

Restrictive Covenants

A. Introduction

The basic problem is relatively easy to understand. Suppose Abigail pays her neighbor Beatrice \$1000 in exchange for a promise that Beatrice will use her land only for residential purposes, because Abigail does not want to live next door to a busy commercial or industrial facility. Suppose that Beatrice then begins to construct a factory on her land. Abigail could sue for breach of contract and obtain appropriate remedies—perhaps including injunctive relief barring Beatrice from building the factory.

But now suppose that instead of building a factory herself, Beatrice sells her land to Clara, who intends to build a factory on the land. Clara didn't promise Abigail anything, and Abigail gave Clara no consideration—they are not in privity of contract. We might therefore conclude that Abigail is out of luck: she cannot enforce a contract against someone who didn't agree to be bound by it. But if that is our conclusion, there is now a huge obstacle to Abigail and Beatrice ever reaching their agreement in the first place: how could Abigail ever trust that her consideration is worth paying if Beatrice can deprive Abigail of the benefit of the bargain by selling her (Beatrice's) land? More generally, if a promise to *refrain* from certain uses will not “run with the land,” can private parties ever effectively resolve their disputes over competing land uses by agreement?

English courts were historically quite resistant to enforcing such restrictions against successors to the promisor's property interest. Only a very small number of negative easements were recognized. Furthermore, actions at law—seeking the remedy of money damages—for breach of a covenant restricting the use of land were available only in quite limited circumstances, in cases involving landlord-tenant relationships. Early American courts were more willing to enforce such covenants outside of the landlord-tenant context, but still required quite strict chains of privity of estate—voluntary transfers of title by written instruments—before they would enforce such covenants by an action for money damages. Of course, where the dispute is over competing uses of neighboring land, perhaps money damages are not the appropriate—or even the desired—remedy. Eventually, landowners with an interest in

enforcing such covenants were able to get injunctions to enforce covenants in some situations.

As courts became more amenable to the enforcement of restrictive covenants by and against successors to the property interests of the original covenanting parties, they developed a set of requirements for such covenants to run with the land. As one court described these requirements:

The prerequisites for a covenant to “run with the land” are these: (1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must “touch and concern” both the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors-in-interest; (4) there must be vertical privity of estate, i.e., privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties.

Leighton v. Leonard, 589 P.2d 279, 281 (Ct. App. Wash. Div. 1 1978). A further requirement is that a restrictive covenant is enforceable only against parties who are on actual or constructive notice of it. *See id.* at 281-282; *accord Inwood N. Homeowners’ Ass’n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

Recently, the Restatement (Third) has attempted to simplify the law of covenants and other servitudes.

Restatement (Third) of Property (Servitudes) (2000)

§ 2.1 Creation of a Servitude

A servitude is created

- (1) if the owner of the property to be burdened
 - (a) enters into a contract or makes a conveyance intended to create a servitude that complies with § 2.7 (Statute of Frauds) or § 2.9 (Exception to the Statute of Frauds); or
 - (b) conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community; or
- (2) [omitted]

§ 2.4 Horizontal Privity Is Not Required to Create a Servitude

No privity relationship between the parties is necessary to create a servitude.

§ 2.6 Creation of Benefits in Gross and Third-Party Beneficiaries

- (1) The benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property, as defined in § 1.5.
- (2) The benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.

§ 2.14 Servitudes Implied from General Plan

Unless the facts or circumstances indicate a contrary intent, conveyance of land pursuant to a general plan of development implies the creation of servitudes as follows:

- (1) Implied Benefits: Each lot included within the general plan is the implied beneficiary of all express and implied servitudes imposed to carry out the general plan.
- (2) Implied Burdens:
 - (a) Language of condition that creates a restriction or other obligation, in order to implement the general plan, creates an implied servitude imposing the same restriction or other obligation.
 - (b) A conveyance by a developer that imposes a servitude on the land conveyed to implement a general plan creates an implied reciprocal servitude burdening all the developer's remaining land included in the general plan, if injustice can be avoided only by implying the reciprocal servitude.

Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank
15 N.E.2d 793 (N.Y. 1938)

LEHMAN, Judge.

