**Question 1**

A developer owned several acres zoned for mixed use development. The developer prepared a subdivision of his various parcels, filed a subdivision map showing residential lots, obtained all the necessary approvals, and began selling the lots. Each of the deeds conveying lots sold by the developer contained the following:

It is hereby covenanted by the seller that the property conveyed shall be used for residential purposes only, that no industrial, commercial, or manufacturing operations shall be maintained thereon, and that this covenant shall bind the buyer, his heirs and assigns, and their successors.

Two years later, after all but two of the lots had been developed as residences, the developer sold his remaining two lots to a real estate speculation firm. The deed to the firm did not contain any language restricting the use of the property. The firm than sold the property to a supermarket chain, which intended to construct a supermarket thereon. A homeowner who had purchased a lot from the developer located next to the proposed supermarket chain brings suit against the supermarket chain seeking to enjoin construction. Her attorney argues that the lots sold by the developer to the firm and then to the supermarket chain are bound by the same restrictions on use that are contained in the deed by which the homeowner took her property.

Is the homeowner likely to win?

(A) Yes, because the developer established a common development scheme for his entire subdivision and the subdivision appeared to conform to the scheme.

(B) No, because the firm and the supermarket were not aware of the restrictions when they purchased the property.

(C) No, because the restrictions in the homeowner’s deed bind only the purchaser of the land.

(D) No, because the deed by which the firm took the property from the developer did not contain any restrictions on use.

**Question 2**

Two lots and their transfers. Walter owns two adjoining lots (Lots 1 and 2) in a subdivision. Walter conveys Lot 2 to Brian, the deed to Brian stating in pertinent part: “The grantee shall not use the land for any commercial purpose.” Imagine the following four different scenarios that could arise with respect to performance of the covenant made by Brian:

1. The next year Brian opens a store on Lot 2. Walter brings an action against Brian to enforce the covenant.

2. The next year Brian dies, devising Lot 2 to Bunny. Bunny then opens a store on Lot 2. Walter brings an action against Bunny to enforce the covenant.

3. The next year Walter conveys Lot 1 to Willie. Brian, who still owns Lot 2, opens a store on Lot 2. Willie brings an action against Brian to enforce the covenant.

4. The next year Brian dies, devising Lot 2 to Bunny. One month later Walter conveys Lot 1 to Willie. Bunny then opens a store on Lot 2. Willie brings an action against Bunny to enforce the covenant.

In which of the above fact patterns will it be important for the plaintiff to demonstrate that the covenant made by Brian meets the legal requirements for a real covenant?

(A) None of the above fact patterns.

(B) All of the above fact patterns.

(C) 4 only.

(D) 2 and 4.

(E) 2, 3, and 4.

**Question 3**

Living next to a busy highway. Covenants recorded 40 years ago restricted all of the lots in a 90-lot subdivision to residential use only. Homes were constructed on all the lots. Four lots at the edge of the subdivision adjoined Simpson Bridge Road, at the time a two-lane road with residences and small businesses on both sides. Commercial development gradually intensified along Simpson Bridge Road. Today the part of Simpson Bridge Road adjoining the four lots and near the subdivision is a divided eight-lane highway, lined with shopping centers, hotels, restaurants, automobile dealerships, and other businesses. Heavy automobile traffic and proximity to these businesses have made the four lots undesirable for residential purposes. These properties have a market value equal to approximately 60 percent of the value of equivalent properties in the subdivision with interior locations, away from Simpson Bridge Road. On four of the interior properties, homeowners conduct small-scale home businesses. No one has sued them, claiming that they have violated the covenant. The owners of the four lots recently granted a real estate developer an option to purchase their properties. The developer presently is exploring commercial development possibilities. Other homeowners in the subdivision have brought a declaratory judgment action against the four lot owners and the developers, seeking a judgment that the restrictive covenant remains enforceable.

Will the court hold that the “residential use only” covenant is still enforceable?

(A) Yes, because the economic loss incurred by the four lot owners if they continue to abide by the covenant is not severe.

(B) Yes, because the changes that have taken place during the past 40 years are external to the subdivision.

(C) No, because the four lots are no longer suitable for residential use.

(D) No, because no one has enforced the covenant against the four interior lot owners who conduct home businesses.

(E) The outcome will depend upon whether horizontal privity was established when the covenants were created 40 years ago.

**Question 4**

Allison and Bertrand were neighboring land owners who owned fee simples in adjacent parcels of land. The parcels were separated by a fence which lay on Allison's property. Since proper maintenance of the fence was important to Bertrand's property as well as to Allison's, both parties agreed that when the fence needed repairs and painting from time to time, Allison would cause this to be done, and Bertrand would then reimburse Allison for half the cost. The agreement also provided that if Bertrand did not pay a debt that was properly owing, Allison could get a lien on his land for the unpaid debt. The agreement was embodied in a document signed by both parties, and filed in the local real estate records indexed under both Allison's and Bertrand's names. The document did not specifically give Bertrand any right to come upon Allison's land to make the repairs if Allison declined to do so.

