ARIZONA STATE UNIVERSITY COLLEGE OF LAW

PROPERTY LAW, SPRING 2005

Professor Karjala

FINAL EXAMINATION
Part 1 (Essay Question)

MODEL ANSWER

Wednesday May 4, 2005 1:00 p.m.

Instructions

This part of the examination consists of one essay problem that you have 1 hour to complete. Your score on this part of the examination will account for roughly 1/3 of your final grade in the class.

You are permitted to have with you and to use during the examination the textbook, any class handouts (including printouts from the class web site), your class notes, and any other materials made by you personally or by your study group (not photocopied from printed materials). The materials we have studied constitute the legal authorities to which you are authorized to refer in answering the questions. Do not rely on or cite as authorities cases, statutes, or other materials that we have not studied in class.

Please write legibly, double space, and on one side of a bluebook page only.

In answering this problem, do not begin with an elaborate discussion of the facts. Indeed, mere repetition of the facts without relevant legal doctrine will not get you any points at all. Neither, for that matter, will abstract discussion of legal doctrine that is not tied to the facts of the problem. Your analysis should weave relevant legal doctrine together with the facts to create a response that is directly relevant to what has been asked.

GOOD LUCK!
Problem

Developer was the owner of a row of ten one-acre parcels of land, each parcel abutting Green Street. In 1980 Developer sold one each of the parcels to ten separate purchasers. Each of the original deeds contained the following restriction:

Grantees, and their heirs and assigns, agree not to erect on the property any building other than one intended for single-family residence purposes, containing a minimum of 2500 square feet. Grantees also agree not to allow any plant, tree, or shrub more than 3 feet in height to grow or be placed within 15 feet of Green Street. These restrictions will run with the land to all subsequent owners or possessors of the property.

Each deed also referred to a recorded plan for the ten parcels and stated that the restrictions were imposed on each of the ten lots for the benefit of the other lots in the group. A and B now own adjoining parcels in this development, having acquired their properties, improved with houses, by mesne conveyances from the original purchasers from Developer. Each of their deeds contained the above-quoted description and reference to the plan for the ten parcels. A acquired her parcel in 1990, and B acquired his parcel in 2004. Shortly after A acquired her parcel, A planted a tree within 15 feet of Green Street. The tree was 5 feet high when she planted it, and it is now 20 feet high. The tree’s branches droop down in the summer and make it difficult to see traffic on Green Street when exiting from the driveway of B’s house. (Indeed, it seems that visibility onto Green Street is the primary reason for the restriction.) B was aware of the tree when he bought his property but did not realize at the time how much his view would be obstructed. Now that B has moved in, however, he is constantly irritated during the summer by how slowly he must drive when leaving home in order to exit his driveway safely. (As long as B drives slowly, there is no serious risk of an accident resulting from the limited visibility of the traffic. Once the front of his car gets near Green Street he can see enough to go slowly forward so that any oncoming traffic will be able to avoid him, and ultimately visibility becomes clear enough that he can safely pull into the street.)

B asked A to trim or cut down her tree, but A refused. B then reread his deed and the land records and concluded that A’s house was subject, like his, to the restriction quoted above. He showed it to A and demanded that A cut the tree down (at least to no more than 3 feet in height). A again refused. B now seeks your advice as to whether he has any legal ground under the law relating to easements and equitable servitudes to force A to remove the tree. The statute of limitations for adverse possession and for prescriptive easements is 10 years. What advice would you give B? (While these facts may also raise issues concerning common law nuisance, do not discuss them.) Be sure to discuss whether, and why, the law of adverse possession and prescriptive easements applies to termination of the restriction in question.
Model Answer

[Preliminary Comment: This turned out to be a very difficult problem for the class in general. Indeed, virtually no one in the class addressed the question in the last sentence of the problem, namely, whether and why a restrictive covenant could be terminated under the principles of adverse possession. Because one-third of the total possible raw points were allocated to this issue, the scores were tightly bunched, and a single point in raw score ended up being more significant than is normally the case. I actually mentioned this main issue in class as we were finishing up our discussion of easements and covenants, so I felt that the question would be a good and fair one; and it is based on my own experience with a second home in Flagstaff, so it is not too far removed from reality. Moreover, everyone should bear in mind that no one was competing against the question; rather, everyone was competing against everyone else. The scores were curved according to the College’s grading system, so everyone had an equal chance to do well – or poorly. But I apologize to those who left the exam room feeling that they had not had a chance to show their stuff.]

