

A landowner lawfully subdivided his land into 10 large lots. The recorded subdivision plan imposed no restrictions on any of the 10 lots. Within two months after recording the plan, the landowner conveyed Lot 1 to a buyer, by a deed that contained no restrictions on the lot's use. There was then a lull in sales. Two years later, the real estate market in the state had generally improved, and during the next six months the landowner sold and conveyed eight of the remaining nine lots. In each of the eight deeds of conveyance, the landowner included the following language: "It is a term and condition of this conveyance, which shall be a covenant running with the land for the benefit of each of the 10 lots [with an appropriate reference to the recorded subdivision plan], that for 15 years from the date of recording of the plan, no use shall be made of the premises herein conveyed except for single-family residential purposes." The buyer of Lot 1 had actual knowledge of what the landowner had done. The landowner included the quoted language in part because the municipality had amended its zoning ordinance a year earlier to permit professional offices in any residential zone. Shortly after the landowner's most recent sale, when he owned only one unsold lot, the buyer of Lot 1 constructed a one-story house on Lot 1 and then conveyed Lot 1 to a doctor. The deed to the doctor contained no reference to any restriction on the use of Lot 1. The doctor applied for an appropriate certificate of occupancy to enable her to use a part of the house on Lot 1 as a medical office. The landowner, on behalf of himself as the owner of the unsold lot, and on behalf of the other lot owners, sued to enjoin the doctor from carrying out her plans and to impose the quoted restriction on Lot 1.

Who is likely to prevail?

- A. The doctor, because Lot 1 was conveyed without the restrictive covenant in the deed to the first buyer and the subsequent deed to the doctor.
- B. The doctor, because zoning ordinances override private restrictive covenants as a matter of public policy.
- C. The landowner, because the doctor, as a successor in interest to the first buyer, is estopped from denying that Lot 1 remains subject to the zoning ordinance as it existed when the landowner conveyed Lot 1 to the first buyer.
- D. The landowner, because with the first buyer's knowledge of the facts, Lot 1 became incorporated into a common scheme.

Explanation:

Elements of real covenants & equitable servitudes

Real covenants

(enforceable by money damages)

Equitable servitudes

(enforceable by equitable relief)

For *burden* to run

For *benefit* to run

Express

Implied

Writing

Writing

Writing

Intent to create common scheme

Intent to run

Intent to run

Intent to run

Touch & concern

Touch & concern

Touch & concern

Restrictive servitude

Horizontal & vertical privity

Limited vertical privity

Notice

Notice

Notice

No notice required

Equitable servitudes are covenants (ie, promises) regarding land that are enforceable in equity (eg, by injunction) against the promising parties and their successors in interest. They are typically created by an *express* written agreement. But one can be ***implied from a common scheme**** in a planned subdivision if three elements are met:

Intent to create common scheme – the owner intended to impose a servitude on all lots in the subdivision (eg, most of the lot deeds contain common restrictions)

Restrictive servitude – the intended servitude is a promise *not* to do something on land

Notice – the person to be bound by the servitude had actual, record, or inquiry **notice** of it

If the common scheme arises after some of the lots have already been sold, those previously sold lots will *not* be incorporated into the common scheme or subject to the implied servitude **(Choice D)**.

Here, the landowner subdivided his land into 10 lots. He first conveyed Lot 1 to a buyer by a deed that contained no restrictions on the lot's use. The landowner then conveyed the next eight lots by deeds that contained covenants restricting the lots' use to residential purposes. But since that common scheme did not exist when Lot 1 was first conveyed to the buyer, there is no *implied* servitude on Lot 1. And since the doctor's deed for Lot 1 contained no *express* restrictions on the lot's use, she will likely prevail.

*Equitable servitudes implied from a common scheme of development are also known as implied reciprocal negative easements or implied reciprocal servitudes.

(Choice B) Zoning ordinances override restrictive covenants only if the two are in direct conflict (eg, covenants restricting use to commercial purposes in areas zoned only for residential use).

(Choice C) The doctor's use of Lot 1 is governed by the zoning in existence during her ownership of Lot 1—not the zoning as it existed when the landowner first conveyed Lot 1 to the buyer.

Educational objective:

For an equitable servitude to be implied from a common scheme, (1) the owner must have intended to impose a servitude on all lots in the subdivision, (2) the servitude must be restrictive, and (3) the person to be bound must have had notice of the servitude.

References

Restatement (Third) of Property: Servitudes § 2.14 (Am. Law Inst. 2000) (equitable servitude implied from a common scheme in a residential subdivision).

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