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Thomas E. Roberts

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PROMISES RESPECTING LAND USE—CAN BENEFITS BE HELD IN GROSS?

Thomas E. Roberts*

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* Professor of Law, Wake Forest University School of Law

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I. INTRODUCTION

Covenants and servitudes affecting land use, like all promises, create benefits and burdens. If there is no land benefited by the performance of a promise, the benefit is said to be in gross.¹ Early on, English courts, out of a concern for alienability,² invalidated interests in gross that limited the use of land. The rule persists today as most courts in this country deny enforceability to covenants and servitudes in gross. The anti-in gross rule is troublesome. First, it is unclear whether the rule promotes any legitimate policy and, if it does, whether enforcement of the rule takes adequate account of the losses imposed. There is an unfortunate tendency to use the in gross label in a conclusory manner, and most of the decisions fail to articulate reasons supporting their actions. The supposed goal of fostering free land use and alienability is inadequately explored, if it is addressed at all. Furthermore, the cost of non-enforcement, in terms of upsetting contracts freely entered into, passes virtually unnoticed.

The purpose of this article is to compare and evaluate the anti- and pro-enforcement views. The conclusion reached is that considerations of alienability are generally insufficient to justify setting aside the otherwise legitimate expectations arising from contracts affecting land use. The article suggests dispensing with any rule that automatically rejects benefits in gross. Instead, an approach is suggested that first seeks to determine the reason for the existence of a promise and then weighs its utility and its harm. What is needed is a balancing of the policies underlying freedom of contract against concerns for free land use and alienability.

In addition to protecting contractual expectations, removal of the in gross barrier will also aid efforts by governmental entities and private or-

¹ "In gross" refers to an interest which is attached to a person rather than appurtenant to land. This term is also used for easements in gross, see Restatement of Property § 454 (1944) [hereinafter Restatement], as well as conditions and options in gross. See infra note 5. The phrase has its origin in medieval Latin where in grosso meant something independent or at large. See IV A New English Dictionary on Historical Principles 447 (Sir James Murray ed. 1901); Ballentine's Law Dictionary 623 (3d ed. 1969).

² Objections initially surfaced with easements in gross. See 2 American Law of Property § 9.13, at 375 (Casner ed. 1952) [hereinafter A.L.P.]. The dislike probably was due in part to the fact that interests in gross were not as discoverable, upon inspection, as interests appurtenant to adjacent tracts. Since England then had no recording system, the risk to purchasers would have been too great if such interests were valid. See J. Dukeminier & J. Krier, Property 962-63 (1981).
ganizations to preserve agricultural land, scenic views, and historical sites by allowing them to purchase development rights through the use of covenants. These sound land use control mechanisms have been inhibited by the existence of the anti-in gross rule.⁵

Rejection of the anti-in gross rule will bring the law of covenants and servitudes in line with the law in similar areas. In this country, the burden of easements in gross will run and there is no reason to treat covenants in gross differently.⁴ Likewise, conditions⁶ can be held in gross and, again, there appears to be no reason to distinguish between covenants and conditions with respect to this issue. It is a disservice to the integrity of the law to treat like interests differently.

A second problem is the confusion that exists due to the failure of the courts to define with particularity the meaning of “in gross.” Commentators, by accepting judicial misapplication of the supposed rule or by using an overly broad definition of in gross, have added to the confusion. Cases raising the issue of who was intended to be able to enforce a covenant have been mixed with those involving the absence of a dominant estate. When one rule

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5. An owner may create a defeasible fee and retain either a possibility of reverter or a right of entry which, though there is no dominant estate, is enforceable by forfeiture, a sanction more severe than money damages or an injunction which could result from enforcing a covenant or servitude. See J. Cribbet, Principles of the Law of Property 351 (2d ed. 1975); see also Jost, The Defeasible Fee and the Birth of the Modern Residential Subdivision, 49 Mo. L. Rev. 695, 778 n.236 (1984) (citing cases which have refused to enforce defeasible fees where the benefits were in gross but acknowledging that conditions in gross are usually allowed).

Options in gross involve similar problems. Distinctions are drawn between options appendant, such as one held by a tenant to purchase or renew a lease, and options to purchase or repurchase which are unrelated to any other interest in land held by the optionee. See L. Simes & A. Smith, The Law of Future Interests §§ 1243-45 (1956); 6 A.L.P., supra note 2, §§ 24.56-.57. While options in gross are otherwise valid and a purchaser with notice will take subject to such rights, 8A G. Thompson, Commentaries on the Modern Law of Real Property § 444 (1963), they may be subject to the Rule against Perpetuities and the rule against unreasonable restraints on alienation. 6 A.L.P., supra note 2, §§ 24.56-.57; see also Restatement, supra note 1, §§ 402-05.
is used to answer two different questions, the policy basis of the rule cannot be properly identified and the cases cannot be accurately catalogued. The consequence has been to overstate the strength of both the majority and minority rules.

This article will attempt to remove the confusion by focusing on the separate inquiries that must be made. Clarifying when promises are in gross will bring more certainty to questions that arise with respect to developer and property owner association enforcement of neighborhood covenants. Sometimes these provisions are, unfortunately, labelled as in gross even though land is benefited.

The following section of the article, Part II, will deal with two matters that must be addressed at the outset to establish the parameters of the in gross problem. These include the question of whether the anti-in gross rule is one that affects only running covenants and servitudes, and whether it makes any difference if enforcement is sought in law or equity. Then, in Part III, the article will assess the merits of the anti- and pro-in gross views and will explore the apparently conflicting case law with respect to the validity of covenants where there is no land benefit and suggest an approach which incorporates the policy concerns of both views to produce more satisfactory results. In Part IV, the article will look at the anti-in gross rule in operation to clear up some of the confusion which exists as to when the rule, assuming it exists, should be applied.

II. SOME PRELIMINARY CONSIDERATIONS

A. A Running Covenant Problem or One of Original Contract Validity

The benefit in gross problem is normally viewed as one to be dealt with in the realm of running covenant theory. Since Spencer’s Case, covenants, and subsequently equitable servitudes, in order to run with the land have had to meet the requirement of touching or concerning the land held by both the promisor and the promisee. The question of the enforceability of benefits

7. See infra text accompanying notes 16-24 (discussing covenants in equity).

Most discussions of covenants use the phrase “touch and concern.” I prefer to use the disjunctive “or” for two reasons. First, Spencer’s Case, where the phrase originated, used “or” not “and.” 77 Eng. Rep. at 74. Second, if phrased in the conjunctive, the test can be used to impose a physical touching test. In Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978), the court, in declining to enforce
in gross is part of the touch or concern test. Proper analysis requires that one separate running benefit and running burden problems. On the burden side, the generally accepted test is that in order for a transferee of the original promisor to be bound, both the benefit and burden must touch or concern, or be appurtenant to, land. In other words, not only must the promisor have land that is affected by the promise, but so too must the promisee must also have land affected. If the benefit of the promise does not concern or relate to land, then the benefit is regarded as personal, or in gross, and the successor to the promisor will not be bound. When a question involves an attempt by a transferee of the promisee to assert the benefit of the promise, a running benefit question exists. The general view is that the benefit, to run, must also touch or concern.

Discussions of the benefit in gross problem usually assume that in those cases where courts have refused to permit the burden to run because the benefit was in gross, the result would have been different if the suit had

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9. The benefit in gross problem can become intertwined with questions of vertical privity of estate when a running benefit question is involved. See Cunningham, Stoebuck, & Whitman, supra note 8, § 8.17 (regarding vertical privity). Assuming vertical privity is required, it means that a successor to the original promisee must succeed to some interest in the land of the promisee. See Restatement, supra note 1, § 547. If the benefit is in gross, there is no land and the privity requirement cannot be fulfilled. Since the benefit must touch or concern land in order for the benefit to run, see authority cited infra note 13, the absence of vertical privity is simply another way to declare the promise unenforceable by a transferee of the original promisee. Though some commentators discuss the in gross problem as one of vertical privity, see R. Ellickson & A. Tarlock, Land Use Controls 624 (1981), its usefulness is limited to running benefit cases. The touch or concern test is preferable since it also applies to running burden problems, and, though it was not developed for this purpose, to questions of validity between the original parties. See supra text accompanying note 158.

10. The notion of appurtenance, a term usually employed for easements, is basically the same as the touch or concern test for covenants and servitudes. See French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 So. Cal. L. Rev. 1261, 1271-72 (1982). An easement appurtenant is one which has some land, a dominant estate, benefited by the easement. If no dominant estate exists, the easement is said to be in gross. See Cunningham, Stoebuck, & Whitman, supra note 8, § 8.2 (regarding basic easement terminology). A covenant also may be labelled appurtenant to distinguish it from one which is in gross.

11. See Cunningham, Stoebuck, & Whitman, supra note 8, at 470; Restatement, supra note 1, at 537.

12. See Cunningham, Stoebuck, & Whitman, supra note 8, at 470.
arisen between the original covenaniting parties. A covenant in gross, however, is seen by some courts as an inherent defect in the original promise of the parties. So viewed, the absence of a dominant estate creates a public policy objection rendering the contract unenforceable. A landowner, upon transfer, is simply incapable of attaching a burden to the land conveyed unless there is a corresponding benefit to some other land. The policy underlying this limitation on freedom of contract will be explored below. It must be noted at the outset, however, that in probing the validity of covenants in gross a court may be taking one of two positions: that a covenant which is personal to the promisee is enforceable against only the promisor and not his assigns, or the more fundamental objection that a grantor is incapable of limiting the use of land by the grantee unless there is a benefit to other land. This article takes the position that the same rule should apply to both situations: the covenant should be enforced unless the restraint on alienability is unreasonable.

B. Law and Equity

Differences between covenants running at law and servitudes running in equity have occupied the time of many writers. A general discussion of that

14. Los Angeles Univ. v. Swarth, 107 F. 798 (9th Cir. 1901) (discussed in detail infra text accompanying notes 130-34); Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913) (discussed infra text accompanying notes 47-53); Welitoff v. Kohl, 105 N.J. Eq. 181, 147 A. 390 (1929) (discussed infra text at note 37); Stegall v. Housing Auth. of Charlotte, 278 N.C. 95, 103, 178 S.E.2d 824, 827 (1971) (discussed infra text accompanying note 27). In Swarth, the original promisee was unable to enforce a covenant against the original promisor because the promisee had no land benefited by the covenant. The court appeared to find that the original promisee, owning no land benefited, extracted the promise for the benefit of others. Thus, the case is properly read as one where the original promisee was not a proper party to enforce the covenant because of lack of intent. If the promisees had intended to benefit themselves by retaining the development rights, a notion the court did not expressly consider, it is not clear that the court would have still rejected the suit. See infra text accompanying notes 36-41. In Van Sant, where the court found a covenant in gross valid as against a grantee of the original promisor, the case might be viewed as one involving the original party since the original promisor was a party defendant to the suit and the grantee-defendant was his wife. The court in Van Sant also addressed the defendant's in gross argument as one which went to the validity of the initial covenant. 260 Ill. at 404, 103 N.E. at 195.
15. See infra discussion in Part III, A.
16. The doctrine of equitable servitudes stems from the decision in Tulk v. Moxhay, 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848), where the court substituted a requirement of notice for that of horizontal privity which existed at law. The distinction between real covenants and equitable servitudes has received much attention elsewhere and is beyond the scope of this article. See generally authorities cited supra note 8. Intent and touch or concern must be shown for a promise to run at law or in equity. See 2 A.L.P., supra note 2, § 9.28. See generally CUNNINGHAM, STOEBUCK, & WHITMAN, supra note 8, at 485.
issue will not be repeated here except to note that where the in gross issue is treated as a running problem, it should not matter whether enforcement is sought in law or equity. There have been, however, occasional suggestions that the touch or concern test may be more relaxed in equity than at law.\textsuperscript{17} These suggestions have resulted in some confusion.

One source of the confusion is the Restatement of Property which takes the position that different touch or concern rules apply in equity and law with respect to promises where the benefit is in gross. The Restatement initially declares that the burden of a covenant will not run when the benefit is in gross.\textsuperscript{18} It proceeds to give as an example a noncompetition covenant which is viewed as not touching or concerning the land because the benefit is an economic one rather than a physical one.\textsuperscript{19} The Restatement goes on to say, without explanation, that “no . . . requirement [of a dominant estate] attaches to the running of equitable obligations.”\textsuperscript{20} Two points need be made. First, most courts today regard an economic benefit to land as meeting the touch or concern test, whether at law or in equity.\textsuperscript{21} Second, the Restatement’s

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\textsuperscript{17} See Berger, supra note 8, at 216-17; Cunningham, Stoebuck, & Whitman, supra note 8, at 490.

\textsuperscript{18} See Restatement, supra note 1, § 537; 2 A.L.P., supra note 2, at 375. But see infra text accompanying note 57 (exception regarding covenants to pay money).

\textsuperscript{19} Restatement, supra note 1, § 537 comment f.

