**NUISANCE AND PRIVATE LAND USE CONTROL PACKET**

**Nuisance Law**

1 Mass.App.Ct. 186

Appeals Court of Massachusetts, Essex.

**LYNN OPEN AIR THEATRE, INC.**

**v.**

**SEA CREST CADILLAC-PONTIAC, INC.**

Argued Jan. 16, 1973. | Decied March 22, 1973.

ARMSTRONG, Justice.

This suit was brought to enjoin the defendant’s use of flood lights which interfere with the quality of screen projection at the plaintiff’s open air drive-in movie theater and which in some sections of the plaintiff’s parking area shine directly into patrons’ eyes. No objections were taken to the master’s report, which was confirmed on motion of the plaintiff. A justice of the Superior Court entered a final decree dismissing the bill of **\*187** complaint and the defendant’s counterclaims. The plaintiff appealed.

The master found that when the plaintiff located its drive-in theater many years ago it was the only occupier and user within many hundreds of feet, but that the neighborhood is now a highly developed commercial area located on a heavily traveled public way. He found that the other occupiers of this area are mainly commercial in nature, and are well lighted at night; that the defendant’s use of lights in the evening is normal in the defendant’s business and is only harmful to the plaintiff’s business because of a drive-in theater’s unique high sensitivity to light; and that each party by incurring expenditure could take measures to alleviate the problem. There is no finding as to the relative cost of such measures.

[**[1]**](#co_anchor_F11973113481_1) [**[2]**](#co_anchor_F21973113481_1) The casting of light upon the property of another person may constitute a nuisance and be enjoined when it interferes **\*\*474** with that person’s reasonable and customary use and enjoyment of his property. [Nugent v. Melville Shoe Corp., 280 Mass. 469, 471-473, 182 N.E. 825.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932113284&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) See, generally, [Restatement: Torts, ss 822](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0101589&cite=RESTTORTSs822&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), [826](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0101589&cite=RESTTORTSs826&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search))-[830](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0110457039&pubNum=0101589&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). The master’s subsidiary findings indicate, however, that the defendant’s use of lights is not unreasonable in the highly commercial, heavily lighted neighborhood where the plaintiff’s and defendant’s businesses are located. ‘The character of the locality is a circumstance of great importance.’ [Kasper v. H. P. Hood & Sons, Inc., 291 Mass. 24, 27, 196 N.E. 149, 150.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935114062&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_577_150) There is no finding that the defendant’s lights injuriously affect ordinary users in the vicinity. Injury toa particular user of specially sensitive characteristics does not render the lights an actionable nuisance. [Wade v. Miller, 188 Mass. 6, 73 N.E. 849.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1905003249&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) [Stevens v. Rockport Granite Co., 216 Mass. 486, 488, 489, 104 N.E.371.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1914003383&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) [Tortorella v. H. Traiser & Co. Inc., 284 Mass. 497, 501, 188 N.E. 254.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1934113511&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) [Burnham v. Beverly Airways, Inc., 311 Mass. 628, 631, 42 N.E.2d 575. Restatement: Torts,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1942110066&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) [s 822](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0101589&cite=RESTTORTSs822&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), comment g. See also [Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847, 5 A.L.R.2d 690.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1948103041&pubNum=661&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) [Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Commn., 34 Ill.2d 544, 216 N.E.2d 788.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966109939&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) ‘The plaintiff cannot, by devoting his own land to an unusually sensitive use, such as a drive-in motion picture theatre easily **\*188** affected by light, make a nuisance out of conduct of the adjoining defendant which would otherwise be harmless.’ Prosser, Torts (4th ed.) s 87, p. 579.

[**[3]**](#co_anchor_F31973113481_1) The plaintiff argues that whether or not the defendant’s use of lights was unreasonable with respect to other users in the vicinity, it was negligent for the defendant, knowing the peculiar sensitivity of the plaintiff to light, not to take precautions to avoid that harm in the installation of the lights. This argument assumes that the defendant’s knowledge of the plaintiff’s sensitivity to harm, without more, imposes a duty on the defendant to avoid a use of his property which will cause that harm. That is not the law. See [Rogers v. Elliott, 146 Mass. 349, 15 N.E. 768.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1888170914&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) On the basis of the master’s findings, it does not appear that this defendant was under any duty to restrict his use of lights so as to accommodate the special sensitivity of the plaintiff.

There is no suggestion in the master’s findings that the defendant’s use of the lights is ‘inspired solely (or even partly) by hostility and a desire to cause harm to the (plaintiff).’ [Restatement: Torts, s 829](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0110457038&pubNum=0101589&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)).

Decree affirmed.

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445 Mass. 850

Supreme Judicial Court of Massachusetts,Essex.

**John E. RATTIGAN**, Jr., trustee, & another,

**v.**

**Evan WILE**, individually & as trustee.

Argued Nov. 8, 2005. | Decided Jan. 25, 2006.

[COWIN](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0304330001&originatingDoc=Ia9c21a668d1911da97faf3f66e4b6844&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), J.

**\*851** We conclude in this appeal that activities on one’s property that create or maintain unreasonable aesthetic conditions for neighbors are actionable as a private nuisance. We need not reach the merits of the defendant’s res judicata claim because it was not pleaded below. The judge properly awarded damages and issued an injunction, although we modify both slightly.

*Facts.* This case comes to us after a long history of litigation between the parties that culminated in a jury-waived trial in the Superior Court. We recite the facts found by the judge, supplemented as necessary by other undisputed evidence.

This matter involves two adjacent, prime oceanfront parcels located off West Street in Beverly Farms, an affluent residential section of the city of Beverly. Both properties directly abut a sandy beach and enjoy commanding views of the water. One plot is owned by the plaintiffs, John Rattigan and Jeffrey Horvitz, while the other is owned by the defendant, Evan Wile. The property owned by the plaintiffs is commonly known as Edgewater and contains a luxurious residence, pool, and manicured grounds. The parcel owned by the defendant consists of approximately 2.9 acres of undeveloped land. The defendant’s only land access is by right of way to West Street over land owned by the plaintiffs.

The plaintiffs purchased Edgewater at foreclosure auction in 1991. The next year the adjoining vacant property was also sold at foreclosure auction. The defendant outbid Horvitz for the parcel, and purchased with plans to build a home. Herewith began the problems.

**\*852** Rattigan subsequently brought actions on behalf of the Edgewater House Trust in the Land Court in or around 1992, seeking determinations that the defendant did not enjoy a right of way through Edgewater **\*\*684** and that the defendant’s land was not buildable under Beverly zoning bylaws. These suits were ultimately unsuccessful and the defendant apparently regarded them, and other supplications to city officials that met with mixed success, as a form of “harassment.” After Rattigan and Horvitz filed a successful challenge to the defendant’s building permit, the defendant embarked on a campaign of retaliation in August, 1999.

Between August, 1999, and July, 2003, the defendant placed a number of unusual objects at the edge of his lot, immediately adjacent to the boundary with the Edgewater property. The judge found that although the defendant, who is a building contractor, was undoubtedly aware that final resolution of the dispute concerning his building permit was hardly imminent, he dumped construction debris along the boundary line with Edgewater—broken concrete blocks, used pipe, and rusted metal components including a crane bucket. Later, the defendant brought onto the boundary a “gigantic, red, metal ocean container ... use[d] to ship freight.”

