

Twenty-five years ago, a man who owned a 45-acre tract of land conveyed 40 of the 45 acres to a developer by warranty deed. The man retained the rear five-acre portion of the land and continues to live there in a large farmhouse.

The deed to the 40-acre tract was promptly recorded. It contained the following language: "It is a term and condition of this deed, which shall be a covenant running with the land and binding on all owners, their heirs and assigns, that no use shall be made of the 40-acre tract of land except for residential purposes."

Subsequently, the developer fully developed the 40-acre tract into a residential subdivision consisting of 40 lots with a single-family residence on each lot.

Although there have been multiple transfers of ownership of each of the 40 lots within the subdivision, none of them included a reference to the quoted provision in the deed from the man to the developer, nor did any deed to a subdivision lot create any new covenants restricting use.

Last year, a major new medical center was constructed adjacent to the subdivision. A doctor who owns a house in the subdivision wishes to relocate her medical office to her house. For the first time, the doctor learned of the restrictive covenant in the deed from the man to the developer. The applicable zoning ordinance permits the doctor's intended use. The man, as owner of the five-acre tract, however, objects to the doctor's proposed use of her property.

There are no governing statutes other than the zoning code. The common law Rule Against Perpetuities is unmodified in the jurisdiction.

May the doctor convert her house in the subdivision into a medical office?

- A. No, because the man owns property benefitted by the original restrictive covenant and has a right to enforce it.
- B. No, because the owners of lots in the subdivision own property benefitted by the original residential covenant and have the sole right to enforce it.
- C. Yes, because the original restrictive covenant violates the Rule Against Perpetuities.
- D. Yes, because the zoning ordinance allows the doctor's proposed use and preempts the restrictive covenant.

Explanation:

A **real covenant** is an express promise to do (affirmative) or not do (negative/restrictive) something on land that is enforceable by an action for money damages. The promising parties are bound to the covenant under contract law. But **successors in interest** are bound only if the covenant runs with the land. This occurs when the following elements are met:

Writing – covenant is in a writing that satisfies the statute of frauds (eg, deed to 40-acre tract)

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

Touch and concern – covenant relates to the use, enjoyment, or occupation of the benefited and burdened lands (eg, limiting use of 40-acre tract to benefit five-acre tract)

Horizontal privity – promising parties simultaneously transferred the land and created the covenant (eg, covenant created when 40-acre tract was deeded to developer)

Vertical privity – successor of the *benefited* estate has a possessory interest (not applicable here since the man is a promising party) and successor of the *burdened* estate has a promising party's entire estate or ownership interest (eg, doctor has same ownership interest that developer had)

Notice – person to be bound had **notice** of the covenant (eg, doctor had record notice of promptly recorded deed containing the covenant)

Therefore, the man has a right to enforce the restrictive covenant and stop the doctor from converting her house into a medical office.

(Choice B) The lot owners are successors in interest to the developer's 40-acre estate. As lot owners, they have a possessory interest in that estate that creates vertical privity. They—along with the man—can therefore enforce the covenant.

(Choice C) The Rule Against Perpetuities only applies to future interests that have a possibility of vesting (eg, contingent remainders)—not to real covenants or other nonpossessory property interests.

(Choice D) A zoning ordinance overrides a restrictive covenant only when the two are in direct conflict (eg, a covenant restricting use to commercial purposes in an area zoned only for residential use).

Educational objective:

A real covenant will run to successors in interest if the following elements are met: (1) writing, (2) intent to run, (3) touch and concern, (4) horizontal privity, (5) vertical privity, and (6) notice.

References

Restatement of Property §§ 530–38 (Am. Law Inst. 1944) (setting out the elements for a real covenant).

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Privity requirements for real covenants

