1. Please provide an Analytical Overview of the Topic.

We continue our study of servitudes with an introduction to the law’s enforcement of equitable servitudes as property interests. It is through the development and utilization of equitable servitudes that many different land use restrictions are created today.

2. How are the various types of servitudes related to each other, if at all?

In order for the subtopics of negative easements and real covenants are to be understood, it is helpful to take an overview of all servitudes. Remember that in the introduction to servitudes (p. 667) the textbook mentions five types of servitudes, including an affirmative easement, a profit, a negative easement, a real covenant, and an equitable servitude. The law recognized a limited number of easements, either affirmative or negative. Real covenants were also limited and were only enforceable in a law court for damages or declaratory judgment. As a result of these limitations and of property owners desires to expand land use restrictions beyond easements and real covenants, the courts in equity recognized and enforced negative covenants (ones in which a grantor grants to another property owner the right to restrict the grantor’s use of the grantor’s land). These negative covenants are called equitable servitudes, enforceable by equitable remedies of injunction and specific performance, and sometimes called negative easements.

3. How did the law come to recognize and enforce an equitable servitude?

In Tulk v. Moxhay (1848), Lord Chancellor Cottenham stated the issue as “the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.” The Chancellor affirmed the Master of the Rolls decision restraining the defendant from converting or using the piece of ground and square garden… for any other purpose than as a … square garden and pleasure ground. The Chancellor’s rationale is that “the price would be affected by the covenant, and nothing could be more inequitable than the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.” But who is the loser in this case?

4. What was the language of the original covenant?
Plaintiff to Elms in fee and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns with the Plaintiff, his heirs, executors, and administrators,

“that Elms, his heirs, and assigns should, and would from time to time, and all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered by any buildings, in neat and ornamental order; and that it should be lawful of the inhabitants of Leicester Square, tenants of the Plaintiff, upon payment of a reasonable rent for the same, to have keys at their own expense and privilege of admission therewith at any time or times into the said square and pleasure ground.”

5. What is the nature of an equitable servitude following the Tulk case?

Following the rule in Tulk, an equitable servitude is a covenant respecting the use of land enforceable by the promisee to the original covenant, his heirs, and assigns against successor owners or possessors in equity regardless of its enforceability at law. The type of covenant had to be a negative one (in which the grantor agreed to not use his land in a certain manner), compared to an affirmative one (in which the grantor promises to use his land in a certain manner). (In England, in Haywood, it was found that affirmative equitable servitudes were not enforceable.)

Following Tulk, an equitable servitude had to be 1) a negative covenant 2) that was created by the original parties with the intention that it bind or benefit assigns or successors in title, 3) there need not be privity of estate (the subsequent purchaser need not acquire the entire estate), 4) the assigns or subsequent purchase must be a bona fide purchaser (usually includes creditors) 5) who have notice of the restriction, and 6) the benefit and burden must touch and concern the land. (Horizontal and vertical privity matter little.)

6. Can successors in title other than bona fide purchasers without notice, take land and avoid a prior equitable servitude?

See p. 748, fn 32, equitable servitudes are enforceable against successors in title who give no consideration for their interests, such as donees, heirs, will beneficiaries, whether they have notice or not.

7. How is an equitable servitude a property interest?

Once the property is conveyed to a successor in title (either the dominant or the servient estate), the current owners have the right to sue or to be sued (in other words in Tulk, the plaintiff could not sue Elms for breach on contract by Moxhay, nor could he sue Moxhay for breach of contract. Can you see why?) Also, if the
government condemns the servient estate, it must pay the dominant estate for the loss of the benefit. Southern California Edison Co. Also, property interests can be given without consideration by the creation of a deed, whereas contractual rights must follow consideration.

8. How do the remedies differ for breach of a real covenant versus breach of an equitable servitude? What does it mean to “sell an injunction”?

