First 20 minutes of class will be devoted to students’ evaluations of teacher’s performance.

1. Please provide an Analytical Overview of the Topic.

We continue our study of servitudes with two subtopics: negative easements and real covenants, both in which the grantor promises (usually for some consideration or mutual promises) to the grantee to restrict the use of the grantor’s property (such as “A promises B that A will use his property for residential use only”). Remember that these various legal devices have the overall purpose of adding value to the affected parcel. The pivotal, overriding legal issue is what types of private land use restrictions created between original owners (A and B) can be enforced by and against assignees and successors in title (C and D).

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. What types of easements are there?

Remember that easements might be either affirmative or negative, and that the law has limited the types of land use deemed to be entitled an easement. The law recognized a limited number (four) of affirmative easements (see pp. 670-671): 1) rights of way, 2) the right to place clothes on lines over neighboring land, 3) the right to nail fruit trees on a neighbor’s wall, and 4) the right to water cattle at a pond, and 5) the right to take water for domestic purposes. (Observe that each of these easements, granted by a servient owner, gave a neighbor the right to enter or
perform an act on the servient land.) Historically, the law also recognized a limited number (four) of negative easements. These include (see p. 736) the right to stop a neighbor from 1) blocking your windows, 2) interfering with the air flowing to your land in a defined channel, 3) removing the support of your building (usually by excavating or removing a supporting wall), and 4) interfering with the flow of water in an artificial stream. (see fn 25, p. 736, noting that some rights of support and to water automatically come with the land, so that these easements are additional rights that can be created privately between property owners). (Negative easements involve the right of the dominant owner to stop the servient owner from doing something on the servient land, by grant of the servient owner, usually for consideration.)

4. What negative easements were recognized in the U.S. more recently?

In the U.S., the law recognized an express easement of unobstructed view of the San Francisco Bay over a neighbor’s house. See Petersen, p. 738. A solar easement, preventing a person from blocking a neighbor’s solar collector, has been recognized in the U.S. There is a specialized type of negative easement, called a conservation easement. (pp. 738-40) These allow a grantor to grant to a charitable organization a restriction on the grantor’s land such that the land could not be built upon or developed. These are often in gross, perpetual, and transferable, and may result in tax deductions. Their perpetual nature has raised many issues. There is also the façade preservation easement and the primary residence easement.

5. Why did the law limit the development (increase the number of negative easements)?

First, as there was originally no way to record servitudes, the law limited them to the most obvious or most traditional easements (such as an affirmative easement of a right of way). Second, as negative easements could arise by prescription, the law restricted their numbers and types otherwise land use would be unduly restricted to past usage. Third, the law had a problem with the concept of a grant by A that could give B the right to control use of A’s land.

6. What are covenants that run with land?

Like easements and profits, there are other two types of covenants (promises affecting land) that operate as property interests (“run with the land”) to benefit or bind successors in title. There are two types of covenants that operate like easements, the real covenant and the equitable servitude.

7. What are real covenants?

Real covenants are those covenants that are enforceable at law by successors in title to the original promisors and promises. A real covenant can be a negative
promise (a promise not to do an act) or an affirmative promise (a promise to do an act). As with easements, a real covenant is not enforceable against an assignee or successor in title who has no notice of it. A real covenant is a property interest that benefits and binds successor in title only if 1) it is legally enforceable, 2) the parties intended that it run with the land, 3) it touches and concerns the land, and 4) there is privity of estate.

8. Why were more legally recognized land use restrictions desired?

They often add value to each parcel involved.

9. What does non-assignability of contracts have to do with covenants?

In the early 19th Century, contract rights and duties were not generally assignable. Promises were not enforceable against a person who was not a party to the contract. Only a person who is a party to a contract (privity) can sue on it. Dunlop Pneumatic Tyre Co. (p. 741). The law developed one exception to the rule of nonassignability: Where there was privity of estate, the judges held, the contract was enforceable by and against assignees. And it has long been established that privity of estate existed between a landlord and a tenant that that most covenants in leases would run with the land (“mutual privity”). They would be enforceable by and against a successor landlord or a successor tenant (see assignment vs sublease, p. 393). Hence, where there was privity of contract and privity of estate, a grantor and grantee could create a covenant that benefited and burdened successors in title. And the English law only found this combination in the landlord-tenant relationship. Keppell v. Bailey (p. 741).

10. What is the American real covenant?

The American real covenant is a promise respecting the use of land that runs with the land at law (in other words a covenant relative to land usage that benefited and burdened successors in title). It must 1) be a covenant that is legally enforceable (consideration, no unlawful purpose), 2) the parties to the covenant must intend for it to pass to assigns and successors in title (using the “and his assigns, and successors in title” indicated this intention), 3) the covenant must touch and concern the land (affect the nature, quality or value of land). The law has required that where a grantor desires to a covenant run to assignees and successors in title that there be one or more type of privity of estate. As previously mention, the privity of estate between a landlord and tenant qualified to allow a grantor in that relationship to create a covenant that benefited and burdened successors in title. Horizontal privity exists between the grantor and grantee of an estate in land. Under the stricter view, horizontal privity could only be satisfied if the covenant was granted when fee title to the land was transferred to the promisor (somewhat like a reservation for easements). Under the more liberal view, horizontal privity is satisfied if the covenant is given in exchange for the conveyance of any interest in land (such as a mutual promise not to block the
other’s view of the lake). The Restatement entirely eliminates the horizontal privity requirement. Vertical privity focuses on the chain of conveyances of both the benefited and the burdened parcels. An unbroken chain of conveyance must exist from the original covenantor to the current owner of the burdened land and form the original covenantee to the current owner of the benefited land. (The chain of conveyance could be broken by a bona fide purchaser without notice or by an adverse possessor.)

11. What happens when a lesser estate than the original covenantor or original covenantee had is transferred?

Generally, if the benefited land is subdivided and sold, the owners of the subdivided land will be entitled to the benefit of the original covenant. If the burdened land is subdivided, there is a different in authority. Many jurisdictions hold that the current possessor of the burdened land will not be bound if he has a lesser estate than the original covenantor (such as a lease of the land, and the covenant was to maintain a fence on the land). Other jurisdictions hold that the current possessor of a lesser estate will be bound by negative covenants, restricting the use of the land (such as for residential use) if the current possessor had notice of it. But those jurisdictions hold that a current possessor of a lesser estate will not be burdened by an affirmative covenants (such as payment of subdivision maintenance fee).