

A woman owned five adjoining rectangular lots, numbered 1 through 5, all fronting a main street. All the lots are in a zone limited to one-family and two-family residences under the zoning ordinance. Two years ago, the woman conveyed Lots 1, 3, and 5 to various owners. None of the three deeds contained any restrictions. Each of the new owners built a one-family residence.

One year ago, the woman conveyed Lot 2 to a friend. The deed provided that the friend and the woman, their respective heirs and assigns, would use Lots 2 and 4, respectively, only for one-family residential purposes. The deed was promptly and properly recorded. The friend promptly built a one-family residence on Lot 2.

Last month, the woman conveyed Lot 4 to a banker. The deed contained no restrictions. The deed from the woman to the friend was in the title report examined by the banker's lawyer. The banker obtained a building permit and commenced construction of a two-family residence on Lot 4.

The friend, joined by the owners of Lots 1, 3, and 5, brought an appropriate action against the banker to enjoin the proposed use of Lot 4 or, alternatively, damages caused by the banker's breach of covenant.

Which is the most appropriate comment concerning the outcome of this action?

- A. All plaintiffs should be awarded an injunction because there was a common development scheme, but award of damages should be denied to all.
- B. All plaintiffs should be denied any recovery or relief because the zoning preempts any private scheme of covenants.
- C. An injunction should be denied, but damages should be awarded to all plaintiffs, measured by diminution of market value, if any, caused by the proximity of the banker's two-family residence.
- D. The friend should be awarded an appropriate remedy, but recovery by the other plaintiffs is doubtful.

Explanation:

A **real covenant** is an express promise to do or not do something on land that can be enforced by an action for **money damages** and binds **successors in interest**. A real covenant requires the following:

Writing – covenant is in a writing that satisfies the statute of frauds (eg, Lot 2 deed)

Intent to run – promising parties intended for the covenant to run to their successors in interest (eg, deed says "heirs and assigns")

Touch and concern – covenant relates to the use, enjoyment, or occupation of the benefited and burdened lands (eg, limiting Lot 4's use for Lot 2's benefit)

Horizontal privity – promising parties simultaneously transferred the land and created the covenant (eg, covenant created when woman conveyed Lot 2 to the friend)

Vertical privity – successor of the *benefited* estate has a possessory interest (eg, friend owns Lot 2) and successor of the *burdened* estate has a promising party's same ownership interest (eg, banker owns Lot 4)

Notice – person to be bound had **notice** of the covenant (eg, recorded deed was in the title report examined by banker's lawyer)

An **express equitable servitude** is essentially a real covenant enforced in **equity** (often by an injunction). Since the promise here has the **same elements** as a real covenant **except privity**, the friend can receive an injunction or money damages for the bank's breach of covenant—whichever the court deems appropriate **(Choice C)**.

Since the restriction pertains only to Lots 2 and 4, the other plaintiffs can prevail only if an **equitable servitude** can be **implied** from a **common scheme** or development plan. One cannot be implied here because Lots 1, 3, and 5 were conveyed without any restrictions and before the restriction was created in the Lot 2 deed. Therefore, their recovery is doubtful **(Choice A)**.

(Choice B) Zoning ordinances override restrictive covenants only when they are in direct conflict—eg, if Lot 4 had been zoned for *one*-family residences and the covenant restricted use to *two*-family residences.

Educational objective:

A real covenant is an express promise to do or not do something on land that can be enforced by an action for money damages. An *express* equitable servitude is a real covenant enforced in equity. An *implied* equitable servitude may be created by a common scheme.

References

Restatement (Third) of Property: Servitudes § 5.1 (Am. Law Inst. 2000) (automatic passage of the burden and benefit with appurtenant land).

Restatement of Property § 539 (Am. Law Inst. 1944) (elements of equitable servitudes).

Restatement of Property §§ 530–38 (Am. Law Inst. 1944) (elements of real covenants).

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Real covenant v. Equitable servitude

