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Existence of a Uniform Plan of Development embracing Two Subdivisions

Harvey R. Boller

THE EXISTENCE OF A UNIFORM PLAN OF DEVELOPMENT EMBRACING TWO SUBDIVISIONS

*Berger v. Van Sweringen Co.**

The law of restrictive covenants is complicated by the fact that it must strike a balance between at least two competing policy considerations. On one hand, the law must afford adequate protection for those who purchase in reliance upon a reasonable expectation that the surrounding property will be used for purposes compatible with their own. On the other hand, the law must recognize that restrictive covenants may seriously impair the value of the land by severely limiting the uses to which it may be put. Thus it is important that courts neither interpret restrictive covenants too broadly nor permit land to become frozen by obsolete and irrevocable restrictions.

In striking a balance between these two competing policies, courts must also recognize a third consideration—that of certainty. Certainty or predictability is always an important goal for the law, but it is especially significant here because of the very substantial nature of the buyer's reliance. This reliance most commonly occurs when homes are purchased from a subdivider with the expectation that the character of the neighborhood will be maintained through the enforcement of "residential use only" restrictions. Predictability can, of course, only be purchased at the price of limiting the discretion of the courts.

Restrictive Covenants and Uniform Plans of Development

Covenants restricting the use of real property may be enforced by the parties to the agreement and by the owners of the land for whose benefit the restrictions were imposed, although they were not parties to the agreement.[1] The difficulty lies in determining who are the intended beneficiaries. Since the "intention of the parties" is a matter of fact, it is not surprising that many of the cases appear to be inconsistent.

> [T]he courts seem to have no special difficulty in ascertaining and declaring the controlling general principles of law, but in their application to concrete facts it may well be said that the decisions are in hopeless conflict and confusion, and individual cases as precedents are not of much value, except as general principles are recognized and declared.[2]

An intention to benefit can be demonstrated by the existence of a uniform development plan.[3] Such a plan exists where a common grantor subdivides a tract of land into building lots and conveys these lots subject to generally uniform use restrictions.[4] Where a uniform plan exists, it is held that the grantor

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* 6 Ohio St. 2d 100, 216 N.E.2d 54 (1966).

1 5 Restatement, Property § 541 (1944).

2 O'Malley v. Central Methodist Church, 67 Ariz. 245, 250, 194 P.2d 444, 448 (1948).

3 Osius v. Barton, 109 Fla. 556, 565, 147 So. 862, 866 (1933), rev'd on other grounds, 129 Fla. 184, 176 So. 65 (1937); 5 Restatement, Property § 541, comment e (1944); cf. Wing v. Forest Lawn Cemetery Ass'n, 15 Cal. 2d 472, 480-81, 101 P.2d 1099, 1103 (1940).

4 5 Powell, Real Property § 679, at 189 (1962). Although uniform restrictions are evidence that a uniform plan exists, a plan may be found even though all the property within it is not expressly restricted. In Taylor v. Melton, 130 Colo. 280, 274 P.2d 977 (1954), a uniform plan was found to exist even though only a small minority of the lots conveyed were subject to express restrictions.

When a uniform plan is found to exist, all the lots within the plan are held to be restricted. Those lots which are not burdened by express restrictions are burdened by

burdens each lot for the benefit of every other lot covered by the plan.[5] Since a uniform plan demonstrates the grantor's intention to benefit the other lots, the courts permit any grantee or subsequent grantee to enforce the restriction burdening the property of another grantee within the plan.[6] A grantee must, however, have taken with actual or constructive notice of the restrictions in order for them to be enforced against him.[7]

In a number of cases the question of whether a uniform plan covers two subdivisions has arisen. These are cases in which a plaintiff owning land in one subdivision has attempted to enforce restrictions against land situated in another. The purpose of this Note is to examine the factors which tend to prove or negate the existence of a uniform plan covering two subdivisions. The principles used in determining whether a uniform plan extends over two subdivisions are similar, in many respects, to those used in determining whether a uniform plan exists within one subdivision.[8]

The courts faced with the problem of whether a uniform plan can extend over two subdivisions have treated the question as one of the intent of the parties.[9]

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implied restrictions frequently termed "negative reciprocal easements." See, e.g., Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925), 10 Minn. L. Rev. 619 (1926); Minner v. City of Lynchburg, 204 Va. 180, 129 S.E.2d 673 (1963). Thus uniform plans are used by the courts for two purposes: (1) as a means of implying use restrictions and (2) as a means of determining who the intended beneficiaries of express or implied restrictions are. See Note, 53 Mich. L. Rev. 634, 635 (1955).