\textsuperscript{20} Id. § 539 comment k.

\textsuperscript{21} See Browder, Running Covenants and Public Policy, 77 Mich L. Rev. 12, 42 (1978). Non-competition covenants are discussed infra Part III, B.2. Distinctions between law and equity may affect the benefit in gross problem according to some. For example, in a recent article, Professor French suggests this in her discussion of the similarity between the appurtenance rule for easements and the touch or concern test for covenants. See French, supra note 12, at 1271-72, 1278. She says that touch or concern and appurtenance “uniquely converge” in the law of equitable servitudes by saying that English courts limited equitable servitudes by imposing the appurtenance requirement from easement law, and the touch or concern test from the law of covenants. Id. at 1276-77. As I see it, however, a convergence also exists with respect to covenants, and even Professor French admits appurtenance for easements and touch or concern at law are quite similar. Id. at 1271-72.

Professor French’s distinction between law and equity is important for its implications to the benefit in gross question because she says there may be servitudes which do not touch or concern but still meet the appurtenance test. To support this position, she uses what she recognizes as outdated Massachusetts law. Massachusetts once held that a burden of a covenant not to compete would not run because there was a mere benefit to a business rather than to the land itself. Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885). That view has now been rejected. Whitinsville Plaza v. Kotseas, 378 Mass. 85, 390 N.E.2d 243 (1979). In Massachusetts, as elsewhere, a promise which benefits a business on land is viewed as meeting the touch or concern test. This problem is discussed in more detail infra text accompanying notes 73-80. French, however, uses this now older view as an example of the difference between the touch or concern test and the appurtenance test. Thus, she says that “it is not clear whether the benefit of an equitable servitude must touch and concern the land of the promisee, or merely touch and concern the business carried on upon the
attempt to treat promises in gross differently depending upon whether it is at law or in equity has not found favor with the courts or the commentators, nor was it supported by authority when made.\textsuperscript{22}

From a policy viewpoint there is no reason why the touch or concern test should differ. If the requirement makes sense at law, it should apply in equity as well.\textsuperscript{23} Today, calls for a unified and functional approach to covenants and servitudes properly note that there is no adequate justification for a dual set of rules.\textsuperscript{24} The discussion which follows will not generally differentiate between covenants and servitudes. Rather, the article will explore the traditional judicial view that, at law or in equity, the benefit of a promise must be appurtenant to, or touch or concern, land.

III. Validity of Covenants Where a Non-Land Benefit Exists

While there has been some judicial willingness to allow covenants in gross, the majority of courts which have considered such covenants have refused to enforce them.\textsuperscript{25} The following examination of cases will reveal a
range of views from one extreme that permits land to be burdened only where a compensating benefit to other land exists to the other extreme that considers the beneficial effect of a restriction on land use to be irrelevant. Courts that deny enforcement start from a premise favoring free land use and, bolstered by the Restatement, strike down covenants in gross because of their supposed adverse effect on alienability. The discussion will show that with respect to those courts operating from the free land use perspective the rule is not monolithic. Thus, we will see that some take the absolute position that land may not be burdened with restrictions unless there is a dominant estate. Other anti-in gross decisions, however, occur in circumstances where there is no clear reason advanced for the imposition of a covenant. This latter group of cases can be viewed as promoting a relative rule that only covenants which are ambiguous as to the benefit will necessarily fail. This second viewpoint leaves open the possibility of upholding promises involving non-land benefits where, on balance, the effect on alienability is reasonable.

A. The General Problem—Comparing the Views

Turning to the cases, the traditional view is exemplified by the North Carolina case of Stegall v. Housing Authority of the City of Charlotte. Grantor Garrison extracted a covenant from his grantee Williams requiring the latter to limit use of the conveyed land to single family residences, but Garrison owned no land in the vicinity of the conveyed land which was benefited by this covenant. The court declared that the grantor,


Some statutes require that in order for a covenant to run there must be a direct benefit to property. See Calif. Civil Code § 1462 (West 1982) (discussed infra note 43); Mont. Code Ann. § 70-17-203 (1985); N.D. Cent. Code § 47-04-26 (1978); S.D. Codified Laws Ann. § 43-12-21(1) (1983). These are apparently derived from the Field Code. See Browder, supra note 21, at 22-23.

26. Restatement, supra note 1, § 537.
27. 278 N.C. 95, 178 S.E.2d 824 (1971).
28. The court noted that Garrison did own one small lot but that lot, subject to a railroad right of way, was deemed unsuitable for building and thus was not benefited by the covenant. Id. at 98, 178 S.E.2d at 828. Garrison testified that he put the covenant in the deed to protect some rental property he owned "somewhere
owning no dominant estate, "had no right to limit . . . [the] free

in the area." Id. at 99, 178 S.E.2d at 826. The record failed to indicate how far this property was from the restricted tract, and this precluded a finding that the rental property was a dominant estate. Id. at 102, 178 S.E.2d at 829. The court, thus, approached the case from the viewpoint that Garrison had no land benefited by the promise.

While it has been assumed that if a promisee owns any land, "however insignificant," it will nonetheless constitute a dominant estate, Stone, The Equitable Rights and Liabilities of Strangers to a Contract, 18 Colum. L. Rev. 291, 312 (1918), the courts which require a dominant estate have rejected the idea that technical title to land will suffice. If the land is useless for development purposes, it is not a dominant estate. In Stegall v. Housing Auth. of Charlotte, 278 N.C. 95, 178 S.E.2d 824 (1971), discussed supra, the court found that while the grantor held title to slightly less than an acre, the land was subject to a railroad right of way and was unsuitable for building. See also Kent v. Koch, 166 Cal. App. 2d 579, 333 P.2d 411 (1958) (where a non-buildable parcel did not qualify).

The only possible justification for permitting useless land or technical title to serve as a dominant estate would be avoidance of the rule against allowing enforcement of covenants in gross. If that is the desired goal, then it is better to simply say so rather than to make the requirement of a dominant estate an empty formality. If a compensating advantage to land is required to offset the hindrance on the use and alienability of burdened land, then the advantage should be real.

A more difficult question, where there must be a dominant estate, is how to measure the benefit. While there seems to be no requirement that the benefit equal or exceed the burden, the Restatement suggests that "the burden on the land of the promisor [should bear] a reasonable relation to the benefit received by the person benefited." Restatement, supra note 1, § 537 comment h. While the Restatement has been criticized for this view, C. Clarks, supra note 22, at 143, the limitation makes sense if one accepts the Restatement's concern for decreasing the effect on alienability.

Under the Restatement where a finding is made that no measurable benefit to land exists, then no land should be burdened. For example, in an illustration given by the Restatement, A, retaining ownership of a city lot on one side of a street, transfers land to B consisting of three city blocks on the opposite side of the street with a covenant that there will be no multi-family use. The Restatement says A can enforce a covenant against B's grantee for land near A's retained lot but not as to a lot at the far end of the third block. See Restatement, supra note 1, § 537 comment h, illustration 4. Judge Clark disparagingly calls this "amazing," C. Clarks, supra note 22, at 143, but the Restatement makes sense because it assumes that breach of the covenant at the far end will have "no appreciable effect" upon A's use of the retained lot. See Restatement, supra note 1, § 537 comment h. If that finding is accurate, then A's goal of protecting his own dwelling is not thwarted. A is deprived of the right to bank the development potential of the lots across the street or the right to arbitrarily keep apartments out of town, but he was not trying to do that anyway. While one can object to the intrusion into A's bargain with B, the result is in accord with the Restatement's pro-alienability view. The critical question is the finding of "no appreciable effect." In Metropolitan Inv. Co. v. Sins, 14 Utah 2d 36, 376 P.2d 940 (1962), for example, the dominant estates were several blocks away. The promisees owned two separate parcels on which they operated motels. When they sold another tract several blocks away to plaintiff's predecessor, they imposed a covenant prohibiting its use as a motel. The burden of the covenant was held to run
use'" of the conveyed tract. The only rationale given by the Stegall court for prohibiting this limitation on land use was that a promisor who owns no land that can be benefited by the promise cannot sue because he is a "mere intruder.'"

The lack of any policy discussion forces one to speculate as to what bothered the court. The concern of the court may have been that the servitude was imposed irrationally or arbitrarily, and the public interest may have been viewed as requiring a reason to exist to justify a limitation on the use of land. In Stegall, for example, if the original grantor owned no land in the vicinity of the eighteen acre tract that he sold, why would he care to restrict its use to single family dwellings? To permit a person who sells land to impose limitations on its use to protect retained land is one thing, but to permit a person to tie up land use for no apparent reason is quite another. The effect of enforcing such a covenant is a decrease in the value of land as restricted and a loss to the public of land needed for development. In Stegall, the effect of permitting enforcement of the restriction at that site would have been to prevent the city of Charlotte from constructing an apartment project which the city's housing authority had determined was needed. In order to tolerate such a loss, whether it is characterized as a mere private loss in the decreased value of the restricted land or, as in Stegall, the additional public loss of needed housing, the rule demands that there be some demonstrated reason for imposing the loss. To permit a grantor to conduct a private crusade against the intrusion of multi-family housing into an area

despite plaintiffs argument that there was no benefit to defendant. The case is consistent with the Restatement since the court found that a violation of the covenant would have an appreciable effect on the promisee's other land. Id.

The Restatement's next illustration makes it clear that the test is not physical proximity. Thus, the Restatement says that where a common plan exists, the owners in one end of a subdivision can enforce covenants against those in the other end even though the enforcer's lots are physically remote. Restatement, supra note 1, § 537 comment h, illustration 5. This apparently is based on a finding that breach of a covenant anywhere in the subdivision will have a detrimental effect on all under a domino theory. Other breaches may follow the first and eventually, the doctrine of changed circumstances may render the covenants unenforceable.

If judicial intervention occurs for reasons relating to alienability, a court can minimize its intrusion into the bargain of the parties by adopting a test looking for a minimal beneficial effect accruing to the dominant estate. The Restatement does not call for anything more.

29. 278 N.C. at 102, 178 S.E.2d at 828.

30. Note that the grantor-promissee was not a party to the suit; the court was simply clearing title. Even if the grantor had been able to enforce the covenant, the plaintiffs would have been denied enforcement rights because a lack of intent to benefit their land. See infra text accompanying notes 143-45 (third party beneficiary enforcement discussion).

31. 278 N.C. at 102, 178 S.E.2d at 829 (quoting Los Angeles Univ. v. Swarth, 107 F. 798, 804 (9th Cir. 1901)).
where the grantor owns no land is not tolerable even though to so rule defeats the freedom of the parties to contract. Before one can depress the value of land conveyed there must be an offsetting benefit. Requiring a dominant estate provides this benefit as at least some land may increase in value.  

The rule in Stegall may make sense where one supposes the arbitrary imposition of a restriction, but it does not explain why the offsetting benefit must be land. In fact, Stegall only assumes the benefit must be land. What of the situation where the grantor wishes to benefit a business use or to retain the development rights for later sale?

Some courts make it clear when stating the anti-in gross view that only a land benefit will suffice to impose a valid covenant restricting land use. In Caullett v. Stanley Stilwell & Sons, Inc., a New Jersey court held that a covenant which reserved to the grantor “the right to build . . . the original dwelling” on the conveyed premises was not enforceable. The court did not consider whether the grantor’s bargain deserved protection, and made no assessment as to whether the effect on alienability would be substantial or minimal. The court simply cited the Restatement, noted the concern for alienability, and concluded that the existence of a dominant estate in land was critical. As we shall see below, a number of courts disagree with the position of Caullett and find a business benefit sufficient.

Like the business benefit rejected in Caullett, New Jersey also has refused to permit a grantor, by covenant, to retain the development rights of property transferred to another. In Welitoff v. Kohl, the original grantor argued

32. That is, of course, if the parties gauge correctly in reaching their bargain; if the covenant becomes worthless, the doctrine of changed circumstances may be used to terminate it. See generally Cunningham, Stoebuck, & Whitman, supra note 8, § 8.20.


34. Id. at 111, 170 A.2d at 53.

35. See infra discussion in Part III, B.2.

36. Retention of development rights works as follows: If an owner determines that the land may be worth more in the future than it is now for apartment use, or if apartment use is precluded by zoning restrictions but the owner realizes that the zoning laws may subsequently permit multi-family use, he might wish to sell the fee but permit only single family uses. When the zoning changes or when the market forces dictate conversion to multi-family use, the grantor can then sell his enforcement right by releasing the covenant which he holds.

