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

"apartment buildings, boarding houses, stores, business houses, barns or stables" shall be "erected or maintained". Of the six restricted lots, the four corner ones are improved with single-family residences while the two middle lots are vacant. The surrounding area contains one-family homes in all directions, with the exception of a few two-family homes and a four-story apartment house, all of which have been there for many years.

Plaintiffs Dr. Stanley A. and Mrs. Susan K. Ginsberg own and reside in a single-family home on the *restricted* southeast corner lot. Dr. Ginsberg uses part of the house as a medical office 12 hours a week. His father, who was also a physician, lived and practiced in the house from 1932 on. Dr. Ginsberg started his practice in 1964, paying rent for the office first to his father and then, after his father's death, to his mother. In 1969, his mother transferred the house to the plaintiffs. [p*996]

In or about 1963, an orthodox synagogue purchased the adjacent *unrestricted* property south of the plaintiffs', demolished two private dwellings, and erected its temple. At the same time, the synagogue bought the adjacent vacant *restricted* lot west of the plaintiffs', paved and lighted it, and used it as a parking lot without objection from the plaintiffs or their predecessors apart from minor complaints as to fencing and lighting which were modified pursuant to the plaintiffs' request. Synagogue traffic enters the parking lot through Virginia Street and exits directly onto Empire Avenue by the driveway on the *unrestricted* portion of the synagogue's premises, thus not clogging Virginia Street or substantially disturbing the one-family residential atmosphere. The Trial Justice believed Dr. Ginsberg's statement that the use of the lot for parking was not offensive to him.

In August, 1971, concededly with knowledge of the covenant and of the plaintiffs' intention to enforce it, the defendant, Yeshiva of Far Rockaway, apparently not affiliated with the synagogue, purchased the restricted northwest corner lot at the dead end of the block diagonally across from the plaintiffs. On the eve of purchase, the plaintiffs' attorneys advised the defendant of the plaintiffs' intention to enforce the covenant. In September, 1971, the defendant began to operate an all-day religious school in the former private dwelling for grades 9 through 12. The original nine rooms, unchanged, now serve as four classrooms, an office, a prayer room where the boys pray in the morning and the evening, and a kitchen, with two of the rooms used as a dormitory for three out-of-town boys. The hours are 9 a.m. to 6 p.m. Monday through Friday, with additional hours on Sunday mornings and meetings on Thursday evenings. There are 47 students ages 14 to 18 and some eight teachers. Dr. Ginsberg has been disturbed by the students playing roller skate hockey on the parking lot and in the street in the late afternoon and early evening and by the frequent failure of the school to remove some 8 to 10 garbage cans from the street for several days after collection.

The plaintiffs commenced this action to enforce the covenant on or about February 1, 1972. In or about March, 1972, the defendant purchased the adjoining vacant *restricted* lot. It plans to further expand the school. . . .

The trial court found that despite the synagogue's use of one lot as a parking lot and some deterioration in the residential character of the area, the area retains a residential character of substantial value. This value will be adversely affected by the presence of groups of students of high school age and by the use and servicing of the school property by persons other than private residents. In reliance on *Evangelical Lutheran Church* v. *Sahlem* (254 N.Y. 161), the trial court enjoined the operation of the school.

On appeal, the defendant seeks to distinguish *Sahlem* on the ground that in that case the covenanted area was exactly the same as when the restriction was placed on the land, while at bar, as contended by the defendant, there has been substantial change. The defendant inter alia argues that, in balancing the equities, religious corporations should be distinguished from

commercial enterprises (cf. *Matter of Westchester Reform Temple* v. *Brown*, 22 N.Y.2d 488, 493).

It has long been the rule in this and other jurisdictions that residential use covenants are enforceable against religious institutions such as churches and synagogues (*Evangelical Lutheran Church* v. *Sahlem*, 254 N.Y. 161, *supra*; [further citations omitted]). CHIEF JUDGE CARDOZO, speaking for the Court of Appeals, said (p. 168): "Neither at law nor in equity is it written [p*997] that a license has been granted to religious corporations, by reason of the high purpose of their being, to set covenants at naught. Indeed, if in such matters there can be degrees of obligation, one would suppose that a more sensitive adherence to the demands of plighted faith might be expected of them than would be looked for of the world at large." In that case, as at bar, the plaintiff, with knowledge of the restrictive covenants and of the defendant's opposition, purchased land opposite the defendant's and sought to build a church. In the absence of proof that "the character of the neighborhood has so changed as to defeat the object and purposes for which the restrictions were imposed", the Court of Appeals declared the covenants enforceable both at law and in equity (*Sahlem*, *supra*, p. 166). The facts at bar are entirely similar to those in *Sahlem*, with the added circumstance that the purchaser here is a school, not a church or synagogue. *Sahlem* is clearly dispositive.

The dissenters, ignoring the limits of both the briefs and the arguments before the trial court, attack the viability of *Sahlem* in the light of more recent decisions with regard to zoning and restrictive covenants.

Clearly, however, zoning is an aspect of the police power, asserted for the general welfare, and must bear a substantial relation to the public health, safety, morals, or general welfare (*Euclid* v. *Ambler Co.*, 272 U.S. 365). It is conceded that *all schools*, public and private, and religious institutions are protected from the full impact of *zoning* restrictions because of their contribution to the public welfare ([citation omitted]; *Matter of Diocese of Rochester* v. *Planning Bd. of Town of Brighton*, 1 N.Y.2d 508, 526). While the Court of Appeals has stated that a municipality's lack of power to limit the use or erection of structures for churches and synagogues is founded on the constitutional guarantees of freedom of worship [citations omitted], at the same time the court noted that appropriate restrictions may nevertheless be imposed on churches and schools and they may also be excluded [citations omitted].

There is a fundamental distinction between zoning restrictions and private covenants. Zoning is an *encroachment* on private property rights and its enforcement requires the justification of an overriding public interest. In contrast, the restrictive private covenant *is itself a property right and its subordination to the right of the purchaser is "condemnation without authority of law"* [citation omitted].

Reliance by the dissenters on *Shelley* v. *Kraemer* (334 U.S. 1) is completely misplaced. Unlike the restrictions at bar, the covenants considered in *Shelley* were racially discriminatory on their face . . . .[1]

Furthermore, the Supreme Court of the United States has shown little disposition to extend *Shelley* (70 Harv.L.Rev. 1428, 1437, [further citation omitted]).

The dissenters' reliance on *Marsh* v. *Alabama* (326 U.S. 501) is also misplaced. In *Marsh*, a company-owned town sought to ban the distribution of religious literature on a sidewalk in its

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[1] Cf. *West Hill Baptist Church* v. *Abbate*, (53 Ohio Op.2d 107, 112) where two churches of other religious denominations had been erected in the large restricted area and the court said: "The appearance of discrimination in favor of certain religious denominations * * * is given by the existence of these churches * * * the presence of these two churches in this area indicates that a choice was made by the beneficiaries of the covenant between denominations."

shopping district. The town and its shopping district were accessible to and freely used by the public in general. In reversing a conviction for criminal trespass, the Supreme Court [p*998] merely held that people who live in company towns have the obligations of all other citizens and the consequent need for uncensored information. The case is inapposite.

It must further be observed that even in zoning, exclusion of religious institutions is not impossible. The availability of alternative locations would be a highly relevant consideration (70 Harv.L.Rev. 1428, 1436). The ordinance may be constitutional while the particular application is not [citation omitted].