[5] Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 512, 75 S.E.2d 620, 628 (1953). 5 Powell, Real Property § 679, at 192 (1962). This is the result of a determination that a uniform plan exists, regardless of how many lots in the subdivision are expressly burdened. See note 4 supra.

[6] 5 Restatement, Property § 541, comment e (1944). There is a split of authority on the theory of the enforcement of this right. 3 Tiffany, Real Property § 861 (1939). Tiffany states that "while the right to enforce in equity an agreement . . . of a restrictive character as against a subsequent purchaser with notice thereof is generally recognized, the judicial expressions as to the principle underlying such enforcement are singularly inharmonius." Id. at 485.

This right has been held to stem from contract. See, e.g., Palermo v. Allen, 91 Ariz. 57, 64-65, 369 P.2d 906, 911-12 (1962). The Restatement of Property also adopts this view. 5 Restatement, Property, Introductory Note to Chapter 46 (1944). On the other hand the right of enforcement has been considered to be an easement or property right. See, e.g., Sanborn v. McLean, supra note 4. At least one case holds that this right stems from neither contract not property:

> The truth is that plaintiff's right need not rest in contract nor consist of an estate or easement . . . . Her rights flow rather from the inequity of allowing the abandonment of a uniform scheme of restrictions after the owners of an allotment have sold part of the lots on the faith of its enforcement . . . .

Carmichael v. Hall, 33 Ohio C.C. Dec. 26, 18 Ohio C.C.R. (n.s.) 259, 260 (Cir. Ct. 1909).

According to the contract theory the transfer of the land from the grantor to the grantee involves an implied assignment of the right to enforce the covenant, 5 Powell, Real Property § 679 (1962), or the grantee takes as a third-party beneficiary of the rights created by the restriction. See 5 Restatement, Property, Introductory Note to Chapter 46 (1944). The property theory holds that a negative easement attaches to the land involved by virtue of the mutual burdens and benefits imposed. 3 Tiffany, Real Property § 861, at 486-87 (1939).

Finally, there is the question of whose intention governs. Where the right of enforcement is a contract right, the intention of the parties, i.e., the grantee and the grantor, determines who are the beneficiaries. Palermo v. Allen, supra; 5 Restatement, Property § 541, comment e (1944). Where the right of enforcement is held to rest in property, there is some authority that the grantor's intention alone controls. Coomes v. Aero Theatre & Shopping Center, Inc., 207 Md. 432, 439, 114 A.2d 631, 635 (1955).

[7] 7 Thompson, Real Property § 3170 (1962).

[8] See note 16 infra.

[9] See, e.g., Craven County v. First-Citizens Bank & Trust Co., supra note 5, at 514, 75 S.E.2d at 629, where the court stated:

Upon an examination of the facts in each case the courts have, until *Berger v. Van Sweringen Co.*,[10] consistently found no uniform plan existing over the subdivisions.[11] In *Berger*, however, the Supreme Court of Ohio found that a uniform plan was in force over two subdivisions and therefore permitted a suit by a plaintiff in one subdivision against the owner of land in another.[12]

In order to ascertain whether the parties intended a uniform plan to encompass two subdivisions, the courts attempt to determine whether the land in question is treated as separate tracts or as a single entity. Separate or divisional treatment supports the inference that no uniform plan was intended. Where the land is developed as a single entity, however, there is an inference that a uniform plan was intended.[13] Analysis of the relevant decisions shows that four factors are of central importance in ascertaining whether divisional or single-unit development was intended. These are: (*1*) the way in which the land in question is platted, (*2*) the scope of any provision for altering the restrictions imposed, (*3*) the express limitations on the extent of the restrictions imposed by the conveyance itself, and (*4*) the similarity of restrictions between subdivisions.

Plats as Indicia of Intention

Plats have been used in two ways to determine whether a uniform plan was intended. First, the grantor may file separate plats covering the land in question.

