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FORE! A Heads-Up to Nebraska Real Estate Attorneys After the Skyline Woods Golf Course Case

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This past December, the Nebraska Supreme Court made a landmark decision in Nebraska real estate law in *Skyline Woods Homeowners Ass'n v. Broekemeier*.[1] In this decision, for the first time, Nebraska recognized implied restrictive covenants[2] inferred from a common scheme of development. Such covenants are not recorded expressly in the chain of title, but rather are inferred from a common plan affecting the property and its surroundings. This decision has the potential to set some costly traps for the unwary homebuyer and real estate attorney.

This commentary seeks to explain the rationale and importance of the court's decision in *Skyline Woods*. It contains three parts. The first explains and summarizes the supreme court's decision in *Skyline Woods*. The second seeks to elucidate the extremely confusing law of real covenants. The last section seeks to advise both practitioners and homebuyers of the potential pitfalls that *Skyline Woods* sets for the unscrupulous homebuyer.

Skyline Woods Homeowners Association v. Broekemeier

The dispute in the case stems from a bankruptcy sale[3] and the purchasers' subsequent refusal to maintain the property as a golf course. Residents of the surrounding neighborhood

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[1] 276 Neb. 792, 758 N.W.2d 376 (2008).

[2] These property rights are known by a variety of names including equitable easements, implied easements, equitable servitudes, implied equitable servitudes, implied grants, and rights arising by estoppel. *See Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 688 P.2d 682, 689 (Ariz. App. 1984). *See also infra* note 18 (further highlighting the confusion of terminology).

[3] One of the issues in this case was whether the bankruptcy sale would clear the title to the property. The court ruled that it would not and the purchasers would still be bound by the covenants. *Skyline Woods*, 276 Neb. at 813-15, 758 N.W.2d at 392-93. However, this portion of the ruling however is merely tangential to the issues of real property law that this article focuses on and is not discussed further.

sought an injunction requiring the purchasers—David Broekemeier, Robin Broekemeier, and their company, Liberty Building Corporation[4]—to maintain the property as a golf course.

The property in question changed hands several times over the past forty years. Most importantly, it was owned for a period of time by Dennis Circo, who also owned a significant amount of land surrounding the course. Circo planned and developed the surrounding area as a residential neighborhood with the golf course at the heart of the development. Circo later sold the course and it eventually wound up in the possession of Skyline Country Club, which filed for bankruptcy in 2004.[5]

Over its history, a number of documents were drafted relating to the land's continued use as a golf course. None of these documents were binding. In 1976, a land contract—not a deed—was recorded in which the land was identified as a golf course and which bound the buyer to maintain the land as such.[6] However, it is not clear if the contract was ever carried out and, in any case, the original seller was again in possession of the land a short time later. From 1981 through 1990, a series of covenants were recorded for the benefit of the golf course. These required the neighboring homes to keep their yards clean, to install shatterproof windows, and to refrain from removing trees or installing fences, among other things.[7] Additionally, there was also an easement allowing golf balls to cross the yards of the surrounding homes.[8] These covenants and the easement burdened the surrounding homes but there was never a covenant burdening the land that constituted the course. Next, an unrecorded purchase agreement required that a buyer maintain the property as a golf course.[9] Finally, there were two recorded memoranda of understanding that attempted to incorporate by reference the terms of the unrecorded purchase agreement.[10]

The court in *Skyline Woods* began its analysis with a cite to *Wessel v. Hillsdale Estates, Inc*.[11] In *Wessel*, the covenant itself was express, but the precise scope of the covenant was not, and the court had to determine the meaning of it.[12] Somewhat surprisingly, the *Wessel* court read

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[4] They will collectively be referred to as "defendants."

[5] *See generally Skyline Woods*, 276 Neb. at 794-95, 758 N.W.2d at 380-81.

[6] *Id.* at 797, 758 N.W.2d at 382.

[7] *Id.* at 797-98, 758 N.W.2d at 382-83.

[8] *Id.* at 798, 758 N.W.2d at 383.

[9] *Id.* at 799, 758 N.W.2d at 383. The purchase agreement evidenced the sale of the property from Circo to American Golf, a company that eventually merged with a national partnership to form the Skyline Country Club.

[10] *Id.* at 799-800, 758 N.W.2d at 383-84.

[11] 200 Neb. 792, 266 N.W.2d 62 (1978).

[12] The court ruled that a developer's plan to build apartments on an area set aside to be a commons area violated the recorded covenants which gave residents of the surrounding neighborhood an interest in the commons. The

the covenant to cover a much wider area than the developer had argued for. Such a reading seems to contradict the general policy in American law that favors the free and unrestricted use of land.[13] In any case, the court in *Skyline Woods* found precedent for implying restrictions on land use based on a common scheme of development.