When Horvitz added barriers to shield those on his property from viewing the objects, first a few shrubs and then a six foot trellis fence (the maximum he believed he could build), the defendant “moved the construction debris inexplicably” so that the materials continued to be prominently in view. For example, after Horvitz erected the fence, the defendant responded “almost immediately” by moving “the largest pieces of the debris,” including the crane bucket, to the top of the red container so that they would remain visible. On a portion of the boundary of his property not protected by visual barriers, the defendant placed the detached bed of a pick-up truck that at one point held a large truck tire, and an unusual “wire frame or rack” from which hung a yellow detergent bottle and several plastic **\*853** figures including a duck, a goose, and an owl. A judge ordered the rack removed in a contempt proceeding related to this suit, see *infra,* in April, 2002.

Similarly, soon after Horvitz built a section of fence to shield swimmers at Edgewater’s pool from apparent catcalls by individuals on the defendant’s lot, the defendant responded by moving to his side of the fence “a trailer, like an office trailer ... on a construction site,” and elevating it on cinder blocks “so that the top windows loomed above the trellis fence.” In 2001 and 2002, the defendant placed several portable toilets near the pool, so close that a person could not walk between the toilets and the Edgewater fence. The toilets generated an offensive odor that wafted over the pool. In the summer of 2002, the defendant placed a fifteen foot white and yellow striped tent also within a few feet of the Edgewater pool area, “obliterating any view and light from that direction.” The city quickly ordered removal of the tent.

The judge found that there was no “logical explanation” for the defendant’s failure to locate elsewhere many of the objects that appeared along Edgewater’s boundary, except to “annoy, harass or otherwise create an offensive, harmful condition.” The defendant’s parcel was “a huge lot with multiple” locations where these items could have been placed. The fact that the tent and portable toilets were situated **\*\*685** elsewhere during the summer of 2003 reinforced this determination.

Activity on the lot was also disconcerting. On occasions in the summers of 2001 and 2002, the defendant invited 150 to 200 people from a local youth center to a beach party. The defendant himself did not attend. The judge concluded that the invitation was “not born[ ] of a desire to be a charitable citizen in Beverly but, rather, was part of the campaign that was being waged against the Horvitzes to create a difficult and destructive neighborhood.” The defendant intended the outing to be a recurring event but it was discontinued by the city because it was “disturbing the peace.”

Between 1999 and 2002, the defendant, who is a licensed commercial helicopter pilot, used his property as a heliport. He posted a sign on the Edgewater fence near the pool deck, some distance away from the takeoff and landing site, that read in **\*854** bold red lettering, “WARNING HELICOPTER OPERATIONS [;] AUTHORIZED ACCESS ONLY.” On “more than one” of the many helicopter touchdowns and liftoffs, the helicopter’s blades propelled small debris onto the Edgewater property; on one occasion, debris struck Horvitz’s stepson, and on another, debris struck Horvitz’s youngest daughter. By order of the Superior Court prior to trial, the defendant ceased landing on the plot but continued overflights to “check the property.”

The plaintiffs filed this action on February 14, 2001, and in July, 2001, following a hearing, obtained a preliminary injunction that enjoined the defendant from, among other things, flying his helicopter near Edgewater and “committing ... acts ... intended to harass ... Horvitz, his family, his employees or his guests.” Prior to trial, the defendant was twice adjudged to be in contempt of the injunction with respect to certain objects that he had placed along the property line.

On July 29, 2003, after a jury-waived trial, a judge of the Superior Court found that the defendant had created an actionable nuisance, and determined that the plaintiffs could recover for costs of abatement and temporary diminishment of the value of Edgewater. The judge credited testimony of an expert appraiser that the potential rental value of Edgewater for the thirteen weeks of the summer rental season declined from $8,000 per week to $2,000 per week as a result of the conditions that were caused by the defendant’s activities. The judge awarded damages for each week of the summer rental seasons of 1999, 2000, 2001, 2002, and 2003, an aggregate of sixty-five weeks, totaling $390,000. In addition, the judge awarded damages of $19,200 for costs incurred installing the trellis fence. With interest, total recovery amounted to $532,035.05. The judge also issued a broad injunction, which she read from the bench:

“The defendant shall be permanently enjoined from doing **\*855** anything or knowingly causing and/or permitting any activity to take place on or about his property that harasses plaintiff [Horvitz], his family or guests, or to commit, cause or permit any acts of harassment against plaintiff [Horvitz] or his family or guests. Harassment shall include any act that has the effect of causing substantial worry or annoyance or causing substantial offense to plaintiff [Horvitz], his family or other persons using **\*\*686** and/or occupying the plaintiff’s property. And this shall include the placement of objects, such as the tent, construction debris, [and] the trailer. This shall include not permitting large gatherings of children, people Mr. Wile doesn’t even know....

“The defendant shall within ten days clear any and all objects from, other than currently growing plant material, an area not less than twenty feet from all boundaries of the plaintiff’s property. Further, there shall remain, other than currently growing plant material, nothing taller than six feet within an area of not less than forty feet from all boundaries of the plaintiff’s property. The defendant shall thereafter allow nothing to be placed on [the] defendant’s property which violates the provision in this paragraph unless and until such time as [the] defendant obtains a valid building permit for any proposed structure on the defendant’s land and which permit is no longer able to be subject to challenge or appeal or until he obtains authorization from a court of competent jurisdiction.”

The defendant appealed and we transferred the case to this court on our own motion.

*Nuisance.* We accept the trial judge’s findings of fact absent clear error, but whether the plaintiffs met their burden on the claim of private nuisance is a question of law. See [*Kuwaiti Danish Computer Co. v. Digital Equip. Corp.,* 438 Mass. 459, 470, 781 N.E.2d 787 (2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003082146&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)).

[**[1]**](#co_anchor_F12008254608_1) [**[2]**](#co_anchor_F22008254608_1) [**[3]**](#co_anchor_F32008254608_1) [**[4]**](#co_anchor_F42008254608_1) Our cases impose a heavy burden on the plaintiffs in such an action. The law ofnuisance “does not concern itself with trifles, **\*856** or seek to remedy all the petty annoyances of everyday life in a civilized community.” W.L. Prosser & W.P. Keeton, Torts § 88, at 626 (5th ed.1984). See, e.g., [*Wade v. Miller,* 188 Mass. 6, 7, 73 N.E. 849 (1905)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1905003249&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) ( “Although the odor arising from the hen houses and yard, which at times was accompanied by the characteristic cry made by their occupants, may have been unpleasant,” there was no actionable nuisance).

“Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others.... Liability for damages is imposed [only] in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.”

