

A STUDENT'S GUIDE TO
EASEMENTS, REAL COVENANTS,
AND EQUITABLE SERVITUDES

THIRD EDITION

LexisNexis Law School Publishing Advisory Board

William Araiza

Professor of Law
Brooklyn Law School

Ruth Colker

Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law
Ohio State University, Moritz College of Law

Olympia Duhart

Associate Professor of Law
Nova Southeastern University Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

David Gamage

Assistant Professor of Law
UC Berkeley School of Law

Joan Heminway

College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried

Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus

Haynes Professor of Law
William and Mary Law School

Melissa Weresh

Director of Legal Writing and Professor of Law
Drake University Law School

A STUDENT'S GUIDE TO EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES

THIRD EDITION

Stephen A. Siegel

*Distinguished Research Professor of Law
De Paul University College of Law*



Library of Congress Cataloging-in-Publication Data

Siegel, Stephen A.

A student's guide to easements, real covenants, and equitable servitudes / Stephen

A. Siegel. -- 3rd ed.

p. cm.

Includes index.

ISBN 978-0-7698-4608-8

1. Servitudes--United States--Outlines, syllabi, etc. 2. Real covenants--United States--Outlines, syllabi, etc. I. Title.

KF657.S56 2012

346.7304'35--dc23

2011048183

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2012 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices

121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800

201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200

www.lexisnexis.com

MATTHEW  BENDER

TABLE OF CONTENTS

Chapter 1	EASEMENTS	1
1.01	INTRODUCTION	1
1.02	EXPRESS EASEMENTS	3
[A]	Definitions	3
[B]	Discussion and Questions	3
[1]	Determining Whether the Document Transfers an Easement or A Fee Simple Estate	4
[2]	Determining Whether the Document Transfers an Easement Appurtenant or an Easement in Gross	8
[3]	The Ancient Conveyancing Rule that Prohibits Conveying a Property Interest to a “Stranger to the Deed”	9
[4]	Conservation and Other Preservation and Environmental Easements	10
[C]	Review Problems	12
	Problem 1	12
	Problem 2	14
	Problem 3	17
	Problem 4	18
[D]	Recapitulation	20
1.03	IMPLIED EASEMENTS	21
[A]	Definitions	21
[B]	Discussion and Questions	21
[C]	Review Problems	27
	Problem 5	27
	Problem 6	31
	Problem 7	34
	Problem 8	36
[D]	Recapitulation	37
1.04	SCOPE	38
[A]	Definitions	38
[B]	Discussion and Questions	38
[C]	Review Problems	47
	Problem 9	47
	Problem 10	49
	Problem 11	52
	Problem 12	54
[D]	Recapitulation	55
1.05	TRANSFER: ALIENATION AND APPORTIONMENT	56
[A]	Definitions	56
[B]	Discussion and Questions	56
[1]	Easements Appurtenant	57
[2]	Easements in Gross	58
[C]	Review Problems	64

Table of Contents

	Problem 13	64
	Problem 14	65
	Problem 15	67
	Problem 16	69
[D]	Recapitulation	70
1.06	TERMINATION	70
[A]	Definitions	70
[B]	Discussion and Questions	71
[1]	Purpose for Which Easement was Created is Accomplished or Becomes Impossible of Accomplishment	72
[2]	Merger	73
[3]	Abandonment	73
[4]	Misuse Which Cannot be Prevented Even by an Injunction	74
[5]	Voluntary or Involuntary Destruction of the Dominant or Servient Estate	75
[6]	The Restatement (Third) and the Termination of Easements	76
[C]	Review Problems	76
	Problem 17	76
	Problem 18	77
[D]	Recapitulation	78
Chapter 2 REAL COVENANTS AND EQUITABLE SERVITUDES		81
2.01	INTRODUCTION	81
2.02	EXPRESS INTENT: THE PARTIES' EXPRESS INTENT TO CREATE A RUNNING COVENANT	85
[A]	Definitions	85
[B]	Discussion and Questions	85
[C]	Review Problems	96
	Problem 19	96
	Problem 20	97
	Problem 21	98
	Problem 22	100
	Problem 23	102
[D]	Recapitulation	103
2.03	IMPLIED INTENT: THE PARTIES' IMPLIED INTENT TO CREATE A RUNNING COVENANT	104
[A]	Definitions	104
[B]	Discussion and Questions	104
[1]	Estoppel	105
[2]	The Circumstances Surrounding the Transaction	107
[a]	Common Schemes	107
[b]	Suits Between Grantees of the Original Promisor	109
[3]	The Restatement (Third) and Implied Running Covenants	112
[4]	Conclusion	112
[C]	Review Problems	114