[D]ecision here requires that we determine the question whether or not these easements or restrictive servitudes reach across Fort Totten Drive and attach to any part of the . . . [other subdivision]. The determination of this question is dependent largely upon whether the developers of this property treated and dealt with the two areas as a single unit and intended the restrictive easements to cover both tracts, or whether the two areas were treated and dealt with as separate, independent units, with intent of the developers and purchasers that the restrictions imposed be limited to the . . . [first subdivision]. This intent is to be gathered from the terms of the covenants and related facts appearing in the chain of title.

See also, Gammons v. Kennett Park Dev. Corp., 30 Del. Ch. 525, 531, 61 A.2d 391, 394 (Sup. Ct. 1948); Reid v. Standard Oil Co., 107 Ga. App. 497, 500-01, 130 S.E.2d 777, 781 (1963); Edwards v. Surratt, 228 S.C. 512, 518-19, 90 S.E.2d 906, 909 (1956); Bein v. McPhaul, 357 S.W.2d 420, 424-25 (Tex. Civ. App. 1962); Russell Realty Co. v. Hall, 233 S.W. 996, 998-99 (Tex. Civ. App. 1921); Meagher v. Appalachian Elec. Power Co., 195 Va. 138, 143, 77 S.E.2d 461, 464 (1953).

[10] 6 Ohio St. 2d 100, 216 N.E.2d 54 (1966).

[11] See Gammons v. Kennett Park Dev. Corp., supra note 9 (bases of decision: express limitation on the enforceability of the restrictions; modification clause); Reid v. Standard Oil Co., supra note 9 (bases of decision: express limitation of the enforceability of the restrictions; separate plats filed; different restrictions imposed on the subdivisions); Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620, (1953) (bases of decision: difference in treatment on plat; express limitation on the enforceability of the restrictions); Bein v. McPhaul, supra note 9 (bases of decision: separate plats filed; different restrictions imposed on the subdivisions); Russell Realty Co. v. Hall, supra note 9 (basis of decision: separate plats filed); Meagher v. Appalachian Elec. Power Co., supra note 9 (basis of decision: express limitation on the enforceability of the restrictions). See also Edwards v. Surratt, supra note 9.

[12] Berger v. Van Sweringen Co., 6 Ohio St. 2d 100, 216 N.E.2d 54 (1966).

[13] Craven County v. First-Citizens Bank & Trust Co., supra note 11, at 513, 75 S.E.2d at 628-29:

[W]here an entire tract is developed over an extended period of time, and the intent clearly appears, as diselosed by the record chain of title, that the restrictions were imposed by the developer in accordance with a plan of development by separate, distinct divisional units within the larger area, rather than as a single development project, effect will be given to restrictive covenants only as they relate to each such separate unit.

In this situation the plat lines determine how far the benefit of the restrictions is to extend.[14] Thus if plaintiff's land is not contained in the same plat as the defendant's, the plaintiff cannot enforce the restrictions.[15] This factor appears to be one of the most pervasive in determining the intent of the parties.[16]

The second way in which a plat may show divisional development is by treating two or more areas in a single plat differently. In *Craven County v. First-Citizens Bank & Trust Co.*[17] the plaintiff and defendant owned property in two different tracts which were separated by a highway. A single plat was filed covering both areas. The plat showed the area in which plaintiff's property was situated as divided into building lots of uniform frontage and depth, while defendant's tract was not similarly divided. The court concluded that the difference in the treatment given the two areas by the plat was one of the "crucial facts" indicating an intention to develop the land in question as separate subdivisions.[18]

In *Berger v. Van Sweringen Co.*,[19] the Supreme Court of Ohio permitted the plaintiffs to enforce restrictions against property in a subdivision in which they did not own any land. The opinion never states whether one or two plats were filed.[20] If only one plat was filed, the case comes within the holding of *Craven County*. In *Berger*, as in *Craven County*, the tract in which the defendants owned land had never been subdivided, while the tract in which the plaintiffs held land had been subdivided. If a single plat was filed the fact that the two subdivisions were represented in different fashions would support the conclusion that divisional development was intended. If two plats were filed an intention to

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14 Russell Realty Co. v. Hall, 233 S.W. 996, 999 (Tex. Civ. App. 1921).

