

Enforceability Of Land Use Servitudes Benefiting Local Government In Washington

City and county governments in Washington commonly use conditional approval of development applications as a land use planning tool.¹ The terms of approval often require that the developer promise to use his land in a certain manner. If the developer agrees, he records his promise as an equitable servitude to run with the land.² Both parties benefit by the conditional approval.

1. An excellent example of conditional approval is the contract rezone, in which the governmental agency makes its approval contingent upon the developer's agreement to act, or refrain from acting, in a certain manner after approval of the rezone. Some commonly imposed conditions are that the developer agree to pay the costs of extending public utilities to the new development, grant land for additional street right-of-way or public facilities, provide fencing or screening vegetation, or limit land use within a zoning district to one particular use. See, e.g., *Cederberg v. City of Rockford*, 8 Ill. App. 3d 984, 291 N.E.2d 249 (1972); *Hedrich v. Village of Niles*, 112 Ill. App. 2d 68, 250 N.E.2d 791 (1969); *Church v. Town of Islip*, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960); *State ex rel. Myhre v. City of Spokane*, 70 Wash. 2d 207, 442 P.2d 790 (1967). Although courts in several jurisdictions have struck down contract rezoning, see, e.g., *Baylis v. City of Baltimore*, 219 Md. 164, 148 A.2d 429 (1959), the Washington Supreme Court approved the validity of such zoning in *Myhre*. In addition to rezones, preliminary plat approvals are often conditional. 4 R. ANDERSON, *AMERICAN LAW OF ZONING*, § 23.24, at 103 (2d ed. 1977); see, e.g., Approval Letter from Thurston County Planning Comm'n (June 10, 1977) (platfile No. 228) (refers to several conditions, including one specifying no common household pets weighing over 250 pounds could be kept on the lots approved). Shoreline permits may be approved conditionally. *Brulotte v. Yakima County*, Shor. Hear. Bd. Dec. No. 137 digested in [1979] WASH. ST. ENVIR. RPTR. § 12-1 (Shoreline Hearings Board required conditions and agreements to be written into the development permit). Further, because the State Environmental Policy Act, WASH. REV. CODE §§ 43.21C.010-.910 (1976), granted local government the power to deny permits formerly issued on a ministerial basis, *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978), local governments may attempt to condition such approvals in the future.

2. See, e.g., *Andres v. Flossmoor*, 15 Ill. App. 3d 655, 304 N.E.2d 700 (1973); Concomitant Agreement, Thurston County Planning Comm'n (Jan. 25, 1978) (rezone file No. Z-6-77); Concomitant Agreement, Thurston County Planning Comm'n (Feb. 23, 1977) (rezone file No. Z-11-76).

Equitable servitudes are used rather than their legal equivalent, restrictive covenants, because those seeking relief generally want the equitable remedies of specific performance and injunctions. Furthermore, the traditional legal requirements for privity make enforcement of covenants at law more difficult than enforcement in equity. One writer, considering the impediments to enforcement at law, concludes that covenants are "next to worthless" for enforcement of residential restrictions. Paulus, *The Use of Equitable Servitudes in Land Planning*, 2 WILLAMETTE L.J. 399, 400 (1963). Although some writers have found that the differences between equitable servitudes and covenants at law have largely disappeared, Newman & Losey, *Covenants Running with the Land and Equitable Servitudes: Two Concepts or One?* 21 HASTINGS L.J. 1319 (1970), the traditional terms are used in this comment. Promise means a promise the original parties enforce under the law of contracts. Covenant running with the land, or simply covenant, means a promise enforceable at law by or against a successor in interest to land held by the original

The developer receives approval for a project that local government would normally disapprove as not in compliance with local land use plans, while local government controls the project's adverse effects. Superficially, the arrangement seems ideal; the effectiveness of the developer's promise, however, is unknown.³ Washington courts have not decided if an executory promise benefiting local government is enforceable against the promisor's grantee when the grantee has no independent contractual obligation.⁴ Therefore, it is uncertain whether equitable servitudes ben-

parties. An equitable servitude, or simply servitude, is a promise enforceable in equity by or against a successor in interest to land held by the original parties. A servitude may or may not also be enforceable at law. See Stoebe, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 863-65, 906 (1977).

3. See *London County Council v. Allen*, [1914] 3 K.B. 642 (C.A.) (burdened land transferred to wife of promisor; she built in violation of the promise and the Council had no remedy).

4. Several enforcement mechanisms accompany the many sorts of conditional approvals used. Generally enforcement is not complicated. The city or county can rescind shoreline permits if the developer does not meet the conditions of approval, Shoreline Management Act of 1971, WASH. REV. CODE § 90.58.140(8) (1976), deny a building permit if the developer does not follow the specifications of a conditional zoning approval, UNIFORM BUILDING CODE § 302(a) (1973 ed.) (adopted by reference at WASH. REV. CODE § 19.27.030(1) (1976)), or deny approval of a final plat if it does not conform to the preliminary plat, WASH. REV. CODE §§ 58.17.150, .170 (1976).

