Question 3

Leo owned three consecutive lots on Main Street. At one end, Lot 1 contained an office building, The Towers, leased to various tenants; in the middle, Lot 2 was a lot posted for use solely by the tenants and guests of the other two lots for parking; at the other end, Lot 3 contained a restaurant, The Grill, operated by Leo.

In 2008, Leo leased The Grill to Thelma for 15 years at rent of $1,000 per month under a written lease providing in relevant part: "Tenant shall operate only a restaurant on the premises. Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease. Tenant and his or her guests shall have the right to use Lot 2 for parking."

In March 2009, Thelma assigned the lease to The Grill to Andrew after he had reviewed it. The lease did not contain any provision restricting assignment. Although Leo did not express consent to the assignment, he nevertheless accepted monthly rental payments from Andrew.

In April 2010, Leo sold Lot 1 and Lot 2 to Barbara after she had inspected both lots. Barbara immediately recorded the deeds. Leo retained ownership of Lot 3.

In June 2010, Leo informed Andrew that, within a month, he intended to open a restaurant across the street from The Grill.

Also in June 2010, Barbara announced plans to close the parking lot on Lot 2 and to construct an office building there. There is no other lot available for parking within three blocks of The Grill.

1. Andrew has filed a lawsuit against Leo, claiming that he breached the provision of the lease stating, "Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease." How is the court likely to rule on Andrew's claim? Discuss.

2. Andrew has filed a lawsuit against Barbara, claiming that she breached the provision of the lease stating, "Tenant and his or her guests shall have the right to use Lot 2 for parking." How is the court likely to rule on Andrew's claim? Discuss.

Answer A to Question 3

1. ANDREW (A) V. LEO (L)

Applicable Law

Service contracts, including leases, are governed by the common law. These contracts involve a lease of land, which is a service. As such, the common law will govern these transactions.

Validity of Lease from L to T - Statute of Frauds

The Statute of Frauds prevents the introduction of a contracts for services that takes more than one year to complete, unless the statute of frauds has been satisfied by a writing, performance, or a judicial assention. In this case, the lease between L and T [was] for a sum of 15 years, but it was in writing and presumably signed by both parties. Therefore, the Statue of Frauds has been satisfied. Therefore, there was a valid lease from L to A.

Assignment from T to A

An assignment occurs when a person who is in rightful possession of property transfers all of her rights to another person. An assignment will be presumed valid, unless there is a no-assignment provision in the lease which is valid and has not been waived. Once rights have been assigned, the original assigning party, the assignor, remains in privity of contract with the lessor and the new assignee is not in privity of estate. As such, both the assignor and the assignee may assert their rights against the landlord, and the landlord may similarly assert his rights against both assignor and assignee.

In this case, A will easily be able to show that T assigned the lease to him since she transferred all of her rights in The Grill to him. Additionally, the original lease between L and A did not contain a 'no assignment' provision. T transferred all of her rights in Lot 3 to A for the balance of 14 years on her lease, which falls within the statute of frauds. Accordingly, A and T's assignment needs to be in writing. Because A and L both

“reviewed” the assignment, it is likely that the assignment was indeed in writing and is therefore valid under the Statute of Frauds.

Therefore, the assignment will be deemed valid.

Equitable Servitude

An equitable servitude (ES) is a promise in relation to land that does not necessarily burden one party's land, but it will concern the land of the other party. The benefit of an ES will be deemed to run with the benefitted land if the following are found: (i) generally, a writing; (ii) intent of the parties that the benefit run; (iii) touch and concern of the land; and (iv) notice. The recovery of an equitable servitude is equitable relief, rather than damages.

In the present action, the lease between T and L contained a promise by L not to open a restaurant within 5 miles of Lot 3, which contained The Grill that T leased. That lease was then validly assigned to A. In order for A to enforce the contract provision against L, he will need to show that the promise was an equitable servitude that was intended to “run with the benefitted estate”, in this case Lot 3.

Writing

Generally, a writing is required for an ES to run with the benefitted land. In this case, there was a writing between L and T, which included the covenant. Additionally, the assignment from T to A was also in writing, as discussed above. Therefore, this requirement is met.

Intent

However, L will argue that he did not intend for the ES to run with the land, since it is not evidenced "to successors or assigns" in the lease. However, because there was a valid assignment and because it is very likely that a 15-year lease will be assigned at some point, A will argue that the fact that a non-assignment provision did not appear in the lease is sufficient to show intent to run. Additionally, A will argue that because L

accepted monthly rental payments from him, that he was well aware that the lease had been assigned and had made no efforts to refuse the assignment or show his intent not to let the ES run with Lot 3.

