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The Evolution of Restrictive Covenants in West Virginia

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THE EVOLUTION OF RESTRICTIVE COVENANTS IN WEST VIRGINIA

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I. INTRODUCTION

While statutory authority exists[1] for counties to adopt comprehensive land use plans[2] and zoning districts,[3] few counties in West Virginia have adopted land use regulations.[4] Therefore, to the extent governmental regulation of land use exists in West Virginia, it essentially exists within incorporated municipalities.[5] The absence of "zoning" outside of municipalities has undoubtedly contributed to the use of restrictive covenants[6] in the development of "rural" land throughout West Virginia into residential subdivisions. In fact, in many residential developments, restrictive covenants, in combination with home owners' associations, provide a rudimentary form of governmental relation that "controls" the use of land within the subdivision and affords a method of providing certain common necessities, such as road maintenance.[7] As a general statement, since any property owner "protected" by a restrictive covenant has a right to enforce the covenant,[8] a basic understanding of the law of restrictive covenants in West Virginia is important not only to attorneys representing developers, but also to those who represent purchasers/homeowners.

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1 W. VA. CODE § 8-24-1 to -78 (1998).

2 W. VA. CODE § 8-24-16 to -27 (1998).

3 W. VA. CODE § 8-24-40 to -41 (1998).

4 As of July 1, 1997, only two counties have any comprehensive land use plans and/or zoning outside of municipalities. Telephone Interview with David Pollard, Director of Planning for Fayette County (July 1, 1997).

5 The enabling legislation for municipalities is the same as for county commissions. *See* W. VA. CODE § 8-24-1 to -78 (1998).

6 Restrictive covenant is defined as

> A provision in a deed limiting the use of the property and prohibiting certain uses. In context of property law, term describes contract between grantor and grantee which restricts grantee's use and occupancy of land; generally, purpose behind restrictive covenants is to maintain or enhance value of lands adjacent to one another by controlling nature and use of surrounding lands.

BLACK'S LAW DICTIONARY 1315 (6th ed. 1990).

7 The provisions of Chapter 36B, Uniform Common Interest Ownership Act, may be applicable to residential subdivision developments and, therefore, should be carefully considered by developers. W. VA. CODE § 36B-1-101 to -207 (1997).

8 *See generally* Jubb v. Letterle, 406 S.E.2d 465 (W. Va. 1991).

The common law rules regarding covenants were complicated and technical. However, because most states' laws regarding covenants evolved from the common law rules, it is helpful to have a basic understanding of them. The common law rules of covenants begin with the rules set forth in the famous *Spencer's Case*.[9]

II. THE EARLY COMMON LAW: REAL COVENANTS

During the early common law,[10] which spanned from 1583, or earlier, to the mid-nineteenth century, courts only recognized what were called real covenants. Real covenants were generally affirmative in nature and, under certain circumstances, were recognized by the courts as running with the land. At early common law, there were only four negative covenants permitted; these were easements for light, for air, for support of a building laterally or subjacently situated, and for the flow of an artificial stream.[11] Otherwise, most real covenants involved the covenantor agreeing to do some affirmative act involving the land, such as building a brick wall on the land, as in *Spencer's Case*.[12] Since real covenants were enforceable in law, damages were the sole relief granted by the courts for their breach; injunctive relief was not available. The technicalities of real covenants at early common law may be best understood by examining each of the five elements including: (1) form of the covenant; (2) whether the covenanting parties intended the covenant to run; (3) whether the covenant touches and concerns; (4) horizontal privity; and (5) vertical privity.[13]

A. Form of Covenant [14]

In order for a covenant to have been binding between the original parties or successors, the covenant between the original parties had to be in an acceptable form. Because at common law the creation of covenants was deemed an interest in land, all of the usual requirements of a conveyance of land had to be met. In

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9 77 Eng. Rep. 72 (K.B. 1583).

10 *See generally* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 466 (2d ed. 1993).

11 *See* 2 AMERICAN LAW OF PROPERTY 402 (1952).

12 *See* 77 Eng. Rep. at 73.

13 *See* CUNNINGHAM, *supra* note 10, at 469.

14 *See generally id.* at 469; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 404-409.

particular, under the English statute of frauds, the conveyance had to be in writing, regardless of the duration of the covenant.

B. *Intent to Bind Successors* [15]

In order to bind future assigns, the parties must have intended for the covenant to run with the land. Much like today, courts at early common law often had to glean the intent of the parties from the facts of each case. The most important determination for the courts was whether the parties intended the covenant to benefit the land, not just to bind the covenantor to perform some personal act. Generally, words which explicitly showed an intention to bind future successors were not necessary. However, the law did require that any covenant involving something not *in esse* had to explicitly state that it was to bind all future assigns. For example, in *Spencer's Case,* the covenant required the lessee of a certain tract of land to build a brick wall upon the land.[16] Therefore, the covenant involved something not *in esse*, since the brick wall did not yet exist. The court held that to bind successors to build the wall required that the instrument explicitly state that the covenant was to bind the assigns of the lessee, which, in *Spencer's Case*, it did so state.[17]

C. *Touches and Concerns* [18]

The "touches and concerns" element is difficult to define but easy to explain. The benefit and/or the burden created by a covenant must touch and concern the land. The concept of "touches and concerns" is similar in nature to the concept of "pornography" which Justice Stewart of the Supreme Court said was too hard to define, but "I know it when I see it."[19] The main goal of the requirement of touches and concerns is that the covenant must relate somehow to the land and should bind and benefit the land. It must be more than just a promise by one person to do something to personally benefit another person. A modern example of "touch

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15 *See generally* CUNNINGHAM, *supra* note 10, at 475-476; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 415-421.

16 *See* 77 Eng. Rep. at 73.

17 *Id.* at 72.

18 *See generally* CUNNINGHAM, *supra* note 10, at 471-475; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 412-415.

19 Jocobellis v. Ohio, 378 U.S. 184, 197 (1964).

and concern" is subdivision plans and restrictions designed to protect the value of the properties. Even though a covenant may affect equally a lot at one end of a development and a lot at the other end, the benefit of the covenant is for all of the tracts equally, and the covenant is designed to protect the value of the land, not just a means of one party to gain personally from another party.

D. *Horizontal Privity* [20]

The term "horizontal privity" refers to a relationship between the original covenantor and covenantee. In order to create a covenant which had the potential to run with the land, the transfer between the parties had to be in the form of a conveyance (in which case, we say that the parties had horizontal privity). The grantor need not have to convey his entire estate to the grantee in order to have horizontal privity, but some portion of an estate had to be transferred. In other words, adjoining landowners could not agree to bind their land for their mutual benefit (no horizontal privity) and have the covenants bind future successors. In addition, at early English common law, covenants could only run with the land when the original parties were in landlord-tenant relationships.[21] Even as late as 1834, in the case of *Keppell v. Bailey,*[22] the court concluded that horizontal privity was satisfied only by a landlord-tenant relationship.[23]

E. *Vertical Privity* [24]

The term "vertical privity" refers to the relationship between the covenantor and his or her successors. In order for a covenant to run with the land, each successor to the original covenantor had to acquire the very same *estate* as his or her

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20 *See generally* CUNNINGHAM, *supra* note 10, at 477-480; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 409-410.

21 *See generally* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 855-859 (3d ed. 1993); Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1272-1273 (1982).

22 39 Eng. Rep. 1042 (Ch. 1834).

23 *See* DUKEMINIER & KRIER, *supra* note 21, at 857.

24 *See generally* CUNNINGHAM, *supra* note 10, at 476-477; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 410-412.

grantor.[25] Horizontal privity (the conveyance between the original parties), which was necessary in order for a covenant to run with the land, did not require the transfer of the grantor's entire estate, but for a covenant to bind the land of successors, the successors had to take the very same estate as their grantor.[26] A popular anecdote summarizes the situation as "real covenants run along with estates as a bird rides on a wagon."[27] Thus, if a successor took less than his or her grantor's estate, attached covenants would not have passed on to the successor.

III. EQUITABLE RESTRICTIONS: THE BEGINNING OF MODERN COVENANT LAW

By the mid-nineteenth century, industrialization had paved the way for new patterns of land use and occupation. Neighborhoods and communities started to grow around industrial sites. A method to control the use of the lands became more desirable, and real covenants, which awarded damages as the only remedy, were not well-suited to afford such protection.[28] At first, landowners turned to contract law to try to gain enforcement of covenants that were not enforceable as real covenants. The parties hoped that contracts would provide a way around the problem of privity between the original parties, as well as expand the running of covenants beyond landlord-tenant relationships. However, since contract rights and duties were not generally assignable, they proved worthless as a realistic means of use restrictions for land. What was needed was some sort of property interest that could be both enforceable against original parties without privity and assignable. In 1848, in *Tulk v. Moxhay*,[29] the courts of equity finally responded to the needs of the landowners by giving birth to equitable restrictions, which were much more suited to the needs of the times. Landowners could now, subject to more relaxed restrictions, create covenants among themselves without any conveyances or a landlord-tenant

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25 *See* EDWARD H. RABIN & ROBERTA ROSENTHAL KWALL, FUNDAMENTALS OF MODERN PROPERTY LAW 485, 486 (3d ed. 1992).

26 It was the *burden* of the covenant that would only run with the estate of the covenantor if an entire estate was transferred to a successor. The *benefit* of the covenant would pass to the covanantee's successors by a transfer of the entire estate or some lesser estate carved out of the estate. *See* CUNNINGHAM, *supra* note 10, at 476.

27 *Id.*

28 *See* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1187-1188 (1982).

29 41 Eng. Rep. 1143 (Ch. 1848).

relationship, which would run with the land. Whereas horizontal privity had previously been required for vertical privity, successors could now be bound even when there was no conveyance between the covenanting parties. Neighbors, without a transfer of land, could now bind their lands, subject to certain rules, for their mutual benefit and security.[30] Like real covenants, the technicalities of equitable restrictions can be divided into the following elements: (1) form of the covenant; (2) intent of the covenanting parties that the covenant shall run; (3) touch and concern; (4) horizontal privity; (5) vertical privity; and (6) notice.[31]

A. Form [32]

The same general concerns as to form that applied to real covenants, as discussed above,[33] also apply to equitable restrictions. Most importantly, equitable restrictions, as interests in land, must be in writing to satisfy the statute of frauds.

B. Intent for the Covenant to Run with the Land [34]

As with real covenants, courts looked at all of the evidence to determine if the parties intended the covenant to run with the land. No particular words were necessary to express such intent. The most important consideration for the courts was that the parties intended to benefit the land, as opposed to binding the covenantor to perform some personal act. Also, with equitable restrictions, the courts did not require the use of the explicit words of intent for covenants relating to something not *in esse*.

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30 *See* CUNNINGHAM, *supra* note 10, at 484-486.

31 *See id.* at 486.

32 *See generally id.* at 486-488.

33 *See supra* note 14 and accompanying text.

34 *See generally* CUNNINGHAM, *supra* note 10, at 490-491; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 415-421.

C. *Touches and Concerns* [35]

Just as with real covenants, the requirement that a covenant touch and concern the land is a concept that is not easy to define. Again, it must be more than a "mere" personal obligation or promise. For example, it must benefit or burden the land.

D. *Horizontal Privity* [36]

Perhaps the most important distinction between the technical elements of real covenants and equitable restrictions involves privity. Under the law of real covenants, in order to bind successors, a covenant had to be created by the original parties as part of a conveyance. Under the law of equitable restrictions, covenants could be created outside of conveyances, although, as a practical matter, most covenants were still part of conveyances. Equitable restrictions could be created by a contract (agreement) between two parties without being part of a conveyance between those parties. For example, since equitable restrictions are usually negative (they involve an agreement not to use land in certain ways), two neighbors who each acquired their lands from a different grantor, could agree to restrict the use of their land for the benefit of each other's land. To illustrate, suppose that *A* and *B* own neighboring tracts of land. They decide to develop their lands into a subdivision by dividing their properties into lots and creating a system of roads. They decide that to make the lots in their subdivision more desirable, they will bind their lands under a set of restrictions.[37] Such a covenant would have lacked vertical privity under the law of real covenants because the original parties lacked horizontal privity, but it could be enforced in equity as an equitable restriction under the new law.[38]

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35 *See generally* CUNNINGHAM, *supra* note 10, at 488-489; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 412-415.