It seems clear that the ten houses subject to the plan are encumbered by an enforceable equitable servitude limiting development to single-family residences and prohibiting tall plants near Green Street. One requirement for an enforceable equitable servitude is that there be intent that the restriction run with the land. Here, such intent is shown by use of the words “Grantees, and their heirs and assigns” and by the express statement in the deeds that the restriction will run. A second requirement is that the restriction must “touch and concern” land. The restrictions in this case are so-called “negative” restrictions, in that they prohibit the affected landowners from doing things with their property that are otherwise legal. Such negative restrictions are invariably held to pass the touch-and-concern test. Finally, any subsequent purchaser must have notice of the restriction at the time of purchase before the burden of the restriction falls upon him. Notice need not be actual, however. Constructive notice through recording or any deed in the chain of title suffices. Here, A’s actual deed recites the restriction, so A had notice of it. Therefore the servitude was at least initially enforceable against A. Courts may terminate restrictive covenants if conditions are so changed that the covenants can no longer accomplish their purpose. Easements, and therefore conceivably equitable servitudes, may also be terminated by abandonment. Finally, there is the question of whether an equitable servitude can be terminated by prescription.

We first note that courts normally enforce equitable servitudes under a reasonableness standard, giving much deference to the homeowners association (if there is one) in interpreting them. Here, a court would have little difficulty finding that the restriction is reasonable, given the restricted visibility that otherwise results (and has resulted here) from the growth of tall plants near the street. Nor does the doctrine of changed conditions apply here. A restriction is not
outmoded if one of its intended beneficiaries continues to benefit from it (Rick v. West, p. 916), and that is the case for B here. Nor is there any evidence that the area has so changed that the original purpose of the restriction cannot be accomplished (Western Land, p. 911). The only thing we know about the original purpose is that it was to help insure visibility by homeowners who seek to drive from their garages onto Green Street, and that purpose seems alive and well, as demonstrated by the facts of this very case. The standard possibilities for terminating restrictive covenants, therefore, do not apply here.

We have learned that affirmative easements may be terminated by, among other things, abandonment as well as by prescription. Abandonment of an affirmative easement is not established by simple nonuse (Presault, p.850). Rather, the owner of the dominant tenement must unequivocally manifest a present intent to relinquish the easement or a purpose inconsistent with its future existence (p.851). If this servitude were an easement, there seems little evidence of intent to abandon the prohibition on tall plants near Green Street. The facts do not indicate that any other properties subject to the restriction are in defiance of it without complaint by others. It is therefore unlikely that the failure to take action by the other landowners to enforce the prohibition against A since 1990 would rise to the level of an abandonment, even if we assume that the benefits flowing from the operation of a negative covenant can be abandoned in the same way that the benefits of an easement can be abandoned.

The issue, then, is whether the part of the restriction concerning tall plants near Green Street is no longer enforceable against A, at least with respect to the tree in question, because the tree has been there, in clear and open violation of the condition, for some 15 years. The statute of limitations for adverse possession and prescriptive easements is 10 years. Do equitable servitudes lose enforceability in the same way that a landowner loses the right to eject a trespasser under adverse possession or prescriptive easement law?

The equitable servitude at issue in this case is closely analogous to a negative easement. We have learned (pp. 856-58) that English courts were reluctant to expand the list of negative easements that they would validate and that the American courts have tended to follow suit, notwithstanding that the reasons for the British reluctance, such as the lack of a recording system, did not apply here. Nevertheless, we could imagine the same fact pattern as arising between two neighbors who mutually agree not to grow tall plants near the street by granting reciprocal negative easements to that effect and recording them. Such easements would be appurtenant to their respective neighboring properties and would therefore run with the land. If one of the neighbors or his successor violated the restriction for the prescriptive period, we would have the issue of whether the easement was terminated by prescription. Analysis of terminating a hypothetical negative easement by prescription informs the analysis of whether a negative covenant can be terminated in the same way.