Touch and Concern

The ES must also directly affect the benefitted party's use of the land. Here, A will argue that the ES concerns his ability to use Lot 3 as a restaurant, which was the purpose of his taking over the lease. L will argue that the provision only refers to restaurants and only inhibits A's ability to run the restaurant, which may be located on land, but does not directly affect the land. However, because A took the land as a restaurant and it is likely that he took it as a restaurant, the fact that the provision goes to preventing L from opening a restaurant within 5 miles directly affects his use of Lot 3. Therefore, the ES does touch and concern the land.

Notice

Finally, the parties must have had notice. L will argue that the assignment between T and A did not contain the provision restricting assignment, and therefore the benefited land did not have notice. However, notice can be gotten by looking to the record and inspecting the previous documents in the chain of leases. As such, A did have valid notice by looking to the lease between L and T. Additionally, L will be deemed to have notice because he was a party to the first lease between him and T. Therefore, this element is met.

Conclusion

It is most likely that A will want to seek equitable relief in the form of an injunction, to enforce the provision preventing L from opening a restaurant within 5 miles of Lot 3. For the reasons stated above, A will likely be able to show that the ES was validly formed and runs with Lot 3. Accordingly, the court will likely order an injunction against L to enforce the ES and prevent him from opening a restaurant within 5 miles.

Covenants to Run with Burdened Land

A may also argue that the provision is a covenant. A covenant is a contractual provision in a writing whereby one promises not to do something in relation to land. It is very similar to an ES, described above. However, money damages can be awarded, which A won't want.

2. ANDREW V. BARBARA (B)

Easements

An easement is a non-possessory interest in the use of someone else's land. An easement appurtenant involves the two properties, a dominant (the benefitted land) and a survient (the burdened land) tenement. An easement is created a number of ways, including by grant (which is a writing), prescription, implication, and necessity. It can be terminated, generally by release or abandonment, which takes a physical act. An easement will pass to a burdened estate so long as the new owner has notice of the easement, which is found by record (looking to previous conveyances), inquiry (looking to the land), and actual notice (being informed of the easement).

In this case, there was a provision in the original lease between L and T that allowed T and her clients to use the parking lot that was located in Lot 2, next door [to] T's leased premises. Because there were two lots, one burdened (lot 2), and the other benefitted (Lot 3), this is an easement appurtenant. Additionally, because the easement was granted in the writing between L and T, this was a valid easement by "grant". L then sold his property to B, who took the property and recorded the deeds. B will argue that because she was not informed of the easement by L and because her deeds did not include the provisions from L to A, since that was simply a lease and B's deeds were actually recorded conveyance documents, that she did not have notice. However, she did inspect both lots, Lot 1 and Lot 2, before purchasing them. In this regard, she most likely noticed that there were many people walking from Lot 2, where they parked their cars, to Lot 3 where they dined at The Grill. Additionally, she would have noticed that there were most likely more cars present in Lot 2 than would normally be for Lot 1

alone. This should have led her to inquire as to whether an easement or agreement existed to allow Lot 3 to use the Lot 2 parking lot. As such, the Court will likely find that B had inquiry notice of the easement and the easement will pass with the burdened Lot 2.

Therefore, B had inquiry notice of the easement and A will most likely be successful in enforcing the easement against her.

Answer B to Question 3

Thelma=T

Leo=L

Andrew=A

Barbara=B

1) Restrictive Covenant/Equitable Servitude

A covenant is a promise to do or not do something on or near one's land. Here L promised in his lease to T that "landlord shall not open a restaurant with 5 miles of the premises during the terms of the lease." Since it is a promise not to do something near his land, it is a covenant.

Equitable Servitude

Whether a covenant is a restrictive covenant or an equitable servitude depends on the types of damage that the plaintiff seeks. If A is seeking money damages, then it is a restrictive covenant. If he is seeking injunctive relief, then it is an equitable servitude. Here, A is suing to prevent L from opening a restaurant, which he said he would do in one month. Since he is seeking injunctive relief, it is an equitable servitude.

Here, the issue is whether the benefit and burdens of the equitable servitude run to A, who is a successor to the original tenant, T. For the benefit to run, the original agreement 1) must have been in writing, 2) parties intended the benefit to run to future successors, 3) the agreement touches and concerns the land, and 4) the parties had notice.

