Fall 1978

QUESTION NO. 11

On June l, 1973, in accordance with a written contract of sale, George deeded some land to City. On the land was a small open bandstand used for summer concerts. The deed contained this language: "To have and to hold so long as City uses the land for park purposes. and should City at any time stop using said land for park purposes, said land shall revert to George, his heirs and assigns forever."

The deed was placed in escrow with Local Loan on the oral understanding that City would deposit the purchase price within 60 days after the date of the deed. Before the deposit was made. the bandstand was destroyed by a fire of unknown origin. City deposited the purchase price in time, but contended that it was entitled to a deduction because of the fire loss. George disagreed, but authorized delivery of the deed and consented not to withdraw the money until they could negotiate the matter.

City took the deed and recorded it at once, but, because of the loss of the bandstand, began using the land for storage of City Street Department trucks. George immediately wrote to City objecting to the use of the land and advising City that he would instruct Local Loan to return the purchase price to City if City would immediately give up possession of the land and reconvey it to George. Three days later, before City had taken any further action, George died.

City then caused the execution and recordation of a deed of the land to George, removed all of the trucks from the land and has requested George's executor to instruct Local Loan to release the escrowed funds to City.

George's executor wants to know whether he should comply with City's request and whether City would have a valid claim to either the land or the funds if he did not. What should he be advised? Discuss.

Answer A to Question 11

The executor needn't return the money to the City. The City did not buy a fee simple absolute interest; it bought a fee simple determinable. If the condition has occurred and the FSD is terminated automatically, City has no right to the return of its consideration.

City's Interest

George seems to have conveyed an interest which is potentially limitless in duration, but which will be automatically terminated upon the occurrence of a condition. The words "so long as" and "the land shall revert" indicate the creation of a fee simple determinable followed by a possibility of reverter. If that is the case, George's estate is automatically entitled to the land when it is clear that the City is not going to use it for summer concerts.

Since courts try to avoid forfeitures, a court might try to stretch the language and construe City's interest as a fee simple subject to a condition subsequent and George's interest as a right of re-entry. This interpretation would mean that the land will not be returned to George's estate until he sues City for possession upon occurrence of the condition (not using land for concerts).

If the court finds that a defeasible fee was created, its effectiveness is not affected by the fact that it may vest, if at all, 21 years after the death of the lives in being. Interests retained in the grantor (poss of reverter, rt of entry, reversion) are vested and not subject to the Rule against Perpetuities. .

An even further stretching of the conditional language and a focus on "to have and to hold" would result in a court construing this interest as a fee simple absolute in the City with a covenant that City will use the land for summer concerts. This interpretation gives the City absolute unlimited ownership and gives George or his heirs a suit for damages for breach of the covenant should the condition occur.

Delivery of the deed to Local Loan

The conditional delivery of the deed to the commercial escrow agent on oral instructions was effective, and parol evidence may be used to prove the conditions. There would not be an effective delivery if G had reserved the power to revoke, but that does not seem to be the case here.

Delivery of the deed to City

George consented to the delivery, consequently, the delivery was not "akin to a theft" and City took title to the property in that effective conveyance.

Risk of Loss

The common law placed the risk of loss on the Buyer (City) in an executory land sale contract. Some jurisdictions (Calif. included), following the uniform Vendor's & Purchaser's. Act, leave the risk of loss on the Seller until the Buyer has either substantial ownership or possession of the property in question.

The parties are free to negotiate the responsibility for risk of loss and if they do so, the contract provisions prevail. That doesn't appear to have been provided for in this contract.

Under the common law majority view, City bears the risk of loss once the contract is executed, but any insurance proceeds George collects on account of the loss will be held in a constructive trust for City. Under the UVPA view, George's estate must pay for the loss occasioned by the fire.

George's Attempt to Recall the Deed

Assuming that George's delivery of the deed to Local was irrevocable and Local's

delivery to City was effective, George cannot cancel the transaction unilaterally and go back to square one. Once a deed has been validly delivered, returning the deed does not overturn the original conveyance.

George's action could be seen as an offer to buy his land back. He would pay the money back and City would re-convey the land. If it was an offer, it is revoked (by operation of law) by George's death before it has been accepted.