To support their argument that the defendant's school is such an exercise of religion as renders unenforceable the plaintiffs' property right, the dissenters rely on a decision which held that parochial schools involve sufficient religious activity and purpose to invalidate State aid (*Lemon* v. *Kurtzman*, 403 U.S. 602). However, it requires very little religious activity to run afoul of the Establishment Clause. A short daily prayer is an impermissible religious activity for a public school [citation omitted], but no one argues that the same daily prayer converts the public school to a religious school.

In the face of its conceded knowledge of the covenant and the warning on the eve of purchase that the plaintiffs would enforce their rights, the defendant purchased the *restricted* corner lot and immediately opened its school. Six months later, despite the commencement of this action, the defendant arrogantly purchased the adjoining *restricted* lot with admitted plans to expand.

The area subject to the covenant is limited to six lots on one short block terminating in a dead end. There is no claim by the defendant that it is excluded from a larger nearby area by the operation of similar restrictions. On the contrary, the neighboring synagogue purchased *unrestricted* property adjacent to the plaintiffs' and demolished two private residences to construct its building. Nor does the defendant school claim that the property in question is particularly suited to its purpose, that it possesses some unique advantage for the operation of its school. The facts are contrary. The probable need for emergency vehicles is much greater in an expanding school with a present population of some 60 students and teachers than it is in a one-family residence, while a building located at the blind end of a dead-end street is less accessible than one on an open street.

In this short dead-end street, noise pollution is magnified and contained. Should the plaintiffs and others who bought in reliance on the restrictive covenant be helpless to protect themselves? No balancing of constitutional rights can support such a conclusion on the facts at bar. . . .

BENJAMIN, J. (dissenting). . . .

The issue raised in this appeal is whether the State power may be invoked by way of injunction against the defendant yeshiva to prevent it from using its premises, which are subject to . . . [a] covenant restricting them to one-family residential use, to operate a religious school thereon. We believe such a use of State power violates the constitutionally protected status religious structures enjoy under the First Amendment made applicable to the States by the Fourteenth Amendment. . . .

In our State the question of the impact of the constitutional guarantees of the free exercise of religion and enjoyment of religious profession (N.Y. Const., art. 1, § 3) on zoning ordinances limiting the use of real property in a designated area to residential use only has been considered in several cases. In those cases it has been held "that religious structures [p*999] cannot be excluded, directly or indirectly, from residential zones" (*Matter of Westchester Reform Temple* v. *Brown*, 22 N.Y.2d 488, 496). In that case JUDGE KEATING, speaking for a unanimous court said (p. 496): "We have said that factors such as potential traffic hazards, effects on property values and noise and decreased enjoyment of neighboring properties cannot justify the exclusion of such structures."

The decision in *Brown* cited with approval *Matter of Community Synagogue* v. *Bates* (1 N.Y.2d 445), which had ruled that the zoning power of the Village of Sands Point did not authorize it to limit the erection or use of structures for public worship and strictly religious uses. *Brown* also cited and relied on *Matter of Diocese of Rochester* v. *Planning Bd. of Town of Brighton* (1 N.Y.2d 508), which involved an effort by the petitioning diocese to obtain permission to erect a church and parochial school with necessary accessory uses on certain property which was located in an area zoned for residential use. The respondent Town Planning Board and Board of Appeals refused permission because (1) the locale was "strictly residential in character", (2) "churches and schools should be built in areas where future residential development could accommodate itself to the church or school" and (3) "good planning requires the maintenance of larger and more expensive homes which bear higher assessed values" (p. 517).

In rejecting these grounds and annulling the decisions of the respondents, the Court of Appeals, after noting that it is well established that a zoning ordinance which wholly excludes a church or synagogue from any residential district "is stricken on the ground that it bears no substantial relation to the public health, safety, morals, peace or general welfare of the community" (p. 522), concluded that the decisions of the respondents denying the petitioner permission to build a church and parochial school on its property *"bear no substantial relation to the promotion of the public health, safety, morals or general welfare of the community"* and must therefore be annulled (p. 526; emphasis in original). . . .

In the instant case we are dealing not with a synagogue but with an all-day religious school. That such a school constitutes an integral part of the religious mission of its sponsors and is therefore an exercise of religion protected by the State and Federal Constitutions is made clear in *Lemon* v. *Kurtzman* (403 U.S. 602, 616), where CHIEF JUSTICE BURGER, speaking for the court said, "parochial schools involve substantial religious activity and purpose."

Nor in this case are we dealing with the constitutional validity of an exercise of the police power based upon a local legislative determination as to possible damage to the public health and welfare resulting from permitting a structure to be used for religious purposes to be located in an area reserved for residential use. Rather we are dealing with a demand by an owner of land subject to a restrictive covenant that the covenant be enforced against other land made subject to that covenant by a previous owner. While the plaintiffs seeking the injunction stand primarily on the letter of their covenant, they do by their proof seek to establish that the operation of the defendant's school does somewhat inconvenience them in their use of their premises. Plaintiffs make no claim that the public welfare will be adversely affected by the operation of the defendant's religious school. The trial court found that the value of the plaintiffs' premises will be adversely affected by the presence of groups of students. But such a claim of inconvenience and possible adverse effect on the value of the plaintiffs' premises, a conclusion not supported by any proof in the record, can hardly be given more weight in the balance against the preferred position given to [p*1000] the free exercise of religion by our Constitution than our Court of Appeals gave in the *Diocese of Rochester* case (1 N.Y.2d 508, *supra*) to a legislative finding that the public welfare will be disserved by the erection of a church and religious school in an area reserved for residential use.

It might be argued that we are faced here with a simple question of enforcing a private contract between private parties and hence the Fourteenth Amendment which is limited to State action cannot serve to raise the First Amendment issue of free exercise of religion. *Shelley* v. *Kraemer* (334 U.S. 1) and its progeny [citations omitted] dispose of that contention. *Shelley* established the doctrine that State court enforcement of a racially discriminatory restrictive covenant is State action subject to the Fourteenth Amendment, and any contention that *Shelley* is limited to matters of racial and even religious discrimination falls before *Marsh* v. *Alabama* (326 U.S. 501), where the Supreme Court of the United States struck down an effort to use State power

to compel compliance with a ban by a privately-owned town against distribution of religious literature on its streets, declaring it a violation of the First and Fourteenth Amendments and saying (p. 509): "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."

The foregoing authorities require us to reverse the judgment appealed from. Nor does *Evangelical Lutheran Church* v. *Sahlem* (254 N.Y. 161), cited and relied on by the plaintiffs, compel a contrary conclusion. That case was decided in 1930, long before the decisions in *Marsh* v. *Alabama* and *Shelley* v. *Kraemer* (*supra*), expanding the scope of the Fourteenth Amendment to the First Amendment guarantee of free exercise of religion and declaring State court enforcement of private agreements to be State action subject to the Fourteenth Amendment. Further, the issue of the constitutionality of a ruling against the plaintiff church was not raised in *Sahlem*. In our view the doctrine established in *Sahlem* no longer has application to the case before us.

GULOTTA, P.J., and COHALAN, J., concur with LATHAM, J.; BENJAMIN, J., dissents and votes to reverse and to grant judgment in favor of defendant, with an opinion, in which MUNDER, J., concurs. . . .

Notes and Questions

1. *Shelley v. Kraemer infra*, pp. S618–623, is obviously relevant to the principal case, and you might want to read it at this point. On the precise subject of the principal case, *see generally* Note, *Restrictive Covenants and Religious Uses: The Constitutional Interplay*, 29 SYRACUSE L.REV. 993 (1978); Note, *Restrictive Covenants as a Device to Control Religious Uses*, 12 SYRACUSE L.REV. 347 (1961).

