some evidence that a general scheme was intended, notwithstanding the reservation of the right to annul or modify.").

3. If you can conceive of a case in which a general plan is found despite the grantor's reservation of a power to annul or modify covenants, can you imagine a case in which the existence of the plan plus other facts bars exercise of that power? *See* Fox Lake Hills Property Owners' Ass'n v. Fox Lake Hills, Inc., 120 Ill.App.2d 139, 256 N.E.2d 496 (1970) (holding that grantor could not, having conveyed common areas to property owners' association, modify covenants requiring payment of annual assessment to the association).

4. A clause reserving the right to annul or modify is likely to be inserted by the developer in anticipation of two somewhat different problems. First, he will want to preserve a measure of flexibility for himself so that should the land turn out to be less saleable than hoped with the restrictions he can unload it without them. For an example of such a case where the developer was caught short by his failure to reserve the power to annul, see Rick v. West, 34 Misc.2d 1002, 228 N.Y.S.2d 195 (Sup.Ct.1962). (Can this interest be protected by the more modest provision suggested *supra*, p. S458, at the end of Note 4?) In addition, the developer may wish, primarily for his purchasers' benefit, to set up a mechanism so that if conditions change a lot owner can obtain a modification of restrictions without obtaining unanimous approval from the hundreds of other owners in the development. The larger the development the more important this becomes. *See, e.g.*, Evangelical Lutheran Church v. Sahlem, 254 N.Y. 161, 172 N.E. 455 (1930).

5. To what extent does enforcement of restrictions or assessments by a homeowner's association depend on the existence of a general plan? Under the [p*995] logic of *Neponsit*, would the reservation of a power to amend or waive by the developer prevent enforcement by the association? What effect on enforcement by individual owners has a power to amend or waive vested in the association (which in its early stages is dominated by the developer)?

6. What is the effect of a clause which purports to give the developer the power to add further blocks of land to the area covered by his recorded restrictions? Does it prevent finding a general plan covering the initially defined area? If it doesn't, upon such an addition is there truly but one general plan covering both the original area and that added? *See* Finucan v. Coronet Homes, Inc., 259 S.C. 142, 191 S.E.2d 5 (1972). *Cf.* Note, *The Existence of a Uniform Plan of Development Embracing Two Subdivisions*, 52 CORNELL L.Q. 611 (1967).

7. Should the grantor's retention of a power to approve the architectural plans of buildings with no explicit standard to hem in his discretion be treated as the equivalent of a power to waive? *See, e.g.*, Donoghue v. Prynnwood Corp., 356 Mass. 703, 255 N.E.2d 326 (1970). Should it be so treated if a court will impose a fairly strict standard of reasonableness upon the grantor's review? *See generally* 40 A.L.R.3d 864 (1971); 47 A.L.R.3d 1232 (1973).

5. Limits on Subject Matter and Duration

GINSBERG v. YESHIVA OF FAR ROCKAWAY

Appellate Division of the Supreme Court of New York, Second Department
45 A.D.2d 334, 358 N.Y.S.2d 477 (1974), *aff'd mem.*, 36 N.Y.2d 706, 366 N.Y.S.2d 418, 325 N.E.2d 876 (1976)

LATHAM, J. In this action to enjoin the operation of a religious school on property subject to a private residential use covenant, the issue is whether there is a violation of the constitutional guarantees of religious freedom by the enforcement of the covenant against the defendant, which purchased with knowledge of the covenant and of the plaintiffs' intention to enforce it.

In 1908, a covenant was attached to six lots, three on the north side and three on the south side of a short dead-end street (now named Virginia Street) off Empire Avenue, which is a well-traveled two-lane street in Far Rockaway, Queens. The defendant's property is situated at the dead end, where all traffic, including emergency vehicles, turns around. The covenant provides in pertinent part that none of the six lots "shall be used except for one private residence" and that no