George's Executor's Duties

The rights and liabilities of George's estate vary significantly depending on what the City's interest is construed to be.

If City has a FSD - executor for estate gets the land automatically without suing or paying for it (assuming Ct sees condition as having occurred and doesn't allow City to "cure").
If City has FS cond. subs., executor must sue for return of land, but needn't pay.

If City has FSA and covenant, executor has an action for damages for breach of covenant - but City can keep the land unless executor, decides to buy it back.

Answer B to Question 11

The executor need not comply with City's request. When George deeded the land

to City, City received a fee simple determinable with a possibility of reverter remaining in George. This means that if City ever breaches the terms of the deed, i.e., stops using the land for park purposes, title to the land in fee simple absolute automatically reverts back to George, without George having to take any further action.

City may argue that the estate conveyed was a fee simple subject to a condition subsequent (i.e., Grantor must act to exercise his right of re-entry, if the condition is breached) or a fee simple subject to a covenant (i.e, Grantor only gets damages, not the land, for breach), but it would lose. "So long as" language is usually interpreted as creating a fee simple determinable, and here it was expressly stated that when the terms were breached, the land "reverts" back to George. Thus, as soon as City did not use the land for a park, title reverted to George.

City complied with the terms of the escrow. Ordinarily, contracts for the sale of land cannot be subject to oral conditions, but oral conditions are permitted when there is a third party involved in the deal - here, Local Loan.

The issue is what is the effect of destruction of bandstand? This may depend in part upon whether bandstand was personalty or realty. If personalty, the intention of the parties would govern, and City may be entitled to recoverthe value of bandstand or deduct that from the price (since agreements for the sale of personalty are not governed by the Statute of Frauds, this could be proved up by any evidence).

The more likely view is that bandstand was a fixture attached to the land and thus part of the realty. This can be determined from the facts; it was a structure, probably big enough so it was not easily moveable and maybe even affixed to the land.

If realty, courts in the U.S. split on who bears the loss for destruction prior to the conveyance_ The majority rule is the equitable conversion doctrine. When the contract is signed, buyer gets equitable title, and seller retains legal title (conveying this at closing). Thus, any losses after contracting are borne by the buyer. Therefore, buyer would bear the loss, (although if George got any insurance proceeds for bandstand most courts would hold these for City in constructive trust) and City is not entitled to set off for the loss.

The minority rule leaves the risk of loss on the seller, until buyer gets possession. Under this view, George bears the loss - thus he could not convey to City what it had bargained for - land with a bandstand. However, City is not entitled to a reduction of the price. Buyer is entitled to enforce the contract with an abatement of the purchase price only where the defect relates to the quantity or title of land, and here the destruction relates to a fixture
on the land, not quantity or title. Thus, City's only remedy would be to rescind the contract (and recover damages for George's breach, since he did not convey land with a bandstand).

It probably was proper for George to agree not to withdraw the money until negotiations had resolved the matter. He was absolutely entitled to the funds, but the City's promise not to sue over the bandstand was probably sufficient consideration for his changing the condition.

However, when the City breached the terms of the deed by using the land for storage, the land reverted to George automatically. George is now entitled to both the funds and the land, since City got what it paid for - a fee simple determinable.

George's letter to City does not change these rights. First, it was merely an offer, which City did not accept before George's death - thus it was revoked by law. Second, even if a contract, it cannot be enforced because oral contracts for the transfer of land are barred by the Statute of Frauds - these contracts must be in writing. Note that land cannot be reconveyed to the grantor simply by returning the deed - all the formalities of a conveyance must be followed, i.e., there must be delivery - an intent to presently transfer title. The execution and recordation of the deed may be some evidence of this, but City had nothing to convey to George - title had already reverted at the time the land was used for storage. Thus, George's executor

should claim both the land and money.

In the minority jurisdictions, City can get back the money, because it had a right to rescind the contract when bandstand was destroyed. Thus, it is entitled to the funds. Since in a rescission the parties are put in the position before the rescission, there would be no terms of park use for City to breach.