[Restatement (Second) of Torts § 822](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0290694712&pubNum=0101577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) comment g, at 112 (1979). For this action to succeed, the plaintiffs must have shown that the defendant caused “a substantial and unreasonable interference with the use and enjoyment of the property” of the plaintiff.[13](#co_footnote_B013132008254608_1) [*Doe v. New Bedford Hous. Auth.,* 417 Mass. 273, 288, 630 N.E.2d 248 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994066864&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), quoting **\*\*687** [*Asiala v. Fitchburg,* 24 Mass.App.Ct. 13, 17, 505 N.E.2d 575 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987042679&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). See [*Hennessy v. Boston,* 265 Mass. 559, 561, 164 N.E. 470 (1929)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1929112643&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (conduct actionable in nuisance if it would “deprive the plaintiff of the exclusive right to enjoy the use of [the] premises free from material disturbance and annoyance”). The injury or annoyance must have substantially interfered “with the ordinary comfort ... of human existence,” or have been substantially detrimental to the “reasonable use [ ] or value of the property.” [*Metropoulos v. MacPherson,* 241 Mass. 491, 502, 135 N.E. 693 (1922)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1922110914&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (citations omitted).

[**[5]**](#co_anchor_F52008254608_1) [**[6]**](#co_anchor_F62008254608_1) [**[7]**](#co_anchor_F72008254608_1) The general rule is that a trier of fact may find an intentional invasion of another’s interest in the use and enjoyment of land to be unreasonable if the “gravity of the harm” caused thereby **\*857** “outweighs the utility” of the actor’s conduct. Restatement (Second) of Torts, *supra* at § 826(a). See 6A American Law of Property § 28.26 (A.J. Casner ed.1952). Where an actor’s “sole purpose” “is to annoy and harm his neighbor,” the law recognizes no utility. Restatement (Second) of Torts, *supra* at § 829(a) & comment c. See 6A American Law of Property, *supra* at § 28.28. Such an action is unreasonable. Every landowner “is bound to use his own property in such a manner as not to injure the property of another, or the reasonable and proper enjoyment of it.” [*Wesson v. Washburn Iron Co.,* 95 Mass. 95, 104 (1866)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1866009394&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_521_104).

[**[8]**](#co_anchor_F82008254608_1) [**[9]**](#co_anchor_F92008254608_1) [**[10]**](#co_anchor_F102008254608_1) A trier of fact may also find a landowner’s conduct to be unreasonable if the harm to a neighbor is substantial and “it would be practicable for the actor to avoid the harm in whole or part without undue hardship.” Restatement (Second) of Torts, *supra* at § 830.

“The question is not whether the activity itself is an improper, unsuitable or illegal thing to do in the place where it is being carried on, but whether the actor is carrying it on in a careful manner or at a proper time. The problem is whether the actor could effectively and profitably achieve his main objective in such a way that the harm to others would be substantially reduced or eliminated.”

*Id.* at § 830 comment c. “The one whose conduct causes the invasion may be able to reduce or eliminate the harm without undue hardship, and if so, he is the one to do the avoiding.” *Id.* at § 827 comment i.

[**[11]**](#co_anchor_F112008254608_1) In this case, the judge found that the defendant’s placement of items near the plaintiffs’ property was intended to harass his neighbors and that the helicopter landings were made in disregard of public safety. Even if the defendant had persuaded the judge that there was a mixed purpose to his actions, she also found with respect to many of the activities that the defendant’s goals could have been accomplished without undue hardship in **\*858** a manner that substantially reduced or eliminated the impact on Edgewater— for example, by utilizing areas of the expansive undeveloped lot not immediately adjacent to the plaintiffs’ property. It is obviously worthy of weight in the fact-finding calculus that this campaign was apparently waged in retaliation for the plaintiffs’ recourse to legal process in the underlying dispute.

**\*\*688** [**[12]**](#co_anchor_F122008254608_1) The question whether the defendant’s activities interfered with and substantially harmed the plaintiffs’ use and enjoyment of Edgewater, to the extent that a tort remedy is available, is a closer one. The defendant concedes that placement of the portable toilets and use of the helicopter on his land were traditional, actionable invasions. See, e.g., [*Stevens v. Rockport Granite Co.,* 216 Mass. 486, 489–491, 104 N.E. 371 (1914)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1914003383&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (noise); [*Commonwealth v. Perry,* 139 Mass. 198, 201, 29 N.E. 656 (1885)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885011382&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (odor). However, he claims that these invasions existed during only a portion of the extended period for which the judge granted nuisance damages. He argues that as to the remainder of the period, for which only visual conditions persisted, there was no substantial, continuing “invasion of another’s interest in the private use and enjoyment of land.” Restatement (Second) of Torts, *supra* at §§ 821D, 821F, 822. See [*Doe v. New Bedford Hous. Auth., supra.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994066864&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search))

[**[13]**](#co_anchor_F132008254608_1) [**[14]**](#co_anchor_F142008254608_1) [**[15]**](#co_anchor_F152008254608_1) [**[16]**](#co_anchor_F162008254608_1) [**[17]**](#co_anchor_F172008254608_1) [**[18]**](#co_anchor_F182008254608_1) We interpret broadly one’s right to use and enjoy his or her land. See [*Hennessy v. Boston, supra;*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1929112643&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search))[*Metropoulos v. MacPherson, supra.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1922110914&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) “Nuisances at common law frequently arise from offensive sights, sounds or smells.” [*General Outdoor Advertising Co. v. Department of Pub. Works,* 289 Mass. 149, 183, 193 N.E. 799 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935113791&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). An actor need not “directly damage the land or prevent its use in order to constitute a nuisance.” [58 Am.Jur.2d Nuisances § 98 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0281699863&pubNum=0113639&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). The landowner’s interest “comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land.” Restatement (Second) of Torts, *supra* at § 821D comment b. This interest is informed by “[t]he location, character and habits of the particular **\*859** community.” *Id.* at § 821F comment e. See [*Kasper v. H.P. Hood & Sons,* 291 Mass. 24, 27, 196 N.E. 149 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935114062&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); [58 Am.Jur.2d Nuisances, *supra* at §§ 102](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0281699867&pubNum=0113639&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), [107](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0281699872&pubNum=0113639&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). “[C]ontinuance or recurrence of the interference” will also factor in the determination. Restatement (Second) of Torts, *supra* at § 821F comment g. See [*Stodder v. Rosen Talking Mach. Co.,* 241 Mass. 245, 250–251, 135 N.E. 251 (1922)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1922110944&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), *S.C.,* [247 Mass. 60, 141 N.E. 569 (1923)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924111615&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (talking machine’s “continuous and monotonous playing of piece after piece” “substantially all day,” on most days, actionable).

“If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion [suffices]. If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not [actionable], even though the idiosyncracies of the particular plaintiff may make it unendurable to him.”

Restatement (Second) of [Torts, *supra* at § 821F](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0290694710&pubNum=0101577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) comment d. These are all issues of fact, see, e.g., [*Senatore v. Blinn,* 342 Mass. 778, 778, 174 N.E.2d 437 (1961)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961116430&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (noise and unsightliness), and it is often difficult for a trier of fact to determine whether an invasion is sufficiently substantial that an action in nuisance may succeed. See W.L. Prosser & [W.F. Keeton, Torts, *supra* at § 88, at 627](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0290693678&pubNum=0101577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); Restatement (Second) of Torts, *supra* at § 821F comment d.