Table of Contents

	Problem 24	114
	Problem 25	115
	Problem 26	117
	Problem 27	119
	Problem 28	120
[D]	Recapitulation	123
2.04	NOTICE	123
2.05	PRIVITY	124
[A]	Definitions	124
[B]	Discussion and Questions	125
[1]	The Concept of Horizontal Privity	125
[2]	The Necessity of Horizontal Privity	127
[3]	The Concept of Vertical Privity	129
[4]	The Necessity of Vertical Privity	130
[5]	The Restatement (Third) and Vertical Privity	130
[6]	Miscellaneous Topics	132
[a]	The Continued Liability of the Covenantor after a Complete or Partial Assignment of her Ownership Interest	132
[b]	The Apportionment of Covenant Burdens and Benefits after Subdivision of the Burdened or Benefited Land	133
[c]	The Circumvention of the Rules on Privity by Providing that a Covenant is Enforceable by a Lien	135
[C]	Review Problems	136
	Problem 29	136
	Problem 30	137
	Problem 31	138
[D]	Recapitulation	139
2.06	TOUCH AND CONCERN	140
[A]	Definitions	140
[B]	Discussion and Questions	140
[1]	The Concept of Touch and Concern	141
[2]	The Necessity of Touch and Concern	150
[3]	The Restatement (Third) and Touch and Concern	152
[4]	Miscellaneous Topics	155
[a]	A Connection Between Horizontal Privity and the Touch and Concern Requirement	155
[b]	A Connection Between the Apportionment of Covenant Benefits and Burdens and the Touch and Concern Requirement	156
[c]	The Circumvention of the Touch and Concern Requirement by Providing that a Covenant is Enforceable by a Lien	157
[C]	Review Problems	157
	Problem 32	157
	Problem 33	159
	Problem 34	161
	Problem 35	163

Table of Contents

[D]	Recapitulation	164
2.07	TERMINATION	165
[A]	Definitions	165
[B]	Discussion and Questions	166
[1]	Abandonment	167
[2]	Acquiescence	167
[3]	Unclean Hands	169
[4]	Relative Hardship	170
[5]	Changed Conditions	171
[6]	The Restatement (Third) and the Termination of Running Covenants	175
[7]	A Note on Terminology	176
[C]	Review Problems	177
	Problem 36	177
	Problem 37	178
	Problem 38	179
	Problem 39	181
	Problem 40	182
	Problem 41	184
[D]	Recapitulation	185

**Chapter 3 DISTINGUISHING EASEMENTS, REAL COVENANTS AND EQUITABLE
SERVITUDES & THE RESTATEMENT (THIRD)’S UNIFICATION OF SERVITUDE
LAW 187**

3.01	INTRODUCTION	187
3.02	DISTINGUISHING BETWEEN EASEMENTS AND RUNNING COVENANTS	187
3.03	THE OUTCOMES THAT TURN UPON WHETHER A SERVITUDE IS AN EASEMENT OR A RUNNING COVENANT	190
3.04	DISTINGUISHING BETWEEN REAL COVENANTS AND EQUITABLE SERVITUDES	192
3.05	THE OUTCOMES THAT TURN UPON WHETHER A RUNNING COVENANT IS A REAL COVENANT OR AN EQUITABLE SERVITUDE	196
3.06	THE RESTATEMENT (THIRD) AND THE NEED TO DISTINGUISH AMONG SERVITUDES: THE UNIFICATION OF SERVITUDE LAW	198

**Chapter 4 CONDOMINIUMS, HOMEOWNERS ASSOCIATIONS, AND THE LAW OF
EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES 201**

4.01	INTRODUCTION	201
4.02	THE MULTI-FACTORED REASONABLENESS TEST FOR THE VALIDITY OF CONDOMINIUM DECLARATIONS, BYLAWS, AND HOMEOWNER ASSOCIATION DECISIONS	203
[A]	The Validity of the Covenants and Bylaws Contained in the Original DCC&R and HOA Decisions Applying Them	203
[B]	The Validity of DCC&R Amendments, Bylaw Amendments, and HOA Decisions Applying Them	204
[C]	HOA Decisions Regarding its Administrative Responsibilities	205
[D]	Concluding Remarks on the Multi-Factored Reasonableness Test	205