36 *See generally* CUNNINGHAM, *supra* note 10, at 491; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 409-410.

37 The agreement would need to be in writing to satisfy the statute of frauds and recorded with the clerk of the county court in order to give record notice. *See* W. VA. CODE § 36-1-1 (1997) (statute of frauds); W. VA. CODE § 40-1-9 (1997) (record notice).

38 CUNNINGHAM, *supra* note 10, at 491.

E. Vertical Privity [39]

Under "real covenants," it was noted that covenants followed the estate of a grantor and bound only successors who took the very same *estate* as their grantor. In contrast, equitable restrictions do not ride with estates like a bird on a wagon, but rather they "sink their roots into the soil."[40] In other words, equitable restrictions bind successors who gain any possessory interest in the land, not necessarily the exact interest as their grantor. This was important in keeping the land secure under a covenant, since now there was less fear that the benefit of a covenant might be lost because of an insufficient transfer to a successor.

F. Notice [41]

Because equitable restrictions are an interest in the land, in order to assure fairness, the courts of equity required that the writing that created them had to be properly recorded. Even though the creation of the restrictions did not need to be in the form of a conveyance, because purchasers have record notice of all matters appearing in their chain of title, the restriction appearing in a document within a purchaser's chain of title gives the purchaser constructive or record notice of its existence. However, if a covenant is not within a purchaser's chain of title, and the purchaser does not have actual notice of the restriction and is not on inquiry notice, then it would not be "fair" to bind the purchaser by such restrictions.[42] The court summarized this point in *Tulk*, stating that "if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchases."[43] Therefore, "equitable restrictions are equitable interests in land that are good against subsequent possessors who are not bona fide purchasers."[44] This was deemed an equitable result by the courts.

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39 *See generally id.* at 491-492; 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 410-412, 427-428.

40 CUNNINGHAM, *supra* note 10, at 491.

41 *See generally id.* at 492-94.

42 *See* John W. Fisher, II, *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ?*, 98 W. VA. L. REV. 449, 493-500 (1996).

43 CUNNINGHAM, *supra* note 10, at 492.

44 *Id.* at 494.

As the brief summary of the common law doctrine presented above illustrates, this subject area of the law had evolved from *Spencer's Case* and is filled with subtle "niceties." In fact, the authors of one casebook began their introduction on the chapter, "Covenants Running with the Land (Promissory Servitudes)," as follows:

> Although the factual situations involving covenants are usually not complicated, the law in this area is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier, like astrophysics. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.
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> When the fifty states in this country adopted the confused English law of real covenants and equitable servitudes they added variations of their own, although to make things interesting each pretended that it was merely applying a well understood common body of doctrine. In 1940 the learned scholars of the American Law Institute undertook to restate the law of covenants and this bred the naive hope that out of the confusion order would emerge. The Restatement itself, however, was so controversial in its resolution of these burning questions that Judge Clark felt impelled to write an entire book exposing its "errors" in delightfully intemperate language. The Restatement sections dealing with servitudes are currently being rewritten, and one hopes that they will meet with a kinder, gentler reception than did their predecessors.[45]

Given the complexities of the common law rules and Professors Rabin and Kwall's portrayal of the subject area as an "unspeakable quagmire," the degree of "simplification" of the body of law in West Virginia comes as somewhat of a surprise. While there are a few exceptions as will appear, overall the general language and approach by the courts in West Virginia in construing restrictive covenants/equitable servitudes has remained relatively consistent. While the number of cases involving restrictive covenants decided by the Supreme Court of Appeals has increased over the past three decades as compared to the first half of

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45 RABIN & KWALL, *supra* note 25, at 447 (citations omitted).

the century, the search for the parties' intent, aided by rules of construction, has remained the key issue.

IV. THE EARLY WEST VIRGINIA DECISION

The law of restrictive covenants in West Virginia has its roots in *Robinson v. Edgell*.[46] In 1903, the plaintiff, as grantor, conveyed the lot in question to the defendant, the grantee, with a restrictive clause which provided that "[t]his writing prohibits the sale of intoxicating liquors in any manner whatever on the premises hereby conveyed, and this is a part of the consideration."[47] The fact that the parties to the lawsuit were the grantor and grantee in the deed containing the restriction meant that the issues of whether the covenant would run with the land and, therefore, would be binding on remote parties was not presented. When the lower court refused to grant an injunction enforcing the covenant, the plaintiff appealed.[48] In acknowledging the jurisdiction of a court of equity to enforce negative covenants restricting the use of real property, the court implicitly noted that in such cases "damages" are not a sufficient remedy.[49] In deciding whether the court should exercise its discretion and grant an injunction, the court explained,

> The right to invoke relief by injunction in such cases is not absolute, however. To a certain extent, the jurisdiction is discretionary. It is governed by the same general principles which control the jurisdiction to compel specific performance of contracts. Where a proper case for its exercise is shown, relief is granted as a matter of course, but if, under the conditions and circumstances obtaining, the granting of the relief sought would work injustice or be ineffectual of any meritorious result, it will be refused. If, therefore, the restrictive covenants in deeds, conveying lots, were made with reference to the continuance of existing general conditions of the property and surroundings, but in the lapse of time there has been a change in the character and surroundings, so as to defeat the purposes of the covenants and to

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46 49 S.E. 1027 (W. Va. 1905).

47 *Id.*

48 *Id.*

49 "The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial." *Id.* at 1028 (citation omitted).

> render their enforcement an inequitable, unjust and useless burden upon the owner of the lot, equity will refuse its aid and leave the plaintiff to his remedy at law. When such change in conditions is due to the act of the grantor or is assented to by him, equity will not interfere at his instance.[50]

While the *Robinson* court did provide insight into why such covenants are used,[51] the significance of the decision, for present purposes, is the court's acceptance of the "validity" of the covenants without discussing the common law elements.

In *Robinson*, a significant portion of the eight pages of the decision dealt with the defenses to enforcement raised by the defendants.[52] In rejecting the defendants' arguments, the court granted the injunction:

> Subject to the right, in the defendants and their assigns, to have the same hereafter dissolved for any sufficient cause that may be shown. As has been stated, the jurisdiction invoked is purely equitable and discretionary and its exercise will extend no further than equity, conscience and justice demand. Therefore, the condition is put in the decree so that, in the event of such changes

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50 *Id.* at 1028-1029 (citation omitted).

51 The court stated,

> The most frequent illustrations of the application of the principle are found in cases involving the rights of parties holding by conveyance town lots, as subdivisions of a tract of land, the use of which had been limited by like or similar clauses inserted in all the deeds for the purpose of impressing upon all the property a certain character or quality, such as residence property. To the end that such property may be the more readily and advantageously sold, the use of each lot for trade, manufacturing, commercial, or business purposes is prohibited. Although the clause is not a covenant to do a beneficial act upon the property of the grantor, so as to directly annex to that property a benefit, but, on the contrary, binds the grantee to abstain from the doing upon his own lot of a certain act, a court of equity looks to the whole scheme as one intended to confer a benefit upon the property remaining in the hands of the grantor after the sale of each lot, and passing by subsequent conveyances to the grantees of other lots, as beneficial interests or rights attached to their lots, and therefore enforces observance of the provisions and restrictions as readily as a court of law would award damages for the breach of a covenant annexed to real property in such a manner as to make it a covenant running with the land.

Robinson, 49 W. Va. at 1028 (citations omitted).

52 The defenses to enforcement of covenants will be addressed later in this Article. *See infra* note 211 and accompanying text.

> in the future, or such conduct on the part of the grantor and those claiming under him, as would make the burden of the restriction inequitable and oppressive, the coercive power of the court may be withdrawn and the parties left to the pursuit of such legal remedies as they may have.[53]

While the facts of *Robinson* involved party litigants who were the grantors and grantees in the deed creating the restrictive provision, the above quote speaks of the "defendants and their assigns" and the "grantor and those claiming under him," that clearly suggests a covenant that runs with the land. In effect, the court in *Robinson* assumed the covenant ran with the land (i.e., the court did not analyze the "covenant" in light of the common law elements) and then decided whether the case presented appropriate facts for a court of equity to assert its injunctive authority. While subsequent decisions focus on the "intent" aspect of the common law rule, these later decisions also follow *Robinson* in ignoring an analysis of the touch and concern element of the common law doctrines.

The discussion in the second case involving restrictive covenants to reach the West Virginia Supreme Court of Appeals, *Withers v. Ward*,[54] begins with the following statement:

> That restrictive covenants, such as are involved here, are valid and binding upon the parties, there seems to be little doubt. *Robinson v. Edgell*, 57 W. Va. 157, 49 S.E. 1027; 7 R.C.L. title, "Covenants," §§ 30, 31. They constitute limitations upon the estate conveyed for the benefit of that retained by the grantor. And it seems to be equally well-established that when such grantor parts with any of [sic] the residue such covenants are for the benefit of his grantee. In other words, such covenants run with the land. The burden thereof attaches to the land in the hands of successive grantees, and any advantages that accrue by reason thereof likewise are part of the said land in the hands of the owners, so that the owner of any one of such lots subject to such a restrictive covenant owes a duty to the owner of every other lot laid out in the same subdivision not to violate the restrictions; and in case he does

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53 *Robinson*, 49 S.E. at 1030 (citations omitted).

54 104 S.E. 96 (W. Va. 1920).

> violate them, or attempts to violate them, the owner of each of the other lots has a cause of action against him.[55]

The restrictive covenant in *Withers* required a fifteen foot setback and that no building erected on any said lots be used for other than dwelling or residence purposes.[56] The defendant in *Withers* violated the fifteen foot setback requirement and was using the building as a public garage in violation of the residential use restriction.

As was true in *Robinson*, the court in *Withers* began with the assumption of a valid restriction.[57] In its brief decision (a total of three pages) the court decided the issuance of an injunction was appropriate.[58]

The first decision in West Virginia that provides any significant discussion of the historical aspects of the subject area is *Cole v. Seamonds*.[59] The *Cole* case was decided three weeks after the *Withers* case. The court in *Cole* ultimately resolved the case by holding that while the covenants may have been binding on the

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55 *Id.* (citations omitted).

56 *Id.*

57 In *Withers*, both plaintiff and defendant were remote grantees of a common grantor who placed the restrictions in the initial deeds of the lots in the subdivision. *Id.*

58 The court stated,

> It is contended, however, that while the plaintiff may have a right of action for the violation of these covenants, it is an action at law for damages, and not a suit in equity to enjoin their violation. We cannot agree with this conclusion. As before stated, these covenants run with and belong to the land. The right to have them enforced, so far as the plaintiff is concerned, is one that is attached to his real estate. It is a part of his real estate, and when the owner of another lot in the subdivision attempts to violate one of these restrictions he is taking from all of the other owners part of their estate. He is not merely committing a trespass upon it. He is destroying it, and it is very well settled that equity will take jurisdiction by injunctive process to prevent one from inflicting permanent injury upon the real estate of another. The authorities above cited clearly support the jurisdiction in equity to prevent by injunction the violation of such restrictive covenants as are involved here.

Id. at 97.

59 104 S.E. 747 (W. Va. 1920).

original parties thereto, they were in effect personal and not enforceable against subsequent owners of the property.[60]

In *Cole*, the plaintiff was attempting to enforce a restriction in the deed conveying 154 acres of surface out of a tract of 156 acres. As to the two acres retained by the grantor, the deed conveying the 154 acres provided,

> [T]he said parties of the first part covenant and agree to use the said 2 acres of surface land for residence and agricultural purposes only, and covenant and agree for themselves, their executors, administrators, and assigns, not to conduct or suffer to be conducted on said 2 acres of surface any mercantile business, and that no intoxicating drinks of any character are to be sold or kept thereon; and this covenant shall run with said 2 acres of surface land.[61]

It is clear from the language of the restriction that it was intended to run with the land, and, in part, (i.e., no sale of intoxicating liquors), the restriction was the same one enforced in the *Robinson* case.[62] Unless the *Cole* decision is viewed in light of the fact that it involved the relationship between coal companies and their employees in the earlier part of this century, an explanation of the decision is difficult.