In the present case, the trial judge found that the community was residential and implicitly intolerant of the activities in which the defendant engaged. These findings were supported by expert opinion to the effect that one who might otherwise have rented Edgewater, if it had been offered for rent, would probably have declined to do so in light of the defendant’s activities. The evidence also showed that the defendant’s interferences continued for several years. Damages were ascertainable. See W.L. Prosser & W.P. Keeton, **\*\*689** Torts, § 88, at 627 (“Probably a good working rule would be that the annoyance cannot amount to unreasonable interference until it results in a depreciation in the market or rental value of the land”). Compare [*Tortorella v. H. Traiser & Co.,* 284 Mass. 497, 502, 188 N.E. 254 (1933)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1934113511&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (evidence that value declined insufficient without showing of extent). The judge’s findings were not clearly erroneous.

**\*860** Courts in other jurisdictions have reached similar conclusions. For example, in [*Statler v. Catalano,* 167 Ill.App.3d 397, 401–402, 405–406, 118 Ill.Dec. 283, 521 N.E.2d 565 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988040685&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), the court affirmed nuisance damages on evidence that the defendants accumulated garbage for five years on the edge of their property nearest that of the plaintiffs, to annoy the latter, and occasionally shot bullets through the plaintiffs’ windows; strategically positioned shooting trophies to taunt the plaintiffs; and intentionally reduced the level of a shared body of water. Likewise, in [*Mark v. State Dep’t of Fish & Wildlife,* 158 Or.App. 355, 361, 974 P.2d 716 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999058453&pubNum=661&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), *S.C.,* [191 Or.App. 563, 573–574, 84 P.3d 155 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004092993&pubNum=4645&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), the court concluded that a finding of nuisance was permissible from evidence of “uncontrolled and intrusive” human nudity at the defendants’ wildlife area, occurring in a location immediately around the plaintiffs’ property. The court determined that a finding of nuisance would have been permissible even in the absence of evidence of a sexual component to the activity (which was a nuisance at common law), although this too was shown. [*Id.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999058453&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) See [*Kirkwood v. Finegan,* 95 Mich. 543, 544, 55 N.W. 457 (1893)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893004073&pubNum=594&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (“character and style” of fence made clear it was constructed in spite and thus actionable in nuisance); [*Lee’s Summit v. Browning,* 722 S.W.2d 114, 115–116 (Mo.Ct.App.1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986163240&pubNum=713&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_115) (affirming trial court finding that automobile salvage yard **was** nuisance in part because salvage material was visible from street); [*Yeager v. Traylor,* 306 Pa. 530, 532, 535, 160 A. 108 (1932)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932114106&pubNum=161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (proposed parking garage abutting residences of “expensive character” was nuisance that could be abated, in part, by use of screen to hide its “unsightly appearance”); [*Foley v. Harris,* 223 Va. 20, 28–29, 286 S.E.2d 186 (1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982103012&pubNum=711&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (sight of collection of several “junked ... old, battered” automobiles actionable in nuisance); [*Martin v. Williams,* 141 W.Va. 595, 601–602, 607–609, 612, 93 S.E.2d 835 (1956)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1956125925&pubNum=711&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (used car lot in residential neighborhood actionable in nuisance based, in part, on unsightliness).

Other courts forbid actions in nuisance that are based solely on unsightly conditions. See, e.g., [*Coty v. Ramsey Assocs.,* 149 Vt. 451, 458, 546 A.2d 196 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988103455&pubNum=162&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), cert. denied, [487 U.S. 1236, 108 S.Ct. 2903, 101 L.Ed.2d 936 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988090871&pubNum=708&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), [*S.C.,* 154 Vt. 168, 573 A.2d 694 (1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990074029&pubNum=162&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (court need not determine rule’s continuing viability because case involved more than mere unsightliness). These courts distinguish cases where “more” than visually offensive **\*861** conditions were present. See [*Wernke v. Halas,* 600 N.E.2d 117, 121–122 & n. 6 (Ind.Ct.App.1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992167628&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_578_121). See also [58 Am.Jur.2d Nuisances, *supra* at § 87](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0281699852&pubNum=0113639&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). However, the modern trend is toward recognition that aesthetic considerations may legitimately generate public and private concern. See [Note, Aesthetic Nuisance: An Emerging Cause of Action, 45 N.Y.U. L. Rev. 1075, 1080–1087 (1970)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=1206&cite=45NYULREV1075&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_1206_1080); Note, Unaesthetic Sights as Nuisance, 25 Cornell L.Q. 1, 2 (1939); Note, The Modern Tendency Toward the Protection of the Aesthetic, 44 W. Va. L.Q. 58, 59–60 (1938). This court long ago decided that aesthetic considerations, standing alone, could support limitations on the use of land. See [*General Outdoor Advertising Co. v. Department of Pub. Works, supra* at 182–187, 193 N.E. 799.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935113791&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) Other courts have determined that the common law of nuisance permits suit on such incorporeal, **\*\*690** value-based interferences as, among other things, disagreeable odors, obnoxious sounds, unreasonable illumination, disadvantageous blocking of light and air, and even undesired social influences from brothels, saloons, and gambling parlors. See Nagle, [Moral Nuisances, 50 Emory L.J. 265, 276–299 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0284009871&pubNum=1135&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_1135_276); Coletta, The [Case For Aesthetic Nuisance Rethinking Traditional Judicial Attitudes, 48 Ohio St. L.J. 141, 165–175 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0101685702&pubNum=1216&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_1216_165). The invasion here was a composite of unpleasant odors, sounds, and visual conditions, and on this record the plaintiff established that the defendant’s actions constituted a nuisance.

[**[19]**](#co_anchor_F192008254608_1) *Damages.* The defendant also advances several arguments with respect to the basis and magnitude of the damage award. He contends that diminution of rental value was an inappropriate measure of damages because the plaintiff never attempted to rent Edgewater. We disagree.

[**[20]**](#co_anchor_F202008254608_1) [**[21]**](#co_anchor_F212008254608_1) [**[22]**](#co_anchor_F222008254608_1) “The general rule for measuring property damage is diminution in market value.” [*Trinity Church in the City of Boston v. John Hancock Mut. Life Ins. Co.,* 399 Mass. 43, 48, 502 N.E.2d 532 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987006959&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), *S.C.,* [405 Mass. 682, 544 N.E.2d 584 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989142370&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). “[W]here damage to real property is not permanent, the measure of recovery is the reasonable expense of repairing the injury plus the intervening loss of rental value for the period reasonably needed to repair the injury.” [*Guaranty–First Trust Co. v. Textron, Inc.,* 416 Mass. 332, 337, 622 N.E.2d 597 (1993)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993213164&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). Diminution in rental value is an injury for which the occupant of the property at the time of the interference **\*862** may recover.[16](#co_footnote_B016162008254608_1) See [*Wolfberg v. Hunter,* 385 Mass. 390, 398, 400, 432 N.E.2d 467 (1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982110297&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (damages pursuant to [G.L. c. 93A, § 9](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST93AS9&originatingDoc=Ia9c21a668d1911da97faf3f66e4b6844&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search))); [*Harrison v. Textron, Inc.,* 367 Mass. 540, 556, 328 N.E.2d 838 (1975)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975115211&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)).