July 2005
Question 2

Developer acquired a large tract of undeveloped land, subdivided the tract into ten lots, and advertised the lots for sale as "Secure, Gated Luxury Home Sites." Developer then entered into a ten-year, written contract with Ace Security, Inc. ("ASI") to provide security for the subdivision in return for an annual fee of $6,000.

Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

> Purchaser(s) hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an annual fee of $600 for 10 years to Ace Security, Inc. for the maintenance of security within the subdivision.

Developer promptly and properly recorded all ten deeds.

One year later, ASI assigned all its rights and obligations under the security contract with Developer to Modem Protection, Inc. ("MPI"), another security service. About the same time, Cora's next-door neighbor, Seller, sold the property to Buyer. Seller's deed to Buyer did not contain the above-quoted clause. Buyer steadfastly refuses to pay any fee to MPI.

MPI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full $6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than $600 a year.

On what theories might Cora reasonably sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses might Buyer reasonably assert, and what is the likely outcome on each of Cora's theories and Buyer's defenses? Discuss.

Answer A to Question 2

2)

Question 2

Cora (C) will assert three different theories: (1) that there was a covenant, the burden of which ran to Buyer (B), and the benefit of which runs to C, (2) that there was an equitable servitude, the burden of which runs to B, and the benefit of which runs to C, and (3) that a negative reciprocal servitude can be implied from a common scheme initiated by Developer (D). C will sue under a covenant theory to obtain damages in the form of the series of $600 payments, or will sue under an equitable servitude theory to require B to pay the $600.

C will assert that he had no notice of either the covenant, equitable servitude or common scheme, and therefore should not have to pay. He will also allege that even if he did have notice, that the assignment of the contractual rights from Ace Security (ASI) to Modern Protection[,] Inc. (MPI) extinguished any obligation he had or notice of an obligation to pay for maintenance of security services.

Cora's Theories of Recovery 1.

Covenant

Cora will assert that the original deed between Developer and Seller created a covenant, the burden of which ran to B, and the benefit of which ran to C. A covenant is a nonpossessory interest in land, that obligates the holder to either do something or refrain from doing something related to his land. For the burden of the covenant to run, there must be (1) a writing that satisfies the statute of frauds, (2) intent of the original contrac[t]ing parties that the covenant bind successors, (3) Horizontal privity between the original parties, (4) Vertical privity between the succeeding parties, (5) the covenant must touch and concern the burdened land [,] 5 [sic] Notice to the burdened party. For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefited land, and (4) there must be vertical privity between the parties.

Running of the burden

Writing

For the burden to run to B, there must be a writing that satisfies the statute of frauds. Here, the original deed was properly written and recorded. Developer inserted the clause covenanting payment in all of the deeds given to the original 10 purchasers. Therefore, there is a writing satisfying the statute of frauds.

Intent

For the burden to run, the original contracting parties must have intended that the benefit run to successor in interest to the land. Here, the deed on its face evidences an intent that the burden run.

It specifically says that the "heirs, successors and assigns" of the deed will be bound to pay the security fees. Therefore the[re] is an intent that the successors- such as B - be bound by the covenant.

Horizontal Privity

For the burden of a covenant to run, there must be horizontal privity between the parties. This requires that the parties be successors in interest - typically this is satisfied by a landlord-tenant, grantor-grantee, or devisor-devisee relationship. Here, the relationship is one of seller-buyer. D was the original seller of the land, and S was the purchaser. S was a successor in interest in the land of D. Therefore there was horizontal privity between the original contracting parties.

Vertical Privity

Vertical privity requires that there be a non-hostile nexus between the original covenanting party and a later purchaser. It is not satisfied in cases in which title is acquired by adverse possession or in some other hostile way. Here, however, S sold the property to B. A sale relationship is a non-hostile nexus, and therefore the requirement of vertical privity is met.

Touch and Concern

Defense by C: B may argue that the covenant here does not touch and concern the land. For the burden to run to a party, the covenant must touch and concern the land, that is, it must burden the holder, and benefit another party in the use and enjoyment of their own land. C will argue that this is not the case here.