37. 105 N.J. Eq. 181, 147 A. 390 (1929). Another case involving the banking of development rights is Rector of St. Stephen’s Protestant Episcopal Church v. Rector of Church of Transfiguration, 201 N.Y. 1, 94 N.E. 191 (1911), where such a covenant was held unenforceable. Plaintiff, St. Stephen’s, and defendant agreed that defendant would sell to plaintiff for $85,000 a parcel of land on which a small chapel sat. Church regulations required the plaintiff to obtain the consent of higher church authorities before it could proceed with purchase. In the interim, it was agreed that the defendant would transfer the land to George Quintard, an officer of the plaintiff. Quintard paid $35,000 to defendant and executed a promissory note and mortgage
that his sale of less than the whole fee meant that he had received less than full consideration and that he should be able to collect the difference between
the fee restricted versus the fee unrestricted. The court rejected this argument
saying that the acceptance of what it called the "reduced purchase price
theory"38 would lead to a perpetual restriction on the use of the land despite
changed circumstances in the area.39 A covenant's validity, the court said,
required the existence of land as a dominant estate and since Kohl no longer
owned any land benefited by the covenant, the covenant was held invalid.

While the courts like Stegall, Caullett, and Welitoff, which adhere to
the anti-enforcement position, do not explain why the burden is only tolerable
if the benefit attaches to other land, several explanations are possible. Yet,
upon examination none justifies automatic non-enforcement. One possible
reason may be an assumption or suspicion that where the benefit is in gross,
such as to a business, information and transaction costs are too high since
the would-be developer, seeking release, may have difficulty locating the
owner of the right. By comparison where there is a dominant estate, the
owner can be located more easily. Ease of locating the owner of the benefit,

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38. 105 N.J. Eq. at 188, 147 A. at 393.
39. Regarding the changed circumstances argument, see infra text accompa-
nying note 142 and Cunningham, Stoebuck & Whitman, supra note 8, at 482.
though, does not tell the whole story. Whether transaction costs are cheaper with covenants appurtenant will depend in large part on how many dominant tracts there are. In the typical subdivision, for example, there will be numerous dominant tracts and high transaction costs. Since transaction costs will not necessarily differ between covenants in gross and covenants appurtenant, a concern for high transaction costs is not persuasive support for a rule which absolutely bars the former. 40

A related concern appears in Welitoff where the court assumes an adverse effect on land use will result if development rights are held for the personal benefit of the covenantee. It is true that allowing the separation of development rights drives up transaction costs since the buyer must deal with two sellers rather than one, but the same thing occurs where there is a covenant appurtenant. Furthermore, whether this increased cost is acceptable may depend on the remedy available because the cost would be less in terms of hindering alienability if the promisee of such a covenant were limited to money damages. To permit a promisee to obtain an injunction would allow a promisee to arbitrarily prevent development. If the promisee were limited to money damages, 41 then a subsequent purchaser would simply pay the owner of the restricted fee its value as restricted and pay the additional amount (the difference) to the promisee. The promisee then would not have the power to prevent development but would simply be able to cash in on his land speculation. The anti-in gross rule certainly reduces the transaction costs by removing the promisee as a person to be dealt with, but, in doing so, it extracts a high price by destroying an otherwise valid, bargained for, contract right.

The underinclusive nature of the anti-in gross rule further exposes the weakness of the concern over alienability as a policy support for the rule. The Restatement says that "[u]nless a burden has some compensating advantage which prevents it from being on the whole a deterrent to land use and development," 42 the burden will not run. Yet, while the compensating advantage must be land, courts do not require that the benefits and burdens

40. For other discussions of the benefit in gross problem and transactions costs, see J. Dukeminier & J. Krier, supra note 2, at 1051; French, supra note 21, at 1287; and Sterk, Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions, 70 IOWA L. REV. 615, 651 (1985).

41. The promisee could obtain the difference between the value of the property restricted and unrestricted from the person who breaches the promise. A contrary argument prefers an injunction remedy to damages since the injunction allows the parties to bargain between themselves for its release, freeing the court from engaging in the time consuming and speculative effort to assess damages. This view works if the transaction costs are low and if one does not fear a hold out situation. Regarding the holdout problem, see J. Dukeminier & J. Krier, supra note 2, at 933-34 and Sterk, supra note 41, at 628.

42. Restatement, supra note 1, § 537 comment a.
be reciprocal.\textsuperscript{43} The rule would better promote its goal if it said that the burden of a covenant will only be enforceable where the burdened land itself is benefited by a like obligation on the land of the promisee. This reciprocity frequently exists in neighborhood covenants, and where it does, it probably makes the enforcement of a restriction more palatable. But the rule does not demand reciprocity. Unilateral covenants are valid and burdened land will suffer without any continuing future benefit to it.\textsuperscript{44}

Another weakness of the anti-in gross cases is the failure to take note of the cost of non-enforcement on the contract rights of the parties. Contract law is designed to carry out the bargains people make. Property law is also an institution geared to protecting expectations and unnecessary barriers should not be erected to defeat private objectives. The builder in \textit{Caullett} sold his land at a below market price so as to be able to build the grantee's house. The grantor in \textit{Welitoff} accepted a reduced price speculating on possible greater gains in the future. Both lost their bargains without any judicial attention directed to the fairness of the decision to them or to the demoralizing effect non-enforcement has on business dealings generally. One may answer that they were presumed to know the law, but the real question is why the law should treat them so harshly.\textsuperscript{45} It must be said in defense of the results in some anti-in gross cases that the expectations of the promisee have not been clearly presented. Where that occurs a decision denying enforcement may simply reflect the fact that the preference for free land use will prevail over an ambiguous contract right. \textit{Stiegall} is a good illustration of this problem. The restraint on land use was significant since enforcement of the covenant would have blocked, or made more costly, a multi-family public housing project, but the expectations of the promisee were vague. He did not argue an intentional retention of development rights and made only a vague ref-

\textsuperscript{43} \textit{See}, e.g., \textit{Nicholson v. 300 Broadway Realty Corp.}, 7 N.Y.2d 240, 196 N.Y.S.2d 945, 164 N.E.2d 832 (1959) (burdened land required to supply heat to adjacent land); \textit{Quadro Stations v. Gilley}, 7 N.C. App. 227, 172 S.E.2d 237 (1970) (burdened land not to be used for gasoline station for benefit of nearby land); \textit{Friedlander v. Hiram Ricker & Sons}, 485 A.2d 965, 971 (Me. 1984) (Dufresne, J., dissenting) (stating that unilateral benefit from a covenant did not render it invalid but suggesting such covenants must be reasonable and cannot be in gross). In California, by statute, a unilateral burden will not run at law. There must be a benefit to the land conveyed. \textit{CAL. CIVIL CODE} § 1462 (West 1982); \textit{see Comment, Covenants and Equitable Servitudes in California}, 29 \textit{HASTINGS L.J.} 545, 553 (1978). Such promises may run in equity, but it is assumed the benefit cannot be in gross. \textit{Id.} at 567; \textit{Marra v. Aetna Constr. Co.}, 15 Cal. 2d 375, 377, 101 P.2d 490, 492 (1940).

\textsuperscript{44} There is, of course, a benefit in the initial price paid.

\textsuperscript{45} One can criticize the promisees in \textit{Caullett} v. \textit{Stanley Stilwell & Sons}, 67 N.J. Super. 111, 170 A.2d 52 (1961), and in \textit{Welitoff} v. \textit{Kohl}, 105 N.J. Eq. 181, 147 A. 390 (1929). The promise in \textit{Caullett} was vague as to specifics of operation, and the promisee in \textit{Welitoff} did not clearly express his intention to retain development rights in the covenant. But the courts' theories make it clear that such covenants will fail even where there is no ambiguity or question of intent.
ference to some other land once owned by him in the area. Given a vague purpose and the apparent lack of interest by the promisee, the court's preference for free land use is understandable. This view of Stegall, which finds support in other cases dealt with below,\textsuperscript{46} tends to soften the absolute nature of the anti-in gross rule.

In contrast to the majority rule is the pro-covenant in gross view of \textit{Van Sant v. Rose}.\textsuperscript{47} In \textit{Van Sant}, the plaintiff had inserted a restrictive covenant regulating building size and establishing setback lines in a deed to a lot sold to Frank Rose. Alvida Rose, wife of the original promisor, obtained title to the lot by \textit{mesne} conveyance.\textsuperscript{48} Plaintiff sought to enjoin the Roses from constructing an apartment house on the lot in violation of the covenant. There was no allegation in the complaint that the plaintiff owned any land which would be adversely affected by the proposed building and there was no apparent reason why the plaintiff had restricted the land's use in the original conveyance to Rose.\textsuperscript{49} Noting that Frank Rose probably paid less for the land because of the covenant and that Alvida Rose took with record notice of the limitation on the use of the land,\textsuperscript{50} the court enjoined the defendants from violating the covenant. That the right was in gross was irrelevant to the court. The plaintiff had owned the fee simple—the whole bundle of rights—and had simply retained a part of the bundle. Thus, using an arithmetic bundle counting approach, the Illinois court concluded that the right of ownership included the right to limit land use.

While the \textit{Van Sant} court relied on the decision of \textit{Tulk v. Moxhay}\textsuperscript{51} to note that it would be unfair for a purchaser with notice to escape from the burden of a covenant of which she had notice, the central question for the Illinois court, as for the North Carolina court in \textit{Stegall}, was the validity of the original covenant.\textsuperscript{52} The Illinois court reasoned that owners of land were permitted to transfer less than the whole of their ownership rights and that a transfer subject to restrictions was valid so long as the restrictions were not contrary to the public good. Implicitly, the public good was not defined to include a concern over the alienability of the restricted parcel.

\textsuperscript{46} See discussion of other cases regarding lack of certainty, \textit{supra} note 45 and \textit{infra} text accompanying notes 116-19.
\textsuperscript{47} 260 Ill. 401, 103 N.E. 194 (1913).
\textsuperscript{48} \textit{Id.} at 403, 103 N.E. at 195.
\textsuperscript{49} There was no such allegation, though one might suspect it was for the benefit of prior grantees of the grantor of other land in the vicinity. The defendant answered the plaintiff-grantor's suit by saying, in the court's words, that the grantor "did not at the time of the filing of the bill, or for a long time prior thereto, own other property in the vicinity." \textit{Id.}
\textsuperscript{50} \textit{Id.} at 404, 103 N.E. at 195.
\textsuperscript{51} \textit{See supra} text accompanying note 16 regarding \textit{Tulk} and the doctrine of equitable servitudes.
\textsuperscript{52} 260 Ill. at 404, 103 N.E. at 195; \textit{see supra} note 14.
The pro-covenant in gross view, which Van Sant exemplifies, upholds freedom of contract and frees the court from having to decide whether the bargain was a good one. If the landowner wants to sell for less and retain some right in the property, that is the business of the parties to the transaction. As the court said in Van Sant, "every owner of the fee has the legal right to dispose of his estate either absolutely or conditionally, or regulate the manner in which the estate shall be used and occupied, as the grantor may deem best and proper."53

The anti-in gross view, which automatically sets aside the contract, unjustifiably substitutes a judicial judgment for the agreement of the parties. A limitation on the free use of land, whether in the hands of the original grantee or a successor,44 will not be permitted even though the limitation presumably was imposed as the result of an arms length bargain. While the Stegall result is acceptable because of the ambiguity in the promise, the extreme viewpoint of Caullett and Welitoff should be avoided. Demanding that there be an offsetting benefit to other land results in a distinction between covenants in gross and covenants appurtenant which lacks a rational basis. While the effect on alienability is a legitimate factor to consider, the mere presence or absence of a dominant estate says nothing from which one can draw a universally applicable rule. Whether a challenge arises in an action between the original contracting parties or in the running context, a covenant with a non-land benefit should not be set aside unless an unreasonable restraint on alienability or use is found.

B. Synthesizing the Cases—A Balancing Approach

Few anti-in gross cases clearly impose an absolute land benefit requirement.55 In many apparently majority rule cases, the refusal of the courts to enforce covenants in gross can be attributed to the indefinite character of the asserted benefit. In other cases, courts have simply assumed that the benefit must be land. These cases are weak authority to support a rule that demands a land benefit. This section of the article will analyze the anti and pro-enforcement cases which have addressed non-land benefit situations. It will synthesize these cases to suggest a more coherent approach, consistent with the results in most cases, which takes account of the concern for free land use and alienability and, at the same time, accords sufficient respect to the contract rights of the parties. This case evaluation will consider cases

53. 260 Ill. at 405, 103 N.E. at 196 (quoting Wakefield v. Van Tassell, 202 Ill. 41, 61 N.E. 830 (1903)).
44. See supra discussion text accompanying note 14 (as to whether the original contract is unenforceable or whether only the running of the burden is prevented).
falling in the categories of covenants to pay money, covenants to benefit businesses, and covenants to benefit the public. This case analysis will reveal that most courts have upheld covenants in gross where the intent was clear and no other public policy objection appeared.