In contrast, enforcement of promises still executory at the time local government grants final approval to a project is more difficult. Rather than simply withholding further approval, the governmental agency charged with enforcement must turn to the courts to enforce such executory promises. Examples include promises to maintain screening vegetation, limit hours of operation, or maintain a particular use on a parcel of property. If the original promisor no longer controls the land, the promise must run with the land to be enforceable against the new property owner.

There are several reasons the promise may not be enforceable as part of an ordinance. The most basic is that the municipality did not include conditions of approval (the developer's promise) in its adopting resolution. *E.g.*, Concomitant Agreement, Thurston County Planning Comm'n (Jan. 25, 1978) (rezone file No. Z-6-77); Concomitant Agreement, Thurston County Planning Comm'n (Feb. 23, 1977) (rezone file No. Z-11-76). Also, zoning enabling legislation sometimes requires uniform regulations in each district, *e.g.*, WASH. REV. CODE § 36.70.770 (1976), and a court might strike down conditions of a rezoning which specially limit only one parcel of land within a larger zoning district. A promise running with the land may be the only enforcement mechanism available against a landowner when the ordinance's conditions of approval are stricken. See *Town of Selah v. Waldbauer*, 11 Wash. App. 749, 525 P.2d 262 (1974).

In the limited area of subdivision approvals, the legislature may have statutorily provided that conditions of approval run with the land. Washington statutory law provides that a prosecuting attorney may commence an action against a violator to compel compliance with the conditions of a subdivision approval. WASH. REV. CODE § 58.17.320 (1976). One writer indicates this provision would allow public enforcement of subdivision covenants against lot purchasers. Goeltz, *Subdivisions, Plats and Dedications*, in *LEGAL ASPECTS OF LAND USE* 1, 16 (1979). The statute does not, however, expressly vary the common law and equitable rules for running of covenants. Therefore, the courts may find that the

efiting local government will run with the land and bind subsequent owners.⁵ After evaluating present Washington law, this comment concludes that Washington courts should enforce equitable servitudes as useful land use planning tools for local government.⁶

When analyzing local law the first considerations are the general elements required to make equitable servitudes run: form, notice, and touch and concern.⁷ Because competent drafters can meet the first two elements, they pose no general problems. Regarding form, drafters must memorialize equitable servitudes in a document signed by the promisor because courts consider equitable servitudes property interests to which the Statute of Frauds applies.⁸ To ensure the promisor's successors have notice

legislature did not alter the traditional rules, but only intended to authorize the prosecuting attorneys to enforce private covenants between a subdivider and lot purchasers. As yet, no court has construed this section.

5. Governmental agencies have avoided using restrictive covenants and equitable servitudes for many public land control purposes because such restrictions held in gross may not run. Buescher, *Conservation Easements and the Law*, in *Conservation Easements and Open Space Conference 29* (Dec. 13, 1961) (sponsored by the Wisconsin Department of Resource Development and State Recreation Commission) (advising state to avoid purchase of covenants for conservation and open space purposes); Report of the Legal Aspects Workshop, in *Scenic Easements in Action* (D)-7 (Dec. 16-17, 1966) (prepared by the University of Wisconsin Law School) (suggesting a statute should "draft around" the possible nonenforceability of covenants in gross); Address by Charles R. Martin, *League of California Cities Annual Conference* (Oct. 14, 1968) (nonuse of deed restrictions in connection with zoning results from doubts regarding enforcement against a subsequent purchaser of restrictions held in gross).

6. Several writers have discussed using equitable servitudes as a land use planning tool. *E.g.*, Paulus, *supra* note 2; Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970); Note, *Equitable Servitudes as a Land Use Planning Tool*, 6 MEM. ST. U.L. REV. 101 (1975). These articles, however, deal with either private imposition and private enforcement of servitudes or private imposition and public enforcement under statutory authority. This comment deals with public imposition and public enforcement of equitable servitudes.

7. See 2 AMERICAN LAW OF PROPERTY, §§ 9.24-9.40 (A.J. Casner ed. 1952); C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND"* 170-86 (2d ed. 1947); RESTATEMENT OF PROPERTY § 539 (1944); Stoebuck, *supra* note 2, at 890-901.