To end an affirmative easement by prescription, such as a right of ingress and egress, the
servient owner must wrongfully and physically prevent the easement from being used for the prescriptive period (Note 3, p. 855). There is no obvious reason that a similar approach could not be taken to negative easements. We note in passing that negative easements cannot arise by prescription in the U.S., because no matter how long the owner of what would be the servient tenement as not done something with his land (such as not building a tall building that would obstruct the light flowing to his neighbor’s land), that owner would have no trespass action against the neighbor (e.g., for “using” the light that flowed across the previously unobstructed property) (footnote 21, p. 856). Such reasoning does not apply to the termination of negative easements, however. Once a negative easement has been granted, its violation gives rise to a cause of action, at least for damages and today, after the merger of law and equity, for an injunction. The violation of a negative easement is always an affirmative act (doing something in violation of the restriction). Therefore, if those benefitting from the restriction have actual or constructive notice of it and fail to enforce their rights, the analogy to adverse possession and prescriptive easements seems at least superficially analogous. And if negative easements can be terminated by prescription in this way, it is difficult if not impossible to distinguish negative covenants in the form of equitable servitudes.

Is the analogy to adverse possession and prescriptive easements compelling? One theory supporting adverse possession is that we seek to punish those who sleep on their rights. That theory would certainly support terminating the servitude by prescription here, where all nine of the people in a position to enforce the servitude have failed for 15 years to insist upon their rights. Another theory is that adverse possession tends to allow land to be put to more productive uses, so we are willing to relax our normally paramount concern for property rights where owners are insufficiently diligent in checking out periodically what is going on with their properties. It is more difficult, in general, to say that allowing violation of an equitable servitude (or negative easement) puts the property to a more productive use. After all, the landowners in this case did all agree to the restriction and subsequent purchasers took with notice. It may well be that the total value to the other nine property owners here of not having a tree on A’s property near Green Street is greater than the value to A of having the tree, but transaction costs have prevented them from combining together to enforce the covenant. (It is equally probable, however, that those same transaction costs may be preventing all the neighbors from coming together and agreeing to release the covenant. Indeed, the transaction costs in this case might even be higher, because releases require unanimous consent, so one holdout can squelch the deal.) Finally, adverse possession is often defended as a means of providing more certainty of property titles by freeing them of very old potential claims that seem unlikely to be asserted but nevertheless cloud the title. While the existence or nonexistence of a tree near Green Street does not have the same significance for the social order as titles to property, one can imagine other types of violations of restrictive covenants that are much more costly to undue if claims against them can be asserted. (Think, for example, of the Lohmeyer case (p. 580), where a restrictive covenant required two-story houses but the house in question had only one story. If the covenant cannot be terminated by prescription, the house may well become unsaleable, and will certainly...
have a much reduced value, simply because of fear that a beneficiary of the covenant may someday seek to enforce it.)

While the policies supporting adverse possession do not unequivocally lead to allowing the termination of negative easements and restrictive covenants in the same way, I would expect that a court would be persuaded by the argument on the need for certainty and by the directness of the analogy. In this case, there has been (1) an actual violation of the negative covenant, (2) the violation is right there on Green Street for everyone to see, that is, it is open and notorious, (3) the use is adverse to the other covenantees, because their views (especially B’s and his predecessors) are directly restricted by the violation and A has not acted with their permission, (4) the violation has been continuous (the tree was 5 feet tall in 1990 and has just grown bigger with time), (5) for more than the statutory period of 10 years. (This violation has also been “exclusive” to A, although the requirement for exclusivity is usually relaxed for affirmative easements by prescription and seems to have little relevance to the issue of terminating easements by prescription. If someone else is violating that same restriction, that factor should favor rather than preclude termination of the restriction, because it tends to show that disregard for the restriction is not idiosyncratic to A.) I conclude that it is likely that, if B were to seek an injunction against A, A would prevail.