Hastings Law Journal

Volume 3 | Issue 1 Article 6

1-1951

Enforcement of Restrictive Covenants in Tract Developments

Carl Callaway

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the Law Commons

Recommended Citation

Carl Callaway, *Enforcement of Restrictive Covenants in Tract Developments*, 3 Hastings L.J. 50 (1951).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol3/iss1/6

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

ENFORCEMENT OF RESTRICTIVE COVENANTS IN TRACT DEVELOPMENTS

By CARL CALLAWAY

Restrictive covenants are, in respect to property law in general, relatively new. The problems and questions which can be encountered in working with them can become quite complex. This is especially true in the case of tract developments where a developer may subdivide a large tract of land into building lots, anywhere from a few to several hundred, and sell them individually with restrictive covenants in each of the deeds. Among the problems that most frequently arise is the age-old one of the running of covenants, or to put it another way: Who can enforce the restrictive covenants against whom? Two of the most important factors to consider in working out a solution to this problem are (a) the relation in time in which the parties acquired their lots and (b) the intent of the parties with respect to the binding effect of the restrictions. In at least one theory of enforcement of these restrictions there may also be a question as to notice by a subsequent purchaser of the existence of the covenant. A recent Connecticut case[1] illustrates the obstacles which are encountered and must be overcome in order that all of the lots in a tract may simultaneously enjoy the benefits and bear the burdens of restrictive covenants. In that case a developer acquired a tract of land by a deed which restricted its use to private residence purposes. He then subdivided this tract into eight lots and eventually sold them all. A map of the subdivision was recorded. The lots were conveyed by the developer in the following order of time: The predecessor in title of plaintiff Maganini acquired lot 2 in 1913. The predecessor in title of the defendant Hodgson acquired lot 6 on July 12, 1915; and, shortly thereafter on July 29, 1915, the predecessor in title of plaintiff Maloney acquired lot 5. The deeds to all lots contained substantially uniform restrictions that the lots were to be used only for residence purposes, with only one residence on each lot, and the lots were not to be subdivided further if the lots would then be less than one acre in size. All of the lots were by municipal ordinance in an A-1 zone for residence purposes which requires the lots be no smaller than one acre. Defendant had no actual notice of the restrictions because they were not contained or referred to in her deed. When she commenced extensive alterations of her garage, to convert it into a small private residence with the intention of selling her main house and subdividing her lot into two lots smaller than one acre each, the plaintiffs sought an injunction. Plaintiffs alleged that their lots will be depreciated in value to the extent of $25,000

[1]Maganini et al. v. Hodgson, 82 A. 2d 801 (Conn., 1951).

and $10,000, respectively. The trial court held that Maloney could enforce the restrictions but that Maganini could not. Maganini and the defendant both appealed. Upon appeal, it was held that Maganini could also enforce the restrictions and that defendant was bound by the restrictions. The reasons the trial court gave why Maganini could not enforce the covenant were that (a) the restrictions in their deed varied from those in the other deeds so Maganini's lot was not part of the tract development; and, (b) because his lot was conveyed to him prior to the time of the conveyance of the defendant's lot. The Supreme Court of Connecticut brushed aside reason (a), saying the variance in the restrictions was more apparent than real,[2] and thus included the Maganini lot in the development. This is the most significant thing in the opinion, because this change in conclusion takes all the vitality out of reason (b). The relation in time of the conveyances ceases to have any significance once the lots in question come within a tract development, as the relation in time is not a factor in the theory on which tract development restrictions are enforced. The court states[3] that it is true that the restrictions can not be enforced by a prior grantee if the only evidence relied upon as a ground for enforcing the restrictions is evidence from individual deeds but that this principle is not true if a uniform plan of tract development is found to exist. The court had concluded that there was a uniform plan of development and therefore Maganini could enforce the restrictions. There are several theories which are suggested to explain the enforcement of restrictive covenants.[4] They are (1) the Contract theory; (2) the Equitable Easement theory; (3) the Unjust Enrichment theory; and (4) what may be called the Tract Development theory.

The Contract Theory

Under the first theory[5] the law of contracts is applied as a basis for enforcing the covenant between grantor and grantee[6] as to the use which the grantee may make of the land conveyed to him. The covenant given by the grantee in the deed is the expression of this contract and shows the intent of the parties. The use of the land is the subject-matter of the contract. The

---

[2] *Id.*, at 804.

[3] *Id.*, at 804 to 805.