The plaintiff, as assignee of Neponsit Realty Company, has brought this action to foreclose a lien upon land which the defendant owns. The lien, it is alleged, arises from a covenant, condition or charge contained in a deed of conveyance of the land from Neponsit Realty Company to a predecessor in title of the defendant. The defendant purchased the land at a judicial sale. The referee's deed to the defendant and every deed in the defendant's chain of title since the conveyance of the land by Neponsit Realty Company purports to convey the property subject to the covenant, condition or charge contained in the original deed....

Upon this appeal the defendant contends that the land which it owns is not subject to any lien or charge which the plaintiff may enforce. Its arguments are confined to serious questions of law. ...On this appeal we may confine our consideration to the merits of these questions, and, in our statement of facts, we drew indiscriminately from the allegations of the complaint and the allegations of the answer.

It appears that in January, 1911, Neponsit Realty Company, as owner of a tract of land in Queens county, caused to be filed in the office of the clerk of the county a map of the land. The tract was developed for a strictly residential community, and Neponsit Realty Company conveyed lots in the tract to purchasers, describing such lots by reference to the filed map and to roads and streets shown thereon. In 1917, Neponsit Realty Company conveyed the land now owned by the defendant to Robert Oldner Deyer and his wife by deed which contained the covenant upon which the plaintiff's cause of action is based.

That covenant provides:

'And the party of the second part for the party of the second part and the heirs, successors and assigns of the party of the second part further covenants that the property conveyed by this deed shall be subject to an annual charge in such an amount as will be fixed by the party of the first part, its successors and assigns, not, however exceeding in any year the sum of four (\$4.00) Dollars per lot 20x100 feet. The assigns of the party of the first part may include a Property Owners' Association which may hereafter be organized for the purposes

referred to in this paragraph, and in case such association is organized the sums in this paragraph provided for shall be payable to such association. The party of the second part for the party of the second part and the heirs, successors and assigns of the party of the second part covenants that they will pay this charge to the party of the first part, its successors and assigns on the first day of May in each and every year, and further covenants that said charge shall on said date in each year become a lien on the land and shall continue to be such lien until fully paid. Such charge shall be payable to the party of the first part or its successors or assigns, and shall be devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part, its successors or assigns. And the party of the second part by the acceptance of this deed hereby expressly vests in the party of the first part, its successors and assigns, the right and power to bring all actions against the owner of the premises hereby conveyed or any part thereof for the collection of such charge and to enforce the aforesaid lien therefor.

‘These covenants shall run with the land and shall be construed as real covenants running with the land until January 31st, 1940, when they shall cease and determine.’

Every subsequent deed of conveyance of the property in the defendant’s chain of title, including the deed from the referee to the defendant, contained, as we have said, a provision that they were made subject to covenants and restrictions of former deeds of record.

There can be no doubt that Neponsit Realty Company intended that the covenant should run with the land and should be enforceable by a property owners association against every owner of property in the residential tract which the realty company was then developing. The language of the covenant admits of no other construction. Regardless of the intention of the parties, a covenant will run with the land and will be enforceable against a subsequent purchaser of the land at the suit of one who claims the benefit of the covenant, only if the covenant complies with certain legal requirements. These requirements rest upon ancient rules and precedents. The age-old essentials of a real covenant, aside from the form of the covenant, may be summarily

formulated as follows: (1) It must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one ‘touching’ or ‘concerning’ the land with which it runs; (3) it must appear that there is ‘privity of estate’ between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant....

The covenant in this case is intended to create a charge or obligation to pay a fixed sum of money to be ‘devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part [the grantor], its successors or assigns.’ It is an affirmative covenant to pay money for use in connection with, but not upon, the land which it is said is subject to the burden of the covenant. Does such a covenant ‘touch’ or ‘concern’ the land? ...In truth such a description or test so formulated is too vague to be of much assistance and judges and academic scholars alike have struggled, not with entire success, to formulate a test at once more satisfactory and more accurate. ‘It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case.’ Clark, *op. cit.* p. 76.