2. In the next chapter constitutional limits on publicly created land use controls are examined. As the principal case suggests, it is possible that such limits may apply as well, via *Shelley v. Kraemer*, to privately created, but judicially enforced covenants. *See generally*, Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP.PROB. & TR.J. 1 (1984); Note, *Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions*, 21 U.C.L.A.L.REV. 1655 (1974). Consider the following products of private covenant; which if any raise serious constitutional questions?

(a) A restriction prohibiting anyone under 21 from living in a subdivision or condominium. *See* O'Connor v. Village Green Owners' Ass'n, 33 Cal.3d 790, 662 [p*1001] P.2d 427, 191 Cal.Rptr. 320 (1983); White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla.1979); Riley v. Stoves, 22 Ariz.App. 223, 526 P.2d 747 (1974); Travalio, *Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing*, 40 OHIO ST.L.J. 295 (1979); Note, *The Enforceability of Age Restrictive Covenants in Condominium Developments*, 54 S.CAL.L.REV. 1397 (1981).

(b) A restriction which through its total prohibition of apartments and specification of minimum lot size and cost of construction effectively bars low and middle income families from a large development. *Cf.* pp. S508–513 *infra*.

(c) A covenant limiting use to single-family residence and defining family so as to exclude nontraditional groupings of individuals living communally. *See* Jayno Heights Landowners' Ass'n v. Preston, 85 Mich.App. 443, 271 N.W.2d 268 (1978); 71 A.L.R.3d 693, 725–35 (1976); Note, *Group Homes and Restrictive Covenants*, 57 U.MO.KAN.CITY L.REV. 135 (1988). *Cf.* Gregory v. Dept. of Mental Health, 495 A.2d 997 (R.I.1985) (interpreting the covenant to allow

six mentally retarded adults to live in a single-family residence district). For the same problem in the context of public regulation, see p. S518, Note 5, *infra*.

(d) A covenant which denies the owner the satisfaction of advertising his political allegiance with a lawn sign. *See* Note on Collisions, *infra*, p. 522.

(e) The grant of assessment (taxing) power to an association in which the developer retains a major voice so long as there is a significant amount of unsold land with the result that residents fail to receive one vote per person in this "private government." *See* Comment, *Democracy in New Towns: The Limits of Private Government*, 36 U.CHI.L.REV. 379 (1969). *See generally* Reichman, *Residential Private Governments: An Introductory Survey*, 43 U.CHI.L.REV. 253 (1976).

(f) A requirement of architectural review, which, as enforced, prevents an owner from building his home to his own taste. *See* 47 A.L.R.3d 1232 (1973). *Cf.* Note on Collisions, *infra*, p. 522.

(g) A covenant demanding advance approval by the grantor or a review committee of all construction with either no explicit standard or only a very inexact one.[1]

(h) A provision binding lot owners to new rules established by the homeowners' association. *Compare* Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180 (Fla.Dist.Ct.App.1975) *with* Winston Towers Zoo Ass'n, Inc. v. Saverio, 360 So.2d 470 (Fla.Dist.Ct.App.1979).

3. In addition to the "touch and concern" test and its equitable counterpart and constitutional limitations, there are other doctrines which upon occasion may prevent enforcement of a covenant because of its subject matter or effect. Decisions have denied enforcement to covenants on the ground that they offend public policy. *See, e.g.*, Lain v. Rennert, 308 Ill.App. 572, 32 N.E.2d 375 (1941) (covenant against advertising signs invalid because it was given in consideration of neighbor's statutorily-required consent to allow establishment of a filling station, a consideration deemed void as against public policy). And covenants will be disregarded if they are found to be unreasonable restraints on alienation. [p*1002] *See* RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES §§ 3.5, 3.6 (Tent.Draft 1991). *See generally* Haskell, *Contractual Devices to Keep "Undesirables" Out of the Neighborhood*, 54 CORNELL L.REV. 524 (1969), and Ch. 3, § 3C6.

Should the courts enforce a covenant which requires the residents of a subdivision to purchase garbage collection services (or some other essential item) from the developer? *See* Sloane v. Dixie Gardens, Inc., 278 So.2d 308 (Fla.Dist.Ct.App.1973).

CAMELBACK DEL ESTE HOMEOWNERS' ASS'N v. WARNER

Court of Appeals of Arizona, Division 2, Department B
156 Ariz. 21, 749 P.2d 930 (1987)

ROLL, J. . . . Ronald H. Warner and others (Warner) appeal from an order of the superior court granting declaratory and injunctive relief to . . . Camelback Del Este Homeowners Association and others (Camelback Homeowners). Camelback Homeowners filed a cross-appeal, seeking additional declaratory relief . . . . The primary issue on appeal is whether the restrictive covenants of a Phoenix subdivision are enforceable against commercial encroachment. . . .

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[1] In June 1972, by order of the Circuit Court of Arlington County affirmed without opinion in Eustice v. Binford, 212 Va. 119, 181 S.E.2d 634 (1971), the Eustice family was forced to demolish their home which had been disapproved by the neighborhood architecture review board operating under a covenant against "inharmonious" structures. *See* Washington Post June 3, 1972, § B, at 1, col. 1. *But see* Ashelford v. Baltrusaitis, 600 S.W.2d 581 (Mo.App.1980).

Camelback Del Este is a Phoenix subdivision consisting of 83 single-family residences which borders on Camelback Road. The area surrounding the subdivision has undergone tremendous changes over the past three decades. Camelback Road has been widened in this area from two lanes to seven lanes. Whereas thirty years ago East Camelback Road had an average weekday traffic flow of 15,200 vehicles, it now has an average weekday traffic flow of over 50,500 vehicles, the highest daily traffic flow of any street in Phoenix. Camelback Homeowners represents the owners of the 83 residences situated in the subdivision.

The subdivision is subject to deed restrictions which include the following:

> 4. No structure shall be erected, altered, placed or permitted to remain on any of said lots other than one detached single-family dwelling not to exceed two stories in height, and a private garage not to exceed one story in height for not more than two cars, and a guest house or servant quarters for the sole use of actual non-paying guests or actual servants of the occupants of the main residential building. . . .

Ronald H. Warner was aware of the deed restrictions of the subdivision. In September of 1983, Warner purchased one of the subdivision lots in the vicinity where a garden-office complex was planned. He then obtained options to buy eight additional lots at the proposed site of the complex. The options were obtained by offering the various owners between $150,000 and $350,000 per residence. Warner's real estate expert testified that the most any home in the subdivision sold for in 1984 was $119,000.

Warner filed an application for a zoning change with the City of Phoenix in connection with the nine lots. Thereafter, on August 12, 1984, Warner met with some of the owners in the subdivision. Warner asserts that no resident stated that they intended to enforce the restrictions and that had any homeowner informed Warner of such intent, the Warners would have amended the rezoning application.

An attorney who resided in an adjoining subdivision discussed the restrictions with Ronald Warner. During August of 1984, the attorney told [p*1003] Warner, "Ron, even if you get the rabbit out of the hat in this thing, and somehow get city council to approve this zoning for commercial office, you still got deed restrictions, and, you know, how are you ever going to get around the deed restrictions?" On October 9, 1984, Warner conducted a poll of all homeowners in the subdivision. The results indicated that Warner lacked substantial support for lifting the restrictions and proceeding with the project. On October 17, 1984, the Phoenix City Council held a hearing regarding Warner's zoning request. One homeowner declared in Ronald Warner's presence at the hearing, "[W]e will not relinquish these deed restrictions without a fight."