1. Covenants To Pay Money

Covenants to pay money are sometimes considered a species of covenants which, when in gross on the benefit side, may nonetheless be enforceable. As an initial matter, though, care must be taken to distinguish between burden and benefit problems. Historically, there has been some dispute as to whether the burden of a covenant to pay money touches or concerns the promisor's land. Not all covenants are treated the same, and generally, the burden of a covenant to pay assessments for the maintenance of common areas will be regarded as touching or concerning the promisor's land while the burden of paying a mortgage debt will not. Of interest here is the benefit side where a promise to pay money may, or may not, touch or concern the benefited land.

a. Covenants Affecting Cost, Not Use, of Burdened Land

The benefit of a covenant to receive payment may not be connected to any land of the promisee. Since the covenant affects cost and not use, however, the anti-in gross rule should not be used to deny its validity. For

56. Almost all covenant in gross cases fall into these categories. There are very few reported cases which involve the pure retention of development rights. Two such cases are Weltoff v. Kohl, 105 N.J. Eq. 181, 147 A. 390 (1929) and Rector of St. Stephen's Protestant Episcopal Church v. Rector of Church of Transfiguration, 201 N.Y. 1, 94 N.E. 191 (1911) (a temporary retention) (discussed supra text accompanying note 36). Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913) (discussed supra text accompanying note 46), is treated as such a case though the reason for the extraction of the promise is never set out in the court's opinion.

57. See Berger, supra note 8, at 222-32.


59. Covenants to pay a mortgage debt, though they seemingly relate to land, have been held not to touch or concern on the burden side and, thus, will not run impliedly so as to create a personal obligation on the successor's part. Of course there may be an express assumption. See Berger, supra note 8, at 228-29; 5 R. Powell, THE LAW OF REAL PROPERTY ¶ 675[2]. The objection here has been with respect to the failure of the burden to touch or concern. The fact that the benefit is in gross has not attracted the courts' attention.
example, consider the promise contained in Mathis v. Mathis,60 where a grantee covenanted to pay certain sums to one of the grantor’s sons. Though the benefit of this type of covenant is obviously in gross, enforcement of the promise does not trigger the alienability objection since, in such a situation, a purchaser can take the cost of the covenant into account when establishing the purchase price. So long as the promise involves an easily ascertainable burden, it should be enforced.

Where, however, the promise is unclear or uncertain in amount, alienability may be affected. Consider Blasser v. Cass,61 where the Supreme Court of Texas held that the burden of a covenant to pay a broker’s commission would not run. Citing section 537 of the Restatement as support, the Texas court held that the burden of a covenant where the benefit was held by one with no interest in land would “hamper and impede”62 real estate transactions. The decision makes sense. Blasser purchased property from Meyer which was subject to a lease negotiated by Meyer. The lease contained an agreement by Meyer to pay a commission to Cass. The lease stated that a commission would be due Cass upon renewal of the lease but did not state the percentage of the commission. A separate contract between Meyer and Cass put the commission at four percent. Thus, Blasser in purchasing Meyer’s reversion could not determine from the face of the lease how much it would cost him in commissions if the lessees renewed. This uncertainty might hamper alienability to some degree, while a clearly spelled out promise to pay a specific sum of money would not.

The question in a Blasser type case should be whether the restraint imposes too great a burden when compared to the interest in enforcing the terms of the contract. Assuming that the leases were beneficial to Blasser as the owner of the reversion, efforts by Cass to secure a lease benefited Blasser economically. An expectations argument, though, might favor freeing Blasser from the promise. Since the commission involved the past efforts of the broker, and since the promise to Cass was additional compensation for securing the initial lease (he did not have to obtain the renewals to be paid the additional fee), one might successfully urge that a purchaser like Blasser

60. 402 Ill. 60, 83 N.E.2d 270 (1949). In Mathis, the court permitted enforcement of a covenant made by a grantee to provide financial support to the grantor’s son. While the court said such a covenant binds subsequent owners, id. at 66, 83 N.E.2d at 273, the case was brought against the original promisor; hence, the statement that the covenant should run is dicta. It makes sense though. Had there been a sale of the burdened land in Mathis, the purchaser would have been on notice of how much it would cost him to comply with the covenant and accordingly could have adjusted his purchase price. Mathis is noted at 5 R. Powell, supra note 59, ¶ 673[2] n.41.

61. 158 Tex. 560, 314 S.W.2d 807 (1958) (opinion below reported at 302 S.W.2d 733 (Tex. Ct. App. 1957)).

62. Id. at 562, 314 S.W.2d at 809.
would not expect personal liability for those efforts. The important point is that it is preferable for a court concerned with the effect on alienability to balance these factors.

b. Covenants Where Burdened Land is Benefited

Where a promise to pay arises out of a transaction which itself benefited the burdened land, even the Restatement agrees that an exception to the rule against the burden running when the benefit is in gross is in order. The Indiana case of Conduit v. Ross is an example of the exception. Adjoining landowners Ross and Hauck agreed to build a party wall. Ross paid for the construction and Hauck was to pay Ross a share of the cost. Hauck sold his land, and Ross, not having been paid, sued Hauck's transferee. The court, noting that even though the benefit of the payment to Ross was personal, held that the burden would run to one who purchased with notice since the burdened land was benefited by Ross's performance of her part of the covenant. Presumably the absence of the offsetting benefit to other land is tolerable because of the benefit to the burdened land. Furthermore, the unfairness of allowing a person who receives a benefit to escape payment is hard to ignore.

Some courts, though, have rejected this view. Justice Holmes, in Lincoln v. Burrage, held that the burden of a covenant to pay for a party wall would not run where the promisee owned no land benefited by the promise. The court said no dominant estate existed to which the covenant could be annexed for running purposes. That this allowed the defendant to escape from a liability which was on record and from which he received a benefit

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63. The touch or concern test is sometimes cast as an expectations test. See Berger, supra note 8, at 212.
64. Restatement, supra note 1, § 537(b) and comment g; see also 2 A.L.P., supra note 2, § 9.13, at 375.
65. 102 Ind. 166, 26 N.E. 195 (1885); see also Ball v. Rio Grande Canal Co., 256 S.W.2d 678 (Tex. Ct. App. 1923) (obligation to pay for water for irrigation ran in equity).
66. The benefit of such a covenant is personal to the promisee. Though this should not prevent the burden from running, the benefit will not impliedly run with a transfer of the promisee's property. When one of two adjoining lot owners agrees to, and does, build a party wall which benefits both lots, a subsequent sale by the party who built and paid for the wall of his lot will convey only the lot and easement rights in the party wall, but the right to receive payment is a debt imposed on the other lot for the personal benefit of the builder. See Gibson v. Holden, 115 Ill. 199, 3 N.E. 282 (1885). (Note the second headnote in Gibson is misleading when it says the "covenant to pay...did not pass." 115 Ill. 199, 199, 3 N.E. 282, 282. It should have said the covenant to receive payment did not pass.)
did not trouble the court.68 In terms of fairness and expectations, the result in *Conduit* is preferable to the one in *Lincoln*.

Another question that arises in this type of situation is whether a covenant to pay for a party wall should be considered solely personal. It is indisputable that the right to receive payment is personal. The parties in *Lincoln* willingly characterized their right as one to receive delayed compensation. But it seems that the promise also touches or concerns. While we are accustomed to labelling promises as either personal or as touching, there is no reason why they cannot be both.69 In *Lincoln* the promise to pay enabled a wall to be built which benefited the land of the promisee as well as the land of the promisor. Without the security of the promise, the builder probably would not have proceeded to build. There is a compensating advantage to land which flows from enforcement of the party wall agreement. Thus, even accepting the traditional assumption that a land benefit must exist, the reasoning in *Lincoln* is unsound.

c. Covenants to Pay Assessments to Benefit a Common Area

Covenants to pay assessments for upkeep of common areas are sometimes labelled in gross. Yet, they touch or concern on the benefit side since the funds paid are earmarked for use on common areas such as roads or recreational facilities.70 There is a dominant estate whether one regards it as the common area or as the individual lots which are enhanced in value by these maintenance expenses. Even the Massachusetts court, having rejected

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68. The defendant in *Lincoln* acquired both lots on which the party wall sat. She tore the wall down to build on both lots, yet used the foundation of the wall in her new building. The *Lincoln* holding was reaffirmed in Town of Belmont v. Massachusetts Amusement Corp., 333 Mass. 565, 132 N.E.2d 172 (1956), where a covenant to reconvey property to the grantor was held unenforceable in part because there was no dominant land. There was also a statute of frauds problem inasmuch as the deed did not contain the agreement. In Sanitary Facilities II v. Blum, 22 Md. App. 90, 322 A.2d 228 (1974), the burden was not permitted to run where the benefit of a promise to pay was in gross. The promise involved payment of an annual fee for sewer and water facilities. Yet, another developer, not the promisee, constructed the facilities. The case is distinguishable from the party wall case since in *Sanitary* there was no debt to pay.

69. *See*, e.g., Berger, *supra* note 8, at 210 (discussing this with respect to a burden problem). Judge Clark, in his well known work on covenants, discussed the difficulties with meeting the touch or concern test for party wall covenants on the benefit side. Believing such covenants should run, he questioned the touch or concern test because once the wall was built, all that was left for the builder, he said, was the collateral right to receive payment. C. Clark, *supra* note 22, at 153. Clark's view seems unnecessarily restrictive. While the right to payment is severed from the land, there is still a continuing benefit to both lots which lasts as long as the wall stands.

the benefit in gross in the party wall case of Lincoln, found that a covenant to pay an annual fee for water power was not in gross where the funds were used by the promisee to insure continued maintenance of a dam and canals owned by the promisee and where other owners who used the power depended, in part, on the continued contribution of all to keep the facility operating. Thus, even though the defendant did not use the water power itself, the burden of paying was held to run.

Insofar as covenants to pay money are concerned, where burdened land is also benefited most agree that the right to receive payment, though personal, should be enforced. Even where the promise to pay does not relate to any benefit to the burdened tract the right to receive payment should be enforced. Since the limitation only affects the cost of land, not its use, no legitimate alienability objection exists. Purchasers commonly take subject to obligations to pay various kinds of assessments; when one purchases with notice of a promise to pay a specific sum, one’s expectations, as a general matter, are that payment is obligatory.

2. Covenants Benefiting Businesses

There is a gaping hole in the anti-in gross rule when covenants benefiting business are involved. In most cases where courts have directly considered the validity of such covenants they have upheld them. Historically, two similar types of covenants have fallen into this category, non-competition covenants and covenants promising to purchase exclusively from a particular supplier or use a particular carrier. Today, the former are not considered as in gross and the latter, though in gross, are generally enforced.

In earlier years, courts tended to view the touch or concern test as requiring a physical connection with the land. Economic effects were seen as collateral or personal. In the area of non-competition covenants, Justice Holmes’ opinion in Norcross v. James articulates this early view. There, the Massachusetts court found that the burden of a covenant prohibiting the

71. 177 Mass. 378, 59 N.E. 67 (1901) (discussed supra text accompanying note 67).
72. In Essex Co. v. Goldman, 357 Mass. 427, 258 N.E.2d 526 (1970), the court found the covenant not to be in gross. This finding made the Lincoln case inapposite, but it leaves Massachusetts jurisprudence in the anomalous situation where one who uses a facility built by another escapes liability (Lincoln involved use of party wall) while one who does not use a facility must pay. The Essex Co. decision makes sense since the scheme contemplates, from the outset, financial participation by all. The Lincoln decision is the unfortunate one. See supra text accompanying notes 67-69; see also Ball v. Rio Grande Canal Co., 256 S.W. 678 (Tex. Ct. App. 1923) (obligation ran in equity to pay for water used for irrigation).
73. See Cunningham, Stoebeck, & Whitman, supra note 8, at 471.
promisor from conducting a quarry operation in competition with adjacent land of the promisee would not run. For Holmes, the problem was that the benefit of the promise did not touch or concern the dominant estate inasmuch as there was no "direct physical advantage." The Restatement subsequently adopted Holmes' theory in part with its rule that a non-competition covenant would not touch or concern at law but would in equity.

Notwithstanding Holmes and the Restatement, most courts have found non-competition covenants to touch or concern. Even Massachusetts now has adopted this view. The fact that the benefit is to a business on the dominant estate means that the arrangement is more personalized than the typical restrictive covenant, but that does not trouble most courts. A promise not to use Blackacre for business purposes will enhance neighboring Whiteacre for the conduct of any less intensive non-business use, while a covenant not to operate a gas station on Blackacre particularizes the benefit to aid Whiteacre only if Whiteacre is used for operating a gas station. The non-competition covenant benefits the dominant estate at least for so long as the dominant estate is used to conduct the protected business, and it is sensible to assume that the covenant would terminate if Whiteacre ceased to be used for a gas station. For purposes here, if one agrees that a benefit can be economic, then non-competition covenants cannot be viewed as in gross.

75. 140 Mass. at 192, 2 N.E. at 949. Cast as a burden problem, courts might also find that the burden does not touch or concern but simply regulates the personal conduct of the business. See Montgomery v. Creager, 22 S.W.2d 463 (Tex. Ct. App. 1929) (discussed infra note 89) and in Cunningham, Stoebuck, & Whitman, supra note 8, at 472.