8. 5 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 672 (P. Rohan rev. ed. 1979); RESTATEMENT OF PROPERTY § 533, Comment b (1944); Stoebuck, *supra* note 2, at 890-92. If enforced on a contract theory, however, the property Statute of Frauds does not apply to equitable restrictions. At different times Washington courts have characterized equitable restrictions as both property and contract interests. In *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co.*, 102 Wash. 608, 173 P. 508 (1918), the Washington Supreme Court said that a promise running with the land and enforceable in equity was a "grant of valuable rights in real estate, and . . . a deed." *Id.* at 617, 173 P. at 511. Later, in *Johnson v. Mt. Baker Park Presb. Church*, 113 Wash. 458, 194 P. 536 (1920), the court held the statute did not apply because the equitable servitude involved was a contract right, not an interest in property. As a practical matter, it makes little difference whether

of the promise, the parties need record only a proper document in the chain of title to the burdened land.⁹ Unlike form and notice, the touch and concern requirement is a doctrinal limit on the class of promises that run with the land to bind subsequent owners. Under touch and concern analysis, courts examine the substantive nature of the promise to determine if it relates to the land.¹⁰ Regardless of the parties' intent, only promises related to the land will run as equitable servitudes.¹¹ This touch and concern test, therefore, usually determines the enforceability of servitudes.

Unfortunately, courts often impose the touch and concern requirement without adequate analysis. A court may simply label the promise "in gross," *i.e.*, personal, and, consequently, refuse to enforce it against subsequent owners.¹² Sound policy reasons, however, support imposition of the touch and concern test. First, the test prevents promises unrelated to the land from encumbering titles and thus furthers the pervasive judicial policy of promoting free use and alienability of land.¹³ Second, the test limits the situations in which a court will enforce a contract against a noncontracting party. As a means of making promises enforceable, the doctrine of covenants and servitudes running with the land has contract characteristics.¹⁴ But under traditional contract theory, running servitudes are unusual because they bind a person not a party to the original contract. Courts, accordingly, should impose the touch and concern requirement to limit the running of contract burdens in the real property context.¹⁵ The

courts require a writing. Conditional land use approvals are invariably written, and even if the promisor has not signed the approval, generally he has signed the application.

9. *E.g.*, *Wiegman v. Kusel*, 270 Ill. 520, 110 N.E. 884 (1915); *Oliver v. Hewitt*, 191 Va. 163, 60 S.E.2d 1 (1950); *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co.*, 102 Wash. 608, 173 P. 508 (1918); 2 AMERICAN LAW OF PROPERTY, *supra* note 7, at § 9.24; C. CLARK, *supra* note 7, at 183.

10. C. CLARK, *supra* note 7, at 96-97.

11. See *Stoebuck*, *supra* note 2, at 892.

12. *E.g.*, *Chandler v. Smith*, 170 Cal. App. 2d 118, 338 P.2d 522 (1959); *Orenberg v. Horan*, 269 Mass. 312, 168 N.E. 794 (1929); *Shade v. M. O'Keeffe, Inc.*, 260 Mass. 180, 156 N.E. 867 (1927). In gross personal promises are those which relate to a person rather than being appurtenant to land. See BLACK'S LAW DICTIONARY 703 (5th ed. 1979). In other words, such promises do not touch and concern the land.

13. See *Kent v. Koch*, 166 Cal. App. 2d 579, 333 P.2d 411 (1958); *Kotesky v. Davis*, 355 Mich. 536, 94 N.W.2d 796 (1959); *Burton v. Douglas County*, 65 Wash. 2d 619, 399 P.2d 68 (1965).

14. See *Stoebuck*, *supra* note 2, at 864.

15. See *Chaffee, The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250, 1258 (1956).

burden runs to nonparties only when the promise concerns the land itself.¹⁶ In a sense, courts enforce the promise against subsequent owners of the land because the promise binds the land itself. Accordingly, the touch and concern test promotes free alienability of land and limits the instances in which a promise binds noncontracting parties.

While there is agreement that a touch and concern test is necessary, the actual nature of the test varies.¹⁷ The Washington Supreme Court stated its touch and concern test in *Rodruck v. Sand Point Maintenance Commission*.¹⁸ In *Rodruck*, the trial court enforced an affirmative promise to pay for road maintenance against three subdivision lot owners.¹⁹ The developer recorded restrictive covenants for the subdivision in 1929. The covenants provided that a commission composed of the subdivision lot owners was to own and maintain the subdivision streets. The three lot owners purchased their lots in 1942 with record notice of the covenant to pay their share of road assessments. After annexing the subdivision in 1953, the City of Seattle assessed the maintenance commission for street improvements. The commission, pursuant to the subdivision covenants, then assessed the

16. See Stoebuck, *supra* note 2, at 892.

17. Compare RESTATEMENT OF PROPERTY § 537 (1944) with C. CLARK, *supra* note 7, at 97. The Restatement test focuses on physical benefit while the Clark test focuses on modification of ownership rights.

