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RESTRICTIVE COVENANTS: WHAT'S NEW, WHAT'S HOT AND WHAT'S NOT

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RESTRICTIVE COVENANTS: WHAT'S NEW, WHAT'S HOT AND WHAT'S NOT[1]

Within the past few years, real estate practitioners and title companies became aware of a hot new topic that falls generally under the heading of deed restrictions and restrictive covenants: the concept of private transfer fees. Both proponents and opponents were forced to resort to musty principles of black-letter law in order to formulate a defense of, or objection to, this concept, which will be discussed in detail in Part B of this paper. To set the stage for an analysis of private transfer fees, and the special issues and challenges relating thereto, Part A of this paper presents a refresher course on Texas law pertaining to the requirements for deed restrictions and other restrictive covenants to run with the land, general requirements for enforceability, and who may enforce these restrictions.

A. WHAT'S NEITHER "NEW" NOR "HOT" – REVIEW OF TEXAS LAW PERTAINING TO RESTRICTIVE COVENANTS

The recent transfer fee controversy provides a convenient opportunity for a brief review of the applicable Texas principles regarding restrictive covenants. It has long been the law in Texas that "an owner of land may contract with respect to their [*sic*] property as they [*sic*] see fit, provided the contracts do not contravene public policy."[2] In this regard, the public policy of the state is declared in its judicial decisions and statutory provisions that are summarized in the following section.

1. Required Elements of an Enforceable Restrictive Covenant in Texas

"A restrictive covenant can bind a successor to the burdened land in two ways: as a covenant that runs with the land at law, or as an equitable servitude."[3] Covenants that run with the land bind the heirs and assigns of the covenanting parties, while personal covenants do not.[4]

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[1] The authors wish to acknowledge the valuable contributions of their colleagues Holly Lewis, Erin Watkins and Kendra Mayer, who respectively performed the legal research that serves as a basis for this paper. It should also be noted that this paper is not intended as legal advice, and that competent legal counsel should be engaged to provide advice concerning specific issues discussed herein and specific real estate transactions.

[2] *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 634 (Tex. 1987) (citing *Goodstein v. Huffman*, 222 S.W.2d 259, 260 (Tex. App.—Dallas 1949, writ ref'd)).

[3] *TX Far West, Ltd. v. Texas Invs. Mgmt., Inc.*, 127 S.W.3d 295, 302 (Tex. App.—Austin 2004, reh'g overruled).

[4] *Veterans Land v. Lesley*, 281 S.W.3d 602, 621 (Tex. App.—Eastland 2009, pet. filed); *Montfort v. Trek Resources, Inc.*, 198 S.W.3d *344*, 355 (Tex. App.—Eastland 2006, no pet.). Regarding personal covenants, it is settled law that, for example, a monetary payment covenant that is "disconnected" from land is personal in nature and does not satisfy the necessary elements to run with the land. *See* discussion at n. 21 *et. seq.*, *infra*.

Numerous Texas judicial decisions[5] have recognized that a covenant runs with the land if:

- It touches and concerns the land;[6]
- It relates to a thing in existence or specifically binds the parties or their assigns;
- It is intended by the original parties to run with the land; and
- The successor to the burden has notice.[7]

Although the second element listed above uniformly appears in the pertinent Texas jurisprudence, no reported case was found that expressly discusses or analyzes this element. Accordingly, this paper will proceed to address the other elements.

Numerous reported Texas cases refer to the touch and concern requirement, but those cases are generally lacking in clear analytical detail and for the most part are bereft of clear, concise explanations of the concept.[8] This lack of clarity regarding the touch and concern requirement is not a problem that is peculiar to Texas. In 1998, following years of criticism as to the vague, confusing, and complex nature of the touch and concern requirement that provided the courts with a wide range of judicial discretion in policing servitudes, the American Law Institute ("ALI") abandoned the touch and concern requirement in Section 3.2 of the *Restatement (Third) of Property: Servitudes*.[9] In its stead, ALI relies on a general presumption that a servitude will run with the land if the original parties so intended, provided the servitude is not illegal, unconstitutional, or against public policy. According to ALI, a servitude violates public policy if the servitude is "arbitrary, spiteful, or capricious", if it "unreasonably burdens a fundamental constitutional right", if it "imposes an unreasonable restraint on alienation", if it "imposes an unreasonable restraint on trade or competition", or if it is "unconscionable", basing its position on freedom of contract as a fundamental principle of the American legal system.[10] As of the date of this paper, however, no reported case was found in which a Texas court either adopted or followed the *Restatement (Third)*.[11] Thus, when analyzing whether a covenant will run with the land, Texas practitioners have no alternative at the moment but to deal with the touch and concern requirement, and must resort to the available case law, which is described below.

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[5] *E.g., Lesley*, 281 S.W.3d at 621; *First Permian, L.L.C. v. Graham*, 212 S.W.3d 368 (Tex. App.—Amarillo 2006, pet. denied); *TX Far West, Ltd.,* 127 S.W.3d at 302; *Inwood,* 736 S.W.2d at 635.

[6] *Spencer's Case,* 5 Co. Rep. 16a, 77 Eng. Rep. 72 (1583) was the first reported judicial decision which stated that for a covenant to run with the land it must "touch or concern" the land, and it must expressly bind assigns.

[7] In addition to these four requirements, there must be "privity of estate" between the parties when the covenant was made, as well as between the parties in a subsequent action to enforce the covenant. *Rolling Lands Investments, L.C. v. Northwest Airport Management, L.P.*, 111 S.W.3d 187, 200 (Tex. App.—Texarkana 2003, *reh'g* overruled); *Westland Oil Dev. Corp. v. Gulf Oil*, 637 S.W.2d 903, 910-911 (Tex.1982); *see also Regency Homes Ass'n v. Egermayer*, 243 Neb. 286, 295-296, 498 N.W.2d 783, 789 (Neb.1993) (in order for a covenant of any type to run with land the party claiming the benefit of the covenant and the party who bears the burden of the covenant must be in privity of estate).

[8] In *Westland Oil, supra* n. 7, 637 S.W.2d at 911, the Supreme Court of Texas observed that the "tests involved" in determining whether the touch and concern requirement is satisfied "are far from absolute" and that courts, in seeking to make this determination, "have consistently relied upon rather general statements in their analysis of the touch and concern requirement."

[9] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000) [hereinafter "*Restatement (Third)*"].

[10] *Id*. § 3.02.

[11] A relatively recent unreported case, *Berkman v. City of Keene*, No. 10-08-00073-CV, 2009 Tex. App. LEXIS 8497 (Tex. App. – Waco Nov. 4, 2009, pet. denied) at n. 5, referred in a footnote to the differing *Restatement (Third)* standards, and recognized that "our Supreme Court has not adopted the view of the *Restatement (Third)*."

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First appeared as part of the conference materials for the
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