76. See Restatement, supra note 1, § 539 comment k.

77. See cases cited in Cunningham, Stoebuck, & Whitman, supra note 8, at 473.


79. Id. at 92, 390 N.E.2d at 247 (rejecting Holmes' view on this point); see also 2 A.L.P., supra note 2, § 9.28, at 414. Except in an instance where the intent of the parties may have been to create a personal burden, see Montgomery v. Creager, 22 S.W.2d 463 (Tex. Ct. App. 1929), it is difficult to understand how the promise not to compete differs on the burden side from other restrictive promises regarding use. See 2 A.L.P., supra note 2, § 9.13, at 378. Restrictions like set-back lines or height limitations regulate building, but the common single family use restriction dictates what kind of use may and may not occur on the premises. A promise not to engage in a particular type of business does the same thing. But see Caullett v. Stanley Stilwell & Sons, 67 N.J. Super. 111, 170 A.2d 52 (1961) (discussed supra text accompanying note 33), where the court held that the burden of promise to allow the grantor to build any house which was to be put on the land did not touch or concern the land of the promisor. Most courts would probably view this direct restraint on building as touching or concerning the land.

80. Concerns about non-competition covenants as restraints on trade probably best explain the decisions like Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885), overruled, Whitinsville Plaza v. Kotseas, 378 Mass. 85, 390 N.E.2d 243 (1979) (discussed supra text accompanying note 74), which held that such covenants would not
Courts also have had little trouble with covenants benefiting businesses where the benefits are not tied to uses conducted on specific land near the servient tract. These cases take the form of promises to buy goods from a particular supplier or to use a particular business to transport goods from a specific site. While there is some authority to the contrary, the courts generally uphold these covenants.

This issue is presented in a line of oil cases typified by Smith v. Gulf Refining Co. 81 In Gulf Refining Co., Smith conveyed his interest in certain land to Posey and inserted a covenant that Posey would buy all his oil products from Standard Oil so long as Smith continued to act as agent for the company. Posey assigned his interest in the land to Gulf Oil and the latter refused to buy from Smith and Standard Oil. Stressing that the intent of the original covenanting parties was that the covenant should run and that Smith would not have conveyed the property to Posey without the protection of the covenant, the court held the burden would run. The fact that the benefit was to a business rather than land was treated as immaterial. 82 Other courts, in oil cases, have followed suit. 83

Courts have also found the burden of covenants in favor of a railroad to carry all goods into and from a mine 84 and in favor of a music business to have the exclusive right to install and operate a juke box in a servent

run. See 2 A.L.P., supra note 2, § 9.13, at 379. As the Massachusetts court has recently acknowledged, if such concerns exist they should be dealt with directly rather than under the guise of the touch or concern test. See Whittinsville Plaza, 378 Mass. at 92, 390 N.E. 2d at 247; see also Quadro Stations v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970); Vermont Nat'l Bank v. Chittenden Trust Co., 143 Vt. 257, 465 A.2d 284 (1983).

81. 162 Ga. 191, 134 S.E. 446 (1926).

82. In a subsequent case between the same parties, the court held the contract was not void as against public policy, finding the agreement not to be in restraint of trade. See Gulf Ref. Co. v. Smith, 164 Ga. 811 139 S.E. 716 (1927). In a recent case, the same court found it unnecessary to reexamine Smith but held a similar oil covenant unenforceable because of a lack of horizontal privity. Copelan v. Acree Oil Co., 249 Ga. 276, 290 S.E.2d 94 (1982).

83. See Staebler-Kempf Oil Co. v. Mac's Auto Mart, 329 Mich. 351, 45 N.W.2d 316 (1951). One court, relying upon its power in equity, said it would be "immoral for a party to be able to evade an obligation it may have squarely confronted in making its bargain." Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp., 41 A.D.2d 950, 951, 344 N.Y.S.2d 30, 32 (1973). Another court said that even if it was not a valid covenant, estoppel would prevent the purchaser from escaping from a covenant of which he had notice. John and Sal's Automotive Serv. v. Montesano, 197 N.Y.S.2d 1001 (1960). The Montesano court held that the covenant would run because it touched or concerned the burdened property without discussion of the in gross aspect. Id.; see also Trosper v. Shoemaker, 312 Ky. 344, 227 S.W.2d 176 (Ky. 1948) (where the benefit of a covenant in gross to provide oil supplies ran to assignee of promisee and was applied against the original promisor).

business establishment to run.\textsuperscript{85} Even in England, where both easements and covenants in gross have generally met with disfavor, a series of cases permit the running of the burden where the benefit is to a business. In the so called “tied house” covenants, the courts have permitted the enforcement of covenants to buy beer where they benefit the brewery business of the promisees.\textsuperscript{86}

Not all courts agree that covenants benefiting business touch or concern. In a few cases such covenants have failed on both a burden\textsuperscript{87} and benefit analysis.\textsuperscript{88} While such negative decisions can be explained in some instances on intent grounds,\textsuperscript{89} the general basis for rejection is the theory used by Justice Holmes in \textit{Norcross},\textsuperscript{90} that covenants providing for economic benefits are personal or collateral because they only affect the value of the business

\begin{itemize}
  \item[\textsuperscript{86}] In John Bros. Aberdeen Brewery Co. v. Holmes, [1900] 1 Ch. 188, the court examined a promise by a landowner who operated a tavern to buy beer from a particular brewery. The court held that the promise ran both on the benefit and burden side, although without discussing the in gross aspect of the covenant. \textit{Id.} See C. Clark, \textit{supra} note 22, at 104 n.36 and 2 A.L.P., \textit{supra} note 2, § 9.32 questioning the validity of these cases after London County Council v. Allen, [1914] 3 K.B. 642 (discussed infra text accompanying note 99). Chafee disputed the notion that the tied covenant cases were overruled since he viewed a benefit to a business as not being in gross. See Chafee, \textit{supra} note, at 1257; see also 2 A.L.P., \textit{supra} note 2, § 9.32.
  \item[\textsuperscript{87}] \textit{See} Caullett v. Stanley Stilwell & Sons, 67 N.J. Super. 111, 170 A.2d 52 (1961) (discussed \textit{supra} note 33); Montgomery v. Creager, 22 S.W.2d 463 (Tex. Ct. App. 1929) (burden of covenant to oil company did not run).
  \item[\textsuperscript{88}] Kettle River R. Co. v. Eastern Ry. Co., 41 Minn. 461, 43 N.W. 469 (1889) (coefficient to railroad to transport stone did not run); Caullett, 67 N.J. Super. 111, 170 A.2d 52.
  \item[\textsuperscript{89}] In Montgomery v. Creager, 22 S.W.2d 463 (Tex. Ct. App. 1929), the court held that the burden of a covenant to buy gasoline from the grantor was personal and, therefore, did not run. The parties did not clearly indicate an intent to have the covenant run to bind assignees. The language of the covenant was that Montgomery shall purchase all gasoline sold by him at . . . Park Filling Station from the said L. H. Creager . . . ; that all the gasoline . . . shall be purchased from . . . Creager, unless . . . Montgomery should sell . . . Station. It being agreed, however, that the said L. H. Creager shall have the right to sell . . . said gasoline for a period of at least twelve months from this date, regardless of whether sold or not.
  \textit{Id.} at 464. Montgomery sold within the year and Creager sought to enjoin Montgomery’s transferee from violating the covenant. The court said the agreement regulated Montgomery’s conduct only and that the clause entitling Creager to supply gasoline regardless of sale of the station simply imposed a contractual obligation on Montgomery to obtain a promise by his grantee that the latter would buy from Creager. The failure to obtain such a promise was a personal breach by Montgomery. The court did not address the benefit in gross question.
  \item[\textsuperscript{90}] \textit{See supra} note 74.
\end{itemize}
of the beneficiary. The apparent policy justification of these cases rejecting business benefits is that such promises are inimical to society because they restrain trade. Today, where the issue of trade restraint is the concern, the judicial preference is to directly confront it and not hide behind running covenant and servitude theory.

While it is admirable that the courts upholding business covenants have not tried to fit them into the traditional formula requiring benefited land, it should be noted that this could be done since any business must be conducted from some place. A court anxious to find land can do so. Such an approach, however, would simply be formalistic adherence to the requirement that land be benefited since the intent of the kind of promise under consideration is to benefit a business regardless of its location. A related, but still formalistic, approach would be to do what Professor Chafee suggested, that is, define dominant estate as meaning a business irrespective of its connection to a particular tract of land.

The preferable approach is to ask whether there is any injury to the public interest caused by the promise, such as an undue restraint on trade, which justifies either overturning the agreement of the parties or relieving one from a promise of which he had notice when he bought. To the extent that alienability is the issue, such an approach allows the court to ask whether the benefit to the business is a sufficient offsetting consideration to permit enforcement. If the benefit is permitted to be held in gross, it is true that alienability, as discussed earlier, will be restrained to some degree since transaction costs will increase over those which would exist if there were no covenant at all by requiring the holder of the burden to seek out the owner of the benefit to purchase a release of the contract right. This restraint on alienability exists, however, with any covenant whether it is appurtenant to

91. See, e.g., Kettle River R. Co. v. Eastern Ry. Co., 41 Minn. 461, 474-75, 43 N.W. 469, 475 (1889).
92. See supra text accompanying notes 77-80.
93. A dominant estate need not be immediately adjacent. See Metropolitan Inv. Co. v. Sine, 14 Utah 2d 36, 376 P.2d 940 (1962). An interesting question is whether a dominant estate, once located, is moveable. If one is willing to regard the place where business is conducted as a dominant estate, regardless of its distance from the servient tract, it should not matter that the business may move to another location. With a non-competition covenant, as opposed to a promise to buy supplies from a particular business, proximity is likely to be critical in terms of the adverse effect sought to be prevented by the covenant. If A, who secures a non-competition promise from B with respect to a lot adjacent to A’s gas station, subsequently moves his gas station across town, the advantage of the restriction might well be lost, and a court could find the parties intended for the covenant to terminate whenever the dominant business could no longer beneficially gain from the promise. On the other hand, if A moves across the street or nearby, the restriction on B might still be valuable.
94. Chafee, supra note 84, at 1257.
95. See supra text accompanying note 40.
land or in gross. Problems of securing a release may be insurmountable where the benefit is appurtenant to land, especially if a large number of lots are benefited, and they may be insignificant where the benefit is in gross as where a business entity is no longer interested in the covenant. Furthermore, the changed circumstances doctrine can be used to terminate covenants which no longer benefit the business. Assuming a court feels compelled to review the bargain of the parties, what is needed is individual consideration rather than universal condemnation.

Not only may the restraint on alienability be tolerable, enforcement of the covenant may in fact foster commerce. In *Gulf Refining Co.*,96 for example, the court noted that the promisee would not have sold his land had he not been able to insert the covenant protecting his business. If the law refuses to permit this kind of arrangement, there may be no sale in the first instance. Likewise, enforcement may force the parties to use alternatives, which though valid, have unfortunate consequences. If a developer who owns land is unable to insert the kind of covenant used in *Caullett* for the benefit of his construction business, he may build the house first and offer purchasers more limited options or convey the land by a defeasible fee.97 The consequence of refusing to enforce covenants where the benefit is in gross to a business may be to make commerce more expensive by limiting the flexibility of the parties and may decrease the transfer of land.

3. Covenants Benefiting The Public

Covenants benefiting the public, like covenants benefiting businesses, should not fail because of a knee-jerk reflex to covenant dogma about benefits in gross. Yet, unlike the business cases, in most cases where public benefits appeared to exist, the covenants have not been enforced. Most of these instances can be explained on the basis that the public benefits were uncertain or speculative. But the perception that such covenants may not be enforceable has inhibited legitimate public land use control activity.98

The well-known case of *London County Council v. Allen*99 exemplifies the public interest problem. There a public body granted property and obtained the grantee's promise not to erect any building on a portion of the property without the grantor's prior consent. An injunction action against a successor to the promisor to remove buildings built in violation of the cov-

96. See supra text accompanying note 81.
97. Suggested in J. DUKEMINIER & J. KRER, supra note 2, at 1051; see also supra note 5 regarding conditions.
98. See articles cited supra note 3; see also Netherton, Environmental Conservation and Historical Preservation Through Recorded Land-Use Agreements, 14 REAL PROP., PROB. & TR. J. 540, 541 (1979).
enant failed because the grantor, the court said, lacked a dominant estate. The court found it "very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit . . . by the apparently immaterial circumstance that the public body does not own any land in the immediate neighborhood." 100 Nonetheless, deeming itself bound by precedent, the court found against the plaintiff. 101

No American court today should feel as constrained as the English court did then to adhere to the English objections to interests held in gross, 102 yet some do. In City of New York v. Turnpike Development Corp., 103 the city sought to enjoin the defendant from completing street paving. Here the promise was to "improve said streets with temporary pavement—to be approved by the President of the Borough of Brooklyn and constructed under his supervision." 104 In disregard of the promise the landowner was paving the street without prior city approval. The court said since the city owned no land the covenant was in gross and therefore unenforceable. 105 This makes no sense. The city was not an officious intermeddler. The manner in which the streets were being constructed was important to the city since it had agreed to accept a dedication of the streets once they were built. 106 Concern over future maintenance costs gave the city an interest in how the streets would be constructed. The court could have looked a bit harder and found a dominant estate in the existing city streets which would be connected to the new streets being built or in the city’s future interest in the streets which existed by virtue of the promise to accept ownership once the streets were built. But even if a technical dominant estate did not exist, a public interest did exist as an offsetting benefit which was worthy of notice and consideration by the court.