On December 5, 1984, Camelback Homeowners filed a complaint seeking declaratory and injunctive relief to enforce the restrictive covenants. On April 24, 1985, with leave of the court, the Camelback Homeowners filed an amended complaint adding a second count which also sought a declaratory judgment that the restrictions were not subject to change until February 25, 1987, and, further, that any changes had to apply to all lots uniformly unless 100% of the homeowners agreed to non-uniform amendment. The amended complaint was apparently precipitated by Warner's circulation of a petition to change the restrictions as to certain lots in the subdivision.

Warner asserts that he will have lost between $350,000 and $400,000 expended on this project if he is not permitted to build the complex. However, only $8,000 was expended before the October 17, 1984, Phoenix City Council hearing regarding the rezoning. . . .

The trial court refused to permit Warner to file a counterclaim against certain homeowners who attended a meeting to discuss the project and who, Warner alleges, failed to voice their intent to enforce the restrictions.

The matter was tried to the court in May and June of 1985. On January 30, 1986, the trial court granted Camelback Homeowners declaratory and injunctive relief. The restrictions were held applicable to all lots and enforceable against Warner, and Warner was restrained from removing existing single-family dwellings to construct commercial and/or office buildings. . . . The trial court did not rule on Camelback Homeowners' request for declaratory judgment as to whether the restrictions could be removed as to some of the subdivision lots without approval of 100% of the homeowners.

On appeal, Warner raises the following issues: (1) whether the nine lots should have been relieved of the restrictive covenants; (2) whether the trial court should have considered the hardship on the respective parties in determining whether to relieve the nine lots of the covenants; (3) whether Camelback Homeowners is estopped from enforcing the covenants by virtue of its failure to timely manifest opposition to the project; and (4) whether the trial court erred in dismissing Warner's counterclaim against some of the homeowners. Camelback Homeowners cross-appeal, seeking a declaratory judgment that any changes in the restrictive covenants must apply to all residences in the subdivision unless 100% of the homeowners agree to piecemeal exclusion. . . .

The issue of severing certain lots from operation of restrictive covenants governing a subdivision is not a matter of first impression in this state. In *Continental Oil Company v. Fennemore*, 38 Ariz. 277, 299 P. 132 (1931), our supreme court held that where the residential character of the entire neighborhood remains substantially intact, the court will not engage in a lot-by-lot analysis to consider the release of a portion of the neighborhood from restrictive covenants. . . . In *Continental Oil*, the supreme court stated: [p*1004]

> It is also a matter of common knowledge and accepted human experience that, if the restrictive bars were let down for appellant in this case, the business encroachment on the remainder of the addition would be a matter of gradual yet steady development against which the home owners would be helpless, and the benefits and protection of the restrictive covenants would eventually be lost to all the co-owners therein.

38 Ariz. at 285, 299 P. at 135. In *Continental Oil* the supreme court upheld a lower court ruling that a gas station could not be erected on a lot of a subdivision containing restrictive covenants even though the proposed gas station would have been situated at the intersection of East Roosevelt and 7th Street in Phoenix. Continental Oil Company sought relief from the covenants governing the subdivision because of the greatly diminished residential value of the particular lot where the proposed gas station was to be situated. The supreme court stated:

> We adhere to the doctrine that the lot of appellant cannot be considered separate and apart from its relation to the entire restricted addition. *Though there may be a fringe of property all around the borders of a restricted addition which would be more valuable for business than for residential purposes, this fact alone is not sufficient to warrant the breach of restrictions by these owners.*

38 Ariz. at 286, 299 P. at 135 (emphasis added).

In *Decker* [v. Hendricks, 7 Ariz.App. 162, 436 P.2d 940 (1968)], this court stated that the test for determining whether restrictive covenants should be enforced is "whether or not the conditions have changed so much that it is impossible to secure in a substantial degree the benefits intended to be secured by the covenants." 7 Ariz.App. at 163, 436 P.2d at 941. In *Decker* . . ., the proponents of the business enterprise seeking relief from the restrictive covenants emphasized the "radical and fundamental changes" on the main thoroughfare bordering the subdivision. This court stated:

> [S]ince the changed conditions have occurred outside the restricted district, we must look to the effect that the changes have upon the entire district to determine if the purposes have been frustrated.

7 Ariz.App. at 164, 436 P.2d at 942.

The dilemma presented in this matter is common to rapidly growing urban areas. In *Lebo v. Johnson*, 349 S.W.2d 744, 751 (Tex.Civ.App.1961), the court stated:

> In every growing city it is inevitable that sooner or later commercial and business areas must come face to face with residential areas, and it is then that the restrictions are most valuable to the interior lot owners. It is when the outer tier of lots become more valuable for commercial and business purposes that the restrictions come into play and prevent the residential area from being taken over by commercial establishments. . . .
>
> The front tier of lots must bear the brunt of the onslaughts of business and commerce, otherwise there would be started a system of gradual encroachment that might swallow up the entire area. The other tiers of lots might fall like ten pins, once the encroachment of commerce and business was begun.

See also C[il]berti v. Angilletta, 61 Misc.2d 13, 304 N.Y.S.2d 673 (1969) [further citations omitted].

In the matter before us, it is undisputed that East Camelback Road has undergone tremendous expansion and increased use over the past thirty years. However, the court found that the changes apparent along Camelback [p*1005] Road were not present within the subdivision. At the request of both parties, the trial court viewed the subdivision at different times of the day and night and concluded that while the three lots actually situated on Camelback Road were less desirable as residences, the remaining 80 lots remained desirable for single-family homes. The court found that the streets were quiet with little traffic and concluded that the "evidence is clear that the purpose of the restrictions have not been frustrated and the subdivision now, almost thirty years later, still remains as a quiet, single-family neighborhood." The court found that the restrictions had preserved the character of the subdivision.

Based on these findings and supporting evidence, the trial court followed precedent in concluding that the nine lots intended to be the site of the office complex should not be relieved of the covenants. The trial court observed that the three lots along Camelback Road bear the brunt of the growth of the entire Camelback corridor, but if the first tier of defensive lots were eroded, the next line of homes would become the first line of defense. The trial court concluded that the front tier of lots on Camelback Road must bear the brunt of encroachments in order to prevent the gradual erosion of the residential character of the Camelback Del Este neighborhood.

Nor is the position of Warner improved by the fact that he owns one of the nine lots in the subdivision, for "[t]o permit the border lot owners to later renege on their bargain to the detriment of the interior lot owners is to give them an economic advantage that they did not pay for." [Citation omitted.] The court must consider the overall relation of the various lots and not merely decide whether it may be in the best interest of particular lot owners in a subdivision to be absolved from the operation of restrictive covenants.

Warner argues that the rule of law in Arizona, as articulated in *Continental Oil* and its progeny, is inconsistent with public policy and modern land use concepts. We disagree. In *Continental Oil*, the supreme court wrote:

> The policy of the courts of this state should be to protect the home owners who have purchased lots relying upon, and have maintained and abided by, restrictions, from the invasion of those who attempt to break down these guaranties of home enjoyment under the claim of business necessities.

38 Ariz. at 286, 299 P. at 135. The policy considerations enunciated in Continental Oil remain as vibrant and compelling now as when they were written in 1931. The trial court was correct in concluding that the restrictive covenants were enforceable as to all lots in the subdivision. The decision of the trial court is not clearly erroneous and will not be disturbed on appeal. . . .