Table of Contents

4.03	THE RESTATEMENT (THIRD) AND THE VALIDITY OF CONDOMINIUM DECLARATIONS, BYLAWS, AND HOMEOWNER ASSOCIATION DECISIONS	208
[A]	The Restatement (Third)'s Default Rules for DCC&R Amendments	208
[B]	The Restatement (Third)'s Default Rules for Bylaw Amendments	209
Table of Cases		TC-1
Index		I-1

DEDICATION

To my students, past, present, and future

GENERAL INTRODUCTION

Easements, real covenants, and equitable servitudes are distinct property interests; yet they are so intimately related that they have a collective designation. As a group, easements, real covenants and equitable servitudes are known as servitudes. For convenience, the term “servitude” will be used when saying something that applies to all three interests.

What distinguishes servitudes from other property interests is that they give their owner the right to use, or to prevent the use of, property that she neither owns nor possesses.* Classic examples are a right to cross a neighbor’s land or to prevent her from altering its natural state.

Because servitudes involve rights to use property that one neither owns nor possesses, legal theorists consider them present but nonpossessory property interests. In this regard, they stand in contrast to the fee simple and leasehold estates which are considered both present and possessory.

It may seem strange to say that servitudes are nonpossessory property interests. Pipeline companies and railroad companies frequently establish their routes by acquiring easements. Yet, it may be difficult to explain to someone who has just tripped over an oil pipeline or railroad track that the pipeline or railroad company does not possess the ground its pipeline or track occupies. And in any event, what distinction is there between the right of possession and the right of use? Possession, after all, is a use of property.

The legal concept of possession is not a physical fact; it is an abstract, subtle legal concept. Possession certainly involves the right to make present use of the property. But possession involves more than just any right of use. Possession involves the right to make an extended number of uses of property. The right to make a specific or a limited number of uses of property *does not* possession make.

The distinction between possessory and nonpossessory interests focuses on the generality or specificity of the uses which the interest authorizes its holder to make. Fee simple and leasehold estates are possessory property interests because they carry the right to make general — not necessarily unlimited — use of property. Servitudes are nonpossessory interests because they carry the right to make only a specific or a limited number of uses of property.

The function and importance of servitudes in a system of private property arises from the interdependence of land-use. Land-use involves what economists call “externalities.” The use of one parcel of land affects other parcels, either beneficially or harmfully. Servitudes are the preeminent means by which individuals adjust these externalities. Public law, through such bodies of law as nuisance and zoning, has tools by which land externalities are adjusted. Servitudes are the main private law mechanism by which individuals anticipate, alter or fine-tune the provisions of public law to their particular desires.

Servitudes are not the only private law means for adjusting the interdependence of land-use. Frequently, however, they are the most efficient. Consider the position of a landowner who needs a path across neighboring land in order to provide her land with more convenient access to main thoroughfares. Or consider the position of a landowner who needs assurance that neighboring land will not be developed commercially before she will develop her land residentially. The landowner could acquire the desired path or assurance by acquiring a fee estate, a long-term leasehold, or a servitude in the neighboring land. Any of these interests would give the concerned landowner the path or assurance she needs.

A fee estate or leasehold would give the concerned landowner the general right to control the neighboring land. A servitude would give her only the specific right to use the neighboring land that she needs. And therein lies the significant difference.

By giving the concerned landowner the general right to control the neighboring land, the fee estate and leasehold

* For convenience, throughout the remainder of this STUDENT GUIDE the phrase “right to use” should be understood as meaning “right to use, or to prevent the use of.”

GENERAL INTRODUCTION

give her more rights than she really wants and wishes to use. Their cost is commensurately higher. Servitudes, by providing for the acquisition of narrow, specific rights to use land that is owned by another allows for the acquisition of the narrow, specific rights that frequently are all that are necessary to adjust the externalities that result from land-use interdependence. In sum, the function and importance of servitudes is that they allow landowners to acquire rather specific rights to control land-use. By so doing, servitudes allow a landowner efficiently to acquire specific rights of control over neighboring land and, thereby, secure beneficial, or prevent harmful, interactions.