100. Id. at 673.

101. Id. The covenant was obtained because roads were to be built on the ground in the future and unimproved land would reduce condemnation costs. The court could have found a dominant estate by virtue of the Council’s ownership interest in nearby roads.


104. Id. at 705, 233 N.Y.S.2d at 889. The court also said that it was an affirmative covenant and therefore unenforceable based upon a line of New York cases, limiting the enforceability of affirmative covenants. See CUNNINGHAM, STOEBUCK, & WHITMAN, supra note 8, at 473. The promise to build it was affirmative, but the issue was how, not whether, the road had to be built. How to build imposed a negative obligation on the builder to build according to the city’s wishes.


106. The city had agreed to accept a deed of cession. 36 Misc. 2d at 705, 233 N.Y.S.2d at 889.
Massachusetts was able to protect the public interest in *Inhabitants of Middlefield v. Church Mills Knitting Co.*\(^{107}\) without stumbling over the in gross label. In that case the city, under an obligation to maintain a bridge, secured a promise from the defendant’s predecessor in title that the latter would keep the bridge in repair. While the city was not shown to own the highway which was benefited by the promise, Justice Holmes refused to apply the rule that the burden of a promise which was in gross was not enforceable since he found in this instance that the town was “the natural and convenient protector”\(^{108}\) of the promise to maintain the bridge and as such could enforce the covenant.

It could be argued in *Church Mills*, as was true in *London County* and *Turnpike Development* also, that a loose definition of a dominant estate would have supported the city’s enforcement. Though the city may not have owned the fee to the land which abutted the bridge, it either had an easement for highway purposes or, at a minimum, as the court noted, an obligation to the public to maintain the road. This municipal interest in the road could serve as the dominant estate. Regardless of how well the dominant estate label fits on the facts of the case, a sound reason for extracting the promise in the first instance was shown to exist.\(^{109}\) This finding should counterbalance any concern for hampering alienability.

There is a growing practice by public bodies to purchase or condemn development rights to achieve a variety of environmental objectives. Non-profit organizations may also acquire such rights. These conservation agreements, sometimes called scenic easements, may prohibit development to preserve open space, or to conserve natural resources.\(^{110}\) Development rights may be purchased so as to keep land in agricultural use,\(^{111}\) protect sensitive coastal areas, or retain the facades of significant historical structures.\(^{112}\) A

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108. *Id.* at 272, 35 N.E. at 782.
109. Unfortunately, Justice Holmes later apologized for this breach with the past. In *Lincoln v. Burrage*, 177 Mass. 378, 59 N.E. 67 (1901), where Holmes held an affirmative promise to pay the value of a party wall would not run since the benefit was in gross, he described the *Church Mill* case as a rare situation enforcing a spurious easement. *Lincoln* is discussed *supra* text accompanying note 67.
112. Some states have enacted statutes to permit these kinds of land use arrangements which dispense with the in gross requirement. *See* statutes cited *supra* note 3. But see Section 121-38(a)(2) of the North Carolina Conservation and Historic Preservation Agreements Act which provides that conservation or preservation agreements shall not be unenforceable because of “[l]ack of benefit to a particular land or person.” N.C. GEN. STAT. § 121-38(a)(2) (1986) (emphasis added). Is some land needed?
landowner’s promise not to convert land to residential, commercial, or industrial use benefits the public by keeping land in agricultural production and not imposing upon the municipality the burdens that come with increased development. Similar public benefits accrue with environmental or historical agreements. Yet, the municipality may own no land which is benefited by any of such promises, and this may render the covenant unenforceable.

Enforceability may turn on the form of the agreement. For example an agreement to preserve land for aesthetic purposes, may be labelled a scenic easement and may be an easement appurtenant where the dominant estate is an adjacent highway in which the state presumably owns either the fee or perhaps an easement. Along a river, where land is subject to a scenic easement, there may be no state owned land benefited by nondevelopment unless the state owns the river bed or the public has a right of navigation. Even if the interest is labelled an easement in gross, there is still no problem under traditional American law with enforcing the burden of the easement against a subsequent purchaser.113 Yet, if the interest is couched in promissory terms and called a covenant rather than an easement, courts may have some difficulty in finding a dominant estate. If language of grant is used rather than language of promise, it is more likely to be labelled an easement and thus, the public body escapes the fatal covenant in gross label. But differentiating language of promise from language of grant114 is a technical chore without substance. Where covenants in gross and easements in gross are functional equivalents, as they are here, the interest created should stand or fall based on an analysis of the intent of the parties and an assessment of the impact of the arrangement on society, regardless of the label.

If a reason for the acquisition of such rights is identified, then enforcement should be allowed. Since the preservation of environmentally sensitive land and historical landmarks are deemed to be within the public interest so as to justify the exercise of a state’s regulatory power,115 there should be no objection to permitting the public to achieve similar objectives by purchase of less than a fee interest. The fact that the state chooses to pay for acquiring a landowner’s promise to limit the use of land should not trigger judicial hostility which does not exist when the state chooses to limit land use for free through the regulatory process.

If the public interest is vague or speculative, concerns for alienability may prevail and lead a court to refuse enforcement. An example can be

113. While most American courts recognize easements in gross, whether the benefit is assignable may be a problem in some jurisdictions. See Cunningham, Stoebuck, & Whitman, supra note 8, at 440.
drawn from *Orenberg v. Horan*, where the grantor, Harvard Church, imposed a covenant on its grantee that he would maintain “in its present position” a tower clock on the premises conveyed. The covenant failed since the church had no land in the vicinity which could operate as a dominant estate. No reason was given for the extraction by the church of the promise. It may have been for aesthetic, historical, or practical benefit to the public, but the lack of evidence on the point arguably justified the court in refusing to cloud the defendant’s title and thereby inhibit development. One who is interested in limiting land use can be expected to provide a clear purpose for the promise and provide evidence of an intent that the promise should run. Rather than using the traditional rule that the covenant was unenforceable because it was in gross, it would be preferable to reach that result after finding that no benefit to the public or to other land was shown to exist.

Speculative ventures by the state may also be deemed contrary to the public interest and a court might prevent enforcement of a covenant limiting land use to curb what it regards as improper governmental activity. Consider the case of a state that obtains a covenant to reduce future condemnation costs where the public need to condemn is uncertain. *Johnson v. State ex rel. Highway Division* is illustrative of such a case. There the state pur-

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117. *Id.* at 313, 168 N.E. at 795.
118. The court rejected a third-party beneficiary argument, *id.* at 315, 168 N.E. 795, which the later cases use. *See* Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224 (1935); *see also* discussion of third party enforcement *supra* text accompanying notes 143-45.
119. An example can be drawn from Javna v. D.J. Fredericks, Inc., 41 N.J. Super. 353, 125 A.2d 227 (1956), where a New Jersey borough, during an acute housing shortage, transferred some land by a deed which provided that the grantee was “to commence the erection of dwellings on said premises ... within a reasonable time after delivery of this Deed.” *Id.* at 306, 125 A.2d at 229. In a subsequent effort by the borough’s grantee to sell, a marketable title question arose. The court found title to the lots unmarketable but did not rule on the validity of the deed. The court did note that *London County Council*, [1914] 3 K.B. 642 (discussed *supra* text accompanying note 99), and its own Welitoff v. Kohl, 105 N.J. Eq. 181, 147 A. 390 (1929) (discussed *supra* in text accompanying note 37), required that there be land benefited for such a covenant to run and there was, said the court, no evidence of any such land owned by the borough. *Id.* at 360, 125 A.2d at 231. How unfortunate it would be to declare the covenant here unenforceable for this reason. If the city was attempting to secure needed housing, why not let it do it. There is no suggested reason as to why it should have to have other land benefited by the promise. The borough perhaps should lose in an attempt to enforce this deed restriction but for the reason that the covenant was vague. It did not indicate what would happen if nothing were built. There was no reverter clause. The language quoted was not clearly promissory and might be viewed as precatory. More can be demanded by a grantor to spell out an intent to bind to successors and to state the contours of an agreement so that it can be intelligibly followed.
120. 27 Or. App. 581, 556 P.2d 724 (1976).
chased a sixty-foot strip of land in fee in 1943 from Robert Brown for the purpose of highway construction. The deed contained a covenant in favor of the state which provided that the state would not have to pay for the removal of any house on the land of the grantor which was adjacent to the sixty-foot strip if, in the future, the state found it necessary to condemn this adjacent land. Some thirty years later the state had not exercised its rights yet the land could not be improved because of the existence of the recorded covenant. The plaintiff, who owned the burdened land in the 1970s, had difficulty selling the property because of a bank's refusal to finance based on the 1943 covenant.

Citing section 537 of the Restatement, the court held that the burden would not run since the covenant's benefit was in gross.\(^{121}\) The court said that while the state as a whole was benefited by the covenant, the benefit was not tied to the sixty-foot strip bought in 1943. Arguably there was a dominant estate,\(^{122}\) but the essence of the promise was to reduce the future cost of condemnation, and not primarily to enhance the value of existing or future highways. The performance of the promise did not relate to the state's right to condemn the land, which had always existed.

Since the state in Johnson had not shown any interest in widening the highway the court's ruling can be viewed as a rejection of the state's method of condemnation. The decision of the court in effect prevented the state from engaging in a land banking process. Viewed as an improper exercise of the power of eminent domain, the speculative benefit obtained is viewed as an invalid reason to limit land use on an indefinite basis.\(^{123}\)

The point here, as with the prior discussions regarding covenants to pay money and covenants benefiting businesses, is that where the parties to an agreement clearly set out their intentions to create a non-land benefit, normally the promise should be enforced. As noted earlier,\(^ {124}\) the groupings of covenants in gross into these three categories was done to aid the process of evaluating the existing cases. The categories should not exclude from the proposed test other kinds of promises in gross such as one retaining development rights. Regardless of the category, any in gross controversy should be resolved by the same balancing approach. A great number of the anti-in gross cases are not really at odds with the proposed balancing approach since so many of them involved contracts of an ambiguous nature.

Complete evaluation of the anti-in gross rule also requires looking at those cases, typically involving subdivision development, where land benefits

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121. Id. at 584, 556 P.2d at 725.
122. As the dissenting judge noted, the covenant enhanced the sixty-foot right-of-way. Id. at 585, 556 P.2d at 726 (Thornton, J., dissenting).
123. See, e.g., Rueb v. Oklahoma City, 435 P.2d 139 (Okla. 1967) (where the court said that a condemning authority cannot take private property based on speculation that the land may at some point in time be used).
124. See supra text accompanying notes 55-56.
do exist but which, for reasons explained below, have been sometimes cited as, or confused with, in gross cases. Excising these latter cases from the anti and pro-in gross dispute, makes proper case analysis easier.

IV. THE OPERATION OF THE ANTI-IN GROSS RULE: CONFUSING "WHO" BENEFITS FROM "WHAT" BENEFITS

Confusion exists in the case law because a number of courts and some commentators have intermingled questions of who can enforce a covenant with the in gross issue. The result has been to overstate the number of adherents to both the majority and minority viewpoints. Where land is benefited and the only question is who should be able to enforce the covenant, it is improper to label the covenant as in gross. While a party who was not intended to benefit from a promise cannot enforce the promise, courts and commentators sometimes speak in loose terms declaring covenants which are unenforceable due to lack of intent to be covenants in gross.

Judge Clark, for example, objected to a rule prohibiting covenants in gross because he believed that socially desirable land use controls would be unenforceable pursuant to such rule due to what he termed "the accident" that the plaintiff-promisee owned no land benefited. Clark's "accident" language reflects a concern with the rules of who can enforce a covenant rather than whether it is necessary to have benefited land. Clark's concern was with the situation where a promise, taken to benefit a neighborhood area, could not be enforced because the promisee no longer owned land in the area and because the neighbor's rights of non-enforcement were unclear. Yet, two distinct problems are involved in this situation. One is that a covenant is enforceable only if there is land benefited by the covenant. Beyond that, however, an additional requirement is that to enforce the promise a party must have an interest in that land or be able to show that he was intended to be the enforcer. As we shall see, this standing to sue problem may be handled by third party beneficiary or agency principles. When courts and commentators, however, cite cases involving merely a lack of intent as cov-

125. That is unless an agency principle is involved. See infra notes 158-63.
126. See, e.g., Stone, supra note 13, at 313 (citing Los Angeles Univ. v. Swarth, 107 F. 798 (9th Cir. 1901), a case where a land benefit existed, discussed infra text accompanying note 130, and citing Formby v. Barker, [1903] 2 Ch. 539, an English case where there was no land benefited); see also Sterk, supra note 40, at 650 n.147 (characterizing as in gross the covenant in Christiansen v. Casey, 613 S.W.2d 906 (Mo. Ct. App. 1981), even though a land benefit existed. Christiansen is discussed infra note 155.).
127. See C. CLARK, supra note 22, at 110.
128. Id. at 110, 182.
129. Clark's fears of enforcement can be dealt with by third party or agency enforcement. See infra text accompanying notes 143-45, 156-63.
enant in gross cases, it suggests much greater support for the anti-in gross rule than actually exists. The following discussion of the intent problem is broken into five subsections, all of which are closely related. For the most part the cases involve subdivision development covenants and the various subsections are designed to address particular points of confusion which have arisen.

