

WRITING ASSIGNMENT – ESSAY QUESTION

(Suggested Time – 25 Minutes)

A developer has asked a city for a low-interest loan to help build a 50-unit apartment complex. In return, the city demands a real covenant in law running with the land limiting the use of five of the new units to low-income families.

Can the city create such a real covenant in law that is enforceable? If so, how?

The question is whether the city can create a real covenant in law that limits five of the developer's apartment units to low-income families. And if this is possible, how exactly such a covenant can be created.

First, the type of covenant needs to be identified because this may impact its createability. The covenant could be written as a restrictive covenant in that it would restrict the burdened property—the developer's property—from using five of the units for anything other than low-income families. The covenant could be written as an affirmative covenant by forcing the developer to rent the five units to low-income families. The implications of this choice of framing the covenant as restrictive or affirmative will be discussed below.

There are five requirements to create an enforceable real covenant at law—horizontal privity (HP), vertical privity (VP), writing, intent, and touch and concern (TC). All of these need to be met at the time of creation to create an enforceable covenant against successors of the developer (except under the 3rd restatement with regards to touch and concern—more on this below).

Horizontal Privity: HP in the covenant context is a property transfer relationship (privity of estate) between the burdened and benefited parties. In this case, these would be the city and the developer. Under the 1st restatement, there must be HP. That is, if the city wants to enforce the covenant against future owners of the apartment complex (which I assume they would), there needs to be HP. Under the 3rd restatement, no HP is required.

So, to meet this requirement and make an enforceable covenant, there would need to be HP if we are in a 1st restatement jurisdiction. This means the city would need to have a property transfer containing the covenant. This could be done by having the developer convey the apartment to the city and the city conveying it back with the covenant. Or the low-interest loan from the city could come with the covenant as a requirement. This mortgage would likely create horizontal privity if we are in a title-theory state—where mortgages are created by transferring title to the mortgagee (the one giving the loan) with the mortgagor having a future interest based on complete repayment. But most states are lien-theory states where no

property is transferred when a mortgage is created and thus there would likely not be HP. But perhaps the mortgage, by itself is enough of a property relationship to create property privity.

Vertical Privity: VP is a property transfer relationship between the original parties to the covenant and parties who obtain the burden or benefitted land. Here, the city cares only about the burden running. Under the 1st restatement, VP is required. The 3rd restatement typically requires VP, although there can be some flexibility.

VP is unlikely to be of any concern considering the developer is unlikely to lose ownership via adverse possession—instead the developer would sell the property to another party—creating VP.

Writing: Real covenants are enforceable under the 1st restatement if they are in writing, with the 3rd providing protection for implied reciprocal covenants via some common scheme or plan. Here we can simply require the developer and city agree to the covenant and put it in writing. Access to the low-interest loan may provide the incentive to get the developer to agree to such a covenant in writing.

Intent: The parties must also intend for the covenant to run with the land. Here, the written covenant should include language that binds “future assigns, heirs, or successors” or the like to the covenant requirements as evidence of intent.

Touch and Concern: There are three ways the TC requirement has been articulated.

The first restatement follows one of two approaches. One is the English rule that finds all restrictive covenants TC the land while all affirmative covenants do not. This is where the way in which the covenant is drafted, as discussed above, may matter for enforceability if the jurisdiction follows the English rule approach.

Another is the approach in *Neponsit* where a covenant is found to TC if it imposes, 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. The covenant would burden the developer’s property because the low-income units would depress the price of the regular units. And, presumably the low-income units are meant to help the city, and thus increase the city’s property values overall by giving those with less income more rental choices. The covenant also is connected with the use of the land—how the complex is used—at least to the degree required to TC under the *Neponsit* test.

The third restatement looks at a number of policy factors at the time the covenant is enforced to see if they are met. Of particular concern here would be whether this covenant is “an unreasonable restraint on alienation” since it limits

how the developer can alienate the five units. The key is whether it is unreasonable. The lack of time limit on this covenant is troubling—particularly if the area improves to such a level that there are no low-income families to rent to. The total number of units may also provide insight into whether it is unreasonable—the lower the percentage these low-income units make-up, the less unreasonable a restriction.

TC can therefore likely be met, particularly with some purposeful drafting such as making it a restrictive covenant (if we are in an English rule jurisdiction) or limiting its duration or scope (if we are in a 3rd restatement jurisdiction).

Benefit in Gross: There is a special rule in some jurisdictions that a covenant is not enforceable if the benefit is in gross. Here, such an argument could be made—with the benefit just being for the city, not specific land.

Purposeful drafting could solve this problem by identifying, in the grant, specific lands (city streets, parks, and other public places) that benefit from greater availability of low-income housing.

Conclusion: A valid covenant can be created—it may just require some specific drafting decisions to meet the requirements of HP, VP, Intent, TC, and the benefit not being in gross as discussed above.