[4] For general reading on the subject and the various theories the following are recommended: Clark, "Covenants and Interests Running With the Land" (2d ed., 1947); Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 (1942); Burby, "Land Burdens in California: Equitable Land Burdens," 10 So. Calif. L. Rev. 281 (1937); McClintock on "Equity," at 336 to 357 (2d ed., 1948); Burby on "Real Property," 129 to 140 (1943); and also see annotations in 124 Am. St. Rep. 128; 14 Ann. Cas. 1018; and 37 L. R. A. (n. s.) 12.

[5] For a discussion of this theory see Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 at 973 to 975 (1942).

[6] See Clark, "Covenants and Interests Running With the Land" (2d ed., 1947), at 172; and Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 at 952 to 953.

contract creates a legal relationship between the parties.[7] It is not an interest in the land.[8] If equity does enforce restrictive covenants on this basis, it is giving specific performance of a contract in relation to land.[9] Contract law allows the assignment of the benefit of the promise, or of the promise itself, by the promisee.[10] Third party beneficiary contracts also allow a third party, not an actual party to the contract to enforce the promise, when the contract was entered into for his benefit. However, the right of the promisor to transfer his obligation has never been recognized so as to make some third party the primary obligor. The primary obligation always remains with the promisor.[11] Applying these contract principles to our problem we see that while plaintiff Maganini might be entitled to enforce the promise on the basis of an assignment to him of the promise or on the basis of being a third party beneficiary, he could not enforce the promise against defendant because he was not the promisor, but only a successor in interest to the promisor with respect to the land. In such a case the promisor could not assign or impose the obligation of the contract upon the defendant in the absence of a novation or some new undertaking by the latter.[12] On the basis of contract law defendant would be free of the restrictive covenant for lack of "privity of contract." The contract theory then cannot explain the decision of the Supreme Court.

The Equitable Easement Theory

Under the equitable easement theory[13] equity enforces the covenant in much the same manner as easements at law are recognized and enforced.[14] Historically law courts refused to enforce restrictive covenants because they were negative in character.[15] Equity assumed jurisdiction to fill the gap.[16] The covenant in the deed runs from the grantee to the grantor and creates in the grantor an interest in the land conveyed which equity treats as an equitable easement. The nature of the easement is the right of the grantor, who still owns land to which the right attaches (the dominant tenement), to have the

---

[7]See Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 at 961.
[8]*Ibid.*
[9]*Id.*, at 973; and McClintock on "Equity," at 336 (2d ed., 1948).
[10]See Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 at 952; and also Corbin, "Assignment of Contract Rights," 74 U. of Pa. L. Rev. 207 (1926).
[11]See Corbin, "Assignment of Contract Rights," 74 U. of Pa. L. Rev. 207 at 216 (1926).
[12]But see Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 at 1085 (1942), where he indicates the covenant could be enforced against a party, other than the promisor, on the basis of an implied at law duty on all of the public not to interfere with the covenant.
[13]For a discussion of this theory see Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 at 975 to 979 (1942).
[14]*Id.*, at 973.
[15]Burby on "Real Property," at 129 (1943).
[16]*Ibid.*

grantee—covenantor's land (the servient tenement) not used for certain purposes. There is a duty on the owner of the servient land not to interfere with the right held by the owner of the dominant tenement. This means that at the time of conveyance of the first lot a right is created in all remaining lots as they are the dominant tenement. The right being appurtenant to those lots, it passes with each lot as it is conveyed,[17] and thus each owner of the later conveyed lots has an easement in the first lot conveyed. The easements in the later conveyed lots are not created till they are conveyed, so the dominant estate, as to these later conveyed lots, will not include the lot first conveyed. The prior grantee will have no easement in lots later conveyed as there is "no privity of estate."[18] This situation could be corrected by the grantor conveying to the first grantee, and all prior grantees, an easement in the lands retained by the grantor. This could probably be done by a covenant by the grantor to restrict the use of the land remaining in his possession. Where this is done it can be said that mutual reciprocal easements are created.[19] By doing this the grantor makes the retained land a servient tenement and the land granted becomes a dominant tenement. This should be done in express terms in the deed as easements are implied at law only in case of strict necessity.[20] Applying this analysis to our facts there could be no dominant tenement held by Maganini because his land was conveyed prior to the defendant's. This theory then does not explain the enforcement of the covenant in the Connecticut case unless the deeds clearly contain mutual reciprocal easements. In the absence of express mutual reciprocal easements, if this theory actually was relied upon by the court it must be that equity in adopting the legal theory of easements, also implies mutual reciprocal easements where they wouldn't be implied at law. That may be what the court is doing by implication when it finds the Maganini lot is part of a uniform plan. It is more likely, however, that the trial court was relying on this theory in denying Maganini relief after finding his lot was not part of the development.