18. 48 Wash. 2d 565, 295 P.2d 714 (1956). In *Rodruck*, the court treated the promise as a covenant rather than a servitude. One commentator believes *Rodruck* is better considered as a servitude case, Weaver, *Fear and Loathing in Covenants* 37 (unpublished manuscript completed in 1978, on file at University of Puget Sound Law School), reasoning that similar promises in other jurisdictions have been treated as servitudes and are better explained as such. Further, other commentators indicate there is no real distinction between covenants and servitudes. Newman & Losey, *supra* note 2; Stoebuck, *supra* note 2, at 920. Whether the promise is characterized as a covenant or a servitude, the policy concerns are essentially the same and the touch and concern standard generally is considered to be the same. See generally 2 AMERICAN LAW OF PROPERTY, *supra* note 7, at § 9.28; 5 R. POWELL, *supra* note 8, at §§ 675-679; Stoebuck, *supra* note 2, at 892. Because courts have favored equitable enforcement of promises, there is some authority indicating the touch and concern test is not as rigorous for equitable servitudes. See *Pittsburg, C. & St. L. Ry. v. Bosworth*, 46 Ohio St. 81, 18 N.E. 533 (1888) (dictum); *Hodge v. Sloan*, 197 N.Y. 244, 17 N.E. 335 (1887).

19. At one time it was important to notice when a promise was affirmative. New York had trouble enforcing promises to do affirmative acts and writers felt compelled to make a distinction between affirmative and negative promises. See, e.g., 2 AMERICAN LAW OF PROPERTY, *supra* note 7, at § 9.16; C. CLARK, *supra* note 7, at 100 n.22. Now, after New York has found such promises enforceable, *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 164 N.E.2d 832 (1959); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938), writers unnecessarily continue to explain the former distinction, only to point out that it is no longer relevant. Stoebuck, *supra* note 2, at 873, 893.

costs to the subdivision lot owners. In their appeal, the lot owners contended the promise did not touch and concern the land. Denying the appellant's contention, the *Rodruck* court established a two-part touch and concern test: (1) the promise must substantially alter legal rights associated with land ownership; and (2) the promise must relate to the land so as to enhance the land's value.²⁰

Courts apply the touch and concern requirement to a promise to determine if the promise will run with the land as a servitude. For clear analysis courts must apply the test separately to the benefit and burden sides of the promise.²¹ While it is clear that the burden of a servitude must touch and concern the land,²² Washington courts have not decided if the benefit of a servitude also must touch and concern the land.²³

Under the *Rodruck* touch and concern test, the burden of a publicly imposed land use servitude usually meets both aspects of the test. The first aspect of the test, alteration of legal ownership rights, is met by definition. Land use servitudes relate to the land and modify rights connected with land ownership because they restrict normal property uses. The second aspect of the test, benefit to the burdened land, is met if local government properly imposes a servitude. Local governments impose land use regulations as an exercise of their police power.²⁴ Thus, for local government to impose a servitude, the servitude must provide some health, safety, or general welfare benefit to the community. The burdened land, the land the servitude restricts, is the focus of the area that receives the benefit. Therefore, the servitude benefits the burdened land as well as the surrounding land. Just as the burden of paying for better roads in *Rodruck* benefited the burdened lots, so too the burden of a land use servitude benefits the burdened land. Just as the court found that a road maintenance servitude touches and concerns, so it should find that the burden of a land use servitude touches and concerns.

20. 48 Wash. 2d at 575-76, 295 P.2d at 720-21.

21. See 2 AMERICAN LAW OF PROPERTY, *supra* note 7, at §§ 9.27 & 9.31; Stoebeuck, *supra* note 2, at 881-82, 901. The terms "burden side" and "benefit side" refer to the two sides of a promise. The promisor has a duty to act or refrain as promised. His duty is termed the "burden" of the promise. The promisee has a right to have the duty performed. His right is termed the "benefit" of the promise. *Id.* at 864.

22. *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wash. 2d at 574-75, 295 P.2d at 720.

23. *Weaver*, *supra* note 18, at 42.

24. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926); *Lillions v. Gibbs*, 47 Wash. 2d 629, 635, 289 P.2d 203, 206 (1955).

Courts have found, furthermore, that burdens very similar to those imposed by local government touch and concern the land. For example, private subdivision covenants requiring that an architectural review committee approve house plans run with the land.²⁵ The burden of such covenants is identical to the burden of site plan review servitudes that local government imposes. Both promises require approval of plans before construction. Private subdivision building standards and use restriction servitudes are further examples.²⁶ The burden of such servitudes is identical to publicly imposed site development servitudes. Because typical public land use servitudes impose the same burden as private subdivision use restrictions, Washington courts should find that the burdens of land use servitudes touch and concern the land. Equitable servitudes impose the same burden, whether a private or public entity holds the benefit.²⁷

The most significant issue in enforcing a public land use servitude is the touch and concern requirement applied to the benefit side. There are two views: some jurisdictions require that the benefit touch and concern land,²⁸ while others allow a promise

25. *E.g.*, *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 449 P.2d 361 (1969); *Kirkley v. Seipelt*, 212 Md. 127, 128 A.2d 430 (1957).

26. *Johnson v. Mt. Baker Park Presb. Church*, 113 Wash. 458, 194 P. 536 (1920); *Foster v. Nehls*, 15 Wash. App. 749, 551 P.2d 768 (1976).

