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The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger

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Comment

Susan F. French*

The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger

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I. INTRODUCTION

Traditional servitudes doctrine requires that covenant burdens and benefits touch and concern the land if they are to pass automatically to successors of the original covenanting parties. The doctrine, which dates back to 1583,¹ applies regardless of the parties' intent, limiting the kinds of covenants that can be made into servitudes.

There is something intuitively appealing about the touch and concern doctrine of traditional servitudes law: limiting covenants that can run with the land to those that relate to the land—that touch or

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1. See *Spencer's Case*, 77 Eng. Rep. 72 (K.B. 1583). For a brief description of the case and the subsequent development of servitudes law, see JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 857-90 (4th ed. 1998).

concern the land "in a substantial degree"²—seems to make sense. If they don't relate to land, why should they bind successors to the land who have not assumed the obligations? This intuitive sense, coupled with the euphonious character of the phrase, probably accounts for its persistence in our law. Nearly every case involving covenants contains a recital of requirements for creating a running covenant that includes intent, privity, and touch and concern.

Despite its widespread and persistent use, the new Restatement (Third) of Property: Servitudes has abandoned the touch and concern doctrine. Why?

Despite its seeming simplicity, the touch and concern doctrine has proved hard to apply, particularly with respect to covenants to pay money or to perform acts on land other than the burdened land. Many pages of scholarly journals have been filled with attempts to explain and rationalize the touch and concern requirement.³ In recent years, particularly beginning in 1982, the doctrine has been subjected to wholesale attack. From one side, Richard Epstein attacked the doctrine on the ground that it allowed courts to interfere with freedom of contract.⁴ From the other side, I attacked the doctrine on the ground that it was too vague, too difficult to understand, too easily manipulated, too easily used to mask analysis, and prone to lead courts and lawyers into error by failing to focus their attention on the real issues. Despite a spirited defense of the doctrine by Jeffrey Stake,⁵ my position prevailed in the new Restatement, which has replaced the doctrine with a number of other rules and doctrines designed to fulfill many of the functions that have been ascribed to the traditional touch and concern doctrine.

It is not my purpose here to rehash the arguments for and against retention of the traditional touch and concern doctrine in the new Restatement.⁶ Suffice it to say that all aspects that recent commentators

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2. This phrase appears in the famous case, *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*, 15 N.E.2d 793, 796 (N.Y. 1938), the case that led the way to widespread enforceability of covenants to pay assessments to property owner associations for maintenance of community facilities.
 3. The first Restatement of Property restated the doctrine as requiring that performance of the covenant operate to benefit the physical use or enjoyment of land possessed by some party to the covenant. See RESTATEMENT OF PROPERTY § 537 (1944). This requirement applied only to enforcement of covenants at law, not to equitable enforcement. See *id.* § 539.
 4. See Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982).
 5. See Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925.
 6. Some have advocated discarding touch and concern. See Epstein, *supra* note 4, (arguing that the only need for judicial regulation of servitudes is to provide notice by recordation of the privately created interests); Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV.

found valuable about the traditional doctrine, save two,⁷ have been

1261, 1289-92, 1305 (1982)(arguing that improved termination doctrines should replace restrictive creation doctrines; if the agreement to create the servitude is valid, the law should give effect to the parties' intent, enforcing the agreement until it becomes obsolete or unduly burdensome). Others have defended the doctrine. See Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 890-98 (1988)(arguing that requirement protects subsequent purchasers against foolish decisions and prevents promisors and others from behaving opportunistically); Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 150-161 (1978)(arguing that the doctrine helps avoid inefficiency); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179, 1233 (1982)(arguing that somewhat unusual interventionist theory is justified because permanent attachment to land of merely personal obligations is likely to frustrate objectives of private land holding system; doctrine eliminates possibility of creating modern versions of feudal serfdom); Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 661 (1985)("However quaint in formulation and muddled in application, the touch and concern requirement . . . has at least some potential to serve as a modest check against externalities, inadequate foresight, and intergenerational imposition.").

