ANSWER TO QUESTION NO. 2

1. Teri likely can stop Kevin from using the colonial as an art gallery: a court could enforce the restriction on use as an equitable servitude against Kevin, who had record notice of the restriction and can thus be enjoined from violating its terms.

In order to create a binding covenant that runs with the land (as opposed to merely a personal obligation), the grantor and grantee must have intended that the covenant run with the land, the covenant must touch or concern the land with which it runs, and the purchaser must have notice of the covenant. See *Greenspan v Rehberg*, 56 Mich App 310 (1974).

Here, Teri and Phil executed a binding contract that clearly intended to run with the land because it restricted forever the use of Phil's land to a single family dwelling. The contract they executed and recorded was expressly made binding on Phil's "heirs and successors." Further, the promise "touched and concerned" the land because it restricted the use of Phil's land in a manner that presumably enhanced the value of Teri's land, or at minimum, affected Teri's enjoyment of her land. The "touch and concern" element is ordinarily met when the covenant affects "the nature, quality, or value of the property demised independent of collateral circumstances, or . . . affects the mode of enjoyment." *Greenspan, supra.* Finally, it is clear from the facts that Kevin had notice of the restriction. Because Teri and Phil recorded their contract, they provided record notice to Kevin, who would discover the existence of the contract in a public record search. Note that it is irrelevant whether Kevin actually knew of the existence of the contract because recordation also imparts constructive notice of the restriction to future owners of the land. *Richards v Tibaldi*, 272 Mich App 572 (2006). As a result, the restriction agreed to by Teri and Phil could be enforceable against Kevin as an *equitable servitude.* (NB: it is irrelevant if the land is otherwise zoned appropriately for Kevin to open a business.) Accordingly, at Teri's request a court should enjoin Kevin's use of the colonial as an art gallery.

2. Teri likely cannot stop Kevin from using the driveway for his personal use but likely can limit its use by others: a court will likely hold that Kevin enjoys an easement implied in law (quasi-easement), but Teri may be entitled to an injunction limiting the use of the easement to a driveway serving a single

family dwelling.

Michigan courts will imply an easement from a pre-existing use where an owner of land subdivides and sells a portion of the property. Absent an agreement to the contrary, the law presumes that a purchaser buys the land with the understanding that he will be able to continue to use the existing easement. See *Kamm v Bygrave,* 356 Mich 189 (1959). The Michigan Supreme Court has explained:

"Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made."

Rannels v Marx, 357 Mich 453 (1959) (citations, internal quotation marks omitted); see also *Smith v Dresselhouse,* 152 Mich 451 (1908) ("It is a general rule of the law of easements that where the owner of two tenements sells one of them, the purchaser takes the portion sold with all the benefits and burdens which appear at the time of sale to belong to it as between it and the property which the vendor retains.").

In this case, Teri created a private driveway crossing her land to service the new colonial. When she subdivided the land and sold the new colonial to Phil, the driveway became *reasonably necessary* for Phil's use and enjoyment of his land. The private driveway is the only method of ingress and egress to/from Phil's colonial, and the home has no other access to Main Street. Under these circumstances, a court will likely imply the grant of an easement from Teri (servient tenement) to Phil (dominant tenement), and thus to Phil's successors. Accordingly, Kevin has a continuing right to use the private driveway that crosses Teri's land.

However, as Michigan law also makes clear, the holder of an easement implied in law cannot increase the burden of the easement on the servient tenement. The use of the implied easement is limited to that which existed at the time the land was subdivided. The general principle underlying the use of the easements is that

"the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." *Delaney v Pond,* 350 Mich 685 (1957); see also *Soergel v Preston,* 131 Mich App 585 (1985). Generally in cases of implied easements, the owner of a right to use a private driveway is not liMited in use by himself, but it may be used by the owner's family, tenants, social guests, and the like. See Michigan Law & Practice Encyclopedia 2d, Real Property §112 (collecting authorities).

Under these facts, a court could limit Kevin's use of the easement to that of a driveway serving a single family dwelling. Thus, even assuming that Kevin is allowed to operate an art gallery out of his colonial, his patrons, service providers, and other members of the general public would not be allowed to traverse the private drive because that would undoubtedly result in an increased burden of the easement on Teri's land due to increased traffic, wear and tear on the private drive, et cetera.