15 Ibid.

> [The] purchasers' rights under restrictive covenants relating to lots in this first plat cannot be extended beyond its borders. They are circumscribed and confined by the territorial limits of the plat with reference to which the purchasers bought, and purchasers cannot be granted relief against the construction of buildings of an obnoxious kind in an adjoining section, even though such buildings are constructed in violation of restrictive covenants, which apply to the adjoining territory.

Ibid.

16 Reid v. Standard Oil Co., 107 Ga. App. 497, 502, 130 S.E.2d 777, 782 (1963); Edwards v. Surratt, 228 S.C. 512, 520, 90 S.E.2d 906, 910 (1956); Russell Realty Co. v. Hall, supra note 14. See also Stephens Co. v. Myers Park Homes Co., 181 N.C. 335, 342, 107 S.E. 233, 237 (1921).

Normally, several plats are employed only where more than one subdivision is involved, i.e., where there is one subdivision, only one plat is filed. Hence the "separate plat test" is not useful where the question is whether there is a uniform plan covering a single subdivision.

17 237 N.C. 502, 75 S.E.2d 620 (1953).

18 Id. at 514, 75 S.E.2d at 629. The court also noted that the contract of sale of the lots recited that the restrictions apply "to lots west of Fort Totten Drive." Ibid. Thus the court suggests that there was an express limitation on the effect of the restrictions.

19 6 Ohio St. 2d 100, 216 N.E.2d 54 (1966).

20 It is assumed here that at least one plat was filed to meet statutory requirements. Ohio Rev. Code Ann. § 711.06 (Page 1954).

> A proprietor of lots . . . in a municipal corporation who subdivides or lays them out for sale, shall make an accurate plat of such subdivision, describing with certainty all grounds laid out or granted for streets, alleys, ways, commons, or other public uses. Lots sold or intended for sale shall be numbered by progressive numbers or described by the squares in which situated, and the precise length and width shall be given of each lot sold or intended for sale. Such plat . . . shall be recorded in the office of the county recorder.

develop the area as separate units would be demonstrated.[21] However, the plaintiffs in *Berger* were permitted to enforce restrictions even though the "plat test" would have supported an opposite conclusion. Thus, the court in *Berger* appears to reject the plat test:

> [I]t appears that the answer to this question [whether a suit can be maintained across subdivision lines] lies not in the ascertainment of artificial and arbitrary lines drawn upon a plat book but in the determination of the intention of the parties to be gained from the language of the instrument and the surrounding circumstances.[22]

Since the use of plat lines in determining the intention of the parties allows no room for judicial discretion, the results achieved by use of this test are predictable and certain. Hence, in rejecting the plat test, the *Berger* rule decreases predictibility in order to allow courts greater flexibility in ascertaining whether a uniform plan does in fact exist.

The Provision for Altering Restrictions (Modification Clause)

A clause in an instrument imposing restrictions which provides for alteration of those restrictions by designated landowners is called a modification clause. Its existence depends entirely on the desires of the parties creating the instrument. There are two possible situations in which a court may employ a modification clause to determine whether an individual is an intended beneficiary of use restrictions. *First*, the plaintiff seeking to enforce the restrictions on the defendant's property may have exclusive or joint power to modify those restrictions. *Second*, the plaintiff may have no power to modify the restrictions he is seeking to enforce.

A. *Plaintiff Has Some Power To Modify.* Where the party seeking to enforce the restrictions has the power to modify them, then it would seem that he is an intended beneficiary of those restrictions and therefore can enforce them. The fact that the power to modify is given to the grantees in a designated area supports the inference that there is a uniform plan encompassing that area.[23] Hence the grantees should be permitted to enforce them *inter se*.

B. *Plaintiff Has No Power To Modify.* Where the plaintiff seeking to enforce the restrictions has no power to modify the restrictions, the question is whether his lack of power to modify ought to support an inference that he is not an intended beneficiary. The answer to this question depends partially on the type of modification clause involved. There are two possible forms the clause may take. *First*, it may vest the power to modify in the grantor;[24] *second*, it may designate that the owners of land in a given area may modify.[25]

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21 See Russell Realty Co. v. Hall, 233 S.W. 996 (Tex. Civ. App. 1921), discussed in note 15 supra.