Even though that be true, a determination by a court in one case upon particular facts will often serve to point the way to correct decision in other cases upon analogous facts. Such guideposts may not be disregarded. It has been often said that a covenant to pay a sum of money is a personal affirmative covenant which usually does not concern or touch the land. Such statements are based upon English decisions which hold in effect that only covenants, which compel the covenantor to submit to some *restriction on the use* of his property, touch or concern the land, and that the burden of a covenant which requires the covenantor to do an affirmative act, even on his own land, for the benefit of the owner of a ‘dominant’ estate, does not run with his land. ... [Nevertheless s]ome promises to pay money have been enforced, as covenants running with the land, against subsequent holders of the land who took with notice of the covenant. ...[T]hough it may be inexpedient and perhaps impossible to formulate a rigid test or definition which will be entirely satisfactory or which can be applied mechanically in all cases, we should at least be able to state the problem and find a reasonable method of approach to it. It has been suggested that a covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant, as owners

of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land. That method of approach has the merit of realism. The test is based on the effect of the covenant rather than on technical distinctions. Does the covenant impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land?

Even though we accept that approach and test, it still remains true that whether a particular covenant is sufficiently connected with the use of land to run with the land, must be in many cases a question of degree. A promise to pay for something to be done in connection with the promisor's land does not differ essentially from a promise by the promisor to do the thing himself, and both promises constitute, in a substantial sense, a restriction upon the owner's right to use the land, and a burden upon the legal interest of the owner. On the other hand, a covenant to perform or pay for the performance of an affirmative act disconnected with the use of the land cannot ordinarily touch or concern the land in any substantial degree. Thus, unless we exalt technical form over substance, the distinction between covenants which run with land and covenants which are personal, must depend upon the effect of the covenant on the legal rights which otherwise would flow from ownership of land and which are connected with the land. The problem then is: Does the covenant in purpose and effect substantially alter these rights?

...Looking at the problem presented in this case ... and stressing the intent and substantial effect of the covenant rather than its form, it seems clear that the covenant may properly be said to touch and concern the land of the defendant and its burden should run with the land. True, it calls for payment of a sum of money to be expended for 'public purposes' upon land other than the land conveyed by Neponsit Realty Company to plaintiff's predecessor in title. By that conveyance the grantee, however, obtained not only title to particular lots, but an easement or right of common enjoyment with other property owners in roads, beaches, public parks or spaces and improvements in the same tract. For full enjoyment in common by the defendant and other property owners of these easements or rights, the roads and public places must be maintained. In order that the burden of maintaining public improvements should rest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of enjoyment a covenant

that the burden of paying the cost should be inseparably attached to the land which enjoys the benefit. It is plain that any distinction or definition which would exclude such a covenant from the classification of covenants which 'touch' or 'concern' the land would be based on form and not on substance....

... Another difficulty remains. Though between the grantor and the grantee there was privity of estate, the covenant provides that its benefit shall run to the assigns of the grantor who 'may include a Property Owners' Association which may hereafter be organized for the purposes referred to in this paragraph.' The plaintiff has been organized to receive the sums payable by the property owners and to expend them for the benefit of such owners. Various definitions have been formulated of 'privity of estate' in connection with covenants that run with the land, but none of such definitions seems to cover the relationship between the plaintiff and the defendant in this case. The plaintiff has not succeeded to the ownership of any property of the grantor. It does not appear that it ever had title to the streets or public places upon which charges which are payable to it must be expended. It does not appear that it owns any other property in the residential tract to which any easement or right of enjoyment in such property is appurtenant. It is created solely to act as the assignee of the benefit of the covenant, and it has no interest of its own in the enforcement of the covenant.

The arguments that under such circumstances the plaintiff has no right of action to enforce a covenant running with the land are all based upon a distinction between the corporate property owners association and the property owners for whose benefit the association has been formed. If that distinction may be ignored, then the basis of the arguments is destroyed. How far privity of estate in technical form is necessary to enforce in equity a restrictive covenant upon the use of land, presents an interesting question. Enforcement of such covenants rests upon equitable principles, and at times, at least, the violation 'of the restrictive covenant may be restrained at the suit of one who owns property or for whose benefit the restriction was established, irrespective of whether there were privity either of estate or of contract between the parties, or whether an action at law were maintainable.' *Chesebro v. Moers*, 233 N.Y. 75, 80, 134 N.E. 842, 843, 21 A.L.R. 1270. ... We do not attempt ... to formulate a definite rule as to when, or even whether, covenants in a deed will be enforced, upon equitable principles, against subsequent purchasers with notice, at the suit of a party without

privity of contract or estate. There is no need to resort to such a rule if the courts may look behind the corporate form of the plaintiff.