B will argue that personal safety of house occupants is not necessarily related to the land. Contracts for security services often are used in matters outside of the home. However, this argument will likely fail. C can argue that the safety services are needed to keep the neighborhood safe. In fact, C and others specifically bought homes in the community because of representations that there would be security services available to keep the land safe. The use an[d] enjoyment of the land would be difficult, if not impossible, without the knowledge that the parties will be safe in their homes. Therefore, C can show that the covenant does in fact touch and concern the land.

Notice

Defense by C: B's primary defense will be that he was not given notice of the covenant. The burden of a covenant may not run unless the party to be burdened has notice of the

covenant. Notice may be (1) Actual, (2) by inquiry, or (3) By Record. The latter two types of notice are types of constructive notice.

-Actual Notice

B will argue that he did not have actual notice of the covenant. Actual notice occurs where the substance of the covenant is actually communicated to the party to be burdened, either by words or in writing. Here, there is no indication that B was told of the covenant in the deed. Therefore, he did not have actual notice.

-Inquiry Notice

A party may be held to be on inquiry notice, if it would be apparent from a reasonable inspection of the community that a covenant applies. C will argue that B was on inquiry notice of the covenant. However, this argument will likely fail.

A reasonable inspection of the community would not have revealed the covenant to pay $600. B might have discovered that the community was protected. There were advertisements claiming that the community was gated and secure. There were probably fences or other signage. However, this notice would be inadequate to tell B that the homeowners themselves were obligated to pay for the security service. The payments for security services may have simply been imputed to the home price, or the funds may have come from elsewhere. Either way, a reasonable inquiry would not have informed B of the existence of the covenant.

-Record Notice

C will argue that B was on record notice of the covenant. Record notice applies where a deed is recorded containing covenants. The burdened party is said to have constructive notice of the covenant that is recorded in his chain of title.

B will argue that he is not on record notice because the covenant was not in his specific deed. This argument will probably fail. A party taking an interest in land, or an agent of theirs, will typically perform a title search. Therefore, they will be held to be on constructive notice of any covenants, easements or other obligations. A simple title search by B would have revealed that the deed from P to S contained a covenant binding successors to pay for the security services.

Therefore, B was on record notice of the existence of the asement.

Running of the Benefit

For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefited land, and (4) there must be vertical privity between the **parties.**

The analysis here will be the same as for the running of the burden, except that horizontal privity will not be required (even though it is present). The original agreement was in writing. The original contracting parties intended that the benefit run. The benefit arguably touches and concerns the land. Furthermore, D and C were in a non-hostile nexus, therefore the requirement of vertical privity is satisfied.

Conclusion: Because the requirements for running of the burden and running of the benefit are present, C can enforce the covenant against B, and will be entitled to damages for B's failure to pay for the security services.

2. Equitable Servitude

C may also attempt to enforce the requirement in the deed as an equitable servitude against B. The requirements for an equitable servitude are less stringent than those required for a covenant - for the burden of an equitable servitude to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties to bind successors, (3) the servitude must touch and concern the land, and (4) notice to the party to whom the covenant is being enforced. If the equitable servitude is enforced, it will allow the party enforcing it to obtain a mandatory injunction. In this

case, enforcement of the servitude would require B to make the $600 payments to MPI.

The analysis for an equitable servitude will be the same as that for the running of the burden of a covenant. There was a writing, there was intent by the original parties, the servitude touches and concerns the land, and arguably, there was notice to B. Therefore, given the forgoing [sic] analysis, C will be able to enforce an equitable servitude against B, and obtain a court order compelling him to pay the fees (subject to any defenses: see below).

3. Reciprocal Servitude Implied from Common Scheme

C may also attempt to enforce the payment of the security fees as a reciprocal servitude based on the original common scheme. A reciprocal negative servitude can be implied from a developer's actions where a developer develops a number of plots of land with a common scheme apparent from the development, and where the development party is on notice of the requirement.

C can argue that there was a common scheme to create a secure and gated community. There were advertisements at the time that the land was developed indicating that a major selling point of the development was that the development would be secure. To that end, the developer entered into a contract with ASI. It is apparent from developer's actions that a common scheme, including maintenance of security in the development, was intended.