22 Berger v. Van Sweringen Co., 6 Ohio St. 2d 100, 102, 216 N.E. 2d 54, 56-57 (1966).

23 Armstrong v. Leverone, 105 Conn. 464, 470, 136 Atl. 71, 74 (1926); Minner v. City of Lynchburg, 204 Va. 180, 189-90, 129 S.E.2d 673, 679-80 (1963).

24 Brigbt v. Forest Hill Park Dev. Co., 133 N.J. Eq. 170, 175, 31 A.2d 190, 194 (Ch. 1943). See Annot., 4 A.L.R.3d 570, 573-82 (1965). The courts do not seem to distinguish clauses where the power to modify is held solely by the grantor and elauses where the power is held jointly by the grantor and the owner of the particular lot on which the restrictions are to be modified. Suttle v. Bailey, 68 N.M. 283, 284-85, 361 P.2d 325, 325-26 (1961).

25 Gammons v. Kennett Park Dev. Corp., 30 Del. Ch. 525, 532-33, 61 A.2d 391, 395 (1948).

Where the modification clause is of the first type, the general rule, as held in *Suttle v. Bailey*,[26] is that the reservation of power to modify by the grantor negates the existence of a uniform plan.[27] Hence one grantee cannot enforce the restrictions against another grantee. The fact that the grantor has the right to modify is interpreted as marking the restrictions for his benefit only.

There appears to be an exception to this rule. In *Goldberg v. Paul*,[28] for example, the court recognizes a line of New York cases holding that a grantor's reservation of the power to modify negates the existence of a uniform plan.[29] However, the court distinguishes those cases on the ground that they turn on two factors not present in *Goldberg*: either the grantor had retained "contiguous or neighboring" land,[30] or the grantor actually modified the restrictions under his reserved power.[31] In other words, a reservation of power by the grantor may negate a uniform plan when combined with one of these two additional factors. The court concludes that:

> The correct rule appears to be that the reservation of a power in the common grantor to waive or vary the conditions may be considered *as a factor* in determining as a matter of fact whether there was a general plan . . . for uniform development in the particular case. If it appears that there was such a plan or scheme, and the consent of the common grantor has not been given to a modification of the restrictive covenant, a grantee may have remedy against another grantee to enforce the restrictive covenant.[32]

The next question to be examined is the effect of a modification clause of the second type—where the power to modify is vested in the owners of property in a designated area. A grantee holding property within the area designated by the modification clause may enforce the restrictive covenants.[33] The right of a grantee who does not own property within the designated area to enforce the restrictions appears to be unresolved. However, there is some relevant discussion in *Gammons v. Kennett Park Dev. Corp.*[34] In *Gammons* the Supreme Court of Delaware denied enforcement of restrictions in one subdivision by the owner of land in another subdivision on the ground that there was an express limitation on the effect of the restrictions.[35] The modification clause, which provided for the modification of restrictions in a given section when seventy-five

See also Annot., 4 A.L.R. 3d 570, 582-86 (1965). The modification clause will normally designate the percentage of landowners whose consent is necessary to modify. See, e.g., Gammons v. Kennett Park Dev. Corp., supra.

[26] 68 N.M. 283, 361 P.2d 325 (1961).

[27] Id. at 287, 361 P.2d at 327; Rose v. Jasima Realty Corp., 218 App. Div. 646, 650, 219 N.Y. Supp. 222, 226 (2d Dep't 1926); see Annot., 4 A.L.R.3d 570 (1965).

[28] 14 Misc. 2d 988, 178 N.Y.S.2d 349 (Sup. Ct. Nassau County 1958).

[29] Id. at 992, 178 N.Y.S.2d at 354.

[30] Id. at 992-93, 178 N.Y.S.2d at 354.

[31] Id. at 994, 178 N.Y.S.2d at 355.

[32] Id. at 995, 178 N.Y.S.2d at 356. [Emphasis added.] A number of courts have followed similar reasoning. See, e.g., Richmond v. Pennscott Builders, Inc., 43 Misc. 2d 602, 607-08, 251 N.Y.S.2d 845, 850-51 (Sup. Ct., Queens County 1964), aff'd mem., 23 App. Div. 2d 968, 260 N.Y.S.2d 590 (2d Dep't 1965); cf. Franklin v. Elizabeth Realty Co., 202 N.C. 212, 162 S. E. 199 (1932); Elliston v. Reacher, [1908] 2 Ch. 665.