Here, the original equitable servitude was from a written lease signed by L and T in 2009. Therefore, the writing requirement is satisfied.

Here, L could argue that there was no intent by the original parties that the benefit would run to future successors because there is nothing said in the lease about the

benefit running to future successors. However, A could argue that because it said that the agreement would last "for the term of the lease" and the term was 15 years, it was intended that the benefit would be valid for the entire period of the 15 years. There was no clause restricting assignment and under the common law a tenant is free to assign her rights under the lease unless the lease or the landlord objects. Because the benefit was to last 15 years and T was free to assign her rights to another, it can be said that the parties intended that the benefit would run to future successors of the lease.

Touches and concerns the land means that whether the agreement affects the parties as landowners, not just community members. Here the agreement affects the tenant because the Grill is a restaurant and the previous owner of the restaurant opening up a new restaurant within five miles of the old restaurant brings along competition and hurts the tenant. It affects the landlord as a landowner because it prohibits him [from] doing something on his land.

Here A had notice of the agreement because it was in the lease and he reviewed it. L could argue that he did not have notice that the agreement was going to be able to [be] used to T's assignee, L. A could argue that L did have notice because he accepted rental payments from A, which presumably were checks written by A and should have then alerted L that A has taken over for T.

Restrictive Covenant

If L brought a claim for money damages, then it would have to be analyzed as a restrictive covenant. All the elements are the same except the original parties must have had horizontal privity and the assignor-assignee would have had to have vertical privity. Vertical privity is any nonhostile nexus. Here T (assignor) and A (assignee) have an assignment relationship which qualifies as nonhostile vertical privity. Horizontal privity means that the original parties must have had a relationship apart from the covenant. Here, T and L were landlord-tenant apart from the covenant. Therefore, horizontal privity is established. A would also prevail under a restrictive covenant theory.

2) Easement

An easement is the nonpossesory property interest to use another's land for one's benefit. Using another's land for the use and enjoyment of one's land is an easement appurtenant.

Here, the agreement that tenants should have the right to use lot 2 for parking is an easement because it gives the tenants a nonpossesory property interest to use lot two for their benefit. It is an easement appurtenant because it is for the using [of] another's land for the use and enjoyment of one's land. Lot 3 is the dominant tenement and lot 2 is the servient tenement.

Here, an express easement was created because it is written in a lease between T who was the tenant for lot 3, dominant tenement, and L who was the owner of lot 2, the servient tenement.

The benefit to an easement appurtenant runs with the land passes automatically with the transfer of the dominant tenement. Here, T, the original leasee of lot 3, assigned her rights under the lease to A. When an assignment of a lease happens, the new assignee and the landlord are in privity of estate and can enforce covenants that run with the estate/estate. Here, A, the assignee, would be able to enforce the easement because it runs with the land.

The burden of an easement appurtenant also passes automatically with the transfer of the servient tenement. Here, the servient tenement, lot 2, was sold by L to B. Therefore, the burden of the easement passes to B. However, the burden would not pass if B was a bona fide purchaser without notice (BFP). A BFP is someone who pays valuable consideration for the land and takes the land without notice of the burden. Here, B did pay valuable consideration for the land by buying it. However, she is not a BFP if she had notice of the easement.

One form of notice is record notice. A buyer is on record notice of what a record search of the grantor-grantee index would reveal. However, in this case L did not sell the land to T but instead leased it. Therefore, the lease containing the easement would not be found through a record search.

Another form of notice is inquiry notice. A buyer has a duty to inspect the land she buys and is on inquiry notice of reasonable inquiries that she should have made. Here, lot 2 was a parking lot of tenants of lot 3 before B bought it and it would have been obvious if she went there and saw that there were cars parked there. She should have asked L why there were cars there. Therefore, she is on inquiry notice of what L would have told her, which is that there is an easement on lot 2.

Easement by implication

Even if the easement from the lease is not enforced, it could be argued that when L sold the land to B he created an easement by implication. This requires a prior use that was reasonable [and] necessary to the owners of the dominant tenement and that this was reasonable [and] apparent when the land was bought. Here, when B bought the land it was apparent that lot 2 was being used as a parking lot. Also, it is reasonable [and] necessary for owners of the dominant tenement because other than lot 2 there is no parking available within three blocks of lot 3.