The analysis for notice of the common scheme is the same as above - it may have been predicated on actual or constructive notice. Here, B was on record notice of the scheme. Therefore, C can successfully hold B to payment of the security fees on an implied reciprocal servitude theory as well.

Buyer's Defenses

Notice

As noted above, one of B's primary defenses will be that he was not given notice of any covenant or servitude. This argument will fail in most courts, because of the fact that B was on record notice of the covenant, based on a deed in his chain of title.

Touch and Concern

As noted above, B may argue that the covenant at issue does not touch and concern that land. This argument will fail, because the security arrangement will clearly benefit the homeowners in their use and "peace of mind" concerning their homes and personal safety.

Assignment of the Contract from ASI to MPI

B will allege that even if he was obligated to pay ASI based on notice in his deed, he was under no obligation to pay MPI, because of the assignment of the contract. This argument will fail.

Here, ASI has engaged in both an assignment of rights and a delegation of duties. All contract duties are delegable, if they do not change the nature of the services to be received by the benefited party (here, B). Unless B can show that the security services received from MPI will be materially different from those he would receive from AS[, then he cannot allege that the delegation and assignment excuses his duty to pay. There is no reason to think that MPI is any less capable of performing security services than MPI.

Furthermore, once contract rights are assigned and delegated, a party must pay the new party to the contract once he receives notice of the assignment. B knows that he has to pay MPI, therefore he cannot allege that he is not making payments because he doesn't know who to pay.

Answer B to Question 2

2)

What theories might Cora sue Buyer for his refusal to pay the annual $600 fee to MR, what defenses could Buyer raise, and what is the like iv outcome o n each theory?

Cora will argue that the Buyer is bound by a covenant that runs with the land. Cora will further argue that this covenant requires Buyer to pay MCI the $600 per year.

Covenants

A covenant is a promise relating to land that will be enforce[d] at law. Enforcement at law usually gives rise to money damages. Equitable servitudes, which will be discussed later, are enforceable in equity, which often means with an injunction.

Cora will argue that a valid covenant was created when each lot owner signed the deed with Developer that contained the clause that each purchaser, including heirs, successors, and assigns, will have to pay an annual fee of $600 to Ace Security. This covenant was in writing[;] Developer recorded all the deeds.

Will the burden of the covenant run?

Cora will argue that even though Seller was the person who initially signed the deed containing the covenant, the burden of the covenant should run to Buyer. The burden of a covenant will run to a successor in interest if 1) the initial covenant was in writing, 2) there was intent from the initial people creating the covenant that it would run to successors, 3) the covenant touches and concerns land, 4) there exists horizontal and vertical privity, and 5) the successor in interest had notice of the existence of the covenant.

Writing:

The initial covenant was in writing because it was included in the deed that each lot purchaser signed in the contract with Developer. Therefor, this requirement has been met.

Intent:

There also appears to be intent that the covenant bind successors in interest. This is because the deed which Developer and Seller signed contained the phrase "hereby agree on their own behalf and on behalf of their heirs, successors, and assigns." This is clear evidence that the original parties intended the burden to run.

Touch and Concern:

A covenant will be considered to touch and concern land if it relates to the land and affects each covenant holder as landowners. Here, the covenant was to provide security and maintenance within the subdivision. This probably will be considered to touch and concern land because the safety and maintenance of the subdivision has a clear impact on each landowner's use and enjoyment of his or her lot. The covenant was not to provide personal security to the landowners, but rather to secure the land that was conveyed in the deed. Therefore, the covenant likely will be considered to touch and concern land.

Horizontal and Vertical Privity:

There must also be horizontal and vertical privity in order for a successor in interest to be bound by the burden of a covenant. Horizontal equity deals with the relationship between the original parties. Here, the original parties are Developer and Seller. There must be some connection in this relationship, such as landlord-tenant, grantor-grantee, etc. Here, Developer owned the large tract of undeveloped land that was eventually turned into the ten lots. Then, Developer conveyed one of the lots that it owned to Seller. This will satisfy the requirement of horizontal privity.