The corporate plaintiff has been formed as a convenient instrument by which the property owners may advance their common interests. We do not ignore the corporate form when we recognize that the Neponsit Property Owners' Association, Inc., is acting as the agent or representative of the Neponsit property owners. As we have said in another case: when Neponsit Property Owners' Association, Inc., 'was formed, the property owners were expected to, and have looked to that organization as the medium through which enjoyment of their common right might be preserved equally for all.' *Matter of City of New York, Public Beach, Borough of Queens*, 269 N.Y. 64, 75, 199 N.E. 5, 9. Under the conditions thus presented we said: 'It may be difficult, or even impossible to classify into recognized categories the nature of the interest of the membership corporation and its members in the land. The corporate entity cannot be disregarded, nor can the separate interests of the members of the corporation' (page 73, 199 N.E. page 8). Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend. Every reason which in other circumstances may justify the ancient formula may be urged in support of the conclusion that the formula should not be applied in this case. In substance if not in form the covenant is a restrictive covenant which touches and concerns the defendant's land, and in substance, if not in form, there is privity of estate between the plaintiff and the defendant....

Notes and Questions

1. As with easements, restrictive covenants may be implied in particular circumstances, and they may arise by estoppel. The most common context for such a covenant by implication is a common-scheme development, where purchasers acquire an interest in a parcel that is part of a community that appears to have commonly planned features—such as residential uses of particular size and density. Such purchasers may be charged with notice of an implied reciprocal covenant restricting their parcels to uses consistent with the common scheme or plan. *See Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925);

Restatement §§ 2.11 & illus. 7; § 2.14. Conversely, where the seller touts the benefits of such features to purchasers who buy in reliance on the seller's representations, the seller and his successors may be estopped from using the seller's retained land in a manner inconsistent with those uses. Indeed, such an estoppel may even serve as an acceptable substitute for the writing required under the Statute of Frauds. Restatement §§ 2.9-2.10.

FONG V. HASHIMOTO

994 P.2d 500 (Hawaii 2000)

Opinion of the Court by KLEIN, J.

I. SYNOPSIS

We granted the application for a writ of certiorari filed by Petitioners-Appellants Muriel Y. Hashimoto and Susan M. Hashimoto, as Trustees of the Living Trust of Gerald S. Hashimoto and Muriel Y. Hashimoto (the Hashimoto trustees), and Susan M. Hashimoto (Susan) individually (collectively the Hashimotos), to review the decision of the Intermediate Court of Appeals (ICA) in *Fong v. Hashimoto*, 92 Haw. 637, 994 P.2d 569, 1998 WL 71951 (Haw.Ct.App. 1998) (hereinafter, the "ICA's opinion"). In *Fong*, Leonard K.K. Fong and Ellen Lee Fong (Senior Fongs), along with Dale S.N. Fong and Linda L. Fong (Junior Fongs) (collectively Fongs), appealed the circuit court's dissolution of a temporary restraining order (TRO) against the Hashimotos building a two-story home and granting the Hashimotos' motion to dismiss. The ICA vacated and remanded the circuit court's dismissal, holding, *inter alia*, that the retention of legal title, pursuant to an agreement of sale (a/s), is a sufficient interest to impose a restrictive covenant and that the restrictive covenant, burdening the Hashimotos' lot, could also be enforced as an equitable servitude. [W]e disagree with the ICA's analysis and emphasize that Fogarty failed to create a legally enforceable restrictive covenant over Lot 11 simply by describing a one-story height restriction in the deed to Lot 11.

II. DISCUSSION

We agree with the essential facts, as set forth in the ICA's opinion as follows: The parties own lots in an Alewa Heights subdivision, known as the "Fogarty Subdivision," named for the common grantor of the lots, Edward Fogarty. The

subdivision consists of fifteen lots. Upon entering the Fogarty Subdivision, Lots 4 and 5 are adjacent lots located to the left, on the mauka side of the road. The Junior Fongs own Lot 4, and the Senior Fongs own Lot 5. Lot 11, owned by the Hashimotos, is located on the makai side of the road, facing Lots 4 and 5.