[33] See note 23 supra.

[34] 30 Del. Ch. 525, 61 A.2d 391 (1948).

[35] Id. at 536, 61 A.2d at 397.

per cent of the lot owners in that section consented, was used to support the conclusion that plaintiffs could not enforce the restrictions. The court reasoned:

> This article is more nearly consistent with a section-by-section development than an overall restrictive scheme. If the latter plan were the developer's purpose, one would ordinarily expect to find a requirement that a specified percentage of owners in *all* sections must consent.[36]

The court appears to be saying that if there is a uniform plan over the entire area, the modification clause should be equally broad. Implicit in this reasoning is the notion that the area to be benefited by the restriction, *i.e.*, the area covered by the uniform plan, is coterminous with that covered by the modification clause. Thus, the fact that a plaintiff does not have any power to modify the restriction on defendant's property is evidence that the plaintiff is not a beneficiary of those restrictions.

Berger v. Van Sweringen Co.[37] presents an interesting problem in the application of the modification clause test. The "modification clause" in *Berger* actually consisted of two clauses—one of which was to control before the year 2026, and the other to govern after that date. The first modification clause, paragraph 17 of the instrument imposing the restrictions, is of the first type discussed above, since the power to modify is held solely by the grantor until 2026.[38] Paragraph 18 provides that after 2026 the restrictions may be altered by the owners of all the land on both sides of the highway within the block where the change is sought to be effected.[39] Paragraph 18 appears to be a clause of the second type since the power to modify after 2026 is held by designated grantees on both sides of the highway. In order to use the modification clause as a test of the parties' intention, it was necessary to determine whether paragraph 17 or paragraph 18 controlled. If paragraph 17 had controlled, the enforceability of the restriction would have turned upon whether the case came within the general rule or the exception concerning the grantor's retention of neighboring land or actual use of the power to modify.[40] If the general rule had been applicable, then the restrictions would be deemed for the benefit of the grantor alone, and hence, the plaintiff-grantees in *Berger* could not enforce the restriction. If, on the other hand, the case were found to come within the excep-

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[36] Ibid.

[37] 6 Ohio St. 2d 100, 216 N.E.2d 54 (1966).

[38] Paragraph 17 provides that:

> The Van Sweringen Company reserves the right to waive, change or cancel any and all of the restrictions contained in this instrument or in any other instrument given by the Van Sweringen Company in respect to lots or parcels within the Van Sweringen Company's subdivisions, or elsewhere *if, in its judgment, the development or lack of development warrants the same or if, in its judgment, the ends or purposes of said subdivisions would be better served* . . . .

Id. at 104, 216 N.E.2d at 58. [Emphasis by the court.]

[39] Id. at 103, 216 N.E.2d at 57:

> The herein enumerated restrictions . . . shall run with the land, and shall bind the owner until the first day of May, 2026, in any event, and continuously thereafter, unless and until any proposed change shall have been approved in writing by *the owners of the legal title to all the land on both sides of the highway within the block in which is located the property*, the use of which is sought to be altered by said proposed change. [Emphasis by the court.]

[40] See text accompanying notes 28-32 supra.

tion, then the grantor's reservation of power would not necessarily preclude enforcement by the plaintiffs, since the restrictions were still in force.[41] *Berger* never discusses the effect of the grantor's reservation of power on the right of the plaintiffs to enforce the restrictions. However, since the court did permit enforcement by the plaintiffs, it may have tacitly applied the *Goldberg* exception.[42] The court, however, appears to have found paragraph 18 controlling on the issue of intention. "The fact that such property owners [the plaintiffs] are given *eventual control* over such change of use indicates that they were intended to benefit from the covenants restricting the use of defendants' property."[43] The court's reasoning seems to be that since some of the plaintiffs in *Berger* did own land across the highway from the defendant's property, they would have the power, after 2026, to keep the restrictions on defendants' property in force by not consenting to their modification. Hence, a uniform plan containing both the plaintiffs' and defendants' properties was deemed to exist. The plaintiffs in *Berger*, therefore, had the right to enforce the restrictions.

Since *Berger* permits the enforcement of restrictions across subdivision lines, it may reflect a desire to enlarge the class of property owners entitled to enforce restrictive covenants. To this extent it illustrates a tendency toward better protection of homeowners, a policy which, however, can be effectuated only at the expense of a corresponding decrease in the economic viability of land.