The Unjust Enrichment Theory

The unjust enrichment theory originated with the case of *Tulk* v. *Moxhay*,[21] the first case in which a restrictive covenant was enforced. The theory is that the grantor conveys the land to the grantee in consideration for

[17]See Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 at 977 to 978 (1942).

[18]*Id.*, at 975 to 979.

[19]See Burby on "Real Property," at 134 to 137; and McClintock on "Equity," at 341 to 344 (2d ed., 1948).

[20]See Burby on "Real Property," at 85.

[21]2 Phillips 774, 41 Eng. Rep. 1143 (High Ct. of Ch., 1848).

a lower purchase price plus the covenant from the grantee that he will restrict his use of the land. This covenant is a contract,[22] and as we have seen, it would only be enforceable against the covenantor because the obligation of the contract is not assignable. So the covenantor could convey the land to a third person who would take the land free of the restriction. According to this theory the covenantor would get a higher price for the land free of the restriction. The result would be the covenantee could not enforce the restriction, and the covenantor would make a profit on the transaction. This would be unjust and inequitable to the grantor. So equity took jurisdiction to enforce the restriction against any third party who purchased the land with notice of the restriction. Under this theory, notice to the purchaser is important, and the intent of such a purchaser as to whether he considers himself bound by the covenant or not would seem to have very little to do with the enforcement of the covenant. This theory, in effect, creates an equitable interest in the grantor in the land conveyed which the grantor or his assigns can enforce.[23] This equitable interest, however, can be cut off by the sale of the land to a bona fide purchaser for value without notice.[24] In the Connecticut case, assuming adequate notice, both plaintiffs could enforce the covenant, as the promise could be assigned, and the defendant would be bound by the covenant by reason of taking the land with notice. Constructive notice is all that is required. There is one criticism of this theory. That is that the land is probably worth more with the covenant on it than it is without the covenant. This is true at least as to those purchasers who will pay a premium to get a home or lot in pleasant surroundings with the assurance that the area will be kept that way. Notice that in this Connecticut case the value of both of the plaintiffs' land will depreciate if the covenant is not enforced. This fact substantiates the criticism and shows the reason given for this theory isn't present there.

The Tract Development Theory

Any one of the foregoing theories may explain why a restrictive covenant is enforceable or not enforceable in a particular situation. They are the theories relied upon in the absence of a tract development, which is a special fact situation. The problem in the Connecticut case arises out of a tract development and the court is relying upon a new theory which could be called the tract development theory. That this is the theory relied upon by the Supreme Court is apparent from the general rule the court states:[25] that

---

[22]See Reno, "The Enforcement of Equitable Servitudes in Land," 28 Va. L. Rev. 951 at 971 (1942).

[23]*Ibid.*

[24]See McClintock on "Equity," at 336.

[25]Maganini et al. v. Hodgson, *supra*, note 1, at 804.

where there is a general scheme of development whereby a tract of land is divided into lots which are sold by deeds containing substantially uniform restriction then any grantee may enforce the restrictions against any other grantee. To support this statement the court cites several cases, including *De Gray* v. *Monmouth Beach Club House Co.*[26] That case is the leading case on this theory and is cited by a multitude of cases throughout the United States. An analysis of the rule set out in the *De Gray* case is in order for the purpose of comparing this theory with the others. The essential elements of the rule[27] can be arranged as follows:

1. There must be a general scheme or plan of development adopted and made public by the developer.
2. That plan must contemplate a restriction as to the uses to which the buildings or lots may be put, such restrictions being put in a covenant inserted in each deed to a purchaser.
3. It must appear by the writings or surrounding circumstances that the restrictions on each lot are intended for the benefit of all the other lots, and that each purchaser is to have the benefit of and be subject to the restrictions.
4. If the above elements are present then any purchaser and his assigns may enforce the covenant against any other purchaser and his assigns if the latter purchaser bought with knowledge of the scheme and the covenant was part of the subject matter of his purchase.