[**[23]**](#co_anchor_F232008254608_1) The judge also awarded $19,200, representing the cost of the trellis fence built by Horvitz as a barrier. The defendant argues that because the fence did not succeed in eliminating the defendant’s interference with Edgewater, recovery of its cost was improper. However, the appropriate inquiry is whether, in the circumstances, the cost incurred for the fence was a reasonable response to the defendant’s behavior. See [*Guaranty–First Trust Co. v. Textron, Inc., supra.*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993213164&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) That is not measured by whether the fence actually succeeded in its purpose, particularly when the defendant took action to thwart it.

[**[24]**](#co_anchor_F242008254608_1) The defendant also objects to the award of damages for those periods during which there was no evidence of nuisance and for those periods during which the judge deemed the interference insignificant. Damages were assessed for all thirteen weeks of the summer rental season of 1999, although the defendant began his campaign of harassment only in August of that year. In addition, the judge issued her findings of fact and rulings of law on July 29, 2003, and the defendant was ordered to remove the offending objects within ten days, but damages were nonetheless awarded for all of August, 2003. The plaintiff does not expressly contend otherwise. Thus, we are satisfied that the period for which damages are awarded should be reduced from sixty-five weeks to **\*\*691** fifty-three weeks (subtracting nine weeks for June and July, 1999, and three weeks for the period in August, 2003, commencing within ten days after the issuance of the removal order). Thus, the rental value portion of the damage award should be reduced correspondingly from $390,000 to $318,000.

[**[25]**](#co_anchor_F252008254608_1) Finally, the defendant argues that the magnitude of the damage award was “unprecedented” and did not take into account **\*863** the fact that many of his offensive activities were sporadic and did not continue during the entire period for which damages were awarded. For example, the office trailer was positioned at the boundary of Edgewater only in June, 2001. Nevertheless, we are satisfied that the award was supported at trial by duly qualified expert opinion, which the defendant did not rebut, and flowed from evidence of a single, hostile, continuous, four-year campaign of interference with the use and enjoyment of the plaintiffs’ valuable real estate. There was no error.

[**[26]**](#co_anchor_F262008254608_1) *Res judicata.* The defendant, on appeal, asserts a novel defense raised below only in his pretrial memorandum, and even there only in conclusory fashion: that two prior adjudications of contempt with respect to the preliminary injunction, in which the judge declined to make certain findings favorable to the plaintiffs, barred the subsequent decision for the plaintiffs on elements of the underlying nuisance claim. We need not address the merits of this argument because it was not adequately raised below.

[**[27]**](#co_anchor_F272008254608_1) [**[28]**](#co_anchor_F282008254608_1) [**[29]**](#co_anchor_F292008254608_1) Res judicata is an affirmative defense that must be set forth “[i]n pleading to a preceding pleading.” [Mass. R. Civ. P. 8(c)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MASTRCPR8&originatingDoc=Ia9c21a668d1911da97faf3f66e4b6844&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), 365 Mass. 749 (1974). A pretrial memorandum is not a pleading. See [Mass. R. Civ. P. 7(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MASTRCPR7&originatingDoc=Ia9c21a668d1911da97faf3f66e4b6844&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)), as amended, 385 Mass. 1215 (1982); 5 C.A. Wright & A.R. Miller, [Federal Practice & Procedure § 1183, at 22–23 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0102228&cite=FPPs1183&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). “The failure to comply with [[rule 8(c)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MASTRCPR8&originatingDoc=Ia9c21a668d1911da97faf3f66e4b6844&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) ] is, without more, sufficient reason for holding that the defense [ ] ... [is] not now open to the defendant[ ].” [*Middlesex & Boston Ry. v. Aldermen of Newton,* 371 Mass. 849, 859, 359 N.E.2d 1279 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977109307&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). See [*Anthony’s Pier Four, Inc. v. HBC Assocs.,* 411 Mass. 451, 471, 583 N.E.2d 806 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992015769&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). Compare [*Demoulas v. Demoulas,* 428 Mass. 555, 575 n. 16, 703 N.E.2d 1149 (1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998255179&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) (no waiver for failure to comply with [rule 8(c)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MASTRCPR8&originatingDoc=Ia9c21a668d1911da97faf3f66e4b6844&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)) where adequate notice of defense was given and issue was argued by both parties in briefs and at motion hearing).

[**[30]**](#co_anchor_F302008254608_1) *Injunction.* Given the defendant’s creativity in persisting with his campaign of nuisance, the expansive nature of the injunction issued by the trial judge was understandable. The judge handled a difficult case well. Nevertheless, the defendant argues, and we agree, that the breadth of the injunction and the emphasis on the subjective effects of the defendant’s actions raise concern that it **\*864** may chill wholly legitimate uses of the almost three acre property. For example, the injunction prohibited any act that would cause “substantial worry” to the plaintiffs, but given the history between the parties, it appears likely that even the most reasonable of the defendant’s actions might cause the plaintiffs consternation. Thus, we make minor amendments so that the injunction provides as follows.

The defendant is permanently enjoined from unreasonably interfering with the use and enjoyment of the plaintiffs’ property. Without limiting the scope of the foregoing prohibition, the defendant shall not leave unattended any objects more than six feet in height within forty feet of the plaintiffs’ boundary line, such as tents, portable toilets, construction and industrial materials, trailers, and warning signs, except reasonable vegetation. The defendant shall not operate, or cause to be operated, a helicopter on his property or within the zone of **\*\*692** interest above the property. So long as the above provisions are not violated, the defendant shall not be enjoined from hosting gatherings on his property that he personally attends. This injunction is not intended to impede the defendant’s ability to build on the property at issue; if he obtains lawful authority to build, he may seek modification of this injunction in the Superior Court.

*Conclusion.* For the foregoing reasons, judgment for the plaintiff is to be entered in the amount of $337,200 ($318,000 in diminished rental value and the $19,200 cost of the fence) plus interest. The injunction is modified as set forth above.

*So ordered.*

**Restrictive Covenants**

291 Mass. 477

Supreme Judicial Court of Massachusetts, Middlesex.

**SNOW et al.**

**v.**

**VAN DAM et al.**

July 29, 1935.

LUMMUS, Justice.

This suit, although brought in Middlesex county, relates to land on the seashore at Brier Neck in Gloucester in Essex county, title to which, after the decision in [Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1906003227&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) was registered on September 5, 1906, in the name of one Luce, from whom title soon passed to one Shackelford. The tract so registered was bounded northerly by a line through a pond not far northerly from a county road called Thatcher Road, which ran through the tract from west to east; easterly by land of other owners; southerly by the Atlantic Ocean, where there was a fine bathing beach; and westerly by Witham Road. The entrance to the tract was at the northwesterly corner, where is situated the lot now owned by the defendant Van Dam, which is the larger part of a triangular piece of land lying north of Thatcher Road and enclosed by Thatcher Road, Witham Road and another road.