Warner contends the trial court erred by not considering the relative hardships to the parties. Although Warner asserts that he will suffer economic loss of between $350,000 and $400,000 should the complex not be built, the evidence clearly established that he was aware of the restrictions in the subdivision before most of the expenditures were incurred, as well as the intention of at least some homeowners to enforce the covenants. It would indeed be inequitable to permit a party who is fully cognizant of building restrictions and the opposition of at least some homeowners to changes in those restrictions to expend large sums of money on the gamble that the restrictions would not be enforced against him and then claim that enforcement of the restrictions works a hardship on him. . . . [p*1006]

The trial court did not err in refusing to balance the hardships that Warner brought upon himself. . . .

Warner contends that the trial court erred in finding that the plaintiffs' conduct was consistent with enforcement of the covenants. Estoppel has three recognized elements: 1) acts inconsistent with the claim afterwards relied on; 2) action by the adverse party on the faith of such conduct; 3) injury to the adverse party resulting from the repudiation of such conduct. [Citation omitted.] Our courts have stated, "[a] correlative essential element of estoppel is that one seeking its protection must have lacked knowledge, and the means of acquiring knowledge, of the facts relied upon. A party's silence will not operate as an estoppel against it where the means of acquiring knowledge were equally available to both parties." [Citation omitted.]. The record contains ample evidence that Warner was aware of the existence of the covenants and that at least one homeowner, in Warner's presence, publicly voiced an intention to enforce them. A poll conducted by Warner indicated a lack of substantial support for the office complex. Nevertheless, Warner expended substantial sums in furtherance of the office plans. On this record, the trial court could properly conclude that Camelback Homeowners was not estopped from enforcing the covenants. . . .

Warner contends that the trial court erred in refusing to permit the filing of a counterclaim against certain homeowners who attended a meeting with Warner to discuss the proposed project. These homeowners, Warner alleges, requested that Warner prepare a proposal extending the complex two lots deep into the neighborhood in return for the homeowners' support and their enlistment of support of other homeowners. Warner contends that the failure of these homeowners to ultimately support the two-lot-deep plan entitle him to maintain an action for breach of contract and promissory estoppel. Warner's motion for leave to file the counterclaim was filed May 3, 1985, less than two weeks before trial commenced. It was within the trial court's discretion under Rule 13(f), Rules of Civil Procedure, 16 A.R.S., to deny the motion to file a counterclaim, and the trial court did not abuse its discretion in so ruling. . . .

Camelback Homeowners cross-appeal, asserting that the trial court should have entered a declaratory judgment in its favor on the issue of whether the declaration of restrictions could be amended so as not to apply uniformly to all lots in the subdivision. The trial court did not address this prayer for relief. The pertinent portion of the restrictive covenant governing the subdivision provides as follows:

> The foregoing restrictions and covenants run with the land and shall be binding on all persons owning any of said lots in Camelback Del Este until February 25, 1967 at which time said covenants shall be automatically extended for successive periods of ten years each, unless by a vote of the majority of the then owners of the said lots in said Camelback Del Este it is agreed to change the said covenants in whole or in part.

Both parties agree that the law in Arizona is that, unless otherwise provided for in the restrictions themselves, any amendment to restrictive covenants must apply to every lot. [Citations omitted.] Warner argues that the above-quoted provision is ambiguous. Camelback Homeowners contend that the provision is not ambiguous, and, when there is no ambiguity in the language, such provisions must be given their plain, ordinary meaning. [Citations omitted.] *Montoya v. Barreras*, 81 N.M. 749, 473 P.2d 363 (1970) . . . involved an amendment provision with language virtually identical in pertinent part to that involved in the instant case. In *Montoya*, the New Mexico Supreme Court held that although the restrictions themselves may [p*1007] be changed in whole or in part, the change or changes made must affect all of the described properties. We agree, and the trial court erred in failing to grant declaratory relief to that effect. We therefore modify the judgment to award the declaratory relief requested. . . .

Notes and Questions on the Durability of Covenants

1. A perpetual restrictive covenant of itself violates no principle of common law, not even the rule against perpetuities. RESTATEMENT (THIRD) OF PROPERTY—SERVITUDES § 3.3 (Tent.Draft 1991). Many residential covenants drafted in the first part of this century were silent on the question of duration, and thus ostensibly took full advantage of that fact with unhappy consequences:

> It is hereby declared that the titles to many areas of land in the Commonwealth [of Massachusetts], particularly in and about centers of population and business, are encumbered by restrictions on the use of land or construction thereon which have become obsolete because of changes in the character of the property or neighborhood, in available construction materials or techniques or in access, services or facilities, or because of changes in other conditions or circumstances affecting the land or the restrictions, or of the development of overlapping or inconsistent public controls through zoning, building code, subdivision control, setback and other laws, ordinances and by-laws;—that such restrictions are often common to many parcels in different ownership and imposed by many different deeds over periods of years so that it is exceedingly difficult to determine all who may have rights to enforce them, and their revision or termination by private agreement cannot reasonably be expected;—that such restrictions often retard the repair and rehabilitation of existing buildings and construction of new buildings, and tend to prevent land from being used for purposes for which there is the greatest public need, to impair land values and the sound growth of neighborhoods, towns and cities, and to lead to conditions requiring the expenditure of public funds in urban renewal, redevelopment and rehabilitation and in the exercise of eminent domain to acquire land and terminate restrictions;—that such restrictions often impair the marketability of titles and land values for long periods or indefinitely even after they have become unenforceable;—that the grounds upon which such restrictions may be declared unenforceable are not now sufficiently clear or adequate to protect the public interest;—that proceedings now available for determining enforceability of such restrictions are inadequate . . . .

JUDICIAL COUNCIL OF MASSACHUSETTS, 36TH REPORT 82–83 (1960).

As suggested by this legislative finding, judicial techniques for trimming down the apparently unlimited covenant do exist, but they share a serious drawback. The principles employed are uncertain at best so that a judicial determination must be obtained before the owner of the property in question can proceed with assurance to disregard the obsolete restriction. If he chooses not to go to court but simply goes ahead with the offending development, he runs a significant risk. This can best be seen by a look at some of the doctrines courts use to defeat enforcement.

A common approach is to construe the restrictions narrowly. *See*, *e.g*., Bellarmine Hills Ass'n v. Residential Systems Co., 84 Mich.App. 554, 269 N.W.2d 673 (1978); Parks v. Richardson, 567 S.W.2d 465 (Tenn.App.1977).

A second approach is to read the original parties' purpose from the circumstances in which the covenant was attached and hold that the covenant is limited in duration by that purpose. In theory, this is but an application of the general rule that: "The duration of the obligation of a promise respecting the [p*1008] use of land is, as is true of other promises, determined by the promise itself. The obligation cannot endure for a longer time than it was, as manifested by the terms of the promise, intended to endure." RESTATEMENT OF PROPERTY § 554 comment a (1944). *See id*. § 554 comment c. A similar technique is to construe an unlimited promise as one intended only to last for a "reasonable time." *See*, *e.g*., Norris v. Williams, 189 Md. 73, 54 A.2d 331 (1947).

A third approach is to employ the arsenal of equitable doctrines limiting relief—estoppel, "unclean hands," acquiescence, laches, relative hardship, and changed conditions—to block an injunction, leaving the plaintiff to a highly unlikely damage recovery. There are some cases that hold the covenant totally extinguished because of changed conditions, presumably on a theory that the restriction was not intended to survive under such different circumstances. *See*, *e.g*., Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933); Annot., 4 A.L.R.2d 1111, 1117–30 (1949); RESTATEMENT OF PROPERTY § 554 comment c, illustration 1 (1944). *See generally* 2 A.L.P. § 9.38; 5 R. POWELL, REAL PROPERTY ¶¶ 683–85 (P. Rohan ed.1980).