A. Covenants Where Land Benefit Exists But Plaintiff Lacks Standing

*Los Angeles University v. Swarth*\textsuperscript{130} illustrates the intent problem. The Baptist Denomination of Southern California persuaded plaintiffs and others to give land to it for the establishment of a church-run school. The Baptists urged donations of land suggesting that other property in the vicinity of the new university would increase in value. Plaintiffs' deeds contained covenants limiting use of the land to buildings devoted to school purposes. A few years later, after a school was started, oil was discovered on the land donated by the plaintiffs, and the school began oil drilling operations. The original promisees sued the university and a lessee\textsuperscript{131} of the promissor seeking an injunction. The court held that the promisees could not enforce the covenant because they owned no land in the vicinity of the burdened land which was benefited by the restriction. The covenant, however, was not in gross because the court found that the grantor-promisees, in extracting the covenant, did so for the purpose of benefiting surrounding land which they did not own. The only interested parties were the incidental third party beneficiaries—those who owned land in the neighborhood. While these landowners could sue, at no time could those who gave the land to the university have enforced the covenant because of lack of intent to be benefited by the promise.\textsuperscript{132}

*Swarth* stands for the limited proposition that where a covenant is intended to benefit tract X, only one with a beneficial ownership interest in tract X can enforce it. While the court in *Swarth* did make an apparent assumption that the banking of development rights is impermissible,\textsuperscript{133} it did not directly consider this issue. The court did not treat the covenant as if it were in gross, yet it has been cited as an anti-in gross case.\textsuperscript{134} *Swarth* and

\textsuperscript{130} 107 F. 798 (9th Cir. 1901).

\textsuperscript{131} It is not clear whether the oil company had a lease or mere license to drill.

\textsuperscript{132} The court noted that the organizers of the university encouraged gifts saying benefits would accrue to nearby land. See Hays v. St. Paul M.E. Church, 196 Ill. 633, 63 N.E. 1040 (1902) (involving a donee beneficiary); see also 2 A.L.P., *supra* note 2, at 425. Why the grantor-promisees wanted to make a gift to others in the area was not disclosed.

\textsuperscript{133} See *Los Angeles Univ. v. Swarth*, 107 F. at 806 (court assumes that with a condition a right of termination may be reserved but that to do so with a covenant requires a land benefit).

\textsuperscript{134} See Stone, *supra* note 13, at 313.
cases like it which deny enforcement to a party who owns no interest in benefited land are based on traditional views of standing to sue. A finding is made that the purpose of the covenant was to benefit certain land and standing principles tell us that a person can only be injured by a breach if he has an interest in that land. Though sometimes so cited,\footnote{35} they are not good authority for the anti-covenant in gross view.

Courts, in accord with this rule, typically deny a developer a right of enforcement after he has parted with his interest in land which was intended to benefit from a set of covenants.\footnote{136} The covenant, however, remains enforceable by those lot owners who do own the land benefited by the covenants.\footnote{137} But if a court finds that there was no intent to benefit other lot owners, they may not sue.\footnote{138}

Some commentators have cited Van Sant v. Rose, the pro-in gross case examined earlier,\footnote{139} as taking a position contrary to the cases discussed im-

\footnote{135} In Graves v. Deterling, 120 N.Y. 447, 24 N.E. 655 (1890) (cited as a majority rule case in Simpson, \textit{Fifty Years of American Equity}, 50 \textit{Harv. L. Rev.} 171, 215 n.258 (1936)), the plaintiff was denied the right of enforcement because the covenant was intended to benefit other lot owners. While the promisee could not sue, the lot owners could. Thus, the covenant was not in gross.

In Peabody Heights Co. of Baltimore v. Wilson, 82 Md. 186, 32 A. 386 (1895), the issue was whether the promise was extracted for personal benefit or also for the benefit of subsequent grantees of other land. The court found an intent to benefit others and held the covenant valid. \textit{Id.} (This case is enigmatically cited as a covenant or easement in gross case in Netherton, \textit{supra} note 98, at 550 n.28.).

Wilmurt v. McGrane, 16 A.D. 412, 45 N.Y.S. 32 (1897) (cited as an anti-enforcement case in W. BURBY, \textit{HANDBOOK OF THE LAW OF REAL PROPERTY} 102 n.37 (3d. ed 1965)), is a case where a covenant was imposed by the Board of Health for the benefit of an adjacent tenement house. The court cleared title to the tract declaring the burden of the covenant would not run because the promisee owned no land affected by the covenant. \textit{Wilmurt}, 16 A.D. at 416, 45 N.Y.S. at 34. Third party beneficiary principles, ignored by the court, could have been used to recognize an enforceable right in the owner or occupants of the tenant house. \textit{Wilmurt} is weak authority because clearly the covenant was not in gross and because the court failed to use the rule of third party enforcement which is well accepted today.


\footnote{138} Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953).

\footnote{139} Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913) (discussed \textit{supra} text accompanying note 47).
immediately above, Van Sant, however, only allows the retention of the right of enforce¬ment without regard to land ownership. The case in the latter case simply carries the intent of the contracting parties. More importantly, Van Sant should not be taken to mean that a party does not extract a covenant for his own benefit. If the grantor intends to keep other land, or if he intends solely to benefit others and not himself, there is no reason why the holding in Van Sant should be extended to allow him to enforce the covenant. In the Illinois law supports this view. In Hayes v. St. Paul

sentiment because it permits a person to retain an enforcement right without land, but in cases where a grantor is found not to have tried to retain such rights, Van Sant does not help to confer upon him standing to sue.

Application of the changed circumstances rule demonstrates the consistency between Van Sant and cases like Swarth. Without questioning the validity of Van Sant, the Illinois courts have allowed a change in circumstances in the neighborhood to result in the unenforceability of a covenant where the covenant's original purpose of protecting certain land can no longer be served. If purpose were irrelevant to the validity of a covenant, the doctrine would not work. Thus, for the doctrine of changed circumstances to co-exist with Van Sant there must be different treatment accorded covenants intended to benefit land from those kept for personal benefit. If the intent is to benefit tract X, then when a benefit no longer accrues to it because of changes, the covenant is lost. If the intent is to benefit a person by retention of the development right, changes in the area should not render the covenant unenforceable.

B. Developer Obtained Covenants To Benefit Prior Purchasers

Caution is needed when assessing a covenant extracted by a developer from a purchaser of a lot within an area subject to a common plan where,

M.E. Church, 196 Ill. 633, 63 N.E. 1040 (1902), the court allowed a donee third party beneficiary to enforce a covenant because it was clear that the grantor intended the restriction to benefit her lot which was adjacent to the restricted lot. It did not matter that the grantor owned no other land. The Van Sant opinion does raise some doubt when, in discussing the defendant's attempt to distinguish Hays, it seems to say that the grantor in Hays could have enforced the restrictions himself. Van Sant, 260 Ill. at 413, 103 N.E. at 198. This does not make sense because the emphasis in both Hays and Van Sant is on intent as the critical issue. If the grantor in Hays intended only to benefit the owner of another lot (his daughter), there is no reason he should be able to enforce the promise unless the court meant that he might do so as an agent of the intended beneficiary. The idea of Van Sant is to enforce the bargain of the parties, and if the bargain shows someone else or some particular land was to benefit then only that person, or the owner of that land, should be able to sue. Subsequent Illinois cases support this. See Streams Sports Club, Ltd. v. Richmond, 109 Ill. App. 3d 689, 440 N.E.2d 1264 (1982), where a club was able to enforce, on third party beneficiary grounds, a covenant to pay dues to maintain a recreational facility within a condominium project. The court, citing Van Sant, said the goal is to enforce the bargain of the parties. Id. at 694, 440 N.E.2d at 1268. Here the contract anticipated enforcement by the club. See Westgate Terrace Community Assocs. v. Burger King Corp., 66 Ill. App. 3d 721, 383 N.E.2d 1355 (1978), where a community association was not allowed to enforce a restrictive covenant as a third party beneficiary because it was unable to prove that it, or the land owned by its members, was intended to benefit from the covenant. By implication, these cases support the view that what Van Sant attempts to do is determine who the agreement was to benefit and to allow that person to enforce it.

142. See Wallace v. Hoffman, 336 Ill. App. 545, 84 N.E.2d 654 (1949) (finding a change in the area sufficient to render a covenant unenforceable where land was no longer benefited).
at the time of extraction, the developer owns no retained land in the area. Such covenants, though almost universally enforced, are sometimes labelled covenants in gross. The label is inaccurate if, as is usually the case, the covenant was taken to aid prior purchasers from the same grantor because there is land which is benefited by the enforcement of the promise.

The situation can be understood by picturing a hypothetical subdivision of four contiguous lots. Assume the developer conveys lot one to A with restrictions on its use, but the developer fails to expressly impose a reciprocal obligation on the use of lots two through four still owned by him. Assume further that the developer restricts lots two, three, and four in conveyances to B, C, and D, respectively, in a fashion similar to the restriction contained in the conveyance of lot one. The question may then arise as to whether a prior purchaser, like A, can sue a subsequent purchaser, like D. If it can be shown that the developer extracted a promise from D to protect lot one as part of a residential community of which lot four is an integral part, the covenant is enforceable by the prior purchaser, A, against D, under third party beneficiary principles.

Even though the developer in the hypothetical owned no lots when he received the covenant from D, the purchaser of lot four, the covenant on lot four is not in gross since lots one, two, and three are benefited by its performance. It may be that the developer inadvertently failed to expressly limit the use of the land retained by him (lots two through four) when he conveyed lot one. If so, the subsequent restriction on the use of lots two through four may have been to correct the inadvertent omission in the first conveyance. It is also possible that the developer’s failure to expressly limit his use of lots two through four when he conveyed lot one was an intentional attempt to preserve flexibility. If so, the insertion of the subsequent covenant on lot four may have been due to pressure brought to bear upon him by the owners of lots one, two, or three. In either event, there is a benefit to the lots of the prior purchasers and since there is land benefited, the policy objection of the anti-in gross rule is not present. The language sometimes found in cases to the effect that a grantor has no right to limit the use of land except for the benefit of other lands then owned by him should not be applicable to this hypothetical situation. While the grantor who has no land may have no reason to get a promise from his grantee, in the hypo-

143. See discussion in connection with Huber v. Guglielmi, 29 Ohio App. 290, 163 N.E. 571 (1928), infra text accompanying note 147.


145. For explanations of third party beneficiary theory, see 2 A.L.P., supra note 2, § 9.30 and CUNNINGHAM, STOEBUCK, & WHITMAN, supra note 8, at 504.

metrical, the developer’s extraction of a promise is intended to, and does, benefit other land.

Some third party cases, like the hypothetical, have mistakenly been labelled as taking a pro-covenant in gross view. For example, in Huber v. Guglielmi, plaintiff Huber, owner of lot twenty-nine, sued defendant Guglielmi, owner of lot twenty-eight, seeking to have Guglielmi comply with a restrictive covenant placed on lot twenty-eight by a common grantor. It was argued that the plaintiff’s grantor, the promisee, who had sold lot twenty-nine before selling lot twenty-eight, owned no interest in lot twenty-nine at the time of restricting the use of lot twenty-eight. Therefore, defendant argued, the benefit of the covenant on lot twenty-eight was in gross and not enforceable by plaintiff. The court rejected this argument finding it proper for the common grantor to impose covenants on all lots pursuant to a common scheme within a subdivision. Apparently when the common grantor sold lot twenty-nine he did not expressly limit the use of twenty-eight in favor of twenty-nine. But when the common grantor sold lot twenty-eight he did limit the use of twenty-eight for the benefit of twenty-nine. Thus, it is like the hypothetical situation discussed immediately above. Though the common grantor did not own lot twenty-nine when he sold lot twenty-eight, the limitation on the use of lot twenty-eight was to protect prior purchasers of lots such as the plaintiff who owned lot twenty-nine. It is misleading to characterize the Huber case as a covenant in gross since there was a dominant estate (lot twenty-nine). The Huber court did cite Van Sant with approval, but it was not a Van Sant type case. Though Huber labelled the “in gross” defense as “too technical to be attractive to a court of equity,” such a defense was not appropriate under the court’s reasoning that the covenant was made for the benefit of the plaintiff’s lot and, therefore, should be enforcable by the plaintiff.

