

A man owned a large tract of land. During his lifetime, the man conveyed the easterly half to his son and the westerly half to his daughter. Both of the conveyances, which were promptly and properly recorded, contained the following language: "The parties agree for themselves and their heirs and assigns that the premises herein conveyed shall be used only for residential purposes; that each lot created within the premises herein conveyed shall contain not less than five acres; and that each lot shall have not more than one single-family dwelling. This agreement shall bind all successor owners of all or any portion of the premises and any owner of any part of the premises may enforce this covenant."

After the man's death, the son decided to build houses on half-acre lots in the easterly tract as authorized by current applicable zoning and building codes. The area surrounding this tract was developed as a residential community with homes built on half-acre lots. The westerly tract is in a residential area covered by a different zoning code, which allows residential development only on five-acre tracts of land.

The daughter has filed an appropriate action to enjoin the son's proposed construction on half-acre lots, claiming that the proposal violates the restrictions set forth in the man's conveyance.

Is the court likely to find the restrictions in the conveyance valid?

- A. No, because of the change of circumstance in the neighborhood.
- B. No, because the restriction conflicts with the applicable zoning code.
- C. Yes, because the original grantees still own their respective tracts.
- D. Yes, because the provision imposed an equitable servitude.

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 &

Restrictive servitude

Horizontal & vertical

Limited vertical

concern

Notice

privity

privity

Notice

Notice

No notice required

Equitable servitudes are express or implied covenants (ie, promises) regarding land that are enforceable in equity (usually by injunction) against the promising parties and their successors in interest. **Express** equitable servitudes have four elements:

Writing – the covenant is expressed in a writing that satisfies the statute of frauds (eg, the deeds from the man to his son and daughter, respectively)

Intent to run – the promising parties intend for the covenant to run to (ie, bind) their successors in interest (eg, the deed says "heirs and assigns" and "all successor owners")

Touch and concern – the covenant relates to the use, enjoyment, or occupation of both the **dominant and servient** estates (eg, restricts use to residential purposes and requires lots to contain five acres)

Notice – the owner of the servient (ie, burdened) estate has actual, record, or inquiry **notice** of the covenant (eg, the son and daughter have actual notice of the restrictions in their respective deeds)

Therefore, the court will likely find that the restrictions in the man's conveyance imposed a valid equitable servitude.

(Choice A) The Changed Conditions Doctrine allows a court to modify or terminate a servitude if the surrounding area or circumstances have changed *so much* that the servitude can no longer fulfill its purpose and it would be unfair to continue to enforce it—eg, the servitude requires residential use in an area that has become commercial.

(Choice B) The restrictions at issue here (which require five-acre lots) *do not* conflict with, and therefore will not be overridden by, the applicable zoning code (which authorizes half-acre lots).

(Choice C) The restrictions imposed a valid equitable servitude that runs with the land, so it can be enforced even if the original grantees no longer own their tracts (so long as the notice requirement is met).

Educational objective:

To create an express equitable servitude, (1) the covenant must be in writing, (2) the promising parties must intend for it to run to their successors in interest, (3) it must touch and concern the land, and (4) the servient-estate owner must have notice.

References

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

Copyright © 2002 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.