Like the principal case, most of the "changed conditions" cases are directed against preventing equitable enforcement of the restriction. A classic statement of their rule, which reveals its roots in the doctrine of relative hardship, is found in McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905):

> Under the circumstances now existing the covenant is no longer effective for the purpose in view by the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residences. If the building restriction were of substantial value to the dominant estate, a court of equity might enforce it even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive.

Id. at 44, 75 N.E. at 963.

For a taste of how some of these doctrines can be used consider the following examples:

(a) Plaintiffs sought to enjoin defendant from building a store on a lot at the edge of the restricted subdivision. On facts quite similar to *Camelback*, coupled with a finding by the trial court that the defendant's violation of the restriction "would not greatly or at all depreciate the value of plaintiffs' property or lower the general class and character of the neighborhood," the Supreme Court of California held that the evidence showed "such a change in the character of the locality as to warrant an equity court in refusing to enjoin a violation of the restrictive covenants." Downs v. Kroeger, 200 Cal. 743, 254 P. 1101 (1927). *But see* Redfern Lawns Civic Ass'n v. Currie Pontiac Co., 328 Mich. 463, 44 N.W.2d 8 (1950):

> It is inevitable that all lots on the fringe of a residential district may, with the changes of the surrounding neighborhood, become a buffer between the residential area and a business or commercial area. It is one of the factors inherent in considering the nature and value of such property. To lift the restriction under consideration here on the lots in question would only cut down this desirable residential area and create another buffer area. To permit the dividing line to be moved in the case at bar thereby creating another buffer district, now composed of both

> residences and vacant property, does not present sufficiently strong equitable considerations. [p*1009]

Id. at 470, 44 N.W.2d at 11–12. For this and perhaps other reasons a good number of decisions suggest that the doctrine of "changed conditions" requires changes within the development itself. *See*, *e.g*., Elliott v. Jefferson County Fiscal Court, 657 S.W.2d 237 (Ky.1983); Albino v. Pacific First Fed. Sav. & Loan Ass'n, 257 Or. 473, 479 P.2d 760 (1971). Indeed, many courts go further and hold that the changes must have occurred within the heart of the area, not just in the affected buffer zone (*e.g.*, Burnett v. Heckelman, 456 N.E.2d 1094 (Ind.Ct.App.1983)) and that the changes within the area must be substantial (*e.g*., Cilberti v. Angilletta, 61 Misc.2d 13, 304 N.Y.S.2d 673 (Sup.Ct.1969), cited in the principal case).

(b) Plaintiffs, the owners of adjacent property, seek to enforce a restriction that "there . . . be left a free space [of not less than 10 feet] adjoining each of the side lines [of a lot]" after making no complaint while the defendant installed steps intruding on that space. "The defendants, according to the master, acted in good faith, and the plaintiffs' delay in asserting their rights 'contributed to or caused disadvantage and harm to the defendants'." On these facts, the Supreme Judicial Court of Massachusetts upheld a master's finding that the plaintiffs' suit was barred by laches. Weinstein v. Tariff, 356 Mass. 738, 255 N.E.2d 595 (1970). *See* Barksdale v. Allison, 210 S.W.2d 616 (Tex.Civ.App.1948) (Defendant talked over his plans with plaintiff who gave no hint that he disapproved of them. "Under such circumstances, the [trial] court was authorized to conclude that appellant's right to injunctive relief . . . was lost by laches and estoppel."). *Compare* Lee v. Powers, 446 S.W.2d 938 (Tex.Civ.App.1969) in which the plaintiffs' delay was held not to constitute laches, acquiescence or waiver because defendant had from the start been informed of the restrictions and the plaintiffs' intent to enforce them should they be violated. "The actions of the appellants . . . cannot be construed other than as a deliberate invasion of others' rights with full knowledge of the facts. Under such circumstances the 'utmost diligence' is not required."

A few recent cases suggest a fourth approach. Combining notions of original intent with notions of changed conditions, an affected landowner seeks to be relieved from the covenant on the ground that it was not intended to apply under the conditions that now prevail. So far, however, this approach has met with little success. *See, e.g*., Marks v. Wingfield, 229 Va. 573, 331 S.E.2d 463 (1985) (covenants against house trailers and temporary dwellings would be enforced despite the fact that flood control regulations had changed the land use in the area from residential to recreational); Independent Property Owners' Ass'n v. Solitron Dev. Co., 333 Pa.Super. 33, 481 A.2d 1207 (1984) (covenant against installing an independent sewage system enforced despite the fact that developer who had imposed the covenant in order to require lot owners to hook into his system had "folded" without ever building the system).

2. In most modern developments, the duration of the restrictions is a matter explicitly dealt with. A study of restricted residential subdivisions in Wisconsin's fastest growing suburban county covering the period 1938–1955 revealed that seventy-six percent of the developments had a provision for termination:

> The lifetime of the restrictions, where specified, ranged from 15 to 50 years, 25 years being both the median figure and the one most frequently used . . . .
>
> Eighteen of the seventy-six termination clauses were drafted to provide for renewal or extension at the end of a fixed period. Twelve provided for automatic renewal for a shorter period, generally ten years, if no objection [p*1010] were filed by a stated proportion of the property owners. This is the practice suggested by the FHA. The rest made renewal depend upon affirmative action by subdivision residents.

Zile, *Private Zoning on Milwaukee's Metropolitan Fringe*, 1959 WIS.L.REV. 451, 459–60. A more recent survey of covenants in Houston, Texas produced the conclusion that "the vast majority of restrictions recorded between 1950 and the present time . . . contain the 'automatic extension' provision." Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 81 (1970). The author notes that both FHA and VA require such a provision in subdivisions accepted for mortgage insurance or guarantee. *Id*.

Despite this trend, there continue to be reasonable numbers of untutored developers who fail to place such limits on their restrictions (the remaining twenty-four percent in the Wisconsin study). And the quantities of land divided and restricted in earlier, less careful days produce the problems of obsolescence enumerated in the Massachusetts legislative findings quoted in Note 1. A number of states, among them Massachusetts, have been prompted to seek a solution in legislation. (Sometimes, but not always, covenants have been dealt with at the same time as rights of entry and possibilities of reverter. *See* pp. S272–275 *supra*.) Generally, though, restrictions existing at the time of the law's enactment are treated much more leniently than those created thereafter. In some cases existing restrictions have not been limited at all. This is surely due to the view that: "Under our constitutional prohibitions one cannot legislate an existing interest of infinite duration into one of thirty years only." Clark, *Limiting Land Restrictions*, 27 A.B.A.J. 737 (1941). *Compare* Biltmore Village, Inc. v. Royal, 71 So.2d 727 (Fla.1954) (striking down FLA.STAT.ANN. § 689.18 (1969) which canceled all reverter clauses older than 21 years unless the holder brought a suit to enforce within a year of the law's enactment) *with* Trustees of Schools v. Batdorf, 6 Ill.2d 486, 130 N.E.2d 111 (1955) (upholding a comparable statute). *See also In re* Turners Crossroad Dev. Co., 277 N.W.2d 364 (Minn.1979) (upholding the Minnesota statute because "its effect is prospective"). *See generally* pp. S272–275 *supra*.