27. This is not to say courts must find that the burden of any servitude touches and concerns the land merely because it is imposed by local government. If local government attempted to make a purely personal obligation run with the land, the *Rodruck* test would not be met. A court should not enforce such an obligation against a nonparty because it would thwart the policies behind the touch and concern test. But if local government stays within the bounds of its police power authority to regulate land use and drafts servitudes similar to those validated in the subdivision context, courts should find that the burdens local government imposes touch and concern the burdened land.

While lawyers should generally treat public land use servitudes like private servitudes, the drafters should give special attention to the method of termination. Servitudes may be terminated in several ways. 2 AMERICAN LAW OF PROPERTY, *supra* note 7, at § 9.37. One of the most common is for the holder of the burdened land to purchase the rights associated with the benefited land. *See id.* at § 9.23. With public servitudes, however, if courts find that the public or the government in a representative capacity holds the benefit, *see text accompanying note 39 infra*, the holder of the burdened land may find it impractical to purchase the servitude because of the large number of benefit holders. Therefore, the drafters of the public servitude should provide an alternative method for termination.

28. *E.g.*, *Chandler v. Smith*, 170 Cal. App. 2d 118, 338 P.2d 522 (1959); *Kent v. Koch*, 166 Cal. App. 2d 579, 333 P.2d 411 (1958); *Foreman v. Safe Deposit and Trust Co.*, 114 Md. 574, 80 A. 298 (1911); *Orenberg v. Horan*, 269 Mass. 312, 168 N.E. 794 (1927); *Kotesky v. Davis*, 355 Mich. 536, 94 N.W.2d 796 (1959); *Minch v. Saymon*, 96 N.J. Super. 464, 233 A.2d 385 (1967); *St. Stephen's Church v. Church of the Transfiguration*, 130 App. Div. 166, 114 N.Y.S. 623 (1909), *aff'd*, 201 N.Y. 1, 94 N.E. 191 (1911); *Stegall v. Housing Auth.*,

to run when the benefit is in gross.²⁹ Although Washington appellate courts have not decided the issue,³⁰ the majority of jurisdictions require that the promise touch and concern benefited land.³¹ Those courts adopt a policy prohibiting in gross obligations from running with the land and encumbering titles. Conversely, some courts follow an equitable doctrine, originally articulated in *Tulk v. Moxhay*,³² that does not require the benefit of a servitude to touch and concern the land.³³

In *Tulk* the owner of several houses adjacent to Leicester Square garden sold the garden subject to a servitude requiring the purchaser and his successors to maintain the garden. After several mesne conveyances the defendant purchased the property with actual notice of his predecessor's promise. Because there was no horizontal privity, the covenant could not run at law and the defendant sought to build on the property. The equity court, after finding the promise bound the defendant, enjoined him from building.

The court based its holding on two theories. One was the contract theory that a vendee with knowledge of the contract his vendor made cannot disregard the obligation. Under this theory, the court granted specific performance on the contract to prevent the vendee from being unjustly enriched by purchasing inexpensive restricted land and later selling the land for a greater price free of the restriction. The other theory was based on property law. The court reasoned, by analogy to easements, that the restriction attached to the property and bound subsequent pur-

278 N.C. 95, 178 S.E.2d 824 (1971); *Clark v. Guy Drews Post of Am. Legion*, 247 Wis. 48, 18 N.W.2d 322 (1945).

29. *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913); *Pratte v. Baltos*, 99 N.H. 430, 113 A.2d 492 (1955); *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 App. Div. 2d 950, 344 N.Y.S.2d 30 (1973); *Huber v. Gugliemi*, 29 Ohio App. 290, 163 N.E. 571 (1928). See *RESTATEMENT OF PROPERTY* § 539 (1944).

30. *Weaver*, *supra* note 18, at 42.

31. *Newman & Losey*, *supra* note 2, at 1137; see *Chandler v. Smith*, 170 Cal. App. 2d 118, 338 P.2d 522 (1959); *Kent v. Koch*, 166 Cal. App. 2d 579, 333 P.2d 411 (1958); *Foreman v. Safe Deposit & Trust Co.*, 114 Md. 574, 80 A. 298 (1911); *Orenberg v. Horan*, 269 Mass. 312, 168 N.E. 794 (1927); *Kotesky v. Davis*, 355 Mich. 536, 94 N.W.2d 796 (1959); *Minch v. Saymon*, 96 N.J. Super. 464, 233 A.2d 385 (1967); *Genung v. Harvey*, 79 N.J. 57, 80 A. 955 (1911); *St. Stephen's Church v. Church of the Transfiguration*, 130 App. Div. 166, 114 N.Y.S. 623 (1909), *aff'd*, 201 N.Y. 1, 94 N.E. 100 (1911); *Stegall v. Housing Auth.*, 278 N.C. 95, 178 S.E.2d 824 (1971); *Craven v. First Citizens Bank & Trust Co.*, 237 N.C. 502, 75 S.E.2d 620 (1953); *Clark v. Guy Drews Post of Am. Legion*, 247 Wis. 48, 18 N.W.2d 322 (1945); *Reno, The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 1067, 1088 (1942).