In *Cole*, the owners of the two acres reserved in the conveyance of the 154 acres sold one-sixth (1/6) of an acre to their daughter "without reservation, exception or limitation of any sort, except that she should not sell and convey the

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60 The court said,

> The purpose thus disclosed is to prevent the presence of the mercantile establishments, not because other forms of business are per se obnoxious, but because of the class of people who perchance may congregate there. The motive is unquestionably proper, though sometimes subject to abuse, and as a personal covenant may have been binding upon the original parties thereto. But resolving all doubts in favor of the continued free use of property, unencumbered by restrictions, as by legal and equitable principles we must, we are of opinion that a court of chancery should not lend its coercive power to enforce such restrictions as equitable property rights against subsequent alienees.

Id. at 752.

61 *Id.* at 747-48.

62 The court in *Cole* noted that "[w]e are concerned here only with such of the restrictions as seem to prohibit the maintenance and operation of the general mercantile store and 'hot dog' wagon sought to be enjoined in this proceeding." *Id.* at 751.

parcel without their [her parents, the Grantors] consent."[63] The daughter, one of the defendants, rented a building on this one-sixth acre parcel to M.A. Hindy, a co-defendant, who conducted a general mercantile store; she let another building on the parcel to Nick Gemerous, another co-defendant, who used the premises as a "'hot dog' and soft drink establishment."[64] The plaintiff sought to enjoin the defendants from violating the above quoted restriction. After presenting the facts, the court began its discussion by noting,

> It is unnecessary to enter into a discussion of the vexing and technical rules relating to covenants running with land, for we are of opinion that a court of equity should not exert its coercive powers under the situation presented in this case, irrespective of whether the provisions of the deed from Reece Browning to Cole and Crane be considered technical covenants running with the land, or as instances of that general class of restrictive covenants or equitable servitudes, limiting the use of real estate, which bind purchasers who take with notice thereof, whether they fall within the class of such technical covenants or not. The latter question more properly arises in an action at law to recover damages for the violation of such agreements.
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> Covenants restricting the use of land are frequently incorporated in deeds for the purpose of benefitting land retained by the grantor, or, as in this case, land conveyed to the grantee. Such restrictions are recognized and enforced in courts of equity, even as against subsequent purchasers with notice, when it clearly appears that the intention of the parties was to limit or restrict the use of one parcel of land for the benefit of another, provided the enforcement of such restrictions will not violate any principle of public policy. It is wholly immaterial whether the restrictions are technically such as "run with the land."
>
> In the leading and pioneer case of *Tulk v. Moxhay*, 2 Phillips, 774, 776, this question is discussed at length:
>
> > It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a

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63 *Id.* at 748.

64 *Cole*, 104 S.E. at 748.

> manner inconsistent with the contract entered into by his vendor and with notice of which he purchased. * * * For if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.
>
> The existence and applicability of this rule, without regard to the question whether or not the covenant runs with the land, has heretofore been recognized by this court in the case of *Robinson v. Edgell*, 57 W.Va. 157, 49 S.E. 1027, and the general proposition is so well settled that only a few additional authorities need be cited.[65]

The court in *Cole v. Seamonds* also made the following comments:

> It is unnecessary to discuss fully the exact nature of the right created in equity by these restrictive covenants. By some courts they are termed equitable easements; by others servitudes. In some the right created is created as contractual in its nature; in others, they are expressly recognized and protected as property rights. This court in the recent case of *Withers v. Ward*, 104 S.E. 96, not yet [officially] reported, has intimated that the latter is perhaps the real nature and characteristic of such restrictions. An extreme application of the property theory is found in the recent case of *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N.E. 244, L.R.A. 1918B, 55, which holds unconstitutional a statute providing the procedure whereby a property owner, whose land is subject to the burden of equitable restrictions limiting the use or manner of using his land, may upon paying the ascertained amount of damages which will result to the person or property entitled to the benefit of such restrictions by reason of the nonenforcement of the same, have the title to his property registered free from restrictions; the court's decision being based upon the ground that, even though payment of full compensation is guaranteed, this is a taking of property for private purposes without the consent of the owner, and therefore in violation of the Declaration of Rights.
>
> But whatever the nature of the right, when the parties by their contract have created an equity which attaches to the

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65 *Id.* at 748 (citation omitted) (omission in original).

property, limiting its enjoyment in favor of another parcel, and pro tanto enlarging the enjoyment of the latter, such equity, like all others, will bind a purchaser, who takes the legal title with notice thereof, at least until the surrounding circumstances and conditions have so changed as to render nugatory, ineffectual, and inequitable any further enforcement, thereof; *Robinson v. Edgell*, 57 W.Va. 157, 49 S.E. 1027. Tiffany, in his work on Real Property (2d Ed.) vol. 2, § 396, p. 1437, likens this right to demand equitable enforcement of restrictive covenants to that by which the equitable right to specific performance of a contract is enforced against a subsequent holder of the property, not a bona fide purchaser for value, as well as to the doctrine that a trust may be enforced against a purchaser from the trustee under like circumstances.

In 2 Pomeroy's Equity Jurisprudence (4th Ed.) § 688, the author says:

> The full meaning of this most just rule (that one who takes with notice of an equity takes subject to that equity) is that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim, or right in or to the same subject-matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer.

And again from section 689 we quote:

> On the same principle, if the owner of land enters into a covenant concerning the land, concerning its use, subjecting it to easements or personal servitudes, and the like, and the land is afterwards conveyed or sold to someone who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which in law 'runs with the land.'

* * *

> But it may be urged that in this case there was no transfer from covenantor to covenantee of the land sought to be burdened with this equity. That is true; but as said in *Wiegman v. Kusel*, supra, it is not material – "that such stipulations should be binding at law, or that there should be privity of estate between the parties in order to warrant equitable relief. Such building restrictions will be enforced in equity upon equitable principles, each case being considered with reference to its own circumstances."
>
> Moreover, it is also true that we most frequently meet these equitable restrictions in deeds where the grantee enters into restrictive covenants respecting the lands conveyed to him for the benefit of adjoining land retained by his grantor. But the principle is the same where the grantor covenants to restrict the use of land retained by him for the benefit of land conveyed to his grantee. Both Tiffany and Pomeroy agree upon this proposition, and the cases cited therein support the text.[66]

The importance of the above quotes from *Cole* is that they constitute one of the most significant jurisprudential discussions of the subject area found in any West Virginia decision.[67] However, the *Cole* case is most frequently quoted for the statement "that any doubts as to the purpose, propriety, or validity of restrictions limiting the use of property are resolved in favor of its free and unrestricted use by the vendee."[68] The *Cole* decision also recognized that the notice necessary to make such "restrictions" binding against remote parties could be constructive as well as actual.[69]

In the decade that followed *Cole*, the West Virginia Supreme Court of Appeals decided a number of fact-specific cases by applying general rules of

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66 *Id.* at 749-50.

67 The *Cole* case is also one of the few West Virginia cases to involve the issue of whether a grantee is bound by the information contained in as prior, out conveyances from a common grantor. *See* Fisher, *supra* note 42, at 509.

68 *Cole*, 104 S.E. at 752; *see generally* Deutsch v. Mortgage Sec., Co., 123 S.E. 793, 795 (W. Va. 1024); Neekamp v. Huntington Chamber of Commerce, 129 S.E. 314, 317 (W. Va. 1925).

69 "Actual notice of such restrictive covenants is not essential. Such constructive notice as is afforded by a duly recorded instrument in the vendee's chain of title is sufficient." *Cole*, 104 S.E. at 747, Syl. Pt. 4.

construction. In *Deutsch v. Mortgage Securities Co.*,[70] the court held that a covenant which provided "that the said lot hereby conveyed shall never be used for the purpose of constructing flats or apartments thereon . . . and that no dwelling house shall be built upon the said lot except *a one-family* house"[71] did *not* prevent the lot owner from building *two* one-family dwelling houses on the premises. In deciding the case, the court said that in discovering the intent of the parties,

> words used are to be taken in their ordinary and popular sense, unless they have acquired a peculiar or special meaning in the particular relation in which they appear, or in respect to the particular subject-matter, or unless it appears from the context that the parties intended to use them in a different sense.[72]

The court further explained, "If the language of a restrictive covenant, when read in the light which the context and surrounding circumstances throw upon it, remains of doubtful meaning, it will be construed against rather in favor of the covenant."[73] The court also applied the general rule of deed construction that if there is doubt, the construction favorable to the grantee must be adopted.[74] The court also quoted *Cole* that "[r]estrictive covenants are to be strictly construed against the person seeking to enforce them, and all doubt must be resolved in favor of natural rights and a free use of property, and against restrictions."[75]

A year after the *Deutsch* case, the court again was faced with interpreting a residential restriction in *Neekamp v. Huntington Chamber of Commerce*.[76] The economic development aspects of this case are evident in the court's decision. In *Neekamp*, the developer acquired 83.43 acres in Wayne and Cabell counties lying between the Baltimore and Ohio railroad on the north and the Chesapeake and Ohio railroad on the south. The developer began selling lots subject to a residential use

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70 123 S.E. 793 (W. Va. 1924).

71 *Id.* at 794 (emphasis added).

72 *Id.* at 795.

73 *Id.*

74 *Id.*

75 *Deutsch*, 123 S.E. at 795.

76 129 S.E. 314 (W. Va. 1925).

restriction in a subdivision developed on this land.[77] When the developer became insolvent, a special receiver sold the remaining lots without restrictions. The Chamber of Commerce acquired lots in the subdivision for the purpose of erecting a railroad siding from the Baltimore and Ohio tracts to a manufacturer located on the southern portion of the tract. The manufacturer's site was served by the Chesapeake and Ohio railway. When the plaintiff sought to enjoin the construction of the railroad siding, the Supreme Court of Appeals applied general rules of construction[78] in holding that the word "building" did not prohibit the erection of a railroad siding.[79]

In 1926, in *United Fuel Gas Co. v. Morley Oil and Gas Co.*,[80] the court used the general rule of construction that "[w]ords are to be given their ordinary and

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77 The covenants stated,

> That no building nor any part thereof shall be erected or maintained upon the premises herein conveyed nearer than twenty (20) feet to the front property line of said lot; nor shall the dwelling erected on said premises cost less than Fifteen Hundred Dollars ($1,500.00) when completed.
>
> That there shall not be erected on said premises any buildings other than for dwelling or residence purposes, or purposes of like nature, and the necessary and proper out-buildings pertaining thereto; nor shall any building erected thereon be used for other than dwelling or residence purposes or purposes of like nature, and as such out-buildings pertaining thereto.
>
> The covenants herein contained shall run with the land and the provisions herein shall extend to the heirs and successors and assigns of the parties hereto.

Id. at 315.

78 "Restrictive covenants in conveyances of real estate * * * are not favored and will not be aided or extended by implication." *Id.* at 316 (omission in original). *See supra* note 75 and accompanying text.

79 The court stated,

> Applying the rule of strict construction, and using the foregoing definitions approved by the courts of all jurisdictions in this country, in construing the words of the restrictive covenants, we are led irresistibly [sic] to the conclusion, that the construction of the railroad spur-track of the character described in the bill of complaint, will not constitute a violation of such covenant. This interpretation receives convincing support from the fact that the parties made the contract under consideration, in the light of the law of our state, that a public service corporation, exercising the right of eminent domain, has the advantage over a private person or corporation, in that it cannot be kept off the premises entirely, but may enter the restricted district and destroy its exclusive character upon making just compensation for the property rights thus taken.

Id. at 317.