As to affected restrictions, the statutes may simply put a time limit on covenants which would otherwise have none (*see, e.g.*, MASS.GEN.LAWS ANN. ch. 184, § 23 (1977)) or quite absolutely prohibit the parties from setting a longer period. As an example of these efforts consider the Minnesota statute, which is similar to a proposal put forward by the late Judge Clark in a speech to the American Bar Association except that Judge Clark expanded the list of affected interests to include: "all covenants, conditions, easements, profits, rights of reentry, possibilities of reverter, or other servitudes or restrictions." Clark, *Limiting Land Restrictions*, 27 A.B.A.J. 737 (1941).

MINN.STAT. § 500.20 (1990):

> **Subdivision 1. Nominal conditions and limitations.** When any covenants, conditions, restrictions or extensions thereof annexed to a grant, devise or conveyance of land are, or shall become, merely nominal, and of no actual and substantial benefit to the party or parties to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a basis of forfeiture of the lands subject thereto. . . .
>
> **Subd 2a. Restriction of duration of condition.** Except for any right to reenter or to repossess as provided in subdivision 3, all private covenants, conditions, or restrictions created by which the title or use of real property is affected, cease to be valid and operative 30 years after the date of [p*1011] the deed, or other instrument, or the date of the probate of the will, creating them, and may be disregarded.
>
> This subdivision does not apply to covenants, conditions, or restrictions:
>
> (1) that were created before August 1, 1988, by deed or other instrument dated on or after August 1, 1982 . . .;
>
> (2) that were created before August 1, 1959, under which a person who owns or has an interest in real property against which the covenants, conditions or restrictions have been filed claims a benefit of the covenant, condition, or restriction if the person records in the office of

the county recorder or files in the office of the registrar of titles in the county in which the real estate affected in located, on or before March 30, 1989, a notice sworn to by the claimant or the claimant's agent or attorney: setting forth the name of the claimant; describing the real estate affected; describing the deed, instrument, or will creating the covenant, condition, or restriction; and stating that the covenant, condition or restriction is not nominal and may not be disregarded under subdivision 1;

(3) that are created by the declaration, bylaws, floor plans, or condominium plat of a condominium . . .;

(4) that are created by the articles of incorporation, bylaws, or proprietary leases of a cooperative association . . .

(7) that were created after July 31, 1959, and before August 1, 1982, under which a person who owns or has an interest in real property against which the covenants, conditions or restrictions have been filed claims a benefit of the covenant, condition, or restriction if the person records in the office of the county recorder or files in the office of the registrar of titles in the county in which the real estate affected during the period commencing on the 28th anniversary of the date of the deed or instrument . . . creating them and ending on the 30th anniversary, a notice as described in clause (2).

A notice filed in accordance with clause (2) or (7) delays application of this subdivision to the covenants, conditions, or restrictions for a period ending on the later of seven years after the date of filing of the notice, or until final judgment is entered in an action to determine the validity of the covenants, conditions, or restrictions, provided in the case of an action the summons and complaint must be served and a notice of lis pendens must be recorded in the office of the county recorder or filed in the office of the registrar of titles in each county in which the real estate affected is located within seven years after the date of recording or filing of the notice under clause (2) or (7). . . .

Subd. 3. Time to assert power of termination. Hereafter any right to reenter or to repossess land on account of breach made in a condition subsequent shall be barred unless such right is asserted by entry or action within six years after the happening of the breach upon which such right is predicated.

Notice that Subdivision 1 can be read as applying only to conditions causing forfeiture, in contrast to Subdivision 2a which clearly limits restrictive covenants as well. Is there any sound reason to distinguish between the two in such a statute? *See* Uniform Act Relating to Reverter of Realty, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS 315 (1946) (which does). *Compare* N.Y.REAL PROP.ACTIONS LAW § 1951 (McKinney 1979). One planner's response to Judge Clark's proposal was: "Judge, you are throwing out the baby with the bath water . . . . [Y]ou will be killing all the Shaker Heights and Roland Park schemes if you put any fixed terminal date of thirty years . . . ." Ascher, *The Role of Covenants as a Tool of Urban Redevelopment*, PROC., SEC. OF [p*1012] REAL PROP. & TRUST LAW, A.B.A. 26, 30–31 (1951). Do you agree that this is a problem? How should it be dealt with?

Conceding the desirability of some limitation by statute there are still tough questions of detail. In what respects would you modify the Minnesota Law (which itself has been modified since its initial passage)? Do you agree with Judge Clark that easements and profits should be covered as well? *See* Clark, *Limiting Land Restrictions*, 27 A.B.A.J. 737, 741 (1941).

None of the statutes deal directly with the now common phenomenon, restrictions which are stated to be valid for an initial fixed period and thereafter for a succession of renewal periods unless a stipulated percentage of those affected vote to remove them. (An exception is a recent Massachusetts marketable title law, which allows such extensions under certain conditions.

MASS.GEN.LAWS ch.184 §§ 27, 28 (1984).) Would you construe the Minnesota statute as allowing this? What limits, if any, should be placed on such arrangements?

"Marketable Title Acts" also operate to curb the lifetime of old restrictions. *See* DKM3, pp. 621–27. As they apply to covenants and other restrictions—possibilities of reverter and rights of entry—they extinguish those which have been of record for a certain period unless they have been kept alive by the filing of a new notice.

3. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM.L.REV. 546, 549 n.10 (1991), reports a notable lack of success by plaintiffs seeking to be relieved of covenants on the ground of changed conditions (48 of 65 reported cases from 1970 to 1990 unfavorable to those claiming changed conditions). If the *Restatement (Third) of Property—Servitudes* is adopted and most of the "categorical" restrictions on servitudes are removed, will the courts have to become more willing to listen to "changed conditions" arguments? Will the doctrine of changed conditions have to be made to apply to easements as well? Professor Robinson also finds that there is no coherent basis for the doctrine in either contract or property law. Do you agree? *See also*, Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS.L.REV. 1, 34–43, 78–84; Korngold, *Reply: Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination*, 1990 WIS.L.REV. 513; Winokur, *Rejoinder: Reforming Servitude Regimes: Toward Associational Federalism and Community*, *id*. 537. Together with Robinson, *supra*, these articles not only present their own conflicting views but also review the extensive recent literature on the topic.

SHELLEY v. KRAEMER

Supreme Court of the United States.
334 U.S. 1 (1948).

VINSON, C.J. These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

[The facts in the first of the two cases are as follows:] . . . On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

". . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to [or] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." . . .

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. [p*180] At the time the court rendered its decision, petitioners were occupying the property in question. . . .

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment.[1] . . .

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[1] The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

I.

. . .

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, 1978 of the Revised Statutes, derived from 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of Buchanan v. Warley, [245 U.S. 60 (1917)], a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. [Further case discussion omitted.] . . .

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. . . .

Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. . . . [p*181]

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

II.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. . . . [T]he examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some

manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. Thus, in . . . Cantwell v. Connecticut, 310 U.S. 296 (1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. [Other examples omitted.] . . .

III.

. . .

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or [p*181] occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U.S. 501 (1946). . . .

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political

rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

Notes and Questions[1]

1. In Barrows v. Jackson, 346 U.S. 249 (1953), the Court had occasion to comment on the language in *Shelley* to the effect that "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed by the Fourteenth Amendment." *supra* p. 180. Barrows involved not a suit for injunction as in Shelley but a suit for damages for violation of a racially restrictive covenant. The Court had little difficulty in finding that the awarding of damages would be just as much state action as the granting of an injunction. [p*183] Further, the Court held, over Chief Justice Vinson's dissent, that the white defendant-vendor in the damage action had standing to raise the constitutional issue even though it was not his constitutional rights but those of the black vendee (who was not a party to the suit) which were being violated by the covenant.