7. Professor Jeffrey E. Stake, *supra* note 5, in his defense of retaining the traditional touch or concern doctrine, argues that it is used by courts to achieve an efficient allocation of the burdens and benefits of covenants among original parties and successors. He argues that courts properly allow burdens or benefits to run to successors only in situations where economic inefficiency is thereby avoided. In his view, the courts appropriately deprive people of the power to create running burdens or benefits unless inefficiency would thereby be avoided.

Although I believe that the question whether the original party, or the successor, can more efficiently perform the burden, or more efficiently receives the benefit, is appropriately taken into consideration in determining what the parties probably intended, I do not believe that courts should substitute their judgment as to efficiency for arrangements that the parties freely arrived at based on their judgment as to what served their best interests. Only if the arrangement is so inefficient, or so unfair, that it would be against public policy to enforce it, should courts refuse to permit the creation of the servitude. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (Tentative Draft No. 7, 1998).

Stake's other argument, which was rejected, is that the touch and concern rubric itself should be retained, rather than replaced by a more direct test aimed at the reasons why courts might justifiably refuse to carry out the intent of the parties. He argues that judges intuitively reach efficient results, but that if explicitly directed to do so, they would find it more difficult to do so. He argues that an explicit efficiency-in-allocation test might lead to less efficient results because courts might overlook subtle inefficiencies, and lawyers unsophisticated in economic analysis might argue false economies or ignore important efficiencies that they are unable to articulate in economic jargon. In other words, lawyers and judges will intuitively do a better job of producing efficient results if asked whether a covenant touches or concerns land than they will if explicitly asked to determine whether placing the benefit or burden on the successor would avoid inefficiency. See Stake, *supra*, note 5, at 933-74.

The Restatement takes the position that judges and lawyers will do a better job if directly asked the question why a particular servitude arrangement agreed to by the parties should not be enforced, rather than asked whether it touches or concerns the land. This new formulation probably avoids the problem foreseen by Stake in that it uses terms familiar to lawyers and judges. Rather than using

retained in the new Restatement. Instead my purpose is, first, to pay tribute to Lawrence Berger's contribution to our current understanding of the touch and concern doctrine, and then to provide a road map to the new Restatement's incorporation of the functions previously attributed to the touch and concern doctrine.

II. A TRIBUTE TO LAWRENCE BERGER

Professor Rabin aptly described the law of real covenants and equitable servitudes when I first encountered it:

[T]he law in this area [real covenants and equitable servitudes] is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.⁸

The first time that I had to teach running real covenants and equitable servitudes was a nightmare.⁹ The materials I had to work with were two lists of requirements, one for covenants to run at law, the other for equitable servitudes. I also had some cases that didn't seem to make any sense. In fact, the lists didn't make much sense either. The lists looked like this:

<u>Covenants at law:</u>	<u>Equitable Servitudes:</u>
Intent	Intent
Writing	Notice
Horizontal Privity	
Lease (England)	
Easement (Mass.)	
Deed (elsewhere)	
Touch or Concern	Touch or Concern (maybe)
Benefits in gross??	No benefits in gross
	No affirmative burdens
Vertical Privity	Vertical Privity
Strict (burden)	None (burden)
Relaxed (benefit)	Relaxed (benefit)

economic jargon, Section 3.1, allows courts to refuse enforcement to arrangements as servitudes if persuaded that the arrangement would violate public policy. Although not limiting possible grounds for public policy violations, Sections 3.4 through 3.7 channel that discussion into questions whether the proposed arrangement would be an unreasonable restraint on alienation or on trade, or whether it would be unconscionable. These are all terms familiar to judges and lawyers, and arguably, at least, leave as much room for intuitive understandings as the old touch or concern rubric.

8. EDWARD RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 489 (1974).
9. Not only was I new to the material—I don't remember meeting real covenants in law school—but I was the only Property teacher in the building that year. Both my property colleagues were on leave. It was really a nightmare!

The lists started out pretty straightforward, but got more and more complicated. The lists finally turned into charts as I tried to fight through the questions whether appurtenant and touch and concern meant the same thing, whether benefits in gross were allowed for real covenants and easements, but not for equitable servitudes, whether adverse possessors were bound on equitable servitudes, but not on real covenants, whether the statute of frauds really did not apply to equitable servitudes and notice really wasn't required for real covenants. Not only did the commentators and jurisdictions go all over the place, but nothing explained why these things mattered.