80 135 S.E. 399 (W. Va. 1926).

popular meaning unless they have acquired a peculiar significance"[81] and decisions in sister jurisdictions in holding that a covenant that the one acre of land was "to be exclusively appropriated and used as a site for a schoolhouse and school for the said township"[82] prohibited the extraction of oil and gas for commercial purposes.[83] The court in *United Fuel Gas Co.* "qualified" two of the rules of construction it had relied on in an earlier case by quoting with approval a Virginia case as follows:

> (1) In case of doubt as to the meaning of a deed, such doubt must be resolved in favor of the grantee; and (2) restrictive covenants are not favored in equity.
>
> The application of both these rules was sought in a similar case recently before the Supreme Court of Virginia. That court in refusing to apply them said: "The first rule here mentioned is itself not a favorite, and is generally said to be the one of last resort when all other rules of construction have failed. It certainly is never to be resorted to unless the language involved can be said to be ambiguous. The second rule, which declares that restrictive covenants are not favored, simply means that all doubts are to be resolved in favor of the free alienation of real estate. Neither rule can operate when there is no room for doubt as to the intention of the parties." *Va. Ry. Co. v. Avis*, 124 Va. 711.
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> The statement by the Virginia court is undoubtedly the law.[84]

The only covenant case to be decided by the court in 1930s was *Prindle v. Baker*.[85] In this very brief decision (three pages), the court recognized that there are

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81 *Id.* at 399.

82 *Id.*

83 *Id.* at 401.

84 *Id.* at 399. The only other "covenant" case of the 1920s was *Kaminsky v. Barr*, 145 S.E. 267 (W. Va. 1928). In *Kaminsky*, the lower court granted injunctive relief enforcing a setback restriction. On appeal, the injunction was modified to permit the defendant to use the "restricted area between the building line and the avenue [for] such structure as shall not be in excess of the use made by the plaintiff and others of the said area, and as will cause no greater interference with light, air, and outlook than is caused by such use." *Kaminski*, 145 S.E. at 269.

85 178 S.E. 513 (W. Va. 1935).

several different theories for enforcing restrictive covenants[86] and, without aligning itself with any of these theories, held that a covenant prohibiting the removal of *mineral* substance[87] prevents drilling an oil and gas well.[88]

Several things are notable about the "covenant cases" decided in the pre-World War II era. First, there was not a large number of cases that reached the Supreme Court of Appeals. Second, the cases were fact specific, and the court used general rules of construction. While these decisions resolved the dispute between the litigants, they were of limited precedential value. Third, the decisions were generally very brief and there was essentially no analysis of the cases in light of common law doctrine. Finally, the remedy sought in every case was injunctive relief.

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86 It is a familiar rule of equity that when deeds from a common grantor parceling a tract of land contain a like restrictive covenant (not contravening public policy), it may be enforced by any grantee against another grantee. Several theories are advanced for the rule. Some courts take the view that such restrictions "are in the nature of reciprocal negative easements." Another court holds that the restrictions are enforceable "as a contractual stipulation which is made for their (the vendees) common benefit." Other courts favor the presumption that:

> [E]ach purchaser has paid an enhanced price for his property, relying on the general plan, by which all the property is to be subjected to the restricted use being carried out, and that while he is bound by and observes the covenant, it would be inequitable to him to allow any other owner of lands subject to the same restriction, to violate it.

Id. at 513-14 (citations omitted).

87 The covenant stated,

> That no sand pit or gravel pit shall be excavated upon said premises hereby conveyed, and that no sand or gravel or other mineral substance shall be taken from same for use for commercial purposes, or for any purpose, other than that of grading of said premises, or . . . to be used in connection with any building to be erected thereon.

Id. at 513 (omission in original).

88 "Petroleum and natural gas in place are ordinarily classified as minerals." *Prindle*, 178 S.E. at 514 (citation omitted).

> Here, the intention of the covenant was not to prevent the removal of other mineral substances merely because they might be of the same general character as sand and gravel, but because their removal would lessen the desirability of the subdivision for residential use. The removal of oil and gas would so lessen it. We are therefore of the opinion that the term "mineral substance" as used in this covenant was meant to include oil and gas. The covenant does not contravene public policy.

Id.

While the first covenant case of the 1940s[89] followed the earlier pattern, the other cases decided in that decade are more interesting. In *Recco v. The Chesapeake and Ohio Railway Co.*,[90] the court addressed the right of a railroad company to remove a railroad crossing. The 1870 deed, which granted a right-of-way to the railroad through a 490 acre farm, provided that "the company is to build and maintain a good crossing with cattle guards * * * ."[91] By 1940, a portion of the farm had been divided into lots and was a part of the town of Hansford. The railroad, at the urging of the State Road Commission, for "safety" reasons "closed" the crossing upon the completion of a grade separation project (an overpass). The plaintiff, whose business suffered because of the loss of traffic occasioned by the closing of the crossing, sought an injunction to keep the crossing open. Whereas the earlier West Virginia cases involved restrictive easements, i.e., restricting the owners use of their property to residential use or the activities thereon, the *Recco* case involved an affirmative covenant.[92] The *Recco* case was before the court on a certified question and was resolved on a procedural issue which required further proceedings to resolve factual matters. However, in so doing the court explained that subsequent grantees would not be prevented from enforcing the covenant because of a lack of privity.[93]

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89 Wolfe v. Landers, 20 S.E.2d 124 (W. Va. 1942) (considering the plaintiff's petition for an injunction to enforce residential covenants).

90 32 S.E.2d 449 (W. Va 1944).

91 *Id.* at 450 (omission in original).

92 Affirmative or negative covenants are defined as follows: "The former [affirmation] are those in which the party binds himself to the existence of a present state of facts as represented or to the future performance of some act; while the latter [negative] are those in which the covenantor obliges himself *not* to do or perform some act." BLACK'S LAW DICTIONARY 363 (6th ed. 1990).

93 Restrictions such as covenants "not to build nearer the street than a certain line, or not to build certain kinds of buildings, or not to use the lots for certain purposes, or not to build so as to cut off a certain prospect * * *" (Pomeroy's Equity Jurisprudence, idem, p. 853) are not to be confused with a covenant, the effect of which is to create in the owner of the dominant estate a vested legal property interest in a servient estate, with the concomitant right to the owner thereof to enjoy the same. Where an owner of land divides it into lots and sells the lots to different grantees by deeds containing the same negative or affirmative covenants, and the lots are sold to subsequent grantees, each will be charged with constructive notice of the covenants in the original deed under which he claims title. Though there would be no legal privity among the subsequent grantees and therefore one lot owner cannot maintain an action at law against the owner of any other lot, based upon the latter's violation of any of the covenants, a suit in equity may be brought by an original grantee or subsequent grantee against the owner of

Four years later, the case of *Cottrell v. Nurnberger*[94] reached the court. *Cottrell* involved both restrictive covenants and affirmative duties on the part of the covenantor. Nurnburger, the defendant, owned 6.2 acres of land that were subdivided to develop the Falls View addition at Lower Falls on the Coal River. Part of the oral representations made to purchasers of lots were that "Lot No. 45 [] was reserved solely and exclusively for playground, recreational and other community purposes for the use and benefit of the purchasers, and that he would construct a well and a well house on that lot for their common use and benefit."[95] When the plaintiffs learned that the defendant planned to sell the lot to individuals who planned to use the lot to construct a hotel, they sought to enjoin the defendants. While the dispositive issue was the application of the statute of frauds, the case does provide an extensive discussion of "easements" and "licenses" and the distinction between the two. What the court failed to do was to include covenants within its discussion. In *Cottrell*, the rights the plaintiff sought to assert included easements (the right to go onto lot forty-five) as well as a covenant right, a restriction as to how lot forty-five could be used, and an affirmative duty for the owner of lot forty-five to do a certain act thereon, i.e., construct a well. Because covenants are also considered an interest in land and therefore the statute of frauds is applicable,[96] the result of the case would be the same. The failure of the court to define and

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> any other lot to compel compliance with the covenants contained in the original deeds on the theory that they created an equitable easement or servitude. But where changed conditions will render the enforcement of the covenants inequitable or unjustly burdensome, relief in equity will not be granted. Symons, Pomeroy's Equity Jurisprudence, 5th Ed., Section 1295. Unlike the instant covenant, privity between the parties is not prerequisite to the enforcement of such equitable easement or servitude. A court of equity will enforce such covenants, notwithstanding there may be no legal right, because of the derelict lot owner's inequitable conduct in the violation of the covenants. By the same token, relief will be withheld where it would be inequitable to grant it. The Court simply balances the equities between the contending parties, which it will not do if a vested property right, such as is clearly shown by this record, will be destroyed thereby.

Recco, 32 S.E.2d at 453 (omission in original).

94 47 S.E.2d 454 (W. Va. 1948).

95 *Id.* at 455.

96 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 339.

articulate the distinction between a covenant and an easement as an *interest* in land detracts from an otherwise helpful discussion.[97]

The noteworthy contribution of the 1950s to the jurisprudence of covenants was *State ex rel. Wells v. City of Dunbar*.[98] In *Wells*, the court held that when the state acquired property for use in a governmental capacity, the use of the acquired property by the state in a manner which violates a restrictive covenant does not entitle the other lot owners (i.e., those benefitted by the covenant) to compensation. In *Wells*, the state acquired a lot subject to a residential use restriction and used the lot to construct a bridge. The issue in *Wells* was whether the parties benefitting from a restrictive covenant had a property interest in the covenant, entitling the parties to compensation for its taking. After recognizing a split of authority in other jurisdictions, the court held that the plaintiffs were not entitled to a mandamus compelling the city to prosecute an action of eminent domain.[99]

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97 The court did define the difference between an easement and license as follows: "An easement creates an interest in land; a license does not, but is a mere permission or personal and revocable privilege which does not give the licensee any estate in the land." *Cottrell*, 47 S.E.2d at 456 (citations omitted).

98 95 S.E.2d 457 (W. Va. 1956).

99 We find ourselves in accord with the view that covenants of the nature of those here involved should not be so construed or applied as to require the government, or one of its agencies, in the taking or acquiring of private property for a governmental use, to respond in damages either on the theory of a taking of a vested right, or for breach of such a covenant. To hold otherwise would enable those having title to real estate often to greatly inconvenience and, perhaps, defeat the proper and orderly exercise by the government of the right of eminent domain, guaranteed to it by the Constitution, and absolutely necessary for the operation of the government in a manner best for the interests of all its citizens. No few citizens should be permitted to so contract as to destroy, or make prohibitive to the government, the right to acquire property for necessary governmental purposes. As pointed out in the cited cases, those who enter into such covenants do so with the knowledge that the government has the absolute right to acquire lands for governmental purposes, and they can not be presumed to have intended an interference with such right.

The precise question involved has not been previously determined by this Court. Admittedly, the holding may in some cases cause injury to those having the benefits of such covenants, but we think such injuries are *damnum absque injuria*. Such damages, in most cases at least, would not be damages done directly to the property of claimants, but would amount only to a theoretical reduction in value. In most cases, at least, such damages would be problematical, requiring daring speculation as to the amount thereof. Also, admittedly, there exists a strong, well-reasoned, line of cases holding *contra*. The *contra* view is well-stated in *Meagher v. Appalachian Electric Power Co.*, 195 Va. 138, 77 S.E.2d 461, where many authorities of that view are cited. It may be pointed out,

"Modern covenant law" in West Virginia took shape in *Wallace v. St. Clair*.[100] In *Wallace*, the plaintiff sought to enjoin the defendants from keeping "roomers" in violation of residential use restrictions.[101] The *Wallace* decision represents the most extensive discussion of covenants in West Virginia. It summarizes many of the earlier West Virginia cases as well as cases from other states. Whereas the earlier West Virginia cases tended to use general rules of construction to answer fact specific cases, the *Wallace* decision strives to articulate an underlying policy in construing residential restrictions. To the extent there was language in the earlier decisions that could be construed as antagonistic to residential covenants, the *Wallace* decision reflects a positive attitude by the court toward such covenants.[102]

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however, that many of the cases cited consider the question as it relates to public service corporations, as distinguished from a government or a governmental agent. We need not here, and the holding does not, determine the question as it relates to a public service corporation, that question not being here involved.

Id. at 461.

100 127 S.E.2d 742 (W. Va. 1962).