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[41] In Berger the defendant-grantor attempted to modify restrictions burdening the property of the defendant-grantees in order to permit the construction of a shopping center. The court stated:

> This paragraph [the modification clause of Paragraph 17] places great power in the hands of the . . . [grantor] to control the development of property previously sold by it, and such control continues today even though the company no longer has any property to develop. The company has discretion to act, but it must not abuse that discretion . . . .

Berger v. Van Sweringen Co., 6 Ohio St. 2d 100, 104, 216 N.E.2d 54, 58 (1966). Finding that the grantor had, in fact, abused his discretion, the court declared the attempted modification null and void and the restrictions still in force. Id. at 107, 216 N.E.2d at 59-60.

Generally the courts have permitted a grantor to exercise the right to modify where he has reserved that power. Johnson v. Three Bays Properties #2, Inc., 159 So. 2d 924, 926 (Fla. Dist. Ct. App. 1964); Matthews v. Kernewood, Inc., 184 Md. 297, 307, 40 A.2d 522, 526 (1945); Thompson v. Glenwood Community Club, Inc., 191 Ga. 196, 12 S.E.2d 623 (1940); Thrasher v. Bear, 239 Ala. 438, 440, 195 So. 441, 443 (1940). There are a few cases, however, where a clause giving the grantor the right to modify has been declared invalid. Richmond v. Pennscott Builders, Inc., 43 Misc. 2d 602, 606, 251 N.Y.S.2d 845, 850 (Sup. Ct. Queens County 1964), aff'd, 23 App. Div. 2d 968, 260 N.Y.S.2d 590 (2d Dep't 1965); Ward v. McCarthy, 202 App. Div. 849, 194 N.Y.Supp. 987 (2d Dep't 1922), aff'd, 235 N.Y. 615, 139 N.E. 757 (1923). These cases all involved situations where the grantor attempted to waive restrictions after he no longer retained any land in the development. In each case the court held that a grantor may use his reserved right to modify restrictions only as long as he retains some property in the plan.

It is not clear from the opinion in Berger whether the grantor owned any property when it attempted to use its power to modify. However, since the court stated that the right to modify continues in the grantor even though he has conveyed all his property in the area, it rejects the rigid approach of the courts above which found an attempted modification invalid. By striking down the restrictions on the ground that they represented an abuse of the discretionary power vested in the grantor, Berger introduces flexibility into the law of restrictive covenants at the price of certainty.

[42] This conclusion is supported by the court's statement that the grantor had no property to develop in the area at the time Berger was litigated. Berger v. Van Sweringen Co., supra note 41, at 104, 216 N.E.2d at 58.

[43] Id. at 103-04, 216 N.E.2d at 57. [Emphasis added.]

Express Limitations on the Effect of Restrictions

A clause in the original conveyance limiting the application of the restrictions to a designated tract within the property owned by the common grantor may be taken to show an intention to develop the area according to divisional units. A number of cases so hold.[44] In some cases the clause is sufficiently clear as to require very little construction, and a high degree of certainty is attainable. For example, in *Reid v. Standard Oil Co.*[45] the plaintiff's deed recited: "The following restrictions are applicable to and only to the numbered lots shown in said plat."[46]

In other cases, however, the relevant clause is far less clear and is therefore more difficult to interpret. To that extent the certainty achieved by use of this test is somewhat less than that achieved under the plat test. Thus in *Meagher v. Appalachian Elec. Power Co.*,[47] the instrument recited: "it shall be lawful for any other person or persons owning any other lot or lots *in said development or subdivision* to prosecute any proceedings . . . against the person . . . violating . . . any such covenant or restriction."[48] The court concluded that the intent was to exclude a suit by a party not owning land within the subdivision since the instrument expressly conferred the right to sue to enforce the restrictions on any person owning property within the subdivision where the violation occurred.[49]

This interpretation represents one possible construction of the provision quoted above. But it is at least conceivable that the court could have read the provision as defining part but not all of the class who could sue to enforce the restrictions. There does not appear to be any logical *necessity* for saying that because an instrument expressly confers a right on some individuals, all others are to be excluded. Had the court in *Meagher* construed the instrument in this manner it might have found an intention to benefit the plaintiff in the light of the identical restrictions that were imposed on both subdivisions in question.[50]