32. 2 Phil. 744, 41 Eng. Rep. 1143 (Ch. 1848).

33. See note 29 *supra*.

chasers with notice.

Under the contract theory, the justification for allowing promises to run is the policy against unjust enrichment. In *Tulk* the vendee would have been unjustly enriched by selling free of the restriction regardless of who owned the adjacent houses. Therefore, the court could have enforced the promise on the contractual theory alone, even if the promisee's right was only personal. Not surprisingly, several courts have followed the equitable basis of *Tulk* and allowed servitudes to run when the promise does not touch and concern on the benefit side.³⁴

The Washington courts' approach to touch and concern on the benefit side will determine if public land use promises run with the land as servitudes. If the courts focus on the equitable policy against unjust enrichment and do not require touch and concern on the benefit side, public land use servitudes generally will run with the land because they meet the other requirements for running. If, however, Washington courts require touch and concern on the benefit side, to achieve proper results they must apply the standard with regard to its underlying policy. Mechanistically applied, the touch and concern standard threatens almost all land use promises benefiting local government. These promises are vulnerable to misapplication of the rule because local government does not usually own land benefited by the promise. If the courts look no further than the promisee's lack of land ownership and conclude the promise is in gross, the in gross rule bars the running of land use servitudes for the benefit of local government. The promises would run only in the limited instances where the government actually owns benefited land.³⁵

Mechanistic application of the rule against servitudes in gross results in cases like *London County Council v. Allen*.³⁶ Allen, a developer, received approval for a subdivision from the County Council subject to the condition that he not build on two

34. *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913); *Pratte v. Balatsos*, 99 N.H. 430, 113 A.2d 492 (1955); *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 App. Div. 2d 950, 344 N.Y.S.2d 30 (1973); *Huber v. Gugliemi*, 29 Ohio App. 290, 163 N.E. 571 (1928); *RESTATEMENT OF PROPERTY* § 539 (1944).

35. In some circumstances local government will own nearby property, such as a city or county park or road, to which the benefit could be appurtenant. That the beneficiary has land in the vicinity of the burdened land, however, does not mean the servitude will be appurtenant. In *Kent v. Koch*, 166 Cal. App. 2d 579, 333 P.2d 411 (1958), the court found a servitude within a residential subdivision was in gross and hence unenforceable, even though the plaintiff retained a parcel of land large enough for parking and a sign, but too small for a building lot.

36. [1914] 3 K.B. 642 (C.A.).

lots so that the county could extend the existing road network across the lots. The parties intended the promise to run with the land. Subsequently, the developer's wife, with notice of the restriction, acquired one of the burdened lots. Disregarding the restriction, Mrs. Allen built a house on the lot she obtained and Mr. Allen built a wall on the lot he retained. When the County Council sought to enforce the restriction, the court held Mr. Allen to his promise and required him to remove the wall. In contrast, the court refused to enforce the restriction against Mrs. Allen, reasoning that the Council owned no benefited land and, therefore, the servitude was in gross.

The *London County Council* court recognized that at one time the contractual specific performance rationale of *Tulk v. Moxhay* had been broad enough to bind successors to the property with notice of the restriction. Nevertheless, the court held subsequent cases limited the *Tulk* contract theory supporting servitudes to that of negative easements, which could not run in gross. The court's conclusion that the benefit held by the County Council was in gross ignores the reason behind the touch and concern requirement. Touch and concern ensures that "mere collateral promises," those promises personal to the parties involved, do not run unnecessarily with the land and encumber titles.³⁷ Courts correctly find promises to be in gross only when the promises benefit the individual rather than the land.³⁸ When local government holds the benefit of a servitude that actually benefits the land surrounding the burdened land, the policy behind the touch and concern test is met. The *London County Council* court reached an improper result because it incorrectly concluded that all benefits are in gross when the promisee owns no nearby land.

In Washington there is no reason to find that land use servitudes benefiting local government are in gross when local government does not own nearby land. No case so holds. Moreover, very often a land use promise to local government meets the *Rodruck* touch and concern test on the benefit side even though the government owns no land nearby. Promises typically extracted from a developer, such as those to protect the existing character of a neighborhood, to prevent pollution of local groundwater supplies, or to provide aesthetic benefits to the project area, substantially alter rights associated with land ownership and benefit land in the area. For example, a local government might require a

37. See text accompanying note 11 *supra*.

38. See note 10 *supra*.

twenty-foot wide green belt planted with trees as part of a new shopping center adjacent to residential uses. On the benefit side, both elements of the *Rodruck* test are met; the promise benefits adjacent residential property by what amounts to a scenic easement and the addition of the easement alters rights associated with land ownership. Even though local government did not own the adjacent property, the promise benefited the land. Courts should recognize that actual touch and concern is present with public land use servitudes, and allow such promises to run.

