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Covenants Don't Run Like They Used To

ROGER BERNHARDT

The dispute between the Supreme Court's majority and minority in *Citizens for Covenant Compliance v Anderson* (1995) 12 C4th 345, 47 CR2d 898 (reported at 19 CEB Real Prop L Rep 68 (Mar. 1996)) reminds me of the argument over the flat tax: How much is simplicity worth?

For the majority, speaking through Justice Arabian, the rules of covenants running with the land and equitable servitudes are so complicated that they have to be slimmed down if a modern society is to make sensible use of them; for Justice Kennard, in dissent, the court is not free to ignore every old rule and statute that gets in the way of its drive to simplify things.

The new rule is that a declaration of covenants, conditions, and restrictions (CC&Rs) that was recorded before the subdivider conveyed any lots in the subdivision is binding on all subsequent lot buyers even when their deeds make no reference to the CC&Rs. The old rule was that the CC&Rs did not bind buyers unless their deeds expressly referred to them; there were, however, two "exceptions." Even when an owner's deed was silent, her title would be subject to the CC&Rs if either (1) a previous deed in her own chain of title referred to them (in which case the earlier reference burdened her predecessor's title and then ran as a covenant or equitable servitude to bind her), or (2) an earlier deed to the buyer of some other lot in the subdivision referred to the restrictions (in which case the reference burdened the subdivider's retained land in favor of that earlier buyer, which burden then ran to bind her).

The implicit premise of the majority was that if CC&Rs can in some cases bind buyers who don't expressly consent, why not make them binding in all cases? According to the dissent, the reason you can't is that you have to ignore four settled rules of law to get such a result:

1. Restrictions do not exist until land is subdivided (because while it is under undivided ownership there is no one who can make an owner honor a promise made only to himself), and our recording act (CC §1213) says that a unilateral declaration of CC&Rs does not give constructive notice even when recorded because it is not an instrument transferring title;

2. Promises relating to land must be in writing, as provided in the statute of frauds (CC §1624), meaning that a silent deed cannot be treated as if it contained a promise by the grantee to restrict her title;

3. Under CC §1105, a deed is to be read as transferring the entire fee, not a restricted one; and

4. Under CC §1113, a grant deed impliedly covenants that the grantor has not previously restricted his title.

Since the majority won, those propositions are no longer quite accurate. What does all that mean for attorneys? That depends on whom you represent. The few who represent subdividers and actually draft CC&Rs will probably continue to see that they are both recorded and mentioned in deeds, because that will certainly not hurt. Most attorneys, however, will deal with buyers in subdivisions where CC&Rs are of record. Dealing with such new buyers will not be much of a problem. Henceforth, if a preliminary title report shows previously recorded CC&Rs relating to the property, counsel should simply advise the purchaser that the restrictions affect her, regardless of what her deed or any prior deed in the chain of title says (except perhaps if they all contain some form of appropriate waiver).

The hardest problem will be dealing with previous buyers. If you represented a purchaser last year and saw that no relevant deed properly referred to the CC&Rs, you would or should have said that the restriction was not binding on her because it did not appear "in the only place where

it can be given legal effect, namely in the written instruments exchanged between them which constitute the final expression of their understanding,” as *Riley v Bear Creek Planning Comm’n* (1976) 17 C3d 500, 131 CR 381, and *Werner v Graham* (1919) 181 C 174, 183 P 945, have long taught. That opinion now has to be retracted; the land may be restricted anyway.

But here is the catch. You can’t excuse yourself by saying that the law has changed. The majority opinion, in refusing to make the rule prospective, was adamant that its new rule conforms fully with the “expectation and intent” of homeowners on this matter. Thus, the new rule was apparently always the rule. I fear that makes those of us who thought the opposite (which includes textbook authors, too) look guilty of malpractice. Now our only hope is that the court will say—as it did for the Rule Against Perpetuities—that covenants running with the land are (were) so complicated that no attorney could be expected to get it right anyway!