The court in the *De Gray* case indicates[28] that it is enforcing an "equity" which it says seems to spring from a presumption that each purchaser paid an enhanced price for his land in reliance upon the carrying out of the plan or scheme, and that while one purchaser is bound by and observes the covenant it would be inequitable to allow any other purchaser in the tract to violate the covenant. This presumption is just the reverse of the unjust enrichment theory but it achieves the same result by creating a situation in which equity will act to prevent injustice. This theory probably rests upon a policy idea that it is in the public interest to foster the development of pleasant, quiet and healthy residential areas by private means. If this is true then the court is enforcing the plan or scheme[29] more than it is enforcing a covenant, or a contract, or an interest in land. If the courts are acting according to the policy above suggested then this theory parallels very closely the development of zoning ordinances which are based upon an exercise of

[26]50 N. J. Eq. 329, 24 A. 388 (1892), affirmed 67 N. J. Eq. 731, 63 A. 1118 (1904).
[27]*Id.*, at 340.
[28]*Id.*, at 339.
[29]In Schmidt v. Palisade Supply Co. et al., 84 A. 807 (Ct. of Ch. of N. J., 1912) a tract development, the restrictions were enforced against purchasers of land ostensibly within the development but not actually owned by the developer at the time of the conveyances to the plaintiffs. The developer later acquired the defendant's land, subdivided it, conveying to defendants. The implication of this would seem to be the court was enforcing the scheme or plan advertised rather than enforcing the restrictions on some other recognized basis.

the state's police power to protect the health, safety, and welfare of the community. Applying this theory to the Connecticut case, it is easy to see why plaintiff Maganini was properly allowed to enforce the restriction once the court determined that his lot is within the tract development.

California[30] recognizes the tract development theory but does not follow it to the same extent as the *De Gray* case. The leading case in California is *Werner* v. *Graham*.[31] That case was a suit to quiet title to land as to restrictions expressed in plaintiff's deed. The defendants were all owners of land in the same tract. The land had been divided by a developer into more than 100 lots. A map had been recorded, but it did not include a declaration of restrictions. The deeds, however, all contained uniform restrictions as to the use of each lot, clearly indicating a general scheme of development. The developer orally representd to each purchaser that he was exacting the same restrictions from all purchasers. The developer had given plaintiff a quitclaim deed of any interest he had retained in plaintiff's land while 16 lots were still left unconveyed by the developer. The defendants were in three groups. First, prior purchasers to plaintiff; second, those who purchased after plaintiff, but before the developer had given plaintiff the quitclaim deed; and third, the purchasers of the 16 lots. The trial court had held the plaintiff was bound by the restrictions, but the Supreme Court of California held he was free of the restrictions as to all of the defendants. The reasoning of the court was that as to the first group, the prior purchasers, there was no privity of contract nor privity of estate. As to the third group the court said the developer had released any interest he had held in respect to those 16 lots, so their purchasers got no interest. As to the second group, the court treated it on the basis of a possible tract development and held there could be no enforcement on that basis either. The court said[32] that to have an enforceable restriction there must be, in the deed itself, a clear expression of the intent of both the grantor and the grantee to restrict the lot conveyed as part of a general scheme or plan. The court said it would look only to the deed, or a declaration of restrictions recorded and made part of the deed by reference, in ascertaining the mutual intent of the parties, and the existence of a common scheme or development. Here lies the main difference between the *Werner* case and the *De Gray* case. In the latter the court can look to surrounding circumstances in determining whether there was a common scheme of development. The California court in the *Werner* case also indicates there must be a clear showing in the deed of what land is intended as the dominant

[30]See Burby, "Land Burdens in California: Equitable Land Burdens," 10 So. Calif. L. Rev. 281 (1937).

[31]181 Cal. 174, 183 P. 945 (1919).

[32]*Id.*, at 182.

tenement. In short, California is strict on requiring full written evidence of the plan and the intent of the parties, on the basis of the *Werner* case. The *De Gray* case is more liberal in allowing evidence of the plan and of the intent of the parties to be taken from the circumstances. The intent referred to means what the parties had in mind as to whether the covenant is to be a burden upon, and a benefit to every lot sold in the tract, not only in the hands of the first purchaser, but also in the hands of subsequent owners. California still follows the rule of the *Werner* case that the deed is the only evidence of what the parties have done.[33]

The problem we have discussed in the Connecticut case probably would not be decided the same in California. While the report does not give sufficient facts to tell whether California requirements would be satisfied, it does not appear that such information was present in the deeds because the court decided the Maganini lot was within the tract merely because there was no substantial variation in the covenants in the deeds.

[33]Robertson v. Nichols, 92 Cal. App. 2d 201, at 206, 206 P. 2d 898 (1949).