Historically, the remedy for breach of a real covenant is damages. The remedy for breach of an equitable servitude is an injunction or enforcement of a lien in a suit in equity. Once a party has established the right to an injunction, he may sell it (p. 747, p. 750) which essentially means that he can release the equitable servitude for a price. Today, in most states law and equity have been merged and a court in an equitable action for an injunction can give damages instead. (See cases, p. 750). And the Restatement (Third) of Property says there should no longer be a distinction between a real covenant and an equitable servitude, and promotes the use of whatever remedy is appropriate including declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and impositions of liens.

9. How are “covenants” (real and equitable servitudes) created?

A real covenant is created by written deed signed by the covenator (grantor), pursuant to the Statute of Frauds. If it is only signed by the grantor but contains a promise made by the grantee (who does not sign it), the grantee’s promise is also (generally) enforceable (against the grantee), by what of conduct of acceptance. A real covenant cannot be created by estoppel, implication, or prescription, as can an easement. (And, of course, a real covenant required privity of contract and of estate and historically only applied to landlord-tenant relationships.)

An equitable servitude can, of course, be created in a written deed, signed by the grantor. But, unlike a real covenant, an equitable servitude can also be created by implication in equity under certain circumstances. If it arises out of a promise, an equitable servitude cannot be obtained by prescription. (Can you see why?)

10. When, if ever, can a negative easement or an equitable servitude be implied?

In Sanborn, the court applied the majority rule that negative restrictions could be implied from a general plan (subdivision plan). In Sanborn, due to the obvious residential nature of the subdivision, the subsequent owner had an obligation to inquire beyond the deed as to whether there were any restrictions. In such cases, courts minimize the relevance of the Statute of Frauds. See also, McQuade and Guillette (p. 754, wherein the court found that the recording of the deeds to the other lots in a subdivision gave constructive notice to the purchaser of the
restrictions. (This means that you are obligated to look beyond your deed to the deeds of surrounding subdivision owners.)

A few jurisdictions, such as California, require that an equitable servitude must be created by a written instrument identifying the burdened lot; it cannot be implied by the existence of restrictions on other lots in a subdivision. (See Riley, p. 754). If the restrictions are found in a recorded subdivision map and are said to run with the land, then they are enforceable by and against subsequent purchasers of lots in the subdivision. Anderson (CA case, p. 754) Compare Mass, where covenants (equitable servitudes) will not be implied from a general plan, but if the covenants on the burdened lots are in writing a general plan may be used to show that the neighbors in the subdivision were intended beneficiaries and may enforce the covenants. (Snow, p. 754). In Virginia, equitable servitudes must follow from a general plan; otherwise, it would have to meet the requirements of a real covenant and if it does, can be enforceable by an injunction. (Barner, p. 754-55)

11. What is the Neponsit about?

Issue: the enforceability of assessment covenants, an affirmative covenant or equitable servitude, and was the Association’s interest one that “touched and concerned the land.” (Can an Association sue a subsequent purchaser for passed due association (like condo dues) fees?) Holding: the affirmative covenant for payment of money touched and concerned the land and could be enforced by the Association, thereby affirming an order denying defendant’s motion for a judgment on the pleadings.

12. What is the role of privity in covenants today?

Today, vertical privity is not required for the enforcement of covenants in law or in equity. New York may require privity of estate (successor to the entire estate) for the benefit to run with the land.

13. Today, where does “touch and concern” the land fit in affirmative covenants?

Courts are reluctant to enforce affirmative covenants, such as to maintain a golf course, see pp. 764-66 for reasons. But see Oceanside, p. 765, where the court did.

14. What about the affirmative covenant to pay money in a common community?

Courts have generally found as enforceable these types of affirmative covenants in a common interest community. See Streams Sports, p. 765.

15. Where does the touch and concern requirement fit today?
Restatement (Third) has done away with it and promotes the intention of the parties, except where a covenant might public policy.

16. When does a covenant violate public policy and what result when it does?

Valid unless it is 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, etc. (pp. 766-68).

17. How does an equitable servitude or real covenant differ from a defeasible estate?

Breach of the former is injunction or damages; breach of the latter is actual or possible forfeiture.