In the related area of subdivision covenants, some courts have found touch and concern present although the recipient of the promise owned no land. In the leading case from New York, *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*,³⁹ a subdivision homeowners' association owning no land sought to enforce subdivision covenants. The original lot deeds contained a promise binding the purchaser and his successors to pay an annual maintenance assessment. Property owners formed an association to collect funds and maintain the subdivision. Later, the defendant bank purchased a lot and refused to pay the assessment, claiming the promise did not touch and concern the land. The court found touch and concern present, recognizing land within the subdivision actually was benefited even though the association itself owned no land.

The property owners' association in *Neponsit* is comparable to a local government; although neither owns nearby property, both represent property owners.⁴⁰ The benefit of a promise to government touches land owned by the people government represents, just as the benefit in *Neponsit* touched land owned by those the association represented. Because the promise benefits land, the policy basis for touch and concern is met in both situations; the result should be the same in each.

Significantly, in *Rodruck* the Washington Supreme Court relied heavily on the *Neponsit* rationale.⁴¹ Admittedly, *Rodruck* is distinguishable from *Neponsit* because the property owners' association in *Rodruck* actually owned benefited property. The Washington court, however, did expressly adopt the reasoning of

39. 278 N.Y. 248, 15 N.E.2d 793 (1938).

40. This representation theory may also be useful to private property owners near the burdened land when attempting to enforce the servitude on a third-party beneficiary theory. The representative role of government implies an intent to benefit the nearby public. See *Rodgers v. Reimann*, 227 Or. 62, 361 P.2d 101 (1961) and RESTATEMENT OF PROPERTY § 541 (1941) for discussion of third-party beneficiary theory.

41. 48 Wash. 2d 565, 576, 295 P.2d 714, 721 (1956).

*Neponsit*⁴² and the reasoning shows the benefit of a public land use servitude touches and concerns the land because it benefits nearby land.

Washington courts have additional reasons to find that public land use servitudes meet the requirements for running with the land. First, the Washington Supreme Court has recognized that increasing population, growing urban concentration, and a wide variety of potentially incompatible land uses have created an "insistent social need" for land use control.⁴³ Accordingly, the court validated the use of contract zoning as a land use control tool.⁴⁴ Contract zoning allows governments to ensure land use compatibility through individualized conditional approval of rezones rather than through grants of broad discretion to developers. To receive rezone approval, the developer must promise to comply with the conditions. Commonly local government records the conditions as equitable servitudes because it desires the equitable enforcement remedies of specific performance or injunction.⁴⁵ It would be inconsistent for the court to provide a land use control tool and later invalidate the most desirable means of enforcement. Because the Washington Supreme Court recognizes the contract zoning tool, logically it also must recognize that public land use servitudes run with the land.

Second, Washington case law does not constrain its courts to reach the same result the *London County Council* court termed "regrettable" when it reluctantly denied enforcement of a land use servitude benefiting local government.⁴⁶ The English court indicated it would have enforced the servitude had the contract theory of *Tulk v. Moxhay* remained available.⁴⁷ In contrast with

42. *Id.*

43. *Chrobuck v. Snohomish County*, 78 Wash. 2d 858, 874, 480 P.2d 489, 498 (1970) (Finley, J., concurring).

44. *State ex rel. Myhre v. City of Spokane*, 70 Wash. 2d 207, 422 P.2d 790 (1967).

45. See note 2 *supra*.

46. [1914] 3 K.B. 642, 672 (C.A.). The court, indicating a concern that is still relevant, said:

[It is] very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighborhood.

Id. at 673.

47. The court said:

[A]t the time of *Tulk v. Moxhay* and for at least twenty years afterwards, the plaintiffs in this case would have succeeded against an assign on the ground that the assign had notice of the covenant: since three decisions of the Court of

the limited English theory, Washington retains a broad theory for enforcing equitable servitudes.

The Washington Supreme Court expressed this broad equitable theory and its contractual underpinnings in *Johnson v. Mt. Baker Park Presbyterian Church*.⁴⁸ *Johnson* involved a subdivider who represented to lot purchasers that the development would be an exclusive residential area. Most deeds restricted development to single detached residential buildings. The church purchased a lot from the subdivider with knowledge of the grantor's promises, but without the deed restriction. In an action brought to prevent construction of a church building, the court found the developer's promise ran with the land as an "equitable estoppel" binding the subsequent purchaser. Just as the English court in *Tulk v. Moxhay* focused on the broad principle that one purchasing with notice of a restriction is not freed of the promise, the *Johnson* court focused on the developer's promise, the purchaser's notice, and the lot owner's reliance. Because Washington law retains a broad equitable basis for servitudes, the courts can enforce conditions imposed in the public interest and prevent possible unjust enrichment.