The history of the Junior and Senior Fongs' title is as follows. On March 27, 1940, Fogarty entered into an unrecorded a/s to sell Lot 4 to John Carden Austin and Frances W. Austin (Austins). The Austins assigned this a/s to James Akana Ai and Frances Leon Ai (Ais) by an unrecorded assignment, dated May 12, 1942. The administrators of Fogarty's estate conveyed Lot 4 by way of a recorded deed to the Ais on January 24, 1944. The following covenant was contained in the deed:

That at no time shall any building or structure or any part thereof be erected or placed or allowed to remain on [Lot 4] within fifteen (15) feet of the property boundary line on the 20-foot right-of-way adjoining said premises.

The Fogarty-Ai deed did not mention any height or view restrictions. On September 21, 1984, the Ais conveyed Lot 4 to the Junior Fongs through a recorded deed.

On April 4, 1940, Fogarty executed a deed conveying Lot 5 to Noel Lee-Von Howell and Verona O. Howell (Howells). No view or height restrictions were mentioned in the Fogarty-Howell deed. The chain of title from the Howells to the Senior Fongs is unbroken, the Senior Fongs acquiring Lot 5 by way of a November 29, 1968 recorded deed from Martin Fried and L. Louise Fried (Frieds).

By way of an unrecorded a/s dated April 5, 1941, Fogarty agreed to sell Lot 11 to Franklyn J. De Canio and Lucille C. De Canio (De Canios). On June 26, 1943, the administrators of Fogarty's estate conveyed Lot 11 to the De Canios by a recorded deed. The deed provided that "IT IS UNDERSTOOD AND AGREED that the execution of the within indenture by the Grantors shall constitute full compliance with and performance by [Fogarty] and the Grantors of any obligations under [the April 5, 1941 agreement of sale]."

The De Canios agreed to several restrictive covenants by the following provisions in their deed:

AND the Grantees, in consideration of the premises and of One Dollar (\$1.00) received to their satisfaction from the Grantors, do hereby for themselves and their

assigns, and the survivor of them and his or her heirs and assigns, covenant and agree with the Grantors and their successors and assigns, as follows:

1. That at no time shall any building or structure or any part thereof be erected or placed or allowed to remain on the hereinabove described premises of more than one (1) story in height, nor within fifteen (15) feet of the property boundary line on the 20-foot road right-of-way adjoining said premises, nor within five (5) feet of the property boundary line on the 15-foot road right-of-way adjoining said premises.
2. That no deed, lease, mortgage or other conveyance of the premises hereby conveyed will be made unless the same shall in each case contain the same restrictive covenants, including this covenant, either expressly or by appropriate reference, nor unless or until the grantee, lessee, mortgagee, or other person thereunder shall join therein and bind himself, his heirs and assigns to require the same covenants on the part of any grantee, lessee, mortgagee, or other person under any deed, lease, mortgage or other conveyance made by him.
3. That the foregoing covenants shall run with the land hereby conveyed and shall also apply to and be equally binding upon the legal representatives and successors in interest of the parties hereto, whether or not expressly contained in any deed or other instrument whereby any title to or interest in said property is obtained.

(Emphases added.)

The De Canios then conveyed Lot 11 to Adolph J. Mendonca and Violet G. Mendonca (Mendoncas) by way of a recorded deed dated August 16, 1943. The De Canio-Mendonca deed contained the same restrictive covenant provisions as quoted above. In turn, the Mendoncas conveyed Lot 11 to Gerald S. Hashimoto and Muriel Y. Hashimoto (Mr. and Mrs. Hashimoto) in a recorded deed dated February 19, 1946.

The dispute between the parties arose in January 1995, when the Hashimotos began building a two-story home on Lot 11. On April 7, 1995, Ellen L. Fong (Ellen) spoke to the owners of Lot 14, who explained that they did not build a higher house because of the restriction in their deed. Ellen then spoke to Susan's sister, Sandra Suan (Sandra), informing her that the house on Lot 11 might be too high. On April 12, 1995, Sandra obtained the deed to Lot 11 from her father's study and told Susan that there were restrictive covenants in the deed. The Senior Fongs sent a letter dated April 14, 1995 to the Hashimotos' contractor, Armstrong Builders (Armstrong), advising them that the construction of the Hashimotos' home "may be violating certain restrictions placed upon [Lot 11] by the developers [that] are recorded within [the Hashimotos' deed]."

Construction stopped on April 14, 1995, but the Hashimotos instructed Armstrong to resume construction on May 2, 1995.