The northerly part of the tract, including the lot of the defendant Van Dam, is low and marshy. When the tract was registered in 1906, this northerly part was deemed unsuitable for building, and worthless, and consequently was not divided into lots on the earlier plans. Thatcher Road **\*479** is a public way on which electric cars used to run. There is no summer residence on the north side of that way, and only one bounding on that way on the south side.

From Thatcher Road, going south, there is a fairly sharp ascent to the top of a low hill, from which there is a gentle slope southward to the beach. This hill and slope were in 1906, and still are, well adapted to summer residences. In 1907 the whole tract, except the part north of Thatcher Road, was divided into building lots. By later plans some of the lots were further subdivided and the boundaries of others were changed. In all, about a hundred building lots were laid out. Each of the plaintiffs owns one of these building lots, either on the hill or on the southerly slope, on which he has built a summer residence.

Between July 8, 1907, and January 23, 1923, almost all the lots into which the part of the tract south of Thatcher Road was divided, including the lots of most of the plaintiffs, were sold at various times by the general owner of the tract to various persons. With negligible exceptions, the deeds contained uniform restrictions, of which the material one is that ‘only one dwelling house shall be erected or maintained thereon at any given time which building shall cost not less than $2500 and no outbuilding containing a privy shall be erected or maintained on said parcel without the consent in writing of the grantor or their [sic] heirs.’ The entire unsold remainder of the land south of Thatcher Road was conveyed, on June 15, 1923, by Shackelford, the general owner of the unsold parts of the tract, to J. Richard Clark, subject to similar restrictions.

[**[1]**](#co_anchor_F11935114111_1) [**[2]**](#co_anchor_F21935114111_1) [**[3]**](#co_anchor_F31935114111_1) The low and marshy land north of Thatcher Road was first divided, on a revised plan of 1919, into three parcels, called C, D and E. The revised plan covered the whole Brier Neck tract. On January 23, 1923, about five months before the deed to J. Richard Clark, already mentioned, said Shackelford conveyed said lots C, D and E to one Robert C. Clark, subject to the following restrictions: ‘Only one dwelling house may be maintained on each of said parcels of land at any given time, which dwelling house shall cost not less than Twenty-five Hundred Dollars **\*480** ($2500) unless plans and specifications for a dwelling house of less cost shall be approved in writing by the grantor of said parcels of land, and no outbuilding containing a privy shall be maintained on either of said parcels of land without the consent in writing of the grantor. \* \* \*’ Lot D is the last of which the larger part is now owned by the defendant Van Dam, having been conveyed to him by **\*\*226** Robert C. Clark on February 18, 1933, subject to the restrictions contained in the deed to him ‘in so far as the same may be now in force and applicable.’ This phrase did not purport to create any new restriction, and could have no such effect. [Sargent v. Leonardi, 223 Mass. 556, 558, 559, 112 N. E. 633.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1916003197&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) The defendants have erected on lot D a large building to be used for the sale of ice cream and dairy products and the conducting of the business of a common victualler. The plaintiffs bring this suit for an injunction, claiming a violation of the restrictions. We think that the erection of a building to be used for business purposes was a violation of the language of the restriction. [Powers v. Radding, 225 Mass. 110, 114, 113 N. E. 782.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1916003118&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) The zoning of the land for business in 1927 by the city of Gloucester could not operate to remove existing restrictions. [Jenney v. Hynes, 282 Mass. 182, 194, 184 N. E. 444](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933112975&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).

Prior to the conveyance from Shackelford to Robert C. Clark on January 23, 1923, there could not have been, under the law of this commonwealth, any enforceable restriction upon lot D. [Sprague v. Kimball, 213 Mass. 380, 100 N. E. 622, Ann. Cas. 1914A, 431.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913003267&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) If any now exists in favor of the lands of the plaintiffs, it must have been created by that deed.

[**[4]**](#co_anchor_F41935114111_1) A restriction, to be attached to land by way of benefit, must not only tend to benefit that land itself ([Norcross v. James, 140 Mass. 188, 192, 2 N. E. 946;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885011687&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Shade v. M. O’Keefe, Inc., 260 Mass. 180, 156 N. E. 867;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1927114603&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Sheff v. Candy Box, Inc., 274 Mass. 402, 406, 174 N. E. 466;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1931113709&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Parsons v. Duryea, 261 Mass. 314, 158 N. E. 761),](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1927114713&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) but must also be intended to be appurtenant to that land. [Clapp v. Wilder, 176 Mass. 332, 339, 57 N. E. 692,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900002487&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [50 L. R. A. 120.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900002487&pubNum=473&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) If not intended to benefit an ascertainable dominant estate, the restriction will not burden the supposed servient estate, but will be a mere personal contract on both sides. **\*481** [Lowell Institution for Savings v. Lowell, 153 Mass. 530, 27 N. E. 518;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891010835&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Bessey v. Ollman, 242 Mass. 89, 91, 136 N. E. 176;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1922110966&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Hill v. Levine, 252 Mass. 513, 516, 517, 147 N. E. 837;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1925112117&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Orenberg v. Johnston, 269 Mass. 312, 168 N. E. 794;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930112972&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) London County Council v. Allen, [1914] 3 K. B. 642; In re Sunnyfield, [1932] 1 Ch. 79; In re Union of London & Smith’s Bank Limited’s Conveyance, [1933] 1 Ch. 611.

[**[5]**](#co_anchor_F51935114111_1) In the absence of express statement, an intention that a restriction upon one lot shall be appurtenant to a neighboring lot is sometimes inferred from the relation of the lots to each other. [Peck v. Conway, 119 Mass. 546;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1876017125&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Hogan v. Barry, 143 Mass. 538, 539, 10 N. E. 253;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1887166164&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Welch v. Austin, 187 Mass. 256, 72 N. E. 972,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1905003303&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [68 L. R. A. 189;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1905003303&pubNum=473&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Codman v. Bradley, 201 Mass. 361, 368, 87 N. E. 591;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1909003363&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Lodge v. Swampscott, 216 Mass. 260, 103 N. E. 635.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913002938&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) See, also, [Clapp v. Wilder, 176 Mass. 332, 57 N. E. 692,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900002487&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [50 L. R. A. 120.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900002487&pubNum=473&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) But in many cases there has been a scheme or plan for restricting the lots in a tract undergoing development to obtain substantial uniformity in building and use. The existence of such a building scheme has often been relied on to show an intention that the restrictions imposed upon the several lots shall be appurtenant to every other lot in the tract included in the scheme. [Hano v. Bigelow, 155 Mass. 341, 343, 29 N. E. 628,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892011613&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) and cases cited; [Jackson v. Stevenson, 156 Mass. 496, 501, 31 N. E. 691,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892011015&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [32 Am. St. Rep. 476;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892011015&pubNum=2150&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [McCusker v. Goode, 185 Mass. 607, 611, 71 N. E. 76;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904002588&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Maclary v. Morgan, 230 Mass. 80, 82, 119 N. E. 189;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1918002800&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Wilson v. Middlesex Co., 244 Mass. 224, 231, 138 N. E. 699;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1923111758&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Lacentra v. Valeri, 244 Mass. 404, 406, 138 N. E. 388;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1923111707&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Abbott v. Steigman, 263 Mass. 585, 161 N. E. 596.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1928116534&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) In some cases the absence of such a scheme has made it impossible to show that the burden of the restriction was intended to be appurtenant to neighboring land. [Sharp v. Ropes, 110 Mass. 381;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1872016390&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Webber v. Landrigan, 215 Mass. 221, 102 N. E. 460;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913003053&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Stewart v. Alpert, 262 Mass. 34, 159 N. E. 503.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1928116509&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) In the present case, unless the lots of the plaintiffs and the defendant Van Dam were included in one scheme of restrictions, there is nothing to show that the restrictions upon the lot of the defendant Van Dam were intended to be appurtenant to the lots of the plaintiffs.