C. Developer Suing For Benefit Of Adjacent Land

Covenants have also improperly been labelled as in gross in situations where a developer restricts an area of initial development for the benefit of other land owned by him in a nearby or adjoining area which is to be

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147. 29 Ohio App. 290, 163 N.E. 571 (1928) (cited in 5 R. Powell, supra note 59, ¶ 673[2], at 60-44 n.41, as an example of a court which enforced a covenant “despite the fact that the burden [sic - benefit] was personal to the promisee”); see also Simpson, supra note 135, at 215 (citing Huber and Van Sant as standing for the same proposition); 2 A.L.P., supra note 2, § 933, at 430 n.7.

148. See supra text accompanying note 144.

149. 29 Ohio App. at 295, 163 N.E. at 572.

150. Id.
developed at a later date.\textsuperscript{151} The restriction on the first area is necessary to protect the development potential of the second area which would be damaged if covenants imposed in the first restriction were not enforced. Assuming intent is shown, the covenant should be enforced for the benefit of the second area. \textit{Oakman v. Marino}\textsuperscript{152} and \textit{Hills v. Graves},\textsuperscript{153} two cases where this situation existed, have been cited as standing for the proposition that the common grantor has standing to sue even though the covenant is personal.\textsuperscript{154} \textit{Oakman} and \textit{Hills} do not, however, represent the covenant in gross view. In those cases, the courts found the covenants enforceable by a common grantor who owned property adjacent to the restricted property which would be benefited by enforcement of the promise. There is nothing to indicate that the courts would have permitted suit by the developer absent such a finding.\textsuperscript{155}

\textsuperscript{151} This situation might be distinguished from one where a developer has no nearby land but seeks to enforce a covenant to preserve a good business reputation. A developer might want to keep an area attractive and free from covenant violations to enhance the marketability of future developments regardless of their location. This hypothetical is presented as a benefit in gross in A. CASNER \& W. LEACH, CASES AND TEXT ON PROPERTY 1069 (1969). A difference between the two situations should not be exaggerated. It really is one of emphasis. In the situation in the text, the assumed intent is primarily to benefit a particular tract. In the Casner and Leach hypothetical, the assumed intent is one to benefit the developer in his business. While his business is land development, the intent is not to benefit any specific tract. It is, of course, possible to say a developer intended to benefit both a specific tract and his general business reputation. An additional note here should be made with reference to the Casner and Leach hypothetical. The authors use the hypothetical to introduce a property owner’s association action to enforce a covenant: Merrionette Manor Homes Improvement Ass’n v. Heda, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956). A. CASNER \& W. LEACH, supra, at 1069. The court in \textit{Merrionette} permits enforcement on an agency theory where the covenant, in contrast to the Casner and Leach hypothetical, is not in gross but benefits the lots of the owners of the association. \textit{See infra} text accompanying notes 158-63.

\textsuperscript{152} 241 Mich. 591, 217 N.W. 794 (1928).

\textsuperscript{153} 26 Ohio App. 1, 159 N.E. 482 (1927).

\textsuperscript{154} Christiansen v. Casey, 613 S.W.2d 906, 910 n.1 (Mo. Ct. App. 1981) (citing \textit{Oakman} and \textit{Hills}).

\textsuperscript{155} In \textit{Christiansen}, 613 S.W.2d 906, the court labels the covenants as personal, but also notes adjacent property was benefited. In \textit{Christiansen} itself, the developer still owned property in an adjacent neighborhood which provided the developer with a sufficient interest to enforce the covenant. Sterk, supra note 40, at 650 n.147, calls it a \textit{Van Sant} type case. The \textit{Christiansen} court’s use of the “personal” label is confusing. It is arguable that this brings \textit{Christiansen} into line with Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913) (discussed supra text accompanying note 47), to the effect that a land benefit is irrelevant. However, \textit{Christiansen} cites with approval two land benefit cases, \textit{Oakman}, 241 Mich. 591, 217 N.W. 794 (1928), and \textit{Hills}, 26 Ohio App. 1, 159 N.E. 482 (1927), yet labels them as “personal” covenants. 613 S.W.2d at 910 & n.1. The \textit{Christiansen} court, stressing the facts of the case and putting aside labels, seems to be saying that the developer could sue to
Even if a developer owning no land is permitted to sue as an agent for the owners of other lots within the subdivision, the covenant is not in gross. The developer, having sold lots, may be under a duty to sue,\textsuperscript{156} or the developer may perceive itself to be under an ethical obligation to come to the aid of the neighbors of a subdivision who are confronted with a lot owner who has violated, or is about to violate, a covenant. The residents, perhaps a large group which may be unorganized and may lack the financial resources to pursue the matter in court, might then have their right of enforcement pursued by the developer. If this is the case, then again, the covenant is not in gross because the benefit is being asserted by the developer, as agent, for the benefit of land owned by the owners of other lots within the protected subdivision.\textsuperscript{157}

D. Property Owner Association Enforcement As Agent For Lot Owners

Cases involving enforcement of neighborhood covenants by a property owners’ association have been cited as standing for the proposition that covenants in gross are enforceable.\textsuperscript{158} In such cases, however, the association,

\textsuperscript{156} See cases cited in C. Clark, supra note 22, at 182. Judge Clark, who desired to preserve enforcement of neighborhood covenants, discussed supra text accompanying note 127, cited cases which support agency enforcement like Brett v. Cooney, 75 Conn. 338, 53 A. 729 (1902). C. Clark, supra note 22, at 111, 182. In Brett, the grantor was allowed to rescind a deed fraudulently secured for the benefit of his neighbor’s land. Brett involves an obligation which is, at best, moral. But cf. Restatement, supra note 1, § 550 (permitting agency enforcement where there is a legal obligation).

\textsuperscript{157} See, e.g., R. Ellickson & D. Tarlock, supra note 9, at 624. They recognize the relationship between vertical privity and touch or concern because they note that any touch or concern requirement would be “incompatible with the Neponsit rule that benefits may be held in gross.” Id. Since in Neponsit, there was a land benefit, labelling it as in gross poses problems. The court’s discussion of the in gross problem is intertwined with its concern over the question of whether vertical privity of estate was necessary on the benefit side in order for the burden of the covenant to run. See supra note 9. If privity of estate is necessary, then that means the benefit of a covenant which is in gross cannot run since there can be no privity of estate if there is no land to which the covenant can be annexed. Allowing the benefit of a covenant to run where the benefit is in gross dispenses with any requirement of vertical
representing the owners of land benefited and burdened by reciprocal covenants, either owns common areas within a development which can serve as a dominant estate or it sues as the agent of the association members who own lots. The in gross label should not be used to describe the situation of the property owners' association suing as the agent of lot owners since there is land benefited.

Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank\(^{159}\) demonstrates agency enforcement. There, the court assumed that the property owners' association, a transferee of the original promisee, owned no land. Looking at the issue in vertical privity terms,\(^{160}\) the court said there was privity "in substance, if not in form,"\(^{161}\) reasoning that the association could sue as agent of the lot owners who clearly were in privity with the original promise. Since the declaration of covenants expressed the intention to permit the association to enforce the covenant, there was no reason to use an "ancient formula"\(^{162}\) of privity to thwart the plan. The covenants in Neponsit benefited land since there were both the common areas in which the lot owners had easements of use, to be repaired with the money received and the individual lots whose value was enhanced by proper maintenance of the common areas. In policy terms, there was no question about the absence of any compensating advantage necessary under the traditional view to offset the burden. The question was simply one of who could enforce the covenants. Dicta of the court in Neponsit to the effect that no covenant had ever been sustained where the plaintiff did not own land,\(^{163}\) helped create the confusion.

privity on the benefit side. This is no radical step. Privity of estate is an arcane technicality. The Neponsit court avoided it as have others. See Merrionette Manor Homes Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956); Cunningham, Stoebuck, & Whitman, supra note 8, § 8.17. Yet, the problem persists. In a recent case, the New York Court of Appeals suggested that a "party seeking to enforce [a] covenant need show only that he [holds] property descendant from the promisee which [benefits] from the covenant." Orange and Rockland Utils. v. Philwold Estates, 52 N.Y.2d 253, 263, 418 N.E.2d 1310, 1314, 437 N.Y.S.2d 291, 295 (1981) (emphasis added). Under such a view the benefit of a covenant in gross would not run in favor of the assignee of the covenantor. Yet if suit were brought by the original promisee, no vertical privity question on the benefit side would arise. The issue then would directly be whether the benefit needs to touch or concern. It would be unfortunate to allow these loose statements of privity requirements, such as are contained in Orange, to prevent enforcement of a covenant in gross without specific consideration of the merits of the contract and the alienability issue.

159. 278 N.Y. 248, 15 N.E.2d 793 (1938).
160. See supra note 9 (regarding vertical privity and touch or concern).
161. 278 N.Y. at 262, 15 N.E.2d at 798.
162. Id.
163. Id. This dicta has been used by lower courts to bar covenants which were, in fact, in gross. See City of New York v. Turnpike Dev. Corp., 36 Misc. 2d 704, 233 N.Y.S.2d 887 (Sup. Ct. 1962) (discussed supra text accompanying note 103); Place v. Cummiskey, 6 A.D.2d 344, 176 N.Y.S.2d 806 (1958) (discussed infra note 165).
However, *Neponsit* can only be viewed as in gross, if in gross is defined in vertical privity terms as referring to whether the plaintiff itself owns land. A definition of in gross tied to vertical privity is of limited value because it can only be used in running benefit cases and not to test cases challenging the original validity of a covenant or running burden issues. Such a view also removes the policy of alienability as a support.

Use of the in gross label in these various intent cases produces unnecessary confusion as it combines two different problems. First, where there is land benefited, but the question is who can sue to enforce it, an intent analysis is all that is needed. The promise should not be treated as if it is in gross. Second, where there is no land benefited, the promise is in gross and the analysis should focus on the alienability issue which should be confronted directly.

VI. CONCLUSION

The law relating to the enforceability of covenants involving benefits in gross suffers from imprecise analysis and the tendency to over generalize. Assessments of the case law frequently include non-benefit in gross cases thereby confusing the question of who can sue from the question of whether, regardless of who sues, there must be land benefited. With the intent cases excised, the numerical strength of cases adhering to the traditional anti-in gross position is not significant. The mixed results the courts have reached, as seen in the business and public benefit cases, demonstrate that some courts have been capable of non-dogmatic approaches.

Where the benefit of a covenant is not tied to land, it is unfortunate for courts to employ the common law anti-in gross rule in a knee-jerk fashion. Concerns for alienability are not absolute and do not justify a mechanical rule.¹⁶⁴ Judicial examination of the reason for a limitation on land use is a better method of dealing with the legitimacy of the limitation. Contracts freely entered into normally should be upheld. Fairness also dictates that parties who take with notice of promises abide by them, unless, under the particular circumstances, the restraint on alienability is undue.

Sufficient deference can be accorded to the traditional canon favoring free land use by applying a rebuttable presumption against covenants in

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¹⁶⁴ See Browder, *supra* note 21, at 43 (rejecting a mechanical rule and substituting a test which would only refuse enforcement under circumstances where alienability was unreasonably restrained).
gross. If there is no reason for the limitation\textsuperscript{165} or if the reason is unclear,\textsuperscript{166} a decision not to enforce the promise is rational. A party seeking to enforce a promise can be expected to come forward to show why the promise was obtained. Yet, this burden should not be onerous. Where the reason is clear and not against the public interest, such as where it is shown that a promisee intended to retain the development rights or benefit a business or the public, the courts should permit enforcement. A court might determine that enforcement of a particular promise would unduly complicate transactions\textsuperscript{167} or that a covenant is, for some other reason,\textsuperscript{168} contrary to public policy. What needs to be avoided, though, is the mechanical rejection of promises affecting land use based upon ambiguously founded notions that such promises adversely affect alienability.

\textsuperscript{165} See Stegall v. Housing Auth. of Charlotte, 278 N.C. 95, 178 S.E.2d 824 (1971) (discussed supra notes 27-32, 46); see also Place v. Cummiskey, 6 A.D.2d 344, 176 N.Y.S.2d 806 (1958). In Place, the plaintiffs in transferring title to some lots and to a street extracted a covenant that the name of the street would be retained as Lena Place. Title to the street was subsequently transferred to the city which then changed the name of the street. While the suit was an action for money damages against the original promisee and hence did not technically present a running question, the court relying upon dicta in Neponsit, discussed supra note 163 and accompanying text, held that the covenant could not be enforced because the plaintiff owned no land. 6 A.D.2d at 346, 176 N.Y.S.2d at 809. No clear reason was given for the promise. It was hinted that sentimental reasons existed but, if so, it might well have been speculative to assess damages.