101 The court summarized the pivotal language of the restriction as follows:

The portion of the covenant which deals with the erection of buildings contains the following language: "That there shall be no more than *one dwelling* and that *a single dwelling* erected on each 60 feet frontage * * *." (Italics supplied.) Another portion of the covenant dealing with the type of buildings which may be erected is as follows: "That there shall not be erected on said premises any building other than for *dwelling or residence purposes* or purposes of *like* nature." (Italics supplied.) A portion of the language dealing with the use which may be made of buildings erected on the premises is as follows: "* * * nor shall any building erected thereon be used for other than *dwelling or residence purposes*, or purposes of *like* nature * * *."

Id. at 753 (omissions in original).

102 Zoning regulations and building restrictions imposed by municipalities are an accepted part of modern community life. Similar ends are frequently accomplished in developments of residential areas, as in the present case, by the voluntary, contractual acts of property owners by means of restrictive covenants similar in nature to that which is herein involved. Such restrictive covenants are not against public policy. They do not place a restraint upon alienation. Their purpose is lawful and laudable. If the restrictions are reasonable in nature and purpose, they are upheld. Covenants of this nature are quite unlike covenants in restraint of trade, covenants in restraint of alienation, covenants purely personal in nature or covenants which merely impose a restraint upon one parcel of real estate for the benefit of another. Covenants of the type here under consideration are designed to be for the benefit of every lot or parcel of land in the area affected by the restriction. Each lot or parcel is not merely burdened by a restriction but

The *Wallace* court held that covenants should be construed in a manner that most closely meets the intentions of the parties. As the court explained, "the fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish."[103] Thus, *Wallace* represented a new "rule" in the construction of covenants: the intent of the parties controls.

After considering a number of cases from sister jurisdictions and secondary authorities, the court concluded that "the defendants' use of a portion of their dwelling as a rooming house constitutes a violation of the restriction."[104] The essence of the court's reasoning is reflected in syllabus point two, which read as follows:

> Where each lot in an area developed exclusively for residential purposes is bound by a restrictive covenant which states that only "one dwelling and that a single dwelling" may be erected on each lot and that the dwelling may not be used "other than for dwelling or residence purposes, or purposes of like nature," the word "dwelling" and the words "single dwelling" refer not only to the type of building but also to the permissible use thereof; and the restrictive covenant is violated by owners who keep eight roomers for compensation in the dwelling previously erected on their lot.[105]

The last two decades have seen a marked increase, as compared to the first half of this century, of covenant cases reaching the West Virginia Supreme Court of Appeals. As noted above, restrictive covenants have become common in residential developments. As the court in *Wallace* observed, "under the modern

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> it is also clothed with the benefit which is enforceable against every other lot or parcel. The burdens and benefits are reciprocal. The reasons for the rule of strict construction do not obtain with full force in such a situation. "Under the modern view, building restrictions are regarded more as a protection to the property owner and the public rather than as a restriction on the use of property, and the old-time doctrine of strict construction no longer applies."

Id. at 751 (citations omitted).

103 *Id.* at 751.

104 *Id.* at 755.

105 *Wallace*, 127 S.E.2d at 744-745.

view, building restrictions are regarded more as a protection to the property owner and the public rather than as a restriction on the use of property . . . ."[106]

This increased usage of such covenants provides fertile grounds for litigation, and the cases tend to fall into general categories. For example, there are (1) cases as to whether a structure placed or planned for a parcel violates the covenant, (2) cases involving situations in which one owner desires to use his or her parcel for a prohibited use, and (3) cases as to whether a parcel is subject to the restrictions. Each of these lines of cases is discussed in turn.

A. Does the Structure Violate the Covenant?

Much of the insight in this area is courtesy of Ms. Emma Jean Allred of Huntington. Two of the relevant decisions are the result of her attempts to prevent a "carport" from being built on an adjoining lot, owned by the Polings, in the Wallace Circle Subdivision in violation of a set-back restriction.[107] While Ms. Allred established in the trial court that the carport violated the set-back restriction, the trial court molded the injunction to permit the Polings to build a type of carport beyond the set-back line.[108] On appeal, the court decided the construction allowed by the circuit decision was sufficiently substantial to be deemed a "structure" and, therefore, a violation of the restriction.[109] The Supreme Court of Appeals remanded with directions to the circuit court to order the removal of "that portion of the structure which violates the set-back zone established by the covenant in their chain of title."[110] On remand, the circuit court ordered only the removal of the column and permitted the roof and room to remain.[111] Ms. Allred again appealed the circuit

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106 *Id.* at 751 (citations omitted).

107 "The building line of the several lots fronting on Wallace Circle is indicated by _____ and the main foundation of any permanent structure erected on any such lot shall not be built closer to the street line of the [c]ircle than the building line." Allred v. City of Huntington, 304 S.E.2d 358, 359 n.1 (W. Va. 1983) (underline in original).

108 *Id.* at 360.

109 *Id.* at 361. "The fact that the structure rests on a column and foundation within the prohibited zone leads us to conclude that the circuit court erred in allowing the structure . . . ." *Id.*

110 *Id.*

111 *Allred*, 331 S.E.2d at 862.

court's decision[112] and again prevailed. After noting that the intent of the parties in establishing the restriction is controlling, the court concluded,

> [I]n the instant proceeding, despite the somewhat ambiguous nature of the "main foundation of any permanent structure" prohibition, we conclude that in light of the surrounding circumstances and the obvious purpose to be sought, the most likely intent of the parties as expressed in the language employed was to prohibit the roof and room structure which the circuit court erroneously permitted to remain. In limiting the setback prohibition to "main foundation of any permanent structure," the initial parties to the restrictive covenant were most likely seeking to exempt only such incidental incursions into the prohibited area as the eaves of a permanent structure built within the deed restriction or perhaps an awning or similar device attached to such structure but unsupported by posts anchored beyond the setback line. Setback lines serve to guarantee access to light, air, and unobstructed vision. Modern construction techniques and materials which permit permanent structure support in manners radically different from those traditionally feasible may not be utilized to undermine the purpose sought to be attained in the formulation of restrictive covenants prohibiting the construction of main foundations beyond a prescribed setback line.[113]

Again the case was "remanded with directions that the circuit court order that the Polings remove that portion of the roof and room which violated the setback zone established by the restrictive covenants in their chain of title."[114]

Finally, because it is not uncommon for residential sub-divisions in West Virginia to have restrictions prohibiting "mobile homes," the case of *Billings v. Shrewsbury*,[115] is a decision worth noting. In *Billings*, the issue involved a restriction against the placing of a mobile home in a residential subdivision.[116]

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112 *Id.* at 862.

113 *Id.* at 863.

114 *Id.*

115 294 S.E.2d 267 (W. Va. 1982).

116 The covenant provided that "[n]o building of temporary nature, nor trailer, nor mobile home, nor tent, except a child's tent, shall be erected or placed on the property . . . ." *Id.* at 269.

Because the facts of the case involved two structures – one a prefabricated sectional and the other a structure consisting of "two separately towable units that were designed to be joined into one unit," i.e., a double wide[117] – the case provides considerable guidance as to what constitutes a "mobile home." The court held the "prefab" was not a mobile home,[118] but the "double wide" was a "mobile home."[119]

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117 *Id.* at 270.

118 The Shrewsbury home was clearly not designed to undergo repeated moves. A manufacturer's representative testified in the lower court that the R-Anell sectional home must be moored to a permanent foundation just like a conventional stick-built home because of its substantial weight. Failure to support the home with this foundation invalidates the warranty. Further testimony indicated that once the sectional home is tied into the required foundation, it can be moved only as a stick-built home, an effort that costs some $4,000.

Further evidence that the Shrewsbury home is not designed for repeated moves is demonstrated by the way in which it is constructed. The center cap shingles, ventilation and heating systems and portions of the siding were not added until the major prefabricated sectional components had been joined together. Furthermore, the Shrewsbury residence is constructed very much like a conventional stick-built home. Its walls are built of two-by-fours set on 16-inch centers. The roof trusses are built with two-by-twos which are also set on 16-inch centers[,] and the outside walls are covered with lap siding. We also note that the Shrewsbury home is aesthetically acceptable. Photographs admitted into evidence show that this home had the appearance of a conventional, single-family dwelling and compared favorably to other homes in the subdivision.

Id. at 269.

119 The Trigg home, on the other hand, falls within the legislative definition of a mobile home. Like the Shrewsbury house, this structure originally consisted of two separately towable units that were designed to be joined into one unit. The difference, however, is that this structure was designed to be separated again for repeated moves. Testimony given below indicates that the two Trigg units are designed to be unbolted from one another so that they can be moved separately. Further testimony indicates that this structure, commonly known as a "double wide" trailer, was designed so that it need not rest upon a permanent foundation and can be adequately supported by blocks set on any solid surface.

The Trigg unit, however, rests upon a permanent foundation and several witnesses testified that it can be moved only in one piece as a stick-built home. The Triggs contend that this improvement renders the structure immobile and prevents it from being within the definition of a mobile home. We disagree. Mooring this structure to a cement block foundation does not change the essential nature of its construction.

Id. at 270.

B. *Where the Structure Complies But the Use Does Not*

In *Allemong v. Frendzel*,[120] three acres out of a tract of 256 acres were conveyed subject to a restrictive covenant. The restrictive covenant provided that "[t]his conveyance is subject to the restriction that no alcoholic beverages of any kind shall be sold on said premises, and this covenant shall run with the land."[121] Successors in interest to the 253 acres sought to enjoin the owners of a parcel of 1.06 acres, which was a part of the three acres subject to the restriction, from violating the covenant by selling alcoholic beverages at their convenience store.[122]

The court considered the threshold question as one of standing, i.e., did the successors in interest of the 253 acre tract have standing to seek an injunction to enforce the restrictive covenant imposed on the three acre parcel "carved" out of the home place?[123] While an analysis of this issue from the common law perceptive would have included the issue of privity, the West Virginia Supreme Court of Appeals stated that "the right to enforce a restrictive covenant depends directly upon an intent to benefit the land of the person seeking to enforce the restriction," and "the intention as to whom is entitled to the benefit of or who may enforce a restrictive covenant is ultimately a question of fact."[124] The court recognized the case-specific nature of this inquiry, stating that "individual cases are useful as precedent chiefly for the general principles that they recognize and declare."[125] The court answered the standing issue by stating, "[t]he record supports a conclusion that the intent of L.B. Allemong [the grantor who imposed the restriction] in placing the restrictive covenant in the conveyance of that portion of his property was to protect and preserve the quality of the neighborhood."[126] The court also said that Vincent and Mary Howard had standing to seek enforcement of the covenant as well because "as adjacent landowners to the restricted parcel, their land was

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120 363 S.E.2d 487 (W. Va. 1987).

121 *Id.* at 489.

122 *Id.*

123 *Id.* at 490.

124 *Id.*

125 *Allemong*, 363 S.E.2d at 490.

126 *Id.*

intended to reap the benefit of the restrictive covenant."[127] Because the only description of the Howards' is as "adjacent landowners," it appears that they were not in either "horizontal" or "vertical" privity, i.e., successors in interest. This abandonment of any type of privity requirement marked a significant departure from the common law rules.

After questioning the general rules of construction developed by the court in covenant cases from the first half of the century, the court noted, "[t]he fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish."[128] The court concluded that the restriction was not ambiguous nor obscured by the passage of time,[129] and, therefore, the prohibition against the sale of "alcoholic beverages" encompassed beer sold in the defendants' convenience store.[130] In granting the injunction, the court rejected the defendants' arguments that the changes in the neighborhood effectively destroyed the objectives of the covenant, rendering it unenforceable.[131]

A common type of "use" case involves an attempt by a parcel owner to use his or her residence for a business purpose. The case of *Miller v. Bolyard*[132] illustrates this problem. In *Miller*, the restrictions were designed to assure a residential subdivision.[133] The dispute began when the Bolyards started operating

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127 *Id.* at 491.

128 *Id.*

129 *Id.*

130 *Allemong*, 363 S.E.2d at 492.

131 *Id.*

132 411 S.E.2d 684 (W. Va. 1991).