After examining *Wessel,* the court then turned its attention to other states. In surveying the law of other jurisdictions, the court stated that when faced with a common scheme or plan for development, other courts "have invariably found an enforceable restrictive covenant where it is sufficiently implied by the conduct and expectations of the parties and any documents of record or it is known to the buyer."[14]

The court ultimately decided that implied restrictive covenants could be enforced against a subsequent purchaser if the following elements were established: 1) there must have been a common grantor of the land; 2) who had a common plan of development for the land of which the restrictions are a part; and 3) the subsequent purchaser must have had some form of notice of the restrictions.[15]

Applying the law to the present facts, the court determined that defendants were bound by the covenants. For one, there was substantial evidence of the common grantor's common plan for the area. There was testimony from Circo evincing his intent to form a residential neighborhood with a golf course at its heart. In fact, Circo advertised the golf course as one of the benefits of his new subdivision to potential buyers. There were also the covenants burdening neighboring homes that required them to take steps to protect their homes from golf balls and to keep their yards clean to maintain the pristine look of the course. Finally, the court determined that the defendants had inquiry notice of the restrictions. The defendants knew, or should have known, of the restrictions on the neighboring homes and knew that the property had long been used as a golf course. Mr. Broekemeier had, in fact, used the proximity of the golf course when marketing his own nearby properties. There was also the defendants' title insurance policy that specifically excluded easements that were not part of the record as well as rights or interests that were not recorded but could be ascertained by an inquiry of people in possession of the

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covenants did not say how much of the commons was to be set aside though. However, the court, relying on the preamble that listed several uses of the commons area, decided that a substantial part of the commons was what the parties had in mind and the sole basketball court the developer planned to set aside was insufficient. *Id*. at 801-03, 266 N.W.2d at 67-68.

[13] *See, e.g., Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 794, 553 N.W.2d 458, 462 (1996) ("[T]he law disfavors covenants that restrict the use of land."); *Boyles v. Hausmann*, 246 Neb. 181, 189, 517 N.W.2d 610, 616 (1994) ("[U]nder no circumstances shall restrictions on the use of land be extended by mere implication."); *Knudtson v. Trainor*, 216 Neb. 653, 655, 345 N.W.2d 4, 6 (1984) ("[C]ovenants which restrict the use of land are not favored by law, and . . . should be construed in a manner which allows the maximum unrestricted use of the property.").

[14] *Skyline Woods*, 276 Neb. at 807, 758 N.W.2d at 388.

[15] *Id.* at 805-06, 758 N.W.2d at 387.

property.[16] Taken together, the court ruled that these facts were such that a prudent person would have inquired further into the property, and as such, the defendants had inquiry notice of the restriction. As all of the elements were met, the court found that the defendants were bound by the implied restrictive covenants.

A Brief Look at the Law of Restrictive Covenants

This section will give a very brief overview of restrictive covenant law and then will examine how this law has been applied in Nebraska to restrict the use of land.

Restrictive covenants are a means of privately controlling the use of land.[17] The law of restrictive covenants and related concepts is essentially a mixture of contract law, real property law, and equity.[18] "A covenant is an agreement or promise of two or more parties that something is done, will be done, or will not be done."[19] This definition sounds in contract, which is where the concept of covenants originated.[20] Early on, the restrictive covenant was restricted to use in the landlord/tenant context where the promise could be attached to the interest and would not bind third parties.[21] This later changed as restrictions were attached to conveyances in fee simple with the intent to bind further successors.

Such a practice ran contrary to contract law at this time as neither the benefit nor the burden of a contract was assignable and English courts acted to restrict this application. The courts ruled that if the covenant related to something not yet in existence, the covenant must expressly bind "assigns" and the covenant must actually "touch and concern" the land; covenants

[16] *Id.* at 800, 758 N.W.2d at 384.

[17] 7 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 61.02 (David A. Thomas ed., 2005).

[18] *See* 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 60.01 (Michael Allan Wolf ed., 2009). POWELL gives a good explanation of the evolution of the theory of restrictive covenants and related concepts. It quickly becomes apparent that POWELL makes no mistake in calling the law of covenants an "unspeakable quagmire."

A great deal of the confusion comes from the fact that equitable easements, servitudes, and covenants all serve essentially the same purpose and evolved separately only because courts would often get in the way of enforcing one or the other. As a result, different doctrines utilizing different rules were established to ultimately serve the same purpose. A Floridian appeals court decision evidences the confusion surrounding these concepts: "Restrictive covenants are private promises or agreements creating negative easements or equitable servitudes which are enforceable as rights arising out of contract." *Kilgore v. Killearn Homes Ass'n*, 676 So.2d 4, 7 (Fla. App. 1996) (internal quotations and citations omitted).

