

# Easements, Covenants and Servitudes: Traditional Limitations and Future Trends

Joan Youngman

Everyday life presents many examples of agreements that divide the rights to possession of property. A typical lease allows the tenant a period of possession in exchange for payment of rent, and joint ownership arrangements provide a means of sharing or dividing possession. But, nonpossessory interests are equally important because they provide a mechanism for private land use regulation. Some examples are condominium owners' rights in their building's common areas, storekeepers' agreements with the operator of the shopping center in which they are located, and gated communities' covenants to restrict access. None of these convey possession, but all affect daily living and business arrangements. The widespread adoption of public zoning restrictions over the past century has by no means diminished the role of private land use agreements, and may even have enhanced it by making limitations on a possessor's rights of use a familiar and accepted aspect of property ownership.

An agreement concerning the use of property could, of course, take the form of a simple contract, whether between neighbors, store owners and a mall operator, or condominium residents and their homeowners' association. But such a contract would not necessarily survive a sale, inheritance or other transfer of ownership of the property in question. A generation later, a court might well refuse to enforce an

**Editor's note:** This article summarizes a recent Lincoln lecture by Dean Gerald Korngold of the Case Western Reserve University School of Law. He outlined the current status of the law on nonpossessory rights in property and discussed its future direction.

agreement where neither the person violating its provisions nor the person seeking to uphold them were parties to the original contract. For this reason, long-term durability requires that private land use restrictions take the form of a conveyance of a property interest, rather than a contract.

## The New Restatement of Property

Part of the complexity of nonpossessory rights stems from the numerous and often ambiguous distinctions among them in the common law. They fall within four traditional categories:

- An easement is a nonpossessory right in the land of another.
- A profit allows the holder to enter on land that he or she does not possess and remove resources from it, as by mining coal or harvesting timber.
- Covenants, including both real covenants and equitable servitudes, are promises between owners of neighboring land, differing only in the remedy available in the event the promise is broken.
- An equitable servitude can be specifically enforced by ordering action to be taken and the promise kept; breach of a real covenant would only result in monetary damages.

It is clear even from this cursory description that a given interest might be assigned to more than one category. For example, an agreement between neighbors not to construct commercial buildings on their properties might be characterized as an easement, an equitable servitude, or a real covenant, and each result would carry different legal consequences.

Traditionally, courts were most favorably disposed toward easements, and were much less likely to enforce real covenants and equitable servitudes. Over time two distinct categories of property law developed to address similar issues in these different contexts. In 2000 the American Law Institute, an organization of practitioners, jurists and scholars concerned with legal reform, took a major step in attempting to simplify and rationalize the law of nonpossessory interests. Its Restatement (Third) of the Law of Property adopted a single unified approach and a new category, termed "servitudes," encompassing all earlier classifications. Restatements have no binding legal effect, but they often influence both legislatures considering changes to the law and courts charged with its interpretation.

## Policy Arguments: Pro and Con

Judicial decisions concerning nonpossessory interests often give weight to larger issues of public policy in determining whether to enforce these agreements. Four major policy considerations often support enforcement: the moral obligation

accompanying a promise; interests of economic efficiency; respect for freedom of choice; and a desire to promote certainty in business agreements.

**Moral Obligation.** This issue reflects a sense of fairness in enforcing a promise and applies both to the original parties to the agreement and to their successors in ownership. When restrictions that are intended to affect future purchasers (i.e., restrictions that “run with the land”) are recorded at public registries and available for inspection, failure to enforce these agreements will produce an unwarranted windfall for the parties who breach them. The original owners who entered the agreement did so voluntarily and in anticipation of some benefit. Later purchasers presumably made their own bargains in light of these agreements. A buyer of restricted property will generally pay less for it than he or she would if a more profitable use were permitted. Thus the new owner would receive an unfair benefit if the lower purchase price were followed by a release from the obligation to adhere to the restrictions.

**Efficiency and Freedom of Choice.** Nonpossessory agreements promote efficiency by greatly expanding the range of possible property interests that may be transferred. Consider the case of an owner seeking to insure that there is no intrusive construction on a neighboring lot in the future. Absent the availability of a nonpossessory interest, the owner’s only recourse would be to purchase the entire neighboring lot, even if outright ownership was not desired and in fact precluded other non-objectionable use by a different party. The ability to acquire only part of the bundle of rights constituting the property allows flexibility that can benefit all affected parties. In this way efficiency concerns are closely

related to those favoring freedom of choice. The value our society places on individual autonomy leads to a presumption in favor of voluntary private arrangements concerning land ownership. This is especially important when the subject matter concerns one’s home, as do many land use agreements.

**Certainty.** Enforcement of private agreements also promotes the certainty and stability necessary for long-term planning and investment. By contrast, a zoning ordinance may be varied in individual instances or altered in response to political pressure. This is one important incentive for private agreements to restrict land use, even when such limitations are already part of the local zoning code.

These concerns, however, are balanced by other policy considerations that may argue against enforcement of a servitude. Perhaps the most significant is the centuries-old common-law distrust of restrictions on future land use, development and sale. Recognizing that we have no special power to predict the social and economic concerns of future generations, courts have traditionally limited the extent to which contemporary agreements may bind later owners. In fact, the term “mortmain,” referring to property held without the power of sale, literally refers to the “dead hand” of past restrictions. From this perspective, policy considerations favoring efficiency, flexibility and personal choice can militate against as well as in favor of enforcement of restrictions in specific cases.

