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Real Property - General Scheme in Enforcement of Restrictive Covenants

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REAL PROPERTY—GENERAL SCHEME IN ENFORCEMENT OF RESTRICTIVE COVENANTS—Common grantor filed for record a plat of the subdivision in which defendant and plaintiff both own lots. Plaintiff alleged that the subdivision was restricted. Only three of fifteen subdivision deeds entered for record contained written restrictions, and the subdivision plat which had been filed did not show any restrictions. In an action brought by plaintiff to prevent the defendant from violating the alleged restrictions, *held,* temporary injunction restraining the defendant granted. The court found a general building scheme of which the defendant had actual notice when he purchased his lot. *Womack v. Dean,* (Tex. Civ. App. 1954) 266 S. W. (2d) 540.

Various criteria have been suggested by the courts for determining the existence of a common building scheme. Although some courts demand universal written restrictions in the deeds to the lots of the subdivision,[1] more require that only a substantial number of the deeds contain written restrictions.[2] Identical restrictions are not usually required, but the amount of variation allowed will depend upon the individual court.[3] Other tests of a general building scheme are the actual conditions in the subdivision,[4] the acceptance of the actual conditions and reliance thereon by the owners,[5] the filing of a plat of the subdivision showing the restrictions,[6] and oral agreements among the owners.[7] Another approach would not require any one of these, but would determine the existence of a general scheme by considering all of these factors together.[8] In the principal case, the court relied heavily on the actual conditions and on a general understanding among the owners in finding the existence of a general building scheme. Apparently this court adopted a lenient standard for determining the existence of a general scheme. In granting a temporary injunction, the court did not have to consider the merits of the case. However, it seems possible to infer a disposition on the part of the court that these restrictions should be permanently enforced. To enforce restrictions in a subdivision among the owners inter se, the courts have developed the doctrine of reciprocal negative easements.[9] This doctrine requires a common grantor who places restrictive

[1] Hooper v. Lottman, (Tex. Civ. App. 1914) 171 S.W. 270; Abbott v. Steigman, 263 Mass. 585, 161 N.E. 596 (1928).

[2] See 3 TIFFANY, REAL PROPERTY, 3d ed., §868, p. 505 (1939) and cases cited therein. As to what percentage of deeds must contain written restrictions, see Hayes v. Gibbs, 110 Utah 54, 169 P. (2d) 781 (1946).

[3] See BURBY, REAL PROPERTY 136 (1943).

[4] Harley v. Zack, 217 Mich. 549, 187 N.W. 533 (1922).

[5] Ibid.

[6] LaFetra v. Beveridge, 124 N.J. Eq. 24, 199 A. 70 (1938). However, the plat alone will not prove the existence of a general scheme if the restrictions are not stated on the plat. Utujian v. Boldt, 242 Mich. 331, 218 N.W. 692 (1928).

[7] Hays v. St. Paul M.E. Church, 196 Ill. 633, 63 N.E. 1040 (1902).

[8] Allen v. Detroit, 167 Mich. 464, 133 N.W. 317 (1911). As to what factors are considered and what weight should be given to them, see the annotation in 45 L.R.A (n.s.) 962 at 966 (1913).

[9] Doctrine stated in Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925), annotated in 60 A.L.R. 1216 (1929).

covenants in the deeds to the subdivision with the intent in each case that the grantee is to benefit from similar restrictions in the deeds of later grantees to subdivision property.[10] The restrictions are then enforceable by all in the subdivision against those who take with notice of them.[11] Since in the principal case there were no restrictions in the defendant's chain of title, can a restrictive agreement be implied from the general scheme? There is considerable confusion as to the function of the general scheme. It is used primarily to prove that the common grantor intended the *benefit* of written restrictions to go to later grantees in the subdivision. Many courts restrict the use of the general scheme to this purpose only, thus making it necessary to have written covenants in the deeds in order to enforce the restrictions *against* subsequent parties taking within the subdivision.[12] The general scheme has also been used to infer the *agreement* to restrict.[13] This would eliminate the necessity of written covenants or of showing proven oral agreements to restrict. From the emphasis placed upon the general scheme in the principal case, it appears that the court would favor this view. Since the requirement of an equitable servitude is that title be taken with notice of restrictions, it seems that the court was indicating that an agreement to restrict could be inferred from a general scheme. Finally, the general scheme has been used to infer that actual notice of building restrictions has been given to all those who buy within the subdivision.[14] If courts come to allow the general scheme to serve all three of these functions, the end result is likely to be that they will hold that mere proof of the existence of a general scheme will bind all of the lots in the subdivision as a matter of law, without troubling to theorize on why this is so. If in the principal case the court intends to place such an extended significance on the existence of a general scheme, it is difficult to see what purpose could be gained in the remedy requiring the defendant to place these restrictions on his lots before selling them. His successor in title could be bound by the existence of the general scheme in exactly the same fashion that defendant here could be bound. But if the court relies on actual notice of the general scheme to the defendant (rather than notice

[10] Excellent discussion of this doctrine is in 2 AMERICAN LAW OF PROPERTY §9.33, p. 430 (1952). A consideration of the doctrine in Michigan is found in 6 MICH. S.B.J. 222-240, 249-270 (1927).

[11] As to what constitutes notice, the courts have developed several standards. See 3 TIFFANY, REAL PROPERTY, 3d ed., §863, p. 491 (1939).

[12] All authorities cited in the principal case hold this view. See also annotations in 21 A.L.R. 1281 at 1306 (1922); 60 A.L.R. 1223 (1929); and 33 A.L.R. 676 (1924). For a holding that absolute universality of restrictions in deeds is not required, see Hartt v. Rueter, 223 Mass. 207, 111 N.E. 1045 (1916). The California court will not even go this far. Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919).

[13] Allen v. Detroit, note 8 supra; 45 L.R.A. 962 at 964 (1913); Kiskadden v. Berman, 224 Mich. 473, 221 N.W. 632 (1928); Sanborn v. McLean, note 9 supra.

[14] Nerrerter v. Little, 258 Mich. 462, 243 N.W. 25 (1932). See also 10 MINN. L. REV. 619 (1926), and cases therein cited. *Contra:* Bradley v. Walker, 138 N.Y. 291, 33 N.E. 1079 (1893); Casterton v. Plotkin, 188 Mich. 333, 154 N.W. 151 (1915). In the latter case, the court distinguished Allen v. Detroit, note 8 supra.

implied purely from the existence of a general scheme), then there would be purpose to such a decree. In that event the subsequent owner might not have the same actual notice that the defendant does here.

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