This article restricts itself to a cursory explanation. For a more exhaustive explanation that includes easements and servitudes, see generally THOMPSON, *supra* note 17 and POWELL, *supra* note 18.

[19] POWELL, *supra* note 18 at § 60.01[2].

[20] THOMPSON, *supra* note 17 at § 61.03(a).

[21] POWELL, *supra* note 17at § 60.01[3]. This was because neither the burden nor the benefit of a contract was assignable at early common law.

having incidental effects on the land would not be enforced.[22] English courts emphasized strict formality and if the covenant did not use the proper terminology, it would not be enforced.[23] American courts eventually developed three requirements for a restrictive covenant to be enforceable at law: 1) there must be an intent for the covenant to run with the land; 2) the covenant must touch and concern the land; and 3) there must be some form of privity of estate.[24]

Successive court rulings further limited the ability of parties to enforce binding restrictions on land at law. Equity soon stepped in to enforce such promises and the resulting interest came to be known as an equitable servitude. The required elements to enforce an equitable servitude were different from those needed to enforce a covenant at law. For a covenant to run in equity the intent and "touch and concern" requirements must be met. But instead of the privity requirement of a covenant, a servitude requires only that the party to be burdened had notice of the restriction.[25]

Although the concepts of covenants and equitable servitudes were developed to perform the same function, the two required different elements to be enforceable. This situation stems from the historic separation of courts of law and equity. In light of the current situation, which results in much confusion, commentators have been calling for reconsideration of the rules and have proposed a unified concept of servitudes. This proposal would greatly simplify the creation of servitudes and seeks to discard "several of the 19th century technical roadblocks and arbitrary prohibitions" that frustrated the parties' intent to create a servitude or covenant.[26] Under the Restatement, a servitude is created if the owner of the lot to be burdened makes a contract or a conveyance intended to create a servitude[27] or conveys a lot in a general plan development that is subject to recorded declarations of servitudes.[28] The simplified approach put forward by the Restatement is surely more desirable as it does not allow outdated rules and concepts to interfere with the parties' intent.

Nebraska has adopted the common law rule with regards to real covenants and equitable servitudes. Three elements are required to establish a covenant that will be binding on future

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[22] *Id.*

[23] *Id.*

[24] *Id.* at § 60.04[2].

[25] *Id*.

[26] RESTATEMENT (THIRD) OF PROP.: SERVITUDES Ch. 2 intro. note (2000).

[27] A servitude created by either contract or conveyance must either comply with the Statute of Frauds or fall into an exception. *See id.* at § 2.1.

[28] *Id.* Servitudes can still be created by the common law doctrines of necessity, prescription, implication, and estoppel.

landowners.[29] First, the original grantor and grantee must intend for the covenant to run with the land. Second, the covenant must touch and concern the land that it burdens.[30] Finally, the party claiming the benefit of the covenant must be in privity of estate with the party that is burdened by the covenant.[31] With regards to equitable enforcement of a servitude, "[c]ontractual promises with respect to the use of land, which under the rules of equity are specifically enforceable against the promisor, are effective against the successors in title or possession if the successor has actual or constructive notice of the promise."[32]

Courts in Nebraska had enforced equitable restrictions on land in the absence of recorded documents prior to *Skyline Woods*. The touchstone is whether the party to be bound had notice of the restrictions. For example, in *How v. Baker*,[33] the plaintiffs sought to enjoin amendment of covenants claiming that they bought their properties before the original covenants were recorded. Since there were no preexisting covenants, the plaintiffs argued that there was nothing that the defendants could legally amend and thus they could not impose restrictions on plaintiffs' properties. The court ruled that although the covenants were not yet recorded when the plaintiffs bought their property, they had been filed with the county and the plaintiffs had notice of this. The court relied on Nebraska's recording statute,[34] which states that a deed or other interest in land takes effect at the time it is recorded as to all parties who do not have notice. And since the plaintiffs did have notice, the covenants were effective without being recorded.

What *Skyline Woods* Means for Real Estate Attorneys in Nebraska

Skyline Woods has practical, and perhaps severe, implications for attorneys in Nebraska. While the theoretical implications may not be terribly significant, the practical implications have the potential to set some very costly traps for real estate attorneys and homebuyers in Nebraska.

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[29] Regency Homes Ass'n v. Egermayer, 243 Neb. 286, 295-96, 498 N.W.2d 783, 789 (1993).

[30] To "touch and concern" the land, "[t]he covenant must impose . . . a burden on an interest in land, which . . . increases the value of a different interest in the same or related land." *Id.* at 299, 498 N.W.2d at 791.

[31] "Privity of estate" is a "mutual or successive relationship to the same right in property, as between grantor and grantee or landlord and tenant." BLACK'S LAW DICTIONARY 1320 (9th ed. 2009).