Finally, the Washington Court of Appeals has begun to recognize and follow a strong national trend toward liberalizing and expanding the running of servitudes.⁴⁹ Formerly, the court applied a rule of strict construction to defeat the application of running promises.⁵⁰ At that time, the court viewed servitudes as undesirable encumbrances on title and limited their application whenever possible. The court abandoned the strict construction rule in *Foster v. Nehls*.⁵¹ The defendant in *Foster* built a two-story house in a subdivision where covenants restricted building height

Appeals, the plaintiffs must fail on the ground that they have never had any land for the benefit of which this "equitable interest analogous to a negative easement" could be created.

Id. at 672 (citations omitted).

48. 113 Wash. 458, 194 P. 536 (1920).

49. Professor Stoebuck identifies the national trend. Stoebuck, *supra* note 2, at 919. Professor Weaver recognizes that Washington has begun to follow the trend. Weaver, *supra* note 14, at 51.

50. *Burton v. Douglas County*, 65 Wash. 2d 619, 399 P.2d 68 (1965); *Granger v. Bous*, 21 Wash. 2d 597, 152 P.2d 325 (1944); *Miller v. American Unitarian Ass'n*, 199 Wash. 555, 171 P.2d 526 (1918). The policy is stated in *Burton*: "Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land." 65 Wash. 2d at 622, 399 P.2d at 70 (four justices dissenting). See *Bersos v. Cape George Colony Club*, 4 Wash. App. 663, 484 P.2d 485 (1971).

51. 15 Wash. App. 749, 551 P.2d 768 (1976).

to one and one-half stories. The court, despite evidence that the height of a two-story house is no greater than that of a one and one-half story house, expanded the covenant by construction to prohibit "any residence which substantially obstructs the view in question."⁵² The court ordered the second story removed.

Under the old rule of strict construction the court would have defined the restriction in feet and inches or would have invalidated the restriction as an ambiguous attempt to measure height in terms of area. But the *Foster* court recognized the value of land use servitudes and did not treat them as unfavored encumbrances on title. This change in perception resulted from the court's recognition that land use restrictions, such as subdivision servitudes, increase the desirability and value of land by fostering orderly development and providing a mechanism to avoid land use conflicts.⁵³ Washington courts should continue to recognize the validity of public land use servitudes because such servitudes further the same land use planning goals the courts promote in the private context.

In conclusion, the Washington courts are free to enforce public land use servitudes. Of the elements required for a servitude to run with the land, form, notice, and touch and concern on the burden side do not bar running. Only the touch and concern element applied on the benefit side is a potential bar. Washington conceivably could allow public land use servitudes to run with the land by following the minority position of not requiring touch and concern on the benefit side. A less stringent theory, however, is available to enforce public land use servitudes. Washington has not adopted a rule that public servitudes are always in gross when government does not directly own benefited land. Therefore, the courts are free to require touch and concern on the benefit side while recognizing that the requirement is met when the promise benefits land, regardless of ownership.

Based on their past record, Washington courts probably will enforce public land use servitudes. The courts have recognized and responded to the need for land use control to manage growth and development in the state, thereby furthering both public zoning and private subdivision regulation.⁵⁴ Accordingly, to be consistent, the courts must enforce public land use servitudes.

Until the courts actually address the issue, however, uncer-

52. *Id.* at 750, 551 P.2d at 770.

53. See Stoebeuck, *supra* note 2, at 919.

54. See text accompanying notes 43, 49 & 51 *supra*.

tainty remains about the enforceability of public land use servitudes. To provide for the uncertainty, local government must evaluate the risk involved in relying on such servitudes. If a conservative court's potential refusal to enforce the servitude creates a substantial risk to the public interest, local government may withhold its conditional approval of a developer's plans. This results in a harsh loss of flexibility for both developers and local governments. Therefore, the courts should take the first opportunity to establish the enforceability of public land use servitudes.⁵⁵

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55. The state legislature could statutorily provide assurance that servitudes in gross for the benefit of local government will run with the land. The County Planning Enabling Act, WASH. REV. CODE § 36.70 (1976) or the City Planning Commission Act, WASH. REV. CODE § 35.63 (1976) are appropriate places for such an amendment because they deal with land use planning. There may be, however, another alternative to state legislative action. Local governments could accomplish the same result within their boundaries by ordinance if an ordinance that provides for running of land use servitudes in gross is a legitimate planning purpose under the planning enabling acts or is a permissible exercise of police power. Whether local government has that power is beyond the scope of this article. Pierce County has already tried this approach in the Gig Harbor plan. The plan provides, "The conditions and limitations established as part of the site plan approval process shall (legally speaking) run with the land, thus will be binding on all successors in interest to the applicant." Pierce County, Washington, Development Regulations for the Gig Harbor Peninsula at 29 (June 30, 1975).