On May 30, 1995, the Senior Fongs filed a complaint against the Hashimotos seeking declaratory and injunctive relief. The Senior Fongs alleged that "[the Hashimotos'] two-story building, if permitted to remain, w[ould] severely interfere with and shut off the view from the [Senior] Fong's [sic] home, to their great detriment."

On June 2, 1995, the circuit court issued a temporary restraining order (TRO), pursuant to a motion by the Senior Fongs "in order to prevent further harm to [the Senior Fongs], to preserve the status quo and the equities of the parties until a hearing may be held on [the Senior Fongs'] motion for preliminary injunction."

On June 28, 1995, the Junior Fongs filed a motion to intervene pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 24. Representing that their property also benefited from the height restriction on the Hashimotos' lot, and that the Junior Fongs had "an unbroken line [of title] to the grantor of [the Hashimotos'] property[,] the Junior Fongs claimed that it was "necessary" for them to intervene because "their interest may not be protected by [the Senior Fongs'] participation." The circuit court granted the Junior Fongs' motion, and on June 29, 1995, the Junior Fongs filed a complaint seeking the same relief as the Senior Fongs.

Final judgment was entered in favor of the Hashimotos and against the Fongs on October 27, 1995. On November 21, 1995, the Fongs filed their notice of appeal.

On appeal from the circuit court, the ICA held that: (1) legal title to land retained by a vendor pursuant to an a/s is an interest sufficient to permit the vendor to impose restrictions on another parcel of land for the benefit of the land subject to the a/s; (2) because a "common scheme" of one-story and setback restrictions was imposed on the subdivision by the common grantor, and because conveyances evidenced a common scheme existing when the sale of lots in the subdivision began, the restrictions may be enforced as equitable servitudes;

In other words, the ICA held that: (1) Fogarty's retention of legal title to Lot 4 was a sufficient interest to impose the restrictive covenant on Lot 11 in favor of the Fongs' predecessors; (2) there was a common plan for the Fogarty Subdivision that allowed the Fongs to enforce the height restriction as an equitable servitude; (3)

III. ANALYSIS

A. There is no common scheme or plan to support an equitable servitude in favor of the Fongs.

The ICA determined that the height restriction placed in the deed to the Hashimotos' Lot 11 was enforceable, by the Fongs, as an equitable servitude because the height restriction was part of a common scheme or plan created by Fogarty. However, restrictions on only three of the fifteen lots in the subdivision do not constitute a clear "common scheme or plan." *Olson v. Albert*, 523 A.2d 585, 588 (Me. 1987) (restrictions in four of sixteen subdivided lots were insufficient to establish a common scheme). A common grantor may establish a general scheme by conveying the majority of his subdivided lots subject to a restriction that reflects the general scheme. *3 W Partners v. Bridges*, 651 A.2d 387, 389 (Me. 1994).

As the evidence in this case reveals, Fogarty conveyed only three of the fifteen lots in the subdivision with a height restriction. There was also a fourth lot, similarly situated to the three burdened lots, that was not restricted. Moreover, the conveyances and restrictions were generated in a piecemeal fashion, not evidencing a "common scheme or plan." If Fogarty's original intent was to create a subdivision with universal height restrictions, he could have provided for such restrictions at the same time that he provided for setback restrictions. However, Fogarty chose not to describe height restrictions on the plat map filed with the City and County of Honolulu in 1938.

A general building scheme may be defined as one under which a tract of land is divided into building lots, to be sold to purchasers by deeds containing uniform restrictions. *Hagan v. Sabal Palms, Inc.*, 186 So.2d 302, 307 (Fla. Dist. Ct. App.), cert. denied, 192 So.2d 489 (Fla. 1966). The courts will only discern such a scheme from a plan of lots and sales where all the deeds from the common grantor for the lots making up any particular neighborhood group of common benefit therefrom are made subject to the common covenant. *Scull v. Eilenberg*, 121 A. 788, 793 (N.J. Eq. 1923). In the instant case, there was no uniformity throughout the subdivision as to height restrictions because twelve of the fifteen lots in the subdivision were not subjected to a height restriction. Therefore, there was no "common scheme or plan" to support the enforcement of the height restriction, by the Fongs, as an equitable servitude.