Vertical privity relates to the relationship between the original party and the successor who may be bound by the covenant. Vertical privity will usually be satisfied so long as the relationship between the two parties is not hostile, such as when the new owner has acquired ownership by adverse possession. Here, Seller sold the property to Buyer. Therefore, this will satisfy the vertical privity requirement.

Notice:

The final requirement for the burden of a covenant to run to successors is notice to the successor in interest. A successor will be deemed to be on notice of the covenant if there is 1) actual, 2) inquiry, or 3) record notice of the covenant. Actual notice is if the successor was actually aware of the covenant. Inquiry notice is where the successor would have discovered the existence

of the covenant had she inspected the land as a reasonable person would have. Record notice occurs when the successor would have discovered the covenant if an inspection of the records had taken place.

Here, there is no evidence that Buyer had actual notice of the covenant at the time that she bought the land from Seller. Also, it is unclear whether Buyer was on inquiry notice. If Buyer had inspected the land prior to purchase, Buyer may have noticed that the land was being maintained and secured by a company. If Buyer had seen this, she should have also probably concluded that each landowner was partially paying for this maintenance and security service. Therefore, Buyer may be deemed to be on inquiry notice.

Even if Buyer did not have actual or inquiry notice, Buyer clearly had record notice of the covenant. This is because the covenant was in writing and was included in the deed of

each of the original purchasers from Developer. Furthermore, Developer promptly recorded all of these deeds. Therefore, if [B]uyer had went [sic] to the record office and looked up the land that she was buying, she would have discovered the covenant

Therefore, Buyer will be considered to be on notice of the covenant

Buyer's possible defenses to enforcement of the covenant:

Buyer may argue that [s]he should not be bound by the covenant because the covenant does not touch and concern land, she was not on notice of the covenant, and that she should be excused from performing under the covenant because of Ace Security's assignment to MPI.

Touch and concern:

As discussed earlier, the covenant will likely be considered to touch and concern land. Buyer may argue that the duty to provide security to the landowners is primarily there to protect the landowners personally rather than to protect the actual land. Buyer will further argue that because the covenant relates to personal protection of the landowners, it does not relate to land and therefore should not be deemed to touch and concern land. If the covenant is deemed not to touch and concern land, the covenant will not bind successors in interest.

However, because the contract with Ace Security was for the security and maintenance of the subdivision, Buyer's claim will likely be rejected. Even if Buyer can convince the court that the Ace Security had promised to protect the individual landowners rather than the land, Ace Security's promise to maintain the property clearly related to land. It would not make sense for Buyer to argue that Ace Security's duty to maintain relates to maintenance of the landowners rather than maintenance of the land.

Therefore, Buyer's argument that the covenant does not touch and concern land will be rejected.

No Notice:

As discussed earlier, Buyer may argue that she did not have notice of the covenant and, therefore, should not be bound by the covenant. Buyer will point to the fact that the deed between Seller and Buyer did not mention the covenant to pay for security services. However, this argument will fail because Devel[o]per properly recorded each of the deeds which contained the covenants. As a

result, if Buyer would have checked the records she would have discovered the covenant.

Thus, this argument by Buyer will also fail.

Contract Defenses:

Buyer may also make some contract arguments.

What law governs?

The contract between Developer and Ace Security will be governed by the common law because it is a contract for services, not goods. Even though the contract cannot be performed within 1 year (because the contract is for 10 years) the statue of frauds has been satisfied because the contract was in writing between Developer and Ace Security.

Third Party Beneficiary

Cora can claim that he [sic] is a third party beneficiary of the original contract between Devel[o]per and Ace Security. Cora will point out that in the initial contract between Devel[o]per and Ace Security, it was clearly Developer's intent that performance of the security services go to the purchasers of the land rather than to Developer. He will also claim that his rights under the contract has [sic] vested because he has sued to enforce the contract. Because Cora can show that all of the landowners are third party beneficiaries, Cora will have the ability to use under the contract.

Invalid Assignment to MPI:

Buyer may also argue that even if the original covenant runs to her, she should no longer be bound by the covenant because of Ace Security's assignment of the contract to MPI.