[**[6]**](#co_anchor_F61935114111_1) What is meant by a ‘scheme’ of this sort? In England, where the idea has been most fully developed, it is established that the area covered by the scheme and the restrictions imposed within that area must be apparent to the several purchasers when the sales begin. The purchasers **\*482** must know the extent of their reciprocal rights and obligations, or, in other words, the ‘local law’ imposed by the vendor upon a definite tract. Reid v. Bickerstaff, [1909] 2 Ch. 305; Kelly v. Barrett, [1924] 2 Ch. 379, 399 et seq. Where such a **\*\*227** scheme exists, it appears to be the law of England and some American jurisdictions that a grantee subject to restrictions acquires by implication an enforceable right to have the remaining land of the vendor, within the limits of the scheme, bound by similar restrictions. Spicer v. Martin, 14 App. Cas. 12, 24, 25; In re Birmingham & District Land Co., [1893] 1 Ch. 342, 351, 352. Jaeger v. Mansions Consolidated, Ltd., 87 L. T. (N. S.) 690, 697; Gedge v. Bartlett, 17 T. L. R. 43; [Sanborn v. McLean, 233 Mich. 227, 206 N. W. 496, 60 A. L. R. 1212;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1926106445&pubNum=104&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 194 P. 536.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1920149875&pubNum=660&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) See, also, [Nashua Hospital Association v. Gage, 85 N. H. 335, 341, 342, 159 A. 137.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932115993&pubNum=161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) Traces of that idea can be found in our own reports. [McCusker v. Goode, 185 Mass. 607, 611, 71 N. E. 76;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904002588&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Roak v. Davis, 194 Mass. 481, 485, 80 N. E. 690.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1907003235&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) But it was settled in this commonwealth by [Sprague v. Kimball, 213 Mass. 380, 100 N. E. 622, Ann. Cas. 1914A, 431,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913003267&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) that the statute of frauds prevents the enforcement against the vendor, or any purchaser from him of a lot not expressly restricted, of any implied or oral agreement that the vendor’s remaining land shall be bound by restrictions similar to those imposed upon lots conveyed. Only where, as in [Kimball v. Commonwealth Avenue Street Railway, 173 Mass. 152, 53 N. E. 274;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899013899&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Riley v. Barron, 227 Mass. 325, 329, 116 N. E. 473;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1917003175&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Beekman v. Schirmer, 239 Mass. 265, 270, 132 N. E. 45;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921108480&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Lacentra v. Valeri, 244 Mass. 404, 138 N. E. 388,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1923111707&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) and [McLaughlin v. Eldredge, 266 Mass. 387, 165 N. E. 419,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1929112800&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) the vendor binds his remaining land by writing, can reciprocity of restriction between the vendor and the vendee be enforced.

[**[7]**](#co_anchor_F71935114111_1) Nevertheless, the existence of a ‘scheme’ continues to be important in Massachusetts for the purpose of determining the land to which the restrictions are appurtenant. Sometimes the scheme has been established by preliminary statements of intention to restrict the tract, particularly in documents of a public nature ([Allen v. Massachusetts Bonding & Ins. Co., 248 Mass. 378, 143 N. E. 499, 33 A. L. R. 669;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924111631&pubNum=104&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) compare [Beals v. Case, 138 Mass. 138, 141, 142),](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884025224&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_521_141) or in a recorded plan. **\*483** [Sprague v. Kimball, 213 Mass. 380, 383, 100 N. E. 622, Ann. Cas. 1914A, 431;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913003267&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Oliver v. Kalick, 223 Mass. 252, 111 N. E. 879.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1916003378&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) More often it is shown by the substantial uniformity of the restrictions upon the lots included in the tract. Nottingham Patent Brick & Tile Co. v. Butler, 15 Q. B. Div. 261, 269, affirmed 16 Q. B. Div. 778. In some jurisdictions the logic of the English rule, that the extent and character of the scheme must be apparent when the sale of the lots begins, had led to rulings that the restrictions imposed in later deeds are not evidence of the existence or nature of the scheme. [Werner v. Graham, 181 Cal. 174, 183–186, 183 P. 945;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1919006304&pubNum=660&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Sailer v. Podolski, 82 N. J. Eq. (12 Buch.) 459, 464, 88 A. 967.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913006055&pubNum=161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) See, also, [Nashua Hospital Association v. Gage, 85 N. H. 335, 340, 341, 159 A. 137.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932115993&pubNum=161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) In the present case there is no evidence of a scheme except a list of conveyances of different lots from 1907 to 1923 with substantially uniform restrictions. Although the point has not been discussed by this court, the original papers show, more clearly than the reports, that subsequent deeds were relied on to show a scheme existing at the time of the earlier conveyances to the parties or their predecessors in title, in [Hills v. Metzenroth, 173 Mass. 423, 53 N. E. 890;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899014125&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901002975&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Stewart v. Finkelstone, 206 Mass. 28, 92 N. E. 37,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910002970&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910002970&pubNum=474&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) and [Storey v. Brush, 256 Mass. 101, 152 N. E. 225.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1926112724&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) See, also, [Hazen v. Mathews, 184 Mass. 388, 393, 68 N. E. 838.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1903002896&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) Apparently in Massachusetts a ‘scheme’ has legal effect if definitely settled by the common vendor when the sale of lots begins, even though at that time evidence of such settlement is lacking and a series of subsequent conveyances is needed to supply it. In [Bacon v. Sandberg, 179 Mass. 396, 398, 60 N. E. 936, 937,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901002975&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_577_937) it was said, ‘the criterion in this class of cases is the intent of the grantor in imposing the restrictions.’

[**[8]**](#co_anchor_F81935114111_1) Neither the restricting of every lot within the area covered, nor absolute identity of restrictions upon different lots, is essential to the existence of a scheme. [Bacon v. Sandberg, 179 Mass. 396, 398, 60 N. E. 936;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901002975&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Allen v. Barrett, 213 Mass. 36, 39, 99 N. E. 575, Ann. Cas. 1913E, 820;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912003026&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Hartt v. Rueter, 223 Mass. 207, 211, 111 N. E. 1045;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1916003412&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Oliver v. Kalick, 223 Mass. 252, 254, 111 N. E. 879;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1916003378&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Sargent v. Leonardi, 223 Mass. 556, 112 N. E. 633;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1916003197&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Storey v. Brush, 256 Mass. 101, 106, 152 N. E. 225.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1926112724&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) But extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. **\*484** [Beals v. Case, 138 Mass. 138.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884025224&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) **\*\*228** [St. Patrick’s Religious, Educational & Charitable Association of Massachusetts v. Hale, 227 Mass. 175, 116 N. E. 407](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1917003162&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).