I was particularly puzzled by the horizontal privity and touch and concern requirements. Why covenants between neighbors could only be enforced by injunction, but covenants imposed by a grantor on a grantee could be enforced by a judgment for damages, made no sense.¹⁰ Although I was initially attracted to the touch and concern doctrine by its euphony and an intuitive affinity for the idea that benefits and burdens that did not touch or concern the land should not run with it, the cases really puzzled me.

For example, in *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*,¹¹ the highest court in New York struggled mightily to find that a homeowners association could enforce a covenant to pay assessments for upkeep of the privately owned roads, parks, beaches, and sewers serving the development. Why on earth shouldn't such covenants bind successors? Was there some reason developers should not be able to set up communities with privately owned and supported infrastructure? And if they were allowable, why shouldn't the property owners association be the logical entity to collect the assessments and manage the common facilities? The court's discussion of whether the covenants touched and concerned the land did not seem to have anything to do with reality. Another baffling point about the case was why the assessment covenants could not be enforced at law. For relatively small amounts of money, that would surely be as sensible as foreclosing a lien.

I could not make heads or tails out of the material on horizontal privity or touch and concern, or the variations in when interests in gross could be created. Most of the books and articles I turned to didn't help. Privity and touch and concern were incantations solemnly invoked and magically applied by courts, often with inconsistent and unpredictable results. Scholars engaged in mystical contemplation of the sacred terms, but their reading of the deep meanings didn't explain why anyone should care whether an obligation touched or

10. In fact, it didn't make any sense. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.4 (Tentative Draft No. 1, 1989)(providing that horizontal privity is not required).

11. 15 N.E.2d 793 (N.Y. 1938).

concerned or whether the original parties were just neighbors, rather than buyers and sellers of land. Even the explanations of what it means to touch and concern were circular. Something touches and concerns if it alters the legal relations of a landowner. Right! If an obligation runs to a successor, it will alter the legal relations; if it doesn't run, it won't. So, how do they decide whether it will or not? This stuff was ridiculous!

I finally decided that, despite the lists, the statute of frauds probably did apply to equitable servitudes, as well as to real covenants, and that the recording acts did apply to real covenants, as well as to equitable servitudes. But for the rest, I finally resorted to telling the students that it didn't seem to make much sense, but they "just had to learn it." I really dreaded having to come back to this subject another year.

Then I found Professor Lawrence Berger's pioneering article, *A Policy Analysis of Promises Respecting the Use of Land*.¹² It was a breath of fresh air. He actually looked at the privity and touch and concern doctrines in operation and found that touch and concern and vertical privity served a real world, important function. What he figured out was that, properly applied, these doctrines free subsequent purchasers from obligations a normal purchaser would not expect to run with the land, regardless of boilerplate in the documents stating that all obligations are intended to run with the land. Professor Berger's work gave me hope that maybe there was some sense in all the tangled mess of servitudes law after all. His article inspired me to return to the subject to try to figure it all out. The result of several years of hard work was my 1982 article, *Toward a Modern Law of Servitudes, Reweaving the Ancient Strands*,¹³ in which I identified the functions of all the traditional servitudes doctrines. The article recommended discarding those that no longer served needed functions and retaining the others, or their functions, in a modernized law of servitudes that would be easier to understand and use. That article in turn led to my appointment as the Reporter for the Restatement of the Law of Property (Third): Servitudes. That project, the last part of which was adopted by the American Law Institute in May, 1998, is currently in the final stages of editing, and should appear in print in 2000.

Without the inspiration of Professor Berger's article, I might well have taken up income taxation of trusts and estates! As it is, I'm not sure that I haven't emerged the worse for wear, but I am sure that no one teaching in this area today should ever have to say "it doesn't make much sense; you'll just have to learn it." With the new

12. 55 MINN. L. REV. 167 (1970).

13. 55 S. CAL. L. REV. 1261 (1982).