133 *Id.* at 685. The relevant restrictions provided:

3. That the structure erected on said lots shall be used for residence purposes only exclusive of any other use whatsoever[;] . . .
7. That the lot shall be used for construction of only one dwelling; the nature of which construction is limited to a single family residence;
8. That the dwelling erected on said lot shall not exceed two (2) stories in height, nor shall the same be provided with a private garage which exceeds two (2) automobiles in capacity; . . .
10. That any garage or outbuilding permitted by these restrictions, whether or not attached to the principal dwelling, shall be of the same design and material as the

a beauty shop in their house and built a large garage (twenty-four feet wide, forty feet long and eighteen feet high) 185 feet from their house, but only twenty-seven feet from one of the plaintiffs' houses.[134] The court found that the garage, which was built on a separate lot from the one the house occupied, violated the restriction on the size of garages.[135] The court rejected the defendants' arguments that the plaintiffs' failure to object to another large garage located 150 yards from their house constituted a "waiver" of their right to object to the defendants' garage.[136] The court also found the operation of the beauty shop violated the covenant restricting the subdivision to "residential purpose."[137] Finally, the court rejected arguments that a radical change in the neighborhood essentially destroyed the objects and purpose of the covenants in this case[138] and that the plaintiffs did not have "clean hands" because of car restoration work they performed in their basement garage.[139]

C. *Do the Restrictions Apply to the Parcel in Question?*

Given the ramifications of a parcel being subject to restrictive covenants, the question of which parcels of land are "covered" is obviously important. The first case to present this issue to the West Virginia Supreme Court of Appeals was *Jubb v. Letterle*.[140] In *Jubb*, the defendants planned to develop Mountainaire Village on approximately forty-two acres of land in Mineral County.[141] In pursuit of the goal, they had engineering drawings prepared on February 14, 1982, which depicted roads, water lines, lots and a layout to encompass Mountainaire Village. On October 19, 1982, they placed restrictive covenants on record in the county

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principal dwelling . . . .

Id.

134 *Id.* at 686.

135 *See supra* note 133, at Restriction No. 8.

136 *Miller*, 411 S.E.2d at 687.

137 *See supra* note 133, at Restriction No. 3; *see also Miller*, 411 S.E2d at 687.

138 *Id.*

139 *Id.*

140 406 S.E.2d 465 (W. Va. 1991) (*Jubb I*).

141 *See id.* at 467.

clerk's office, which "indicated that the restrictive covenants would be applicable to Mountainaire Village and referenced the plat map of February 14, 1982, by Stultz [the surveyor] as the scope and character of Mountainaire Village."[142] The plat map was not recorded.[143] The defendants contended that prior to the sale of any lots, the scope of Mountainaire Village was scaled down considerably from the original plan.[144] Of the eleven lots sold, deeds for six of the lots made reference to the restrictions and the deeds for five of the lots did not.[145] When the plaintiffs learned that the defendants were advertising the lots for sale without restrictions, they sought to enforce the application of the restrictive covenants to the entire subdivision as it appeared on the February 14, 1982 plat map.[146] Even though the plat map of February 14, 1982, was not recorded, the court explained,

> The act of placing the restrictive covenants on file evidenced a common scheme to enforce the restrictive covenants upon the lot owners. The restrictive covenants referred to the February 14, 1982, Stultz drawing, and such drawing was produced during discovery. The existence of the restrictive covenants was easily ascertainable by any individual conducting a title search in preparation to purchase a lot in Mountainaire Village. Furthermore, the restrictive covenants remained on file throughout the appellants' purchases and were consequently specifically binding upon the owners whose deeds referenced those restrictions. Thus, whether through actual or constructive notice, any potential purchaser would have been aware of the restrictive covenants.[147]

In holding that the plaintiffs were entitled to injunctive relief, the court stated,

> [W]e conclude that it was the intention of the appellees, upon placing the restrictive covenants on file, to create a general plan or

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142 *Id.*

143 *Id.*

144 *Id.*

145 *Jubb I*, 406 S.E.2d at 468.

146 *Id.*

147 *Id.* at 469.

> common scheme of development restricting the usage of all lots within the subdivision for the mutual benefit of all owners. We further hold that each individual owner purchasing property within the area originally designated Mountainaire Village, as depicted in the February 14, 1982, Stultz drawing, acquired a right to enforce the restrictive covenants against any other owner or owners.[148]

The litigants in *Jubb* were back before the Supreme Court of Appeals just three years after the decision in the first case.[149] Following the decision in *Jubb I*, the defendants sold six-tenths of an acre in the northeast corner of the forty-two acre tract to an individual who built a chiropractic office on it.[150] The six-tenths acre tract was separated from the balance of the forty-two acre tract by two tracts owned by a third person and was never owned by the defendants, i.e., were not sold by the defendants out of the forty-two acre tract.[151] The determinative issue was whether the common scheme of development included the entire forty-two acres or just that portion of the forty-two acres designated as Mountainaire Village on the Stultz drawing of February 17, 1982.[152] The court held that because the Stultz plat of the area depicted as Mountainaire Village did *not* include the six-tenths acre tract, the restrictions were not applicable to that parcel.[153]

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148 *Id.*

149 Jubb v. Letterle, 446 S.E.2d 182 (W. Va. 1994) (*Jubb II*).

150 *Id.* at 184.

151 *Id.*

152 *Id.* The court noted that the correct date of the Stultz drawing was February 17, 1982, and not February 14, 1982, as stated in *Jubb I*, 406 S.E.2d 465. *Jubb II*, 466 S.E.2d at 184 n.2.

153 *Jubb II*, 446 S.E.2d at 185.

> The February 17, 1982, Stultz drawing, which depicts the area to be known as Mountainaire Village and which designates areas for future development of that subdivision, does not include the property purchased by Mr. Bohn. The Bohn property is separated a good distance from the appellants' property by sloping terrain and is not visible from the appellants' property. It is evident that by "redrawing" the property lines, the circuit court more precisely determined which land is and is not subject to the restrictive covenants. In so doing, the circuit court attempted to reach a common-sense decision which does not conflict with our decision in *Jubb I* and which may preclude future litigation regarding the applicability of the restrictive covenants. We agree with the circuit court's conclusion that the restrictive covenants placed on file in the Mineral County Clerk's office apply to the area depicted in the February 17, 1982[,] Stultz

The issue of whether a specific parcel is within the subdivision was again before the court in *Teays Farms Owners Ass'n, Inc. v. Cottrill.*[154] The developer had acquired a 385 acre tract, which he planned to develop in phases.[155] The parcel in question contained four acres on which was located a stable and riding ring.[156] Those four acres had never been depicted upon any plats or maps to which the restrictive covenants were made applicable.[157] The defendant acquired title to the four acres pursuant to a foreclosure of a deed of trust. The suit ensued when the owners association sought to enjoin the defendant from expanding the stable facilities and from constructing an indoor riding area, an obvious business enterprise.[158]

The court explained the problem it faced in resolving the dispute as follows:

> This matter is presently before this Court due to an unfortunate occurrence; the developers of this 385 acre tract failed to explicitly identify the *raison d'etre* of the property on which the stable and riding ring were located or concisely define the relationship between that four-acre tract and the subdivision. The developers failed to provide any definite indication of whether this four-acre tract in question was to be considered a part of the subdivision subject to the restrictive covenants, a part of the subdivision not subject to the restrictive covenants, or simply a recreational area adjacent to the subdivision. This absence of any clear characterization of the property created a situation in which the four-acre tract, if considered within the subdivision, has technically been in violation of the subdivision's restrictive covenants since the origin of both the stable and the subdivision. Now, several years later, we are placed in the unenviable position

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drawing as Mountainaire Village, which does not include the Bohn property. *Id.*

154 425 S.E.2d 231 (W. Va. 1992).

155 *Id.* at 232.

156 *Id.* at 233.

157 *Id.*

158 *Id.* "The restrictive covenants that prohibited buildings other than single dwellings, [sic] stated all properties should be used only for residential purposes[] and prohibited owners from conducting any business, profession, or trade on the properties." *Teays Farm,* 425 S.E.2d. at 233 n.1.

> of characterizing the property in question and its relationship to the subdivision.[159]

The court further explained that "[w]hen all tangible indicia of the legal status of property and the application of restrictive covenants fail to provide a resolution, attention must be shifted to the original intention of the parties."[160]

In this case, the developer was available to testify regarding the original concept of the subdivision and stated that the four-acre parcel was not subject to the restrictive covenants applicable to the lots sold for residential purposes.[161] After expressing an appreciation for the concerns of the homeowners, the court sought a Solomonic solution:

> We conclude that the owners association is certainly entitled to reasonable assurance that the property in question will not be converted into some intolerable business activity. Yet the Appellants must also be provided with the opportunity to use their property in an appropriate manner. As explained above, the final analysis convinces us that while no filed document specifically includes this four-acre tract as subject to the restrictive covenants, this property must, as a practical matter, be considered as part of the Teays Farms subdivision. Consequently, we believe that while the restrictive covenants are not enforceable against this property, its status as part of the subdivision prevents unrestricted usage by the Appellants. The Appellants must be limited to the use to which the property had already been placed, specifically a stable area and riding ring. With regard to any additions to the stable as contemplated by the Appellants, we conclude that such additions must be built, operated, and maintained in such a manner as not to constitute a nuisance in a pleasant residential community.[162]

One may explain the court's decree in *Teays Farms* as a court exercising its equity powers in resolving the dispute between the litigants. However, a closer reading of the case reveals that the court actually followed its earlier decisions,

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159 *Id.* at 234.

160 *Id.*

161 *Id.*

162 *Id.* at 234-35.

which stressed the original intent of the parties in holding the four-acre parcel was not subject to the restrictive covenants.[163] The court also provided admonition limiting "unrestricted usage" as dictum designed to send a strong message to the parties as to what the court might consider to be a nuisance.[164]

Two years after the *Teays Farms* case, the court decided *Armstrong v. Stribling*.[165] *Armstrong* resembled *Jubb* in both facts and outcome. Again, the issue was whether certain parcels were part of a development and, therefore, subject to restrictions applicable to lots in the subdivision or whether they were outside the development and, therefore, not subject to the restrictions.[166] This case involved Hy View Terrace Subdivision in Wood County developed by the Coffmans in the 1970s.[167] Two plats depicting Hy View Terrace were prepared and filed with the Wood County Planning Commission.[168] One plat contained forty-five lots and the other plat eleven lots.[169] A third plat which contained forty-five lots, including a recreation area and indications of future development, was also prepared but was not filed with the Planning Commission.[170] Only the plat which contained the eleven lots was approved and recorded in the office of the clerk of the County

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163 "[W]e believe that . . . the restrictive covenants are not enforceable against this property . . . ." *Teays Farm*, 425 S.E.2d. at 235.

164 Credence to this explanation is found not only in the language of the court quoted above, but also in the accompanying footnote which reads,

> Unrestricted use would obviously also be prohibited by prevailing nuisance law. *See generally Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (1989) regarding what constitutes a nuisance. *See also Kahlbaugh v. A-1 Auto Parts*, 182 W.Va. 692, 391 S.E.2d 382 (1990) regarding the determination of what constitutes a residential area from which offensive business activity may be excluded. *Kahlbaugh* explains that whether the business will be permitted depends upon the surrounding facts and circumstances of each particular case, considering such factors as the type of locality, the tradition of business activity, and the particular acts complained of. 182 W.Va. at 694, 391 S.E.2d at 384.

Id. at 235 n.2.

165 452 S.E.2d 83 (W. Va. 1994).

166 *Id.* at 86.

167 *Id.* at 85.

168 *Id.*

169 *Id.*

170 *Armstrong*, 452 S.E.2d. at 85.