An assignment can include all of the rights and obligations of the original contracting party. In general, an assignment and/or delegation will be valid unless 1) the original contract specifically says that all attempted assignments or delegations will be void, or 2) the assignment or delegation materially changes the risks or benefits associated with the original contract.

Here, there is nothing in the original contract between Developer and Ace Security that states that assignments will be void. Furthermore, there is nothing in the covenant that Seller signed with Developer that limits the covenant only to performance by Ace Security. Therefore, this will not be a valid reason for invalidating the assignment and excusing Buyer's need for performance.

Also, it does not appear that Ace Security's assignment to MPI will in any way impact that obligations [sic] to Buyer or the benefits that Buyer will receive. Ace Security was originally required to provide security and maintenance for the subdivision. This is not a personal service that only Ace Security can effectively provide. Rather, security service is a task that any competent security company can handle. Therefore, the fact that performance will now be coming from MPI rather than Ace Security will not negatively impact Buyer's benefits from the contract.

Moreover, the assignment will not effect [sic] Buyer's obligations under the contract either. Under the initial contract with Ace Security, Buyer was required to pay $600 per year. After the assignment to MPI, Buyer is still required to pay only $600 per year. Therefore, Buyer's obligations after the

assignment will not be changed in any way. Therefore, the assignment from Ace to MPI will be considered valid and Buyer will not be excused from performing as a result of this assignment.

MPI's threat to suspect [sic] service unless it receives assurances that it will be paid the full $6,000 each year for the balance of the contract

Buyer may also argue that even if they are bound by the covenant, MPI is not entitled to assurances that it will be paid the entire value of the contract for the remainder of the contract term. As common law, a suit for breach of contract could not be brought until the date for performance has passed. Cora will argue, on behalf of MPI, that they are entitled to assurances of future performance because of Buyer's anticipatory repudiation.

Anticipatory Repudiation

Generally, a suit for breach of contract can only be brought when the date for performance has passed. However, is [sic] a party to a contract unambiguously states that he cannot or will not perform under the contract, a suit may be brought immediately for breach of contract.

Here, Buyer has steadfastly refused to pay any fee to MPI. It is unclear whether the time has passed in which Buyer was required to pay MPI. Regardless, Buyer's clear statement that it will not pay MPI will be considered an anticipatory repudiation. Thus, Buyer will be able to immediately bring suit.

Also, because of the anticipatory repudiation, Cora or MPI would be entitled to immediately bring suit. Because they could immediately sue Buyer if they so chose, it only makes sense to allow MPI to seek assurances that Buyer and the other landowners will continue to perform under the contract.

Equitable servitude

An equitable servitude is much like a covenant except that an equitable servitude is enforceable in equity, rather than at law. Here, Cora may prefer to have the court declare an equitable servitude, so that the court will enjoin Buyer to pay the $600 each year for the 10 year length of the contract. This will ensure that Cora will not have to pay more than $600 in any year.

In order for the burden of an equitable servitude to run with the land, there must be 1) a writing, 2) intent, 3) touch and convern[sic], and 4) notice to the successor in interest. All of these have been discussed earlier and have been satisfied. Therefore, this could be

considered to be an equitable servitude.

Cora may wish to get an injunction requiring Buyer to pay $600 per year for the 10 year length of the contract. Cora will first need to show that Buyer has breached his obligations under the contract.

Under an equitable servitude, the court may require Buyer to pay $600 per year for the remainder of the contract.

Buyer's defenses

Buyer could make the same defenses as in the covenant situation. As stated earlier, all of these defenses will likely be rejected.

Common Scheme Doctrine

Even if Cora's other attempts to enforce a covenant or equitable servitude fail, Cora may be able to show that Buyer should be bound by the common scheme doctrine. Cora would need to show that the original developer had a common scheme for the entire subdivision and that this scheme was dear to anyone who inspected the area and the records. Cora's argument may succeed because of the fact that Developer recorded the covenant between all of the original purchases from Developer.

Conclusion/Likely Outcome:

Cora will likely succeed in showing that there was a covenant between all of the original landowners. Cora will also be able to show that the burden of this covenant should run to Buyer. Cora will also be likely able to show the existence of an equitable servitude.