

A contractor retained a tract of 100 acres after he had developed the adjoining 400 acres as a residential subdivision. The contractor had effectively imposed restrictive covenants on each lot in the 400 acres. A buyer offered the contractor a good price for a five-acre tract located in a corner of the retained 100-acre tract far away from the existing 400-acre residential subdivision. The contractor conveyed the five-acre tract to the buyer and imposed the same restrictive covenants on the five-acre tract as he had imposed on the lots in the adjoining 400 acres. The contractor further covenanted that when he sold the remaining 95 acres of the 100-acre tract, he would impose the same restrictive covenants in the deed or deeds for the 95 acres. The contractor's conveyance to the buyer was promptly and properly recorded.

However, shortly thereafter, the contractor conveyed the remaining 95 acres to a real estate developer for \$1,000,000 by a deed that made no mention of any restrictive covenants. The real estate developer had no actual knowledge of the restrictive covenants in the buyer's deed. The real estate developer now proposes to build an industrial park that would violate such restrictive covenants if they are applicable.

The recording act of the jurisdiction provides: "No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice unless the same be recorded according to law."

The buyer filed an appropriate action to enforce the restrictive covenants against the real estate developer's 95-acre tract. If the real estate developer prevails, what will be the most likely reason?

- A. A covenant to impose restrictions is an illegal restraint on alienation.
- B. Negative reciprocal covenants are not generally recognized.
- C. The deed imposing the restrictions was not in the chain of title for the 95 acres when the real estate developer purchased the land.
- D. The disparity in acreage means that the covenant can be personal only to the contractor.

## Explanation:

### Notice of competing property interests

<b>Actual notice</b>	Buyer has direct knowledge of prior interest in land
<b>Record notice</b>	Document showing prior interest in land is properly recorded & appears in buyer's chain of title
<b>Inquiry notice</b>	Buyer knows, or should know, of circumstances that would prompt reasonable person to investigate (eg, visible use of property, reference to unrecorded transaction in recorded instrument)

A **real covenant** is an *express* promise to do (affirmative) or not do (restrictive) something on the land that is enforceable by an action for money damages. When a real covenant is **not in writing**—as seen with the real estate developer's deed—it can be enforced as an **equitable servitude** that is **implied from a common scheme** if three elements are met:

**Intent to create common scheme** – the owner intended to impose a covenant on all lots in the subdivision (eg, covenant imposed on each lot in the 400 acres and the buyer's 5-acre tract)

**Restrictive servitude** – the intended covenant was a promise *not* to do something on the land (explicitly stated here)

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

Here, the real estate developer had no *actual* notice of the restrictive covenant in the buyer's deed. And since the buyer's 5-acre tract was separate from the 400-acre residential subdivision, the real estate developer lacked *inquiry* notice that his 95-acre lot was meant to be a part of either development. However, the buyer's deed containing the covenant was recorded. Therefore, the real estate developer would lack *record* notice, and therefore prevail, if the buyer's deed was not in the chain of title for the 95 acres when the real estate developer purchased the land.

**(Choice A)** A covenant is an illegal restraint on alienation if it imposes unreasonable restrictions on the *sale or transfer* of land—not merely on the use of land (as seen here).

**(Choice B)** Negative reciprocal covenants (ie, implied equitable servitudes) *are* generally recognized when there is a common scheme of development (eg, a residential subdivision).

**(Choice D)** The disparity in lot acreage is immaterial in determining whether the covenant is personal (ie, enforceable only between the promising parties) or runs with the land (ie, enforceable against successors in interest).

**Educational objective:**

Equitable servitudes can be implied from a common scheme if three elements are met: (1) intent to create a common scheme, (2) restrictive covenant, and (3) actual, record, or inquiry notice.

**References**

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

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

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