Two years after this agreement, Bertrand conveyed his parcel to his daughter, Claire, in fee simple. Claire never explicitly or implicitly promised to pay for repairs to the fence. Five years after this conveyance, Allison spent $1,000 to have the fence extensively repaired and repainted. (There had been intervening repairs which occurred while Bertrand still owned his parcel, and which he paid for. The $1,000 was for work done to repair wear and tear that occurred after Claire took title.) Allison now seeks to recover $500 from either Bertrand or Claire. If both refuse to pay, will Allison's suit be successful against Claire, assuming that there is no special statute in force relevant to this question, and assuming that the common-law approach applies?

**Question 5**

Jerry and Lucy, neighbors, enter into a written agreement whereby they and their successors agree to pay $25/month into a bank account for the maintenance of a wall between their two properties. The wall is locally partially on each tract. Jerry conveys his property to George, and Lucy conveys hers to Cody. The deeds to George and Cody each contain the wall maintenance commitment. Cody defaults on payment into the bank account. George would like to make sure that Cody pays. On what theory should George bring suit, and will he prevail on that theory?

Question 6

Sal owned five adjoining rectangular lots, numbered 1 through 5 inclusive, all fronting on Main Street. All of the lots are in a zone limited to one and two-family residences under the zoning ordinance. Two years ago, Sal conveyed Lots 1, 3, and 5. None of the three deeds contained any restrictions. Each of the new owners built a one-family residence.

One year ago, Sal conveyed Lot 2 to Peter. The deed provided that each of Peter and Sal, their respective heirs and assigns, would use Lots 2 and 4 respectively only for one-family residential purposes. The deed was promptly and properly recorded. Peter built a one-family residence on Lot 2.

Last month, Sal conveyed Lot 4 to Betty. The deed contained no restrictions. The deed from Sal to Peter was in the title report examined by Betty's lawyer. Betty obtained a building permit and commenced construction of a two-family residence on Lot 4.

Peter, joined by the owners of Lots 1, 3, and 5, brought an appropriate action against Betty to enjoin the proposed use of Lot 4, or, alternatively, damages caused by Betty's breach of covenant.

Which is the most appropriate comment concerning the outcome of this action?

(a) All plaintiffs should be awarded their requested judgment for injunction because there was a common development scheme, but award of damages should be denied to all.

(b) Peter should be awarded appropriate remedy, but recovery by the other plaintiffs is doubtful.

(c) Injunction should be denied, but damages should be awarded to all plaintiffs, measured by diminution of market value, if any, suffered as a result of the proximity of Betty's two-family residence.

(d) All plaintiffs should be denied any recovery or relief because the zoning preempts any private scheme of covenants.

Answers:

1. (A) The homeowner will win because the developer established a common development scheme for the entire subdivision and the subdivision appeared to conform to the scheme. An injunction against breaching a covenant may be obtained by enforcing the covenant as an equitable servitude. An equitable servitude can be created by a writing complying with the Statute of Frauds concerning a promise that touches and concerns the land and indicates that the servitude exists, as long as notice is given to the future owners of the burdened land. Here, there was a promise that touched and concerned the land and indicated that a servitude existed (the deed restrictions),but the promise was not contained in the supermarket’s deed. Nevertheless, the court will imply the covenant here. A court will imply a covenant—known as a reciprocal negative servitude—where evidence shows that the developer had a scheme for development when sales began and the grantee in question had notice of the plan. The covenant protects the parties who purchased in reliance on the scheme. Evidence of the scheme can be obtained from the general pattern of other restrictions, and notice can be from actual notice, record notice, or inquiry notice. Here, the supermarket had inquiry notice of the restriction regarding commercial use because of the uniform residential character of the other lots in the development. Thus, the covenant will be implied and (A) is correct. (B) is incorrect because actual awareness of the restriction on the part of the firm and the supermarket is not essential; they have inquiry notice (which is a type of constructive notice). On the other hand, mere notice of the restriction would not be enough if the other elements for an implied negative servitude (common scheme when sales began) are not present. (C) and (D) are incorrect because an implied negative servitude would bind subsequent purchasers whether or not the restriction appeared in their deeds, and despite the fact that the restrictive language in the homeowner’s deed purported to bind only the buyer and her successors. Based on the developer’s representations, the homeowner was entitled to rely on the fact that similar restrictions would be imposed on all other purchasers of the lots.

2. Let’s go down the list to look at each variation. In 1, the original covenantee, Walter, is suing the original covenantor. No successor landowner for either lot is involved. Ordinary contract law will determine whether Walter is entitled to enforce the promise made by Brian. It does not matter whether the covenant is a real covenant capable of running with the land.

In 2, we have the original covenantee, Walter, suing a successor to the original covenantor, Brian. The issue is whether the burden of the covenant runs with the land. For this to happen, the covenant must be a real covenant (or an equitable servitude — but that comes later in this chapter).