In some instances, this concern centers on restraints on alienation, or provisions that make the land more difficult to sell. However, the very flexibility fostered by the introduction of a market for new partial property interests will often obviate this

objection. A prospective owner who wishes to buy property free and clear of a long-standing servitude can often accomplish this by a two-part transaction: purchasing the encumbered property at the lower price it currently commands on the market and simultaneously paying the holder of the servitude the amount needed to release it. Thus, a purchaser of property limited by private agreement to residential use could build a retail structure there (assuming it were permitted by local zoning ordinances) if he or she were able to negotiate with the neighbor a termination of the agreement prohibiting such construction. The lifting of a “cloud on title” of this type is extremely common, as in the case of a new owner who negotiates with a current tenant over payment for early termination of a lease.

### New Models for Judicial Decisions

Given the effort of the Restatement to release some of the “dead hand” of common law classification, and given the enormous proliferation of commercial, condominium, homeowner and conservation restrictions in recent years, what new criteria should courts apply in determining whether to enforce a specific agreement?

One frequently discussed criterion concerns subject matter: should certain categories of restrictions be suspect because they may infringe on special rights, such as the right to individual expression and free speech? Should a homeowners’ association be able to bar the display of flags and political posters from its members’ premises? One real-life dispute pitted the governing board of a cooperative on the East Side of Manhattan against a unit owner who refused to cease sponsoring baptisms in

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the apartment's swimming pool. (The owner argued that often the ceremonies involved college football players, who were too large to fit in a bathtub.) Note that these disputes do not involve the First Amendment, which only prohibits governmental restrictions on speech and religion, not voluntary private agreements. Restrictions also increasingly address architectural and aesthetic issues, which combine concerns for common amenities with problems of limiting personal expression and individual freedom.

Instead of allowing the subject matter to determine the outcome of these cases, an alternate approach would enforce only those covenants that regulate external behavior, not those that seek to limit personal status or activities within a private residence. This would permit restrictions on outside flags and posters, but not prohibitions on unmarried couples living together or the conduct of church services within a home (including baptisms in the bathtub). Of course, it would permit restrictions on the external effects of such arrangements, such as garbage, traffic, parking and noise. Similarly, it would generally support architectural limitations on landscape and external building elements, for these have important "spillover" effects on other residents.

The new Restatement of the Law of Property does not attempt to formulate this approach into a formal rule. However, it does recommend that general considerations of public policy guide courts in determining whether to enforce a specific servitude, and it notes the need for special concern in addressing issues of personal autonomy.

## The Special Case of Conservation Easements

Conservation easements are currently one of the most significant and fastest-growing types of servitudes. They convey to a conservation organization or governmental unit the right to enforce a limitation on development of privately owned property, illustrating the great potential of nonpossessory interests. Often families who are the most committed to the preservation of their land and have a strong sense of its value as open space are the least interested in selling the property to a charity or to the government. The conservation easement permits protection against development while the land remains in private ownership. The organization holding the easement does not have the responsibilities of ownership, and some portion of the property value remains on the tax rolls. The net expenditure, even when the easement must be purchased, is less than the cost of the entire parcel. It is easy to see why conservation easements have become tremendously popular land preservation tools.

At the same time, some of the public policy concerns that argue against enforcement of other servitudes can be operative here as well. In particular, unease over long-term restrictions on land use is magnified in this case because federal income tax law allows a deduction for the gift of an easement only if it operates in perpetuity. Perpetuity is a long time, and appropriate land use may change dramatically in the future. Conservation easements are also "in gross," meaning that they can be held by organizations that are not neighboring property owners. The original limitation of covenants to nearby owners reflected a concern that distant parties might be uninterested in or uninformed about local issues, with no necessary stake in promoting efficient land use and economic development. They could also be difficult to locate if needed to release a covenant or servitude. Finally, there are troubling antidemocratic aspects of a system that permits private parties to impose perpetual land use restrictions without public oversight.

These concerns are not grounds for recommending wholesale changes to the law of conservation easements, such as a restriction to type of ownership or a uniform limitation on duration. These requirements would be too rigid a response, particularly when more time is needed to understand how well-founded such misgivings might be. Individual decisions informed by experience, rather than expansive rulemaking on the basis of abstract reasoning, is the greatest strength of our common-law heritage. This approach permits courts to intervene selectively in the rare cases where the public interest may not support specific enforcement of an easement. This is already a familiar response in, for example, the law of nuisance, where individual awards may be limited to monetary damages alone. State attorneys general may also be able to exercise increased oversight and represent the public interest more actively as conservation easements come into ever-broader use.

## Conclusion

Nonpossessory interests in property are as widespread as rights of way and as familiar as the covenants in a homeowners' association agreement. The enormous usefulness of these servitudes makes efforts to modernize and rationalize their application critically important. At the same time, because their influence is felt in numerous facets of everyday life, judicial analysis of their legal effects provides a context within which to consider bedrock issues of public policy. **L**

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