1. Please provide an Analytical Overview of the Topic.

We continue our study of servitudes a discussion of the scope and termination of covenants. The first of the two subtopics focuses on the legality of covenants that run with the land. The second of the two subtopics focuses on the judicial “termination” or more precisely, judicial modification of a restrictive covenant.

2. What, if ever, is the limitations of covenants that run with the land?

Covenants were legally valid unless they are illegal or unconstitutional (see Shelley v. Kramer, p. 379, p. 783) or violates public policy, such as are arbitrary, spiteful, capricious, unreasonable restraint on alienation, restraints on trade, and if unconscionable. (pp. 766-68).

3. Can a covenant restricting a community to “single family residences” apply to a group home for individuals with AIDS?

According to the court in Hill (p. 773), the answer is no, unenforceable, because a group home is residential and its residents meet the “single family requirement”. As to the FHA, persons with AIDS are considered disabled. As to what is a “sfr,” the cases seem to define it more as a style of house rather than a lifestyle. What is non-residential use in an age of home-based businesses?

4. What about a covenant restricting sales of a home in a given neighborhood to persons of the Caucasian race only?

Such restrictive covenants are very prevalent in deeds throughout this country and were once considered legally enforceable. But on 1948, the court in Shelley v. Kramer (p. 783-5) held that such restrictive covenants could not be legally enforced through state action as such actions are unconstitutional, equal protection for non-whites. In Barrows, the court held that a court could not award damages against a seller who breaches such a covenant. A deed containing a restrictive covenant against a particular race or religion or ethnic group violates section 3604(c) of the Fair Housing Act, which prohibits the printing or publishing of a statement indicating a racial, religious, or ethnic preferences with respect to the buyer of a dwelling.

5. How are restrictive covenants terminated/modified?

Covenants, like easements, can be terminated in a number of ways, including expiration, release, abandonment, merger, estoppel, prescription, condemnation.
(eminent domain), and possibly by operation of the Rule Against Perpetuities. There are also equitable causes for termination or modification such as laches (like adverse possession) and unclean hands. In addition, they may be modified or terminated with the consent of all interested parties. Remember, where do they do when they are terminated in the ownership of one party?

6. When, if ever, can a court terminate a restrictive covenant?

Restrictive covenants may be modified or terminated even without unanimous consent. See pp. 812-813, for common interest communities. In addition, courts may modify or terminate covenants on the basis of changed conditions. See Restatement (Third) of Property (2000), pp. 791-2,

1) when a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. This is a stringent rule: in most cases, when conditions change, the court continues to enforce the covenant by injunctive relief. Note that in both Western Land and Rick, the court refused to terminate the covenants.

2) If modification is not practicable, or would not be effective, a court may terminate the servitude.

3) Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude.

Please do not rush to modify or terminate a restrictive covenant. 1) The changed neighborhood conditions 2) must be within the neighborhood borders (not external or the surrounding area), and 3) must be have substantially diminish the covenant’s benefits. A change in the restricted parcels’ zoning classification does not constitute an adequate changed condition unless the zoning ordinance now prohibits the uses permitted by the covenant.

7. What happened in the Western Land case?

The Supreme Court affirmed the lower court’s enforcement of the residential use restriction, even though substantial changes in traffic patterns and commercial activity had occurred in the vicinity of the subdivision. What option does the defendant have after this case? 1) abide by the injunction, or 2) seek to buy out the restriction.

8. What happened in the West case?

Should the court balance out the financial equities and merely award the complaining party seeking to enforce a restrictive covenant with damages? No, issue the injunction. This is very important because to do otherwise would force
the complaining party to sell their property interest (ala problems with eminent domain).

9. When are damages an appropriate remedy over injunction for breach of a covenant?

Generally, a court can enforce a restrictive covenant by an injunction or by an aware for damages. Should the complaining party pay the other party for the enforcement of the covenant in a changed environment? See Mass., where a statute makes damages rather than an injunction the only remedy in a number of cases. Enforcement of the covenant must be based upon a showing that at the time of the proceeding, it has actual and substantial benefit to the claimant, and if so, the court will award money damages. Do you agree with this approach?

What is the alternative? Holdouts, where an individual owner is singly allowed to holdout against an overall development. See Hurley’s at 49th and Sixth Avenue in New York and compare Paris, Baron Haussmann. See picture, p. 794.

10. What about the Pocono Springs case?

Can an owner abandon their property interest so as to terminate their obligation to pay the cost of affirmative easements? (A very important question for time share owners.) The appellant court agreed with the trial court that there was no abandonment and that the defendants must pay $1,739.82 in past due association fees. Note: p. 796, “no authority exists in Pennsylvania that allows for the abandonment of real property when owned in fee simple with perfect title. Compare, fn 44, “abandonment” of personal property or railway lines not owned in fee simple.

11. What about modification and termination of certain affirmative covenants?

Restatement (Third) of Property, a covenant to pay money or provide services terminates after a reasonable time if the instrument that created the covenant does not specify the total sum due or a definite termination point. This does not apply to an obligation for services or facilities concurrently provided to the burdened estate.

A covenant to pay money or provide services in exchange for services or facilities provided to the burdened estate may be modified or terminated if the obligation becomes excessive in relation to the cost of providing the services or facilities… This does not apply if the servient owner is obligated to pay for services or facilities actually used and the servient owner may practicably obtain the services or facilities from other sources.

The above-stated rules did not apply to obligations to a common interest community or obligations imposed pursuant to a conservation easement.
12. What unique issues arise when a covenant is terminated by condemnation (eminent domain)?

If a government acquires burdened property by eminent domain, it takes free of all private restrictions. And the government may be required to compensate the covenantee (the dominant interest owner for the loss of the benefit), as well as the covenator (for the estate). If the government uses land in violation of a restrictive covenant, the majority rule is that the government must pay damages to the dominant estate owner (and must pay fees where there is an affirmative covenant to do so).

When the government sells property as a tax sale for the owner’s failure to pay property taxes, the courts are split as to whether the new owner takes subject to the pre-existing restrictive covenants.