[**[9]**](#co_anchor_F91935114111_1) [**[10]**](#co_anchor_F101935114111_1) [**[11]**](#co_anchor_F111935114111_1) The existence of a ‘scheme’ is important in the law of restrictions for another purpose, namely, to enable the restrictions to be made appurtenant to a lot within the scheme which has been earlier conveyed by the common vendor. In the present case the lots of some of the plaintiffs were sold before, and the lots of others after, the conveyance from Shackelford to Robert C. Clark on January 23, 1923, which first imposed a restriction upon the lot now owned by the defendant Van Dam. The plaintiffs whose lots were sold before January 23, 1923, cannot claim succession to any rights of Shackelford or of land then retained by him. In general, an equitable easement or restriction cannot be created in favor of land owned by a stranger. [Hazen v. Mathews, 184 Mass. 388, 68 N. E. 838.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1903002896&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) Compare [Vogeler v. Alwyn Improvement Corp., 247 N. Y. 131, 159 N. E. 886;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1928104433&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Lister v. Vogel, 110 N. J. Eq. 35, 158 A. 534.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932114962&pubNum=161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) Nevertheless an earlier purchaser in a land development has long been allowed to enforce against a later purchaser the restrictions imposed upon the latter by the deed to him in pursuance of a scheme of restrictions. [Jeffries v. Jeffries, 117 Mass. 184, 190;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1875016998&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_521_190) [Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1894012938&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Evans v. Foss, 194 Mass. 513, 515, 80 N. E. 587,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1907003200&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [9 L. R. A. (N. S.) 1039,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1907003200&pubNum=474&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [11 Ann. Cas. 171,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1907003200&pubNum=3028&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) and cases cited; Elliston v. Reacher, [1908] 2 Ch. 374, 384; [Roberts v. Scull, 58 N. J. Eq. (13 Dick.) 396, 402, 43 A. 583;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899015197&pubNum=161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Beattie v. Howell, 98 N. J. Eq. 163, 129 A. 822.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1925113473&pubNum=161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) This was done, the original papers show, in [Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901002975&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) and [Stewart v. Finkelstone, 206 Mass. 28, 34, 92 N. E. 37,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910002970&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910002970&pubNum=474&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) In Evans v. Foss, supra, the restrictions were imposed by a deed to the common predecessor of the parties, and then title to part of the land passed to the plaintiff before title to the residue passed to the defendant. See, also, [Dana v. Wentworth, 111 Mass. 291;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1873017196&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Tobey v. Moore, 130 Mass. 448;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1881024672&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Maclary v. Morgan, 230 Mass. 80, 119 N. E. 189.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1918002800&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) Earlier as well as later purchasers of lots within the area covered by the scheme acquire such an interest in the restrictions that the common vendor cannot release them. [Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1894012938&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Ivarson v. Mulvey, 179 Mass. 141, 60 N. E. 477;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901002925&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Goulding v. Phinney, 234 Mass. 411, 413, 125 N. E. 703](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1920134169&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).

**\*485** The rationale of the rule allowing an earlier purchaser to enforce restrictions in a deed to a later one pursuant to a building scheme, is not easy to find. [De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. (5 Dick.) 329, 335–341, 24 A. 388.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892012003&pubNum=161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) The simple explanation that the deed to the earlier purchaser, subject to restrictions, implied an enforceable agreement on the part of the vendor to restrict in like manner all the remaining land included in the scheme (Dean Stone, now Mr. Justice Stone, in [19 Colum. L. Rev., 177, 187),](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=3050&cite=19CR177&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_3050_187) cannot be accepted in Massachusetts without conflict with [Sprague v. Kimball, 213 Mass. 380, 100 N. E. 622, Ann. Cas. 1914A, 431.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913003267&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) In [Bristol v. Woodward, 251 N. Y. 275, 288, 167 N. E. 441, 446, Cardozo,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1929101035&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_577_446) C. J., said, ‘If we regard the restriction from the point of view of contract, there is trouble in understanding how the purchaser of lot A can gain a right to enforce the restriction against the later purchaser of lot B without an extraordinary extension of [Lawrence v. Fox, 20 N. Y. 268. \* \* \*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1859012784&pubNum=596&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) Perhaps it is enough to say that the extension of the doctrine, even if illogical, has been made too often and too consistently to permit withdrawal or retreat.’

[**[12]**](#co_anchor_F121935114111_1) [**[13]**](#co_anchor_F131935114111_1) It follows from what has been said, that if there was a scheme of restrictions, existing when the sale of lots began in 1907, which scheme included the lands of the plaintiffs and of the defendant Van Dam, and if the restrictions imposed upon the land of the defendant Van Dam in 1923 were imposed in pursuance of that scheme, then all the plaintiffs are entitled to relief, unless some special defense is shown. The burden is upon the plaintiffs to show the existence of such a scheme. [Lowell Institution for Savings v. Lowell, 153 Mass. 530, 533, 27 N.E. 518;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891010835&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [American Unitarian Association v. Minot, 185 Mass. 589, 595, 71 N. E. 551.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904002646&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) In our opinion they have done so. Unquestionably there was a scheme which included all the land south of Thatcher Road. The real question is, whether in its origin it included the land north of that road, where is situated the lot of the defendant Van Dam. That lot lies at the gateway of the whole development. One must pass it to visit any part of Brier Neck. The use made of that lot tends strongly to fix the character of the entire tract. It is true, **\*\*229** that the land north **\*486** of Thatcher Road ways not divided into lots until 1919, but it was shown on all the plans from the beginning. The failure to divide it sooner was apparently due to a belief that it could not be sold, not to an intent to reserve it for other than residential purposes. We think that the scheme from the beginning contemplated that no part of the Brief Neck tract should be used for commercial purposes. When the lot of the defendant Van Dam was restricted in 1923, the restriction was in pursuance of the original scheme and gave rights to earlier as well as to later purchasers.

[**[14]**](#co_anchor_F141935114111_1) [**[15]**](#co_anchor_F151935114111_1) [**[16]**](#co_anchor_F161935114111_1) The violation of some of the restrictions by some of the purchasers of lots in the tract, without action by these plaintiffs, does not affect their right to enforce the restrictions against the defendants. [Bacon v. Sandberg, 179 Mass. 396, 399, 60 N. E. 936;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901002975&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Codman v. Bradley, 201 Mass. 361, 369, 87 N. E. 591;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1909003363&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Allen v. Massachusetts Bonding & Ins. Co., 248 Mass. 378, 385, 386, 143 N. E. 499, 33 A. L. R. 669,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924111631&pubNum=104&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) and cases cited. There has been no fundamental change in the character of Brier Neck, making inequitable the specific enforcement of the restrictions, within the rule of [Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892011015