Restatement as a tool, I am hopeful that we can soon come to the point where our coverage of servitude creation focuses on the policy choices involved in determinations whether developers, individual grantors, and neighbors should or should not be able to use servitudes to implement various kinds of arrangements whether they involve land uses, financing infrastructure, creating communities of particular character, or other purposes. The tensions between the values of freedom of contract and society's interests in maintaining utility of land resources and a healthy democracy will provide much more interesting material for class discussion, and better training for future lawyers and judges, than the old struggles with privity and touch and concern. All of us who work in this area owe a big thanks to Professor Berger!

III. ROAD MAP TO A DISAGGREGATED TOUCH AND CONCERN DOCTRINE IN THE RESTATEMENT (THIRD)

The touch and concern doctrine operated primarily to limit creation of affirmative covenants that involved anything other than physical activity on the covenantor's own land, and to prevent the creation of benefits in gross. Although it theoretically operated at the point of transfer of the burdened land, in fact it was sometimes invoked long after a successor had come into possession of the burdened land, and provided an opportunity for termination of an obsolete arrangement. The flexibility of the doctrine, due primarily to the vagueness of its content, allowed courts to use it to stop covenants thought to pose unnecessary risks of depressing land values or of unfairly burdening successors who would not have expected to become liable on the covenant. These functions will be addressed under the headings of protecting land values, protecting purchasers from surprises, and modification and termination of servitude arrangements.

First, a preliminary word on the scope and organization of the new Restatement. This Restatement does not cover Landlord-Tenant Law, which is the subject of another Restatement. The only covenants addressed here are covenants between owners of different parcels of land, or covenants between a landowner and another whose interest is in gross. In addition, this Restatement excludes mortgages and similar real property security devices, which are also the subject of another Restatement, and, to the extent they present different considerations from other covenants, this Restatement excludes servitudes used in connection with oil and gas and other natural resource extractive activities.

The subject of the Restatement is servitudes, which includes easements, profits, and covenants. The Restatement has adopted a unified approach to servitudes law, applying the same rules to all servitudes, except where special characteristics of a particular servitude call for

application of a different rule. Chapter One sets forth the scope of the Restatement's coverage and defines servitudes.¹⁴ The number of servitude categories has been substantially reduced by merging irrevocable licenses into easements and negative easements and equitable servitudes into covenants.

Chapter Two sets forth requirements for and various methods of creating servitudes. The only requirements for creating an express voluntary servitude are intent to create an interest that runs with an interest in land,¹⁵ and compliance with the statute of frauds.¹⁶ A servitude that is effectively created under Chapter Two is valid unless it is illegal or against public policy under Chapter Three.¹⁷ Chapter Four sets forth rules for interpretation of servitudes.¹⁸ Chapter Five covers succession to servitudes, setting forth rules to determine how servitude interests are transferred to successors.¹⁹ This chapter also sets forth rules for allocating benefits and burdens when estates affected by servitudes are split into present and future interests, subdivided, adversely possessed, or transferred as the result of a foreclosure sale.²⁰

Chapter Six deals with servitudes used to create and govern common interest communities.²¹ Chapter Seven covers modification and termination of servitudes²² and Chapter Eight, the final chapter, covers enforcement of servitudes.²³ Standing, remedies, and defenses are the principal subjects of Chapter Eight.

14. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 1.1-1.5 (Tentative Draft No. 7, 1998).

15. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.2 (Tentative Draft No. 1, 1989).

16. See *id.* § 2.8. This is not the only way to create a servitude, of course. Implied servitudes based on prior use, references to maps and boundaries, general plans, and necessity, and servitudes created by prescription are all recognized. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.11-2.15 (Tentative Draft No. 1, 1989); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.16-2.17 (Tentative Draft No. 3, 1993). In addition, exceptions may be made to the statute of frauds, and servitudes may be created by estoppel. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.9-2.10 (Tentative Draft No. 1, 1989).

17. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 3.1-3.7 (Tentative Draft No. 2, 1991); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (Tentative Draft No. 7, 1998).

18. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 4.1-4.13 (Tentative Draft No. 4, 1994).

19. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 5.1-5.9 (Tentative Draft No. 5, 1995).

20. See *id.* §§ 5.4, 5.6, 5.7, 5.9.

21. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 6.1-6.21 (Tentative Draft No. 7, 1998).

22. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 7.1-7.15 (Tentative Draft No. 6, 1997).

23. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 8.1-8.5 (Tentative Draft No. 7, 1998).

People who are interested in problems that might have been caused by or addressed by the old touch and concern doctrine may find provisions in Chapters Two, Three, Four, Six, and Seven of interest.

A. Protecting Land Values

The touch and concern doctrine allows courts to protect land resources from the attachment of affirmative burdens that pose a substantial risk of depressing land values by preventing desirable redevelopment or by imposing financial burdens that reduce its marketability. Provisions in the Restatement that permit courts to afford similar protection are found in Chapter Three which permits invalidation of servitude arrangements that violate public policy.²⁴ The basic rule is set forth in Section 3.1. Section 3.2 provides that the touch or concern doctrine has been superseded by the general rule of Section 3.1 and the more specific rules set forth in Sections 3.4 through 3.7. Those rules cover servitudes that are unreasonable restraints on alienation²⁵ unreasonable restraints on trade or competition²⁶ and unconscionable servitudes.²⁷ It should be noted that these rules are broader than the old touch and concern doctrine in that they apply to negative burdens, as well as affirmative ones, but they are also narrower in that they require a finding that the servitude arrangement actually poses such a substantial risk that to allow the arrangement would violate public policy. These rules invite, if not require, an explanation of the real reasons why a court is justified in interfering with the parties' freedom of contract.

Another way in which the touch and concern doctrine protected land from burdens that would prevent desirable redevelopment was by prohibiting benefits in gross. Benefits in gross may be more difficult to remove or renegotiate because of the potential problems in locating benefit holders since they cannot be identified by ownership of a particular parcel of land. However, benefits in gross are also very useful and the old blanket prohibition proved costly. The Restatement solves the problem by authorizing the creation of benefits in gross²⁸ but providing a special rule for termination. Section 7.12, Modification and Termination of a Servitude Held in Gross, provides:

24. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 3.1-3.7 (Tentative Draft No. 2, 1991); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (Tentative Draft No. 7, 1998).

25. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 3.4-3.5 (Tentative Draft No. 2, 1991).

26. See *id.* § 3.6.

27. See *id.* § 3.7.

28. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.6 (Tentative Draft No. 1, 1989). Section 4.6 also liberalizes the old rules on benefits in gross by providing that they are freely transferable unless the parties intended otherwise. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.6 (Tentative Draft No. 4, 1994).

If it has become impossible or impracticable to locate the beneficiaries of a servitude held in gross, a court may modify or terminate the servitude with the consent of those beneficiaries who can be located, subject to suitable provisions for protection of the interests of those who have not been located.²⁹

B. Protecting Purchasers From Surprises

The touch and concern doctrine's function of protecting purchasers from nasty surprises by limiting running benefits and burdens to those that an ordinary purchaser would expect to run, so importantly identified by Professor Berger,³⁰ is addressed by two provisions in the Restatement. Section 4.5 provides rules for determining whether servitude benefits and burdens are appurtenant, in gross, or personal (meaning non-transferable).³¹ Under that section, a benefit is:

(a) appurtenant to an interest in property if it serves a purpose that would be more useful to a successor to a property interest held by the original beneficiary of the servitude at the time the servitude was created than it would be to the original beneficiary after transfer of that interest to a successor;³²

(b) in gross if created in a person who held no property that benefited from the servitude, or if it serves a purpose that would be more useful to the original beneficiary than it would be to a successor to an interest in property held by the original beneficiary at the time the servitude was created;³³

(c) personal if not transferable under the rule stated in §4.6(2).³⁴

The Restatement also differentiates between appurtenant, in gross, and personal burdens.

The burden of a servitude is:

(a) appurtenant if it could be performed more efficiently by a successor to a property interest held by the original obligor at the time the servitude was created than by the original obligor after having transferred that interest to a successor;³⁵

(b) in gross if undertaken by an obligor who held no property that could be burdened by the servitude, or if it could be performed more efficiently by the

29. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.12 (Tentative Draft No. 6, 1997).