Commission of Wood County.[171] Recorded with the plat for eleven lots were restrictive covenants.[172] The Coffmans "began conveying lots in and around the area depicted as Hy View Terrace."[173] In 1977, the Coffmans conveyed their remaining interest in Hy View Terrace to the Crooks, and the deed of conveyance stated,

> This conveyance is made subject to those certain restrictive covenants and conditions more particularly set forth on the Plat of Hy View Terrace Subdivision recorded in said Clerk's Office in Plat Book No. 15 at page 47, and to all easements, rights of way and reservations that now appear of record affecting said premises.[174]

When the Crooks defaulted on their loan, the defendants acquired approximately 32½ acres of the original forty-five acres at the foreclosure sale.[175] The deed conveying the land to the defendants "explicitly states that the appellants' property was to be subject to the restrictive covenants filed with the eleven-lot plat recorded in the Wood County clerk's office."[176] After acquiring title, the defendants obtained a "surrender and release" of all rights and reservations held by the Coffmans and the bank as the former deedholders of the land; they then filed suit to cancel and terminate the restrictive covenants as a cloud on their title.[177] The defendants planned to build a four-unit apartment, which would have been in violation of the restrictive covenant.[178]

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171 *Id.*

172 *Id.* Restrictive covenant number two provides: "Lots shown shall be used for residential purposes only[] and only one dwelling shall be erected on any lot. No lot can be further subdivided." *Id.* at n.3.

173 *Id.* at 85.

174 *Armstrong*, 452 S.E.2d at 85.

175 *Id.*

176 *Id.*

177 *Id.* at 85-86.

178 *Id.* at 85. The property owners (defendants herein) prevailed in the cloud in title case, but the landowners (plaintiffs herein) in Hy View Terrace were neither served nor given notice of the hearing on the action to remove the restrictions as a cloud in title. *Armstrong*, 452 S.E.2d at 86.

The issue, therefore, was whether the restrictive covenant applied to all of the Coffmans' property, all three plats, or to just the eleven lots on the plat recorded with the restrictions. The court noted that the test was the original intent of the parties.[179] The court held that "it is clear from the facts in this case that the developers of the subdivision, Mr. and Mrs. Coffman, intended that the restrictive covenants apply to the appellants' property."[180]

In discussing the intent of the parties, the court found persuasive the fact that the "Coffmans conveyed several lots *other than* the eleven depicted in the recorded plat which also specifically refer to the restrictive covenants that apply to Hy View Terrace."[181] In addition, the court found it "significant that access to Hy View Terrace can only be achieved by use of one road, which is privately maintained by the homeowners' association of Hy View Terrace,"[182] and the access to the defendants' property is via this road.[183] Finally, the court noted that the deeds to thirty homes in Hy View Terrace all referred to the restrictive covenants.[184]

Jubb and its progeny show a clear commitment by the West Virginia Supreme Court of Appeals for placing the intent of the parties above all other considerations when construing restrictive covenants. Moreover, if the intent of the

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179 *Id.* at 87.

180 *Id.* It is noted that in a motion for a new trial the defendants submitted an affidavit of developer Peggy Coffman which stated,

> At no time during the period which they owned said tracts of land did they intend, plan or represent to anyone that any part of said land, other than the lands contained within [the recorded eleven-lot plat] were to be encompassed or contained within Hy-View Terrace or subject to the restrictive covenants adopted by Coffman for Hy-View Terrace Addition.
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> Mrs. Coffman further stated that she had never before seen the forty-five lot plat which Mr. Mills testified was used to induce him into purchasing land in Hy-View Terrace. Mrs. Coffman acknowledged that the deed conveyed to the Crooks, a predecessor in the appellants' chain of title, did state that the conveyance was subject to the restrictive covenants contained in the recorded eleven-lot plat, but explained that the inclusion of that provision in the deed was "an error on the part of the scrivener of said deed" and that she did not intend for the deed to contain any such provision.

Id. at 86.

181 *Armstrong*, 452 S.E.2d at 87.

182 *Id.*

183 *Id.*

184 *Id.*

parties is clearly expressed in the covenant, the court will most likely favor an interpretation of the covenant that is consistent with this clear expression.

V. MISCELLANEOUS DECISIONS

As illustrated by *G. Corp., Inc. v. MackJo, Inc.*,[185] restrictive covenants are not limited to residential situations. In *G. Corp.*, the court resolved the issue by finding the parties' intent from within the four corners of the Declaration of Protective Covenants.[186] MackJo, the defendant, was the owner and developer of a light industrial park.[187] MackJo conveyed 11.28 acres within this industrial park to G. Corp. and also granted to G. Corp. "a non-exclusive 40 foot easement or right-of-way leading from Corridor G to the 11.28 acres."[188] Section 6.01 of Article VI in the declaration was entitled "Covenants and Restrictions" and provided "[t]he following covenants, restrictions, limitations, regulations and agreements are hereby imposed *on lots* in Childress Place[:] . . . [n]o part of the Industrial Park shall be used for residential purposes."[189] Subsequent to the conveyance to G. Corp., MackJo conveyed a "non-exclusive right-of-way and easement forty feet in width" to Herman Fletcher, the owner of an adjoining tract of land.[190] Mr. Fletcher planned to develop a residential subdivision on the adjoining tract of land that would be served by the non-exclusive easement.[191] The plaintiff sought to enjoin the use of the right-of-way to the Fletcher property as a violation of the "no residential purposes" restriction.[192] In rejecting the plaintiff's argument, the court noted the restriction that "no part of the Industrial Park shall be used for residential purposes" was part of Article VI of the declaration "which is prefaced by the admonishment that . . . [t]he following covenants, restrictions, limitations, regulations and

185 466 S.E.2d 820 (W. Va. 1995).

186 *See id.* at 825.

187 *Id.* at 822.

188 *Id.*

189 *Id.* (emphasis added).

190 *G. Corp.*, 466 S.E.2d at 822.

191 *Id.* at 823.

192 *Id.*

agreements are hereby *imposed on lots* in Childress Place . . . ."[193] The provision concerning the use of the non-exclusive right-of-way was in Article IV.[194] In addition, Article VII provided that MackJo contemplated developing "tracts adjacent and neighboring to Childress Place, and, most likely, [would] utilize the entrance, roads and streets of Childress Place in such development and use thereof."[195] *G. Corp.* is again another example of the court's commitment to construing covenants consistent with the parties intent. The lesson from *G. Corp.* is that the court will use the parties intent as the *sole* factor when construing covenants. As a result, careful articulation of the parties intent in the covenant is clearly the prudent practice.

One of the more interesting decisions is *McIntyre v. Zara*,[196] a per curiam decision that reversed the lower court's granting of a motion for summary judgment.[197] Mrs. Zara conveyed approximately 1.497 acres out of a 29.87 acre tract to Mr. and Mrs. McIntyre.[198] "At the time of the sale, no restrictions, protective covenants or reservations for the land were recorded."[199] However, the deed conveying the property to the McIntyres provided,

> By acceptance of this deed, the Grantees specifically agree and consent to conform to any and all future declarations of restrictions, protective covenants and reservations pertaining to a sub-division which may be developed from real estate presently belonging to the Grantor, and which is adjacent to the property herein conveyed. The Grantees and their successors, shall have all rights and privileges of membership in the future Property Owner's Association for such sub-division, and shall comply with all restrictions, covenants, and reservations pertaining to such sub-

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193 *Id.* at 825.

194 *Id.*

195 *G. Corp.*, 466 S.E.2d at 825.

196 394 S.E.2d 897 (W.Va. 1990).

197 *Id.* at 898.

198 *Id.*

199 *Id.*

division and pertaining to membership in such future Property Owner's Association.[200]

Ten months after the conveyance to the McIntyres, a declaration of various restrictions, covenants and reservations pertaining to the proposed subdivision was recorded.[201] The McIntyres found the restrictions contained in paragraphs "M" and "P" of the declaration, which stated that all home construction, excavation, additions, and/or remodeling within the boundaries of Skyline Estates Subdivision would be performed by Skyline Contracting at a fair market rate unless objectionable. Paragraph "M" of the declaration provided, "[N]o numbered lot may be subdivided without the written consent of the Declarant or the 'Building Control Committee.'"[202] Paragraph "P" provided, "[A]ll home construction, excavation, additions, and/or remodeling within the boundaries of Skyline Estates Subdivision will be performed by Skyline Contracting at a fair market rate unless approval is granted in writing by Skyline Contracting to allow others to perform a specific project."[203]

After holding that the restrictive covenant in this case was sufficient to comply with the statute of frauds,[204] the court summarized the law in this state that evolved in the earlier case construing covenants and reaffirmed that the court should seek the parties' intention.[205]

As noted above, the McIntyres objected to the restrictions that prohibited the subdividing of lots and the "requirement" to use a certain builder. If the

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200 *Id.* at n.1.

201 *McIntyre*, 394 S.E.2d at 899. *See generally* 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 415 (entitled "Land Which Parties Intend to be Benefitted").

202 *McIntyre*, 394 S.E.2d at 899 n.2.

203 *Id.*

204 *Id.* at 899.

In the present case, although the declaration was recorded after the McIntyres' deed, the deed not only refers to the future covenants but specifically notes that the McIntyres agreed to conform "to any and all future declarations of restrictions, protective covenants and reservations pertaining to a sub-division which may be developed." The reference to the restrictive covenants in the McIntyres' deed is sufficient to satisfy the requirements of *W. Va. Code* § 36-1-1 [1931].

Id.

205 *See McIntyre*, 394 S.E.2d at 900. "On remand the circuit court should allow the parties to present evidence concerning their intentions and the alleged agreement regarding the restrictive covenants." *Id.*

McIntyres found the restrictions imposed after their purchase objectionable, the court said they should be granted rescission. The court explained,

> If the circuit court determines that the parties' intentions with regard to the restrictive covenants are so material that it affects the substance of the contract, the circuit court should order rescission, an extraordinary remedy. *See Morrison v. Waggy*, 43 W. VA. 405, 27 S.E. 314 (1897); *Fearon Lumber and Veneer Co. v. Wilson*, 51 W. VA. 30, 41 S.E. 137 (1902) (rescission appropriate remedy when substance of the contract affected); *Boyd v. Pancake Realty Co.*, 131 W. VA. 150, 46 S.E.2d 633 (1948) (upholding rescission based on a mutual mistake concerning an easement). If the circuit court orders rescission, it should return the parties as closely as possible to their pre-contract positions by rescinding the deed, returning the purchase price, awarding interest on the purchase price and awarding costs plus interest for any improvements made to the land.[206]

The possibility that a party can be bound by restrictions placed upon land subsequent to his or her acquiring title thereto presents troubling aspects. Presumably, "notice," which was recognized as early as *Cole v. Seamonds*,[207] must be present before a party will be bound. Although the court in *McIntyre* did not discuss notice, the fact that the grantee accepted the deed, which contained the agreement to subject the parcel conveyed to the future declaration, amounts to actual notice.[208] The court assumes that allowing recession if "the restrictive covenants are so material that it affects the substance of the contract"[209] provides adequate protection to the purchaser. However, since it seems probable that the resolution of that issue would frequently require litigation, it is suggested that even if one assumes that the *McIntyre* case is limited to its facts as a practical matter, an attorney should be very reluctant to advise a client to enter into a transaction which binds them to future restrictions.

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206 *Id.* "The McIntyres' brief indicates that construction of a house was started on the land." *Id.* at n.3.

207 104 S.E. 747 (W. Va. 1920).

208 *See McIntyre*, 394 S.E.2d at 898.

209 *Id.* at 900.

VI. EQUITABLE CAUSES OF ACTION GIVE RISE TO EQUITABLE DEFENSES

By their very nature, equitable defenses are fact-specific. The precedential value of cases rests upon the general discussion of the elements of the defense with the "guidance" provided by the application of those principles to specific facts.

The first case in West Virginia to address restrictive covenants[210] recognized that those who seek equitable relief are subject to equitable defenses.[211] In *Robinson v. Edgell*, the court rejected the defendant's argument that subsequent to the restriction there had been a sufficient change to make enforcement inequitable.[212] In rejecting the argument, the court noted that

> [n]othing has occurred since the conveyance which has wrought a change in conditions. The lot was taken subject to known existing conditions, and a stipulation in the deed prohibiting a particular use of it. To permit the grantee to prevent the operation of the restrictive clause by setting up prior or contemporaneous conditions would enable him to take advantage of his own acts, rather than those of the grantor."[213]

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210 *See* Robinson v. Edgell, 49 S.E. 1027 (W. Va. 1905).