B. A restrictive covenant enforceable at law was not created.

The ICA held that an a/s vendor's mere legal interest in an upslope lot is sufficient to impose a height restriction over a downslope lot favoring the upslope lot or lots. We disagree with the ICA's proposition and emphasize that, as a matter of law, a restrictive covenant burdening a downslope lot for the benefit of an upslope lot is not enforceable at law when either (1) the deeds to the affected lots do not contain a recitation establishing which lot or lots are to be benefitted or burdened by the restriction or (2) the common grantor simply does not have a sufficient interest in the affected properties to create an enforceable restrictive covenant with respect to the benefitted lots.

In point of fact, Fogarty, as vendor under the a/s to the Fongs' predecessors in title, did not establish in them the duty to enforce the restrictive covenant over Lot 11 for their or their successors' benefit. There is no reference in the deed to Lot 11 to the property or properties to be benefitted by the restrictive covenant. Thus, because Fogarty did not designate a dominant parcel or parcels with the corresponding right of enforcement in the deed to Lot 11, there can be no legal enforcement of a valid restrictive covenant.

A restrictive covenant is a contract dependent upon reciprocal or mutual burdens and benefits. *Houston Petroleum Co. v. Automotive Products Credit Ass'n*, 87 A.2d 319, 323 (N.J. 1952). Thus, although the Hashimotos had notice that their lot was restricted, their deed did not contain any reference to the dominant parcel or parcels, a required element of a real covenant. 20 Am.Jur.2d Covenants, Conditions and Restrictions § 25 at 594 (1965).

Moreover, Fogarty did not even have the right to create an enforceable restrictive covenant benefiting Lots 4 or 5. On April 4, 1940, the Senior Fongs' Lot 5 was conveyed by deed to the Howells, more than a year before Fogarty entered into an a/s for the Hashimotos' Lot 11. Put simply, Fogarty retained absolutely no interest in the Senior Fongs' Lot 5 at the time that the height restriction over Lot 11 was created. Therefore, as the circuit court properly determined, it is not possible for the Fongs' Lot 5 to be the beneficiary of the height restriction over Lot 11, under any of the theories considered by the ICA, because Fogarty did not have any right to create a restrictive covenant either benefiting or burdening a lot in which he no longer had any interest.

With respect to the Junior Fongs' Lot 4, at the time that the height restriction over Lot 11 was created, Fogarty retained bare legal title to Lot 4 pursuant to an a/s with the Austins. This court's decision in *Bank of Hawaii v. Horwoth*, 71 Haw. 204, 787 P.2d 674 (1990), is the starting point of our analysis. In *Horwoth*, the equitable owners under an a/s were permitted to receive the monetary surplus after the legal title holder went into foreclosure and the property was sold to satisfy the mortgage. However, *Horwoth* did not determine either the range or the scope of rights that the vendor under an a/s retains as legal title holder during the executory period of the a/s. Thus, *Horwoth* does not help us decide whether the vendor under an a/s can burden property he owns for the benefit of property to which he holds bare legal title.

Horwoth was the primary case cited by the Hashimotos and relied upon by the ICA in its analysis.

Nothing that the ICA cites supports its reasoning regarding a vendor's ability to burden or benefit property, as there is no authority providing a vendor the power to create an enforceable restrictive covenant concerning property to which he merely retains bare legal title. We therefore rule, as did the circuit court, that a vendor cannot benefit property previously sold under an a/s. If the burden and benefit were reversed in the instant case, this conclusion becomes even more lucid. For example, if Fogarty had attempted to burden a lot, previously sold pursuant to an a/s for the benefit of a property he still retained, there would be no deliberation at all. It would be absurd to allow a vendor to alter the nature of property rights, where property has been sold via an a/s, to the detriment of the vendee during the executory period. Likewise, we cannot allow a vendor to alter the nature of property rights sold pursuant to an a/s, for the benefit of the vendee, during the executory period. Either result would be unjust.

As the circuit court properly stated in its conclusions of law, Fogarty had an insufficient interest, in both Lots 4 and 5, at the time that he placed the restriction in the deed to Lot 11, to create an enforceable restrictive covenant for the benefit of Lots 4 and 5. Therefore, even without reference to *Hiner*, the Fongs attempt to enforce the height restriction contained in the Hashimotos' deed to Lot 11 must fail.