30. See *supra* text accompanying note 12.

31. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.5 (Tentative Draft No. 7, 1998) ("Appurtenant, In Gross, and Personal Defined."). This section also goes part way to fulfill the function ascribed to the touch and concern doctrine by Professor Stake, *supra* note 5, by allocating benefits and burdens along lines similar to his efficient allocation test. The only difference is that under the Restatement, the parties would be able to create a different allocation if they manifested their intent clearly enough and did not run afoul of the rule invalidating unreasonable restraints on alienation, or otherwise create an arrangement that would be held to violate public policy.

32. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.5(1)(a) (Tentative Draft No. 4, 1994).

33. *Id.* § 4.5(1)(b).

34. *Id.* § 4.5(1)(c).

35. *Id.* § 4.5(2)(a).

original obligor than by a successor to a property interest held by the original obligor at the time the servitude was created;³⁶

(c) personal if the obligation is not delegable under the rule stated in §4.7(1).³⁷

The rules in Section 4.5 are default rules, rather than mandatory rules, and will yield to a contrary intent of the parties. However, to bind successors to burdens or benefits that would not ordinarily be expected to run, the intent of the parties should be clearly and unmistakably expressed so that a purchaser who checked the records could not legitimately claim unfair surprise.

The other provision which will protect purchasers from nasty surprises is Section 7.13, Extinguishment of Servitude Benefits Under Recording Act. That provision extends greater protection to subsequent purchasers than the old touch and concern doctrine by making it clear that the benefits of servitudes created by prescription, implication, estoppel and oral grant are subject to extinguishment if unrecorded.³⁸

C. Modification and Termination of Obsolete Servitudes

Because litigation does not arise until one of the parties to a servitude wants out of the arrangement, the question whether it is not enforceable because some part of the arrangement did not touch and concern land may not arise until it has been observed for a considerable period of time. In *Eagle Enterprises v. Gross*,³⁹ the New York Court of Appeals held that the burden of a covenant created 30 years earlier to take and pay for water to be supplied to the covenantor's land did not touch and concern the land, and therefore did not bind successors. The decision seems to have been the result of obsolescence or changed conditions⁴⁰ rather than a view that developers should not be allowed to create private water utilities financed by the lots in the development the water supply serves (the logical extension of a finding that the burden did not touch and concern).

Several provisions in the Restatement address modification and termination of servitudes. Section 7.11 provides special rules for mod-

36. *Id.* § 4.5(2)(b).

37. *Id.* § 4.5(2)(c).

38. Exceptions are provided for servitudes providing necessary access and utilities, and servitudes that would be discovered by reasonable inspection or inquiry. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.13(2)-(3) (Tentative Draft No. 6, 1997).

39. 349 N.E.2d 816 (N.Y. 1976).

40. The water supply was created for a summer home development and was provided only from May 1 to October 1. The landowner who wanted out of the covenant had converted his house to a year-round dwelling and had dug his own well. The court found that withdrawal of this owner would not jeopardize the ability of the remaining owners' payments to support the water system.

ification or termination of certain affirmative covenants.⁴¹ Subsection one allows termination, after a reasonable time, of covenants that require payments indefinitely for consideration received in the past (for example, a 1% transfer fee imposed by the grantor on all future sales of the property).⁴² Under subsection two, covenants that require payment for services to the burdened estate may be modified or terminated if the obligation becomes excessive in relation to the cost of providing the services or to the value received by the burdened estate.⁴³ Under subsection two, any modification based on a decrease in value to the burdened estate should take account of any investment made by the covenantee in reasonable reliance on continued validity of the covenant obligation.⁴⁴ The subsection does not apply if the servient owner is only required to pay for services used and if alternative sources of supply are available.⁴⁵ Subsection two would directly allow termination of a covenant in a case like *Eagle Enterprises v. Gross*.

The termination and modification rules of Section 7.11 do not apply to obligations to a community association covered under Chapter Six, or to reciprocal obligations imposed pursuant to a common plan of development which is not a common interest community.⁴⁶ Thus, the ability of communities like Neponsit to continue to rely on all lots in the community to pay to support and maintain common facilities is not jeopardized, while arrangements that benefit outsiders can be modified and terminated. There are two reasons for the exemption. First, in common interest communities and general plan developments, control rests with the property owners, whose interests should all be affected by the amount of the required payments. The problem with covenants to make perpetual payments to outsiders is that outsiders have little or no incentive to bargain or to continue to provide value in return for payments made. Situations in which landowners are required to continue payments at fixed rates, even if the cost of providing service declines, or when landowners are required to pay increasing rates set without reference to increasing costs of providing the service exemplify this problem.