211 The right to invoke relief by injunction in such cases is not absolute, however. To a certain extent, the jurisdiction is discretionary. It is governed by the same general principles which control the jurisdiction to compel specific performance of contracts. Where a proper case for its exercise is shown, relief is granted as a matter of course, but if, under the conditions and circumstances obtaining, the granting of the relief sought would work injustice or be ineffectual or any meritorious result, it will be refused. If, therefore, the restrictive covenants in deeds, conveying lots, were made with reference to the continuance of existing general conditions of the property and surroundings, but in the lapse of time there has been a change in the character and surroundings, so as to defeat the purposes of the covenants and to render their enforcement an inequitable, unjust and useless burden upon the owner of the lot, equity will refuse its aid and leave the plaintiff to his remedy at law. When such change in conditions is due to the act of the grantor or is assented to by him, equity will not interfere at his instance.
Id. at 1028-29.

212 *Id.* at 1030.

213 *Id.* at 1029.

One of the better discussions of the equitable defenses is found in *Ballard v. Kitchen*.[214] In the *Ballard* case, the court discussed the defendant's argument of laches or acquiescence (failure to complain when the defendant had conducted a business on the lot for a number of years);[215] the lack of "clean hands" (plaintiff's violation of the restrictive covenants pertaining to the setback line and the nature of the building material used);[216] and equitable estoppel.[217] The court, in *Ballard*, agreed that the plaintiff's action was barred by laches and acquiescences.[218]

Just as *Wallace v. St. Clair*[219] represents the source of much of the current understanding of restrictive covenants, it also contains one of the better discussions of the defenses to their enforcement. As to waiver, the *Wallace* court noted that "[t]he willingness of some lot owners in a subdivision to waive a building restriction is not binding on others who insist on its strict observance * * * ."[220] Related to waiver is acquiescence, and as to it the court said, "[m]ere acquiescence does not constitute abandonment so long as the restrictive covenant remains of any value."[221]

One of the common arguments against enforcement of restrictive covenants arises when there has been a change in the neighborhood. The *Wallace* court explained that changed conditions of the neighborhood will not be sufficient to

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214 36 S.E.2d 390 (W. Va. 1945). Another case that discusses equitable defenses that is worth noting is *Kaminsky v. Barr*, 145 S.E. 267 (W. Va. 1928). In *Kaminsky*, the defendant argued a change of the neighborhood (small stores in residences and the building of a church); acquiescences (plaintiff did not complain about other violations of restrictions); and laches (failure to take action to compel removal of "temporary structures" on the lot in question). *Id.* at 268-69. While rejecting the defense arguments, the court did modify the injunction to permit the defendant to occupy the set back restricted area with a front porch to the same extent as the plaintiff. *Id.* at 269.

215 Ballard, 36 S.E.2d at 394.

216 *Id.* at 394.

217 *Id.* at 395.

218 *Id.* at 394.

219 127 S.E.2d 742 (W. Va. 1962).

220 *Id.* at 756 (quoting 26 C.J.S. *Deeds* §169 (1956)) (omission in original). *See also* Miller v. Bolyard, 411 S.E.2d 684 (W. Va. 1991).

221 *Wallace*, 127 S.E.2d at 756.

defeat the right unless the changes are "so radical as practically to destroy the essential objects and purposes of the agreement."[222]

Finally, the *Wallace* court held that the trial court erred in finding estoppel, noting, "[m]ere silence will not work a[s] estoppel; to be effective it must appear that the person to be estopped has full knowledge of all the facts and of his rights, and intended to mislead or at least was willing that another party might be misled by his attitude."[223]

While *Wallace* provided an overview of several equitable defenses, one of the more extensive discussions of the change in the neighborhood and acquiescence is found in *Morris v. Nease*.[224] After noting that West Virginia recognizes that changes in a neighborhood's character can nullify restrictive covenants affecting neighborhood property,[225] the court explained,

> Technically, there is a distinction between changes which occur within the restricted neighborhood itself and changes in the surrounding, unrestricted area. The "problem of *change of conditions* arises where the complainant's and defendant's lots lie within a restricted subdivision, but the area surrounding the restricted subdivision has been so changed by the acts of third persons that the building scheme for the subdivision has been frustrated through no fault of the lot owners themselves." *2 American Law of Property* 445-446 (A.J. Casner ed. 1952, emphasis added) [hereinafter cited as 2 *American Law of Property*]. When, however, the change in the neighborhood's character is a result of "violations within the subdivision itself, a problem of *abandonment* rather than change of conditions is involved." 2 *American Law of Property* 446.[226]

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222 *Id.* at 757.

223 *Id.*

224 238 S.E.2d 844 (W. Va. 1977).

225 *Id.* at 846.

226 *Id.*

Noting that changes in neighborhoods often occur through succeeding block-by-block changes,[227] the court explained,

> To guard against such an eventuality courts in a majority of jurisdictions have evolved the rule that "if the benefits of the original plan for a restricted subdivision can still be realized for the protection of interior lots, the restrictions should be enforced against the border lots, notwithstanding the fact that such lot owners are deprived of the most valuable use of their lots . . . ." West Virginia has adopted the essence of this salutary rule by holding that "changed conditions of the neighborhood will not be sufficient to defeat the right (to enforce restrictive covenants) unless the changes are 'so radical as practically to destroy the essential objects and purposes of the agreement.'"[228]

While rejecting the change of neighborhood defense, the court did agree there was acquiescence by the plaintiff and the court referred to it as a personal equitable defense and defined it as follows:

> The equitable defense of acquiescence arises where the complainant has acquiesced in the violation of the same type of restriction by third parties. Where the complainant has failed to enforce a similar equitable servitude against third parties, he has debarred himself from obtaining equitable relief against the defendant for subsequent violations of the same character. The reason for allowing this defense of acquiescence is the belief that the complainant, by his conduct in failing to seek enforcement against similar violations by third parties, has induced the defendant to assume that the restrictions are no longer in effect. Thus, acquiescence by the complainant to the violations of dissimilar restrictions cannot be a bar to enforcement where the restrictions are essentially different so that abandonment of one would not induce a reasonable person to assume that the other was

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227 *Id.* at 847. In its explanation of gradual change, the court stated that, "[a]s soon as the border lots are freed, the next tier of lots is put in the same position as that in which the border lots were originally. Thus by a step-by-step process the restrictions must be relaxed until the plan is totally defeated." *Id.* (citing 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 446).

228 *Morris*, 238 S.E.2d at 847. Helpful discussions of the change of neighborhood defense which applies the law in *Morris v. Neese* to different facts are *Allemong v. Frendzel*, 363 S.E.2d 487 (W. Va. 1987), and *Miller v. Bolyard*, 411 S.E.2d 684 (W. Va. 1991).

> also abandoned. Likewise, failure to sue for prior breaches by others where the breaches were non-injurious to the complainant cannot be treated as an acquiescence sufficient to bar equitable relief against a more serious and damaging violation.[229]

VII. CONCLUSION

The lesson of the cases in West Virginia, and in particular *Teays Farms v. Cottrill*[230] and *G. Corp. Inc. v. MackJo, Inc.*,[231] is that a clear expression of the parties' original intention in placing restitution in property is crucial. Extra care should be given that the parties' intentions are clearly manifested in the document creating the restriction. The lesson of *Jubb v. Letterle*[232] and *Armstrong v. Stribling*[233] is that recorded plats do not necessarily determine the scope of land that is subject to the restrictions. Unrecorded plats may be relied upon by the court to determine the parties' original intention.

While the West Virginia Supreme Court of Appeals has essentially ignored discussing the common law elements, by the very nature of "covenant cases," the common law requirement of privities is usually met. For this reason, the court's ignoring this element appears to make little difference. The exception is *Allemong v. Frendzel*,[234] in which the court held that an adjoining landowner had standing to enforce the covenant.[235] The holding in *Allemong* is not consistent with the common law rules nor supported by earlier West Virginia cases. The statement in *Allemong* that the adjoining landowner had standing was made without adequate explanation.[236] Therefore, it is submitted that the issue of the right of adjoining

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229 *Morris*, 238 S.E.2d at 848 (citing 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 441-442) (footnotes omitted).

230 425 S.E.2d 231 (W. Va. 1992).

231 466 S.E.2d 820 (W. Va. 1995).

232 406 S.E.2d 465 (W. Va. 1991).

233 452 S.E.2d 83 (W. Va. 1994).

234 363 S.E.2d 487 (W. Va. 1987).

235 *Id.* at 491.

236 The court's explanation is that "Vincent and Mary Howard have standing to seek enforcement of the covenant as well because as adjacent landowners to the restricted parcel, their land was intended to reap the benefit of the restrictive covenant." *Id.*

landowners, without a common grantor or any form of privity or agreement giving a right to enforce such covenants, should be revisited by the court for further clarification.[237]

West Virginia is not alone in "simplifying" the common law rules of covenants and equitable servitudes. While the West Virginia Supreme Court of Appeals has focused on the element of "intent," the courts in some other jurisdictions have developed their bodies of law around "touch and concern."[238]

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237 One other case in which the court addressed standing was *Recco v. Railway Co.*, 32 S.E.2d 449 (W. Va. 1944). The court's discussion in that case appears consistent with the common law rule:

> Where an owner of land divides it into lots and sells the lots to different grantees by deeds containing the same negative or affirmative covenants, and the lots are sold to subsequent grantees, each will be charged with constructive notice of the covenants in the original deed under which he claims title. Though there would be no legal privity among the subsequent grantees and therefore one lot owner cannot maintain an action at law against the owner of any other lot, based upon the latter's violation of any of the covenants, a suit in equity may be brought by an original grantee or subsequent grantee against the owner of any other lot to compel compliance with the covenants contained in the original deeds on the theory that they created an equitable easement or servitude. But where changed conditions will render the enforcement of the covenants inequitable or unjustly burdensome, relief in equity will not be granted. Symons, Pomeroy's Equity Jurisprudence, 5th ed., Section 1295. Unlike the instant covenant, privity between the parties is not prerequisite to the enforcement of such equitable easement or servitude. A court of equity will enforce such covenants, notwithstanding there may be no legal right, because of the derelict lot owner's inequitable conduct in the violation of the covenants. By the same token, relief will be withheld where it would be inequitable to grant it. The Court simply balances the equities between the contending parties, which it will not do if a vested property right, such as is clearly shown by this record, will be destroyed thereby.

Id. at 453. *See generally* 2 AMERICAN LAW OF PROPERTY, *supra* note 11, at 415 (entitled "Land Which Parties Intend to be Benefitted").

238 The main issue in *Spencer's Case* was whether a covenantor's successors could be bound by the covenant unless the covenanting parties agreed that the covenant should bind "assigns," using that precise word. Holding that the word "assigns" had to be used if the covenant related to a thing not *in esse*, the court said in dictum that the word did not have to be used if the covenant concerned a thing already existing. All this learning has largely been lost in the American cases. No American decision has been found that makes anything of the distinction between things that are or are not *in esse*. Also, there seems to be extant requirement that the express word "assigns" ever be used. Instead, American courts look for the covenanting parties' "intent" that the covenant shall run.

> Intent is to be found from all the circumstances surrounding the covenant. Obviously the use of the word "assigns" is highly persuasive of an intent to bind successors. The thorough draftsman will use language to the effect that "this covenant is intended to be a running covenant, burdening and benefitting

While the focus on "intent," by its very nature involves a case by case approach, a body of law has evolved that can provide guidance to those who draft such restrictions or are asked to construe them.

> the parties' successors and assigns." Few recent decisions contain much discussion of the intent element; rather, the courts seem to conclude that it is or is not present from the nature of the covenant. A covenant that is found to be of a "personal" kind, such as one owner's promise to pay his neighbor for something the neighbor has already done, will be said not to be intended to run. Conversely, when the covenanted performance is not merely personal but is connected with land, then the courts seem to assume that the parties intended it to run. This comes very close to saying that a covenant that touches and concerns will impliedly be intended to run. Perhaps no authority has put it quite so bluntly, but that is very nearly what has happened. The logical conclusion of that process is to make intent disappear as a discrete element, though it is probably premature to suppose that this has in fact occurred.

CUNNINGHAM, STOEBUCK & WHITMAN, THE LAW OF PROPERTY § 8.16 (2d ed. 1993).