In 3, we have a successor to the original covenantee, Walter, suing the original covenantor. The issue is whether the benefit of the covenant runs with the land. For either the burden or the benefit to run with the land, we have to have a real covenant (or an equitable servitude).

In 4 all we’ve done is to cumulate fact patterns 2 and 3. Now a successor to the original covenantee is suing a successor to the original covenantor. Of course, it’s still essential that we have a real covenant (or an equitable servitude) for the action to succeed. Putting it all together, our answer is E.

3. Let’s start at the end by eliminating E, which fails to give a clear answer, claiming that horizontal privity is an issue. We can’t tell from the facts whether horizontal privity between the original parties existed (although it probably did under the concept of “deed privity” because the original subdivision developer probably restricted the lots in connection with sales to lot purchasers). If there was horizontal privity, we have real covenants. If not, we have equitable servitudes. Either way, the same possible affirmative defenses apply.

A and C are a “pair.” They both focus on the same point, the severity of the harm to the four lot owners if the covenant remains in place, but they come down on opposite sides. The 40 percent diminution in value certainly is substantial, but it indicates that the lots still have substantial value if occupied as residences. This means A is preferable to C unless we can find a better choice.

Choice D points to waiver or abandonment as affirmative defenses based on the home businesses that have been established on four interior lots. Either is possible, but there are two substantial weaknesses. First, four out of 90 is a low percentage. Eighty-six out of 90 lots are in compliance. This counsels against either waiver or abandonment, both of which typically are based on noncompliance that is to some degree extensive. Second and probably more importantly, the character of home businesses is different from what the developer no doubt intends to do with the four lots bordering on Simpson Bridge Road. Waiver or abandonment as to home businesses is distinguishable from waiver or abandonment as to full-scale commercial uses that do not take place within a residence.

We’re left with B. The defendants’ principal argument will be that the changed circumstances along Simpson Bridge Road justify releasing their four lots from the covenant. Most courts would disagree because all the changes have taken place outside the subdivision. Even though the defendants’ homes are worth significantly less due to the external changes, courts would likely conclude that their properties ought to serve as a “buffer” to protect the interior lots from commercial infiltration. B is the best choice.

4. No. Since Claire never promised to pay for repairs, the only way Bertrand's promise could be binding on Claire is if that promise was a “covenant running with the land.” In particular, Claire will only be bound if the burden of the covenant runs with the land. At common law, there are several requirements in order for the burden to run. One is that the burden “touch and concern” the land. Here, this requirement is satisfied, since non-payment would result in a lien which would touch and concern the land. But a second requirement in most states is that there must be “horizontal privity” between promisor and promisee. In particular, it remains the general rule in states following the common-law approach that the burden of the covenant may not run with the land where the original parties to the covenant were “strangers to title,” i.e., had no property relationship between them at the time of the promise. Here, this rule is not satisfied: Allison and Bertrand were strangers to title, and thus could not create a covenant the burden of which would run with the land (unless Allison gave Bertrand an easement to come onto Allison's land to make repairs if she did not do so herself; the facts say that this did not happen).

5. George should sue on the theory that the agreement is enforceable as an equitable servitude. If he does so, he will win.

The agreement meets all requirements for an equitable servitude: it touches and concerns both pieces of land (since the money is used to maintain the wall, which is part of both premises and benefits both), there was intent on the part of the original parties (Jerry and Lucy) that the benefits and burdens would run to their successors; and Cody took with knowledge of the servitude (because his deed from Lucy contained the servitude, putting him on constructive notice of it). Therefore, George will be entitled to an order of specific performance, requiring Cody to make the past-due and future payments.

NOTE: Under the traditional rules governing real covenants, George would not be able to recover damages. That’s because Jerry and Lucy had no pre-existing property relationship when they did the maintenance agreement (they were “strangers to each other’s title”), and this fact prevented them from having the horizontal privity traditionally required for the running of a real covenant. So in a state that maintains traditional rules on real covenants, George will have to recover on an equitable servitude theory (i.e., get an order of specific performance) or not recover at all (since he can’t get damages, which require a real covenant).

6. B; lots 1, 3, and 5 were unrestricted (no express restriction) and there is no evidence of a pre-existing common scheme of development so no implied reciprocal easement will be implied into these lots or lots 2 and 4. So the owners of lots 1, 3, and 5 have no claim. So (a) and (c) are incorrect. When Sal conveyed Lot 2 to Peter the deed imposed the restrictive covenant on both lot 2 and 4 (with Lot 4 retained by Sal). When Sal conveyed Lot 4 to Betty the deed included no restrictions, but she had constructive notice of it because it was found in the title report. So the issue is whether the burden of the covenant runs with land in equity and/or at law. It meets all the elements – intent for the burden to run (successors and assigns language), notice, vertical and horizontal privity, and touch and concern. Thus Peter should be able to get be able to get damages or injunction, so (b) is the best answer and (d) is not correct.