41. See RESTATEMENT (THIRD) OF PROPERTY: SERVIDUTES § 7.11 (Tentative Draft No. 6, 1997).

42. See *id.* § 7.11(1). Such an obligation might be invalid as an unreasonable restraint on alienation, if lacking any rational justification under Section 3.5, or possibly as unconscionable. If not invalid under Section 3, however, it would be terminable after a reasonable time under this section.

43. See RESTATEMENT (THIRD) OF PROPERTY: SERVIDUTES § 7.11(2) (Tentative Draft No. 6, 1997).

44. See *id.*

45. See *id.*

46. See RESTATEMENT (THIRD) OF PROPERTY: SERVIDUTES § 7.11(3) (Tentative Draft No. 6, 1997).

The other reason for exempting common interest communities is that a variety of controls over burdens that may reduce land values or operate unfairly are available under Chapter Six.⁴⁷ Under Sections 6.16 to 6.18, common interest communities are democratically governed by the property owners. Decisions about desired facilities and services and levels of assessments and expenditures are made by the people who have to pay for them. The community association and the governing board have duties, spelled out in Sections 6.13 and 6.14, to treat members fairly and to act reasonably in exercising discretionary powers. Under Section 6.5(2), fees charged for services or use of common property must be "reasonably related to the costs of providing" the service or maintaining the common property or the value of the use or service, unless expressly provided to the contrary in the declaration. Under Section 6.10, property owners enjoy powers to amend the declaration to change covenant obligations. However, the declaration may not be amended to change the basis for allocating voting rights or assessments among the property owners or to prohibit or materially restrict permitted uses of individually owned property. In addition, Section 6.12 provides for a judicial power to excuse compliance with requirements of the governing documents where the provision unreasonably interferes with carrying out the functions of the common interest community and compliance is not necessary to protect legitimate interests of property owners or lenders holding security interests in property. There are also provisions in Sections 6.19 to 6.21 requiring developers to create and turn over control of common property to a property owners association and protecting the rights of purchasers from overreaching by the developer.

Finally, the changed conditions doctrine is set forth in Section 7.10, which provides:

When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, a court may terminate the servitude.⁴⁸

If the purpose of a servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for any use permitted by the servitude, a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude. Conservation and preservation servitudes are not subject to termination under this section.⁴⁹

47. See RESTATEMENT (THIRD) OF PROPERTY: SERVIDUES ch. 6, Common Interest Communities (Tentative Draft No. 7, 1988).

48. RESTATEMENT (THIRD) OF PROPERTY: SERVIDUES § 7.10 (Tentative Draft No. 6, 1997).

49. See *id.* Conservation and preservation servitudes held by governmental bodies and conservation organizations are subject to special rules on enforcement under

IV. CONCLUSION

The touch and concern doctrine was capable of being used to protect against some land burdens that might threaten land values or unfairly surprise land purchasers, and against arrangements that became obsolete. The protection it offered, however, was somewhat erratic, and created obstacles to development of highly useful servitudes, like covenants to pay assessments to common interest community associations and conservation servitudes. In addition, the doctrine exacted a high cost in confusion and complexity, in part by allowing judges to invalidate covenants without explaining what was actually wrong with the particular transaction or arrangement.

The new Restatement places far more emphasis on carrying out the intent of the parties than the old touch and concern doctrine, but has retained the capacity of the judiciary to intervene to prevent servitudes from unduly depressing land values, to prevent unfair surprises to subsequent purchasers, and to terminate obsolete payment arrangements. When judges do intervene to modify or terminate bargained-for servitude arrangements, the Restatement rules are designed to encourage forthright discussion of the grounds for intervention, which should lead to a law of servitudes that is more consistent and predictable and easier to understand.

§ 8.5 (Tentative Draft No. 7, 1988) and a new or renumbered section in Chapter 7 that will be included in the final version of the Restatement.