Land-use has always been interdependent. Accordingly, a law of servitudes has always been a part of the common law. Nonetheless, the law of servitudes has undergone vast development and transformation in the past two centuries. This is because the past two centuries have witnessed a quantum jump in the frequency and severity of land interdependence. The trend of the past two centuries toward greater interdependence has only increased with the recent growth, in America, of condominiums and planned communities as preferred places of abode for over 60 million people.

Servitude law has been dramatically affected by this development. Over the past two centuries, our society has evolved from one predicated upon a rural and agricultural economic base to one predicated upon an urban and industrial, perhaps even a post-industrial, economic base. Land-use in a rural-agricultural economy involves less complex and dense development than land-use in an urban-industrial economy. Consequently, land-use in a rural-agricultural economy is far more self-sufficient, and less interdependent, than land-use in an urban-industrial economy. Accordingly, a rural-agricultural society may be well served by a law of servitudes that is less elaborate, and perhaps even different, than the law of servitudes required by an urban-industrial society.

In fact, that the early common law had a law of servitudes has proven more of a bane than a boon to the modern law. The roots of the modern law may be traced to the early common law. But with the increase in land interdependence stemming from the nineteenth century urban-industrial revolution, the traditional law of servitudes proved inadequate. It was refashioned. Part of the mold in which the existing law was set was carried forward. But other parts of the inherited mold were transformed, indeed broken, and fundamentally new law was developed under the guise of continuity. New principles reworked old doctrines; and old principles created new doctrines. The legal aphorism of pouring new wine into old bottles, or of new corn springing from old fields, fairly accurately describes the judiciary's development of the modern law of servitudes during the nineteenth and early twentieth centuries.

Particulars of the industrial revolution's transformation of servitude law will be taken up in §§ 3.02 and 3.04, *below*. Postponement is necessary until a context has been developed through a complete exploration of easement law. At this point, suffice it to say that the development of real covenants and equitable servitudes was due to limitations in the existing law of easements which until the industrial revolution was the most important form of common law servitude. Real covenants and equitable servitudes developed as a means of circumventing the limitations of the law of easements.

All that needs be grasped at this time is that (a) easements, real covenants, and equitable servitudes are related in that they all give their owners the right to make fairly specific use of land owned by another; and (b) the primary function of all these interests is the efficient adjustment of land-use externalities. Historical accident, more than policy rationale, is responsible for many features of the modern common law of servitudes, including its division into three distinct but related doctrines.

Indeed, one central issue of the current law of servitudes is whether the three part division should be continued. Some legal scholars suggest combining real covenants and equitable servitudes into one doctrine; others suggest reducing easements as well as real covenants and equitable servitudes to one doctrine; still others oppose any unification of these property interests. Law review articles and multiple scholarly symposia propounding diverse perspectives and answers have been devoted to this issue. Although the American Law Institute's decision, in its *RESTATEMENT (THIRD) OF THE LAW OF PROPERTY: SERVITUDES*, to integrate easement, real covenant and equitable servitude law into a unified body of doctrine added fuel to this debate, our nation's court have yet to adopt any major changes in the common law's traditional tripartite division of servitude law.

Whatever the future holds, the three part division of the common law of servitudes has existed for the past two centuries. It exists at present. Law students must come to terms with the law as currently laid down and as it might

GENERAL INTRODUCTION

evolve. Aiding you in this work is the goal of the following **STUDENT GUIDE**, which discusses both current law and the **RESTATEMENT (THIRD)**'s integrated approach. Included in this coverage is a new Chapter discussing the impact of the growth of condominium living on the law of servitudes.

ABBREVIATIONS

The following abbreviations are used in this STUDENT GUIDE:

ALP	AMERICAN LAW OF PROPERTY (A. Casner ed. 1952)
S&W	W. Stoebeck, & D. Whitman, THE LAW OF PROPERTY (3d ed. 2000)
Powell	POWELL ON REAL PROPERTY (M. Wolf, Gen. Ed., 2000)
Restatement (First)	American Law Institute, RESTATEMENT OF THE LAW OF PROPERTY (1944)
Restatement (Third)	American Law Institute, RESTATEMENT (THIRD) OF THE LAW OF PROPERTY: SERVITUDES (2000)