In the light of *Shelley* and *Barrows* consider the following case: In 1942 a group of neighbors in Denver, Colorado, got together and agreed on behalf of themselves, their heirs and assigns, to a racially restrictive covenant. The agreement further provided that if any of the property subject to the agreement

shall be conveyed or leased in violation of this agreement [the right, title, or interest of the owner so violating the agreement] shall be forfeited to and rest in such of the then owners of all of said lots and parcels of land not included in such conveyance or lease who may assert title thereto by filing for record notice of their claim. . . .

Plaintiffs, black owners of property subject to these restrictions, brought suit to quiet title against their white neighbors who had filed the requisite record notice. Defendants asserted that Barrows and Shelley were distinguishable on the ground that the instant case did not involve judicial enforcement of a restrictive covenant by injunction or damages. Rather, they claimed, the agreement in question created a future interest known as an executory interest in plaintiffs' land:

"Such interest vested automatically in the defendants upon the happening of the events specified in the original instrument of grant, and the validity of the vesting did not in any way depend upon judicial action by the courts. The trial court's failure and refusal to recognize the vested interest of the defendants, and its ruling that the defendants have no title or interest in or to the property, deprived the defendants of their property without just compensation and without due process of law."

Capitol Federal Savings & Loan Ass'n v. Smith, 136 Colo. 265, 268–69, 316 P.2d 252, 254 (1957), noted in 58 COLUM. L. REV. 571 (1958). The court was not impressed by the distinction:

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[1] These notes raise issues to which we will return in Chapters 4, 6, and 7, *infra*. Even if you do not fully understand the substantive law discussed in these notes, consider the number of areas to which *Shelley* might apply and keep this case in mind as you proceed further in the materials.

> No matter by what ariose terms the covenant under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment to the Federal Constitution. That this is so has been definitely settled by the decisions of the Supreme Court of the United States. High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the hands of Esau to a blind Isaac, the voice is definitely Jacob's. We cannot give our judicial approval or blessing to a contract such as is here involved.

Id. at 270, 316 P.2d at 255. (Can you see why the court said: "We are unable to rid ourselves of the impression that this writ of error is being prosecuted in the interest of title examiners, rather than in that of property owners . . ."? *Id.* at 270, 316 P.2d at 255.)

In Charlotte Park & Recreation Com'n v. Barringer, 242 N.C. 311, 320, 88 S.E.2d 114, 122 (1955), the Commission brought a declaratory judgment action to determine the validity of the restrictive clauses in deed to the City of Charlotte granting land "upon the following terms and conditions . . . to-wit . . . the lands hereby conveyed . . . shall be held, used and maintained . . . as an integral part of a park, playground and recreational area . . . to be used and enjoyed by persons of the white race only." The deed further provided: "In the event that the said lands . . . shall not be kept, used and maintained for park, playground, and-or recreational purposes, for the use of the white race only . . . then, . . . the [p*184] lands hereby conveyed shall revert in fee simple to the said [grantor], his heirs and assigns." The court held that in the event the provisions were violated the land would revert to the grantor automatically and without any judicial enforcement-thus distinguishing Shelley-and that a contrary holding would deprive the grantor and his heirs of property without due process of law. Is the only difference between the Smith and Barringer cases that one court was in Colorado and the other in North Carolina? Don't make up your mind completely on these cases until you have read the materials on rights of entry, possibilities of reverter, executory interests and the Rule Against Perpetuities, *infra* pp. 391–430.

2. In 1911 United States Senator Augustus O. Bacon of Georgia gave property in trust to the City of Macon to use for a park for white citizens only. May the City maintain the park on a racially discriminatory basis? *See* Evans v. Newton, 382 U.S. 296 (1966); *cf*. Commonwealth of Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957). Assume that the Supreme Court holds that the City may not maintain the park in the way that the testator wished. May the state courts of Georgia now dissolve the trust and turn the park over to Senator Bacon's heirs? If the Georgia courts are allowed to do this, why would anyone bring this type of suit? The Supreme Court affirmed the state court's dissolution. Evans v. Abney, 396 U.S. 435 (1970). Would a contrary ruling have constituted a deprivation of property without due process of law?

3. If neighbors seek to enforce a restrictive covenant limiting lots in a subdivision to "single family occupancy" in order to prevent use of a home as a shelter for unrelated mentally retarded persons is the "state action" test met? If so is there a denial of equal protection. Compare Casa Marie, Inc. v. Superior Court of Puerto Rico, 752 F. Supp. 1152 (D. Puerto Rico 1990) with McGuire v. Bell, 297 Ark. 282, 761 S.W.2d 904 (1988). Cf. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

4. The equal protection clause is not the only constitutional standard which has imposed limits on state property law. The freedoms of speech, association, and religion can pose very similar issues. Here too "state action" must be found. Is there any reason to expect a different "state action" test? For example, if a community's exclusion of churches from large sections by zoning regulation violates the religious freedom of those who would use them (as a number of courts have held), is the same true of a restrictive covenant enforced by state courts? *See* Ginsberg v. Yeshiva of Far Rockaway, *infra* p. 995. *See generally* pp. 1000–01, *infra*.

5. Suppose that a landlord refuses to renew a tenant's lease because (a) the tenant has

complained to the housing authorities about the condition of the premises, or (b) because the landlord and the tenant do not see eye to eye on political or religious questions. The tenant refuses to leave at the expiration of his lease, and the landlord sues to evict him. What Shelley v. Kraemer argument will the tenant make? Will he succeed? *See infra* pp. 701–15. Would it make any difference if the ground for refusal were that the landlord had just discovered that the tenant was of Irish ancestry? If the trespasser were not a tenant but an acquaintance refused a dinner invitation for any of the above reasons who came to the party, nonetheless, uninvited? [p*185]

Section 2. THE PERSONALITY THEORY

Recognizing the inherent difficulties of the labor theory, especially with regard to government regulation, several influential philosophers in the late eighteenth and early nineteenth centuries asserted a very different justification for private property. The theory was first outlined by Kant. Man, he reasoned, acquires property not by mixing his labor with physical objects but by the transcendental process of directing his will toward the objects. [p*147] The individual's property is then transformed into a right against other men by operation of the union of wills of men, which is expressed through public institutions. *See* R. SCHLATTER, PRIVATE PROPERTY 255–57 (1951).

Hegel further developed these ideas in *Philosophy of Right* (1821), and his version of the theory became the standard Idealist statement. Hegel, like Kant, rejected the labor theory and argued that the act of willing was what established property in an object.

G. HEGEL, PHILOSOPHY OF RIGHT

§§ 44–46, 49–53 (T. Knox ed. 1953)[1]

44. A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all "things". . . .

45. To have power over a thing ab extra constitutes possession. The particular aspect of the matter, the fact that I make something my own as a result of my natural need, impulse, and caprice, is the particular interest satisfied by possession. But I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of property, the true and right factor in possession.

If emphasis is placed on my needs, then the possession of property appears as a means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end.

46. Since my will, as the will of a person, and so as a single will, becomes objective to me in property, property acquires the character of private property; and common property of such a nature that it may be owned by separate persons acquires the character of an inherently dissoluble partnership in which the retention of my share is explicitly a matter of my arbitrary preference.

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[1] [The Philosophy of Right is a published set of lecture notes. The large type indicates note headings, the small type detail. The notes marked "[A]" were added not by Hegel but by a student on the basis of his notes of Hegel's actual lectures. Ed.]