Similarity of Restrictions

The fourth factor which is deemed relevant in determining whether a uniform plan embraces two subdivisions is the extent to which the restrictions are similar.[51] Where two subdivisions are involved, the imposition of different restric-

[44] Gammons v. Kennett Park Dev. Corp., 30 Del. Ch 525, 536, 61 A.2d 391, 397 (1948); Reid v. Standard Oil Co., 107 Ga. App. 497, 500, 130 S.E.2d 777, 781 (1963); Bein v. McPhaul, 357 S.W.2d 420, 424 (Tex. Civ. App. 1962); Meagher v. Appalachian Elec. Power Co., 195 Va. 138, 149-50, 77 S.E.2d 461, 467 (1953). See also Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 514, 75 S.E.2d 620, 629 (1953).

[45] Supra note 44.

[46] Id. at 498, 130 S.E.2d at 779.

[47] Supra note 44.

[48] Id. at 149, 77 S.E.2d at 467.

[49] Id. at 149-50, 77 S.E.2d at 467.

[50] The plaintiff alleged that identical restrictions existed, and since the court upheld the defendant's demurrer to the bill, this allegation must be deemed true. id. at 141, 77 S.E.2d at 463.

[51] Bein v. McPhaul, 357 S.W.2d 420, 424 (Tex. Civ. App. 1962); Reid v. Standard Oil Co., 107 Ga. App. 497, 502, 130 S.E.2d 777, 782 (1963). See also Russell Realty Co. v. Hall, 233 S.W. 996, 999-1000 (Tex. Civ. App. 1921); Sanford v. Keer, 80 N.J. Eq. 240, 83 Atl., 225 (Ct. Err. & App. 1912). In Sanford v. Keer only one subdivision was involved. The court concluded:

> It is true that these restrictions varied in different sections in accordance with the designs of the promoters . . . but this does not interfere with the integrity of a neighbor-

tions on the subdivisions tends to support the inference that divisional treatment is intended. Thus the dissimilarity in the restrictions tends to negate the inference that a uniform plan exists.[52]

It seems apparent that courts will inevitably have considerable discretion in determining how dissimilar the restrictions must be to indicate that divisional development is intended. Thus, one can expect the results achieved by the use of this test will be less predictable than the results under the other three tests.

CONCLUSION

The determination of whether a person owning land in one subdivision can enforce land use restrictions in another depends upon whether a uniform plan embraces both subdivisions. Four factors have been employed in ascertaining whether such a plan exists: the plat test, the modification clause test, the express limitation test, and the similarity of restrictions test.

Certainty is of central importance here because of the very substantial reliance involved in the purchase of homes from a subdivider. Uncertainty arises from two sources. *First*, the individual tests may not yield predictable results. This is especially true of the similarity of restrictions test and, in some instances, of the express limitation test. *Second*, the application of two or more tests in a single case may yield conflicting results. In *Berger v. Van Sweringen Co.*,[53] for example, application of the plat test would have resulted in a finding that a uniform plan did not embrace both subdivisions, while the modification clause test as applied by the court yielded a contrary result.

It is apparent that there can be very little certainty if courts are free to determine, on an *ad hoc* basis, which of the four tests is to be applied in a given case. Solution of this problem would seem to require either that each jurisdiction designate one of the four tests as controlling, or that some priority among them be established. Since legislative determination of these issues appears unlikely, it falls upon the courts to recognize and clearly delineate the relevant factors in this area, and thereby to provide greater certainty for the purchasers of land. Until this occurs, a lawyer can best serve his client by having all four tests point in a single direction.

*Harvey R. Boller**

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hood scheme [i.e., uniform plan]. Under such circumstances, the covenants applicable to each section become, to a certain extent, a separate scheme for that section, the various covenants on the different sections forming a general scheme for the whole, only in so far as all contain features common and beneficial to all.

Id. at 245-46, 83 Atl. at 228.

[52] In Berger v. Van Sweringen Co. the similarity of the restrictions on the two subdivisions was apparently not at issue since it was not discussed by the court.

[53] 6 Ohio St. 2d 100, 216 N.E.2d 54 (1966).

* Editorial Supervisor, Randall M. Odza.