[32] Standard Meat Co. v. Feerhusen, 204 Neb. 325, 331-32, 282 N.W.2d 34, 38 (1979). *See also* Reed v. Williamson, 164 Neb. 99, 82 N.W.2d 18 (1957). In *Reed*, the express covenant was meant benefit every lot in a division. The court stated that this plan gave every occupant of that division an equitable interest in the other lots. The court said, "building restrictions . . . create equitable easements . . . or servitudes . . . and . . . may be enforced by anyone interested in the property without regard to privity either of contract or estate and no matter whether the covenant may be said to run with the land or not." *Reed*, 164 Neb. at 115, 82 N.W.2d at 27.

[33] 223 Neb. 100, 388 N.W.2d 462 (1986).

[34] *See* NEB. REV. STAT. § 76-238 (Cum. Supp. 2008).

Skyline Woods represents more of an incremental step forward as opposed to a great leap forward. Courts in Nebraska have long held that parties are bound in equity by covenants and servitudes of which they have notice regardless of whether or not they are recorded. What *Skyline Woods* changes is the analysis with regards to notice. Prior decisions required that the party to be burdened have actual or constructive notice of the restrictions.[35] After *Skyline Woods*, inquiry notice will now be sufficient to bind a party. Inquiry notice is imputed to a party when there are such circumstances that would cause a reasonable person to inquire further. A person with inquiry notice is presumed to know everything that the proper inquiry would have revealed.[36] In *Skyline Woods*, the numerous documents in the chain of title were deemed to have put the defendants on notice.

There are also practical implications and advice that can be gleaned from *Skyline Woods*. The first piece of advice is obvious: Attorneys should *always* draft their covenants, restrictions, and easements explicitly. Attorneys should state not only the restrictions, but also the purpose of restrictions as well as the desire that the restrictions run with the land and bind successive owners. Although courts may find such a restriction by implication now, that decision could be years in the making and may run up sizeable litigation bills. And there will always be questions of evidence on whether there was a common scheme and whether there was sufficient notice, making victory in any given case far from certain. A prudent attorney will not leave it up to the courts.

Attorneys, real estate agents, and buyers should also be very scrupulous in shopping for and buying homes. No longer will a title search be sufficient to alert them to restrictions on the use of the property; in certain circumstances, courts in Nebraska will deem them to have inquiry notice. Such notice could potentially be gleaned from looking at maps of the area, reading documents in the chain of title of surrounding properties, or from simply visiting the neighborhood. The question of exactly how much evidence is needed to attribute inquiry notice to a party is a question that is still wide open.

The easy cases deal with the actual use of the land. *Skyline Woods* is such a case and there are dozens of Nebraska cases dealing with express easements and covenants that restrict the use of land to residential or open spaces.[37] More difficult cases are on the horizon. For example, some Nebraska cases have dealt with express covenants limiting the number of stories a building

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[35] *See, e.g., How*, 223 Neb. 100, 388 N.W.2d 462; *Standard Meat Co.*, 204 Neb. 325, 282 N.W.2d 34. Actual notice is "[n]otice given directly to, or received personally by, a party." BLACK'S, *supra* note 31 at 1163. Constructive notice is notice that the law deems a person to have. In the real estate context, constructive notice most often comes from the recording system. *Id.*

[36] Skyline Woods Homeowners Ass'n v. Broekemeier, 276 Neb. 792, 811, 758 N.W.2d 376, 391 (2008).

[37] *See, e.g.,* Hogue v. Dreeszen, 161 Neb. 268, 73 N.W.2d 159 (1955); Harvey Oaks Homeowner's Ass'n v. Aslan Co., No. A-01-390, 2002 WL 31866163 (Neb. App. Dec. 24, 2002); 1733 Estates Ass'n v. Randolph, 1 Neb. App. 1, 485 N.W.2d 339 (1992).

may have,[38] the types of materials that may be used in construction,[39] and the amount or types of other structures allowed on the property.[40] Whether or not implied covenants will be found to restrict such construction or materials is a question that attorneys, real estate developers, and courts will be forced to confront in the coming years.

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[38] Elkhorn Ridge Golf P'ship v. Mic-Car, Inc., 17 Neb. App. 578, 767 N.W.2d 518 (2009).

[39] *See, e.g.,* Regency Homes Ass'n v. Schrier, 277 Neb. 5, 759 N.W.2d 484 (2009); Hoff v. Ajlouny, 14 Neb. App. 23, 703 N.W.2d 645 (2005).

[40] *See, e.g.,* Breeling v. Churchill, 228 Neb. 596, 423 N.W.2d 469 (1988) (covenants banned the placement of satellites on the property); Countryside Developers, Inc. v. Peterson, 9 Neb. App. 798, 620 N.W.2d 124 (2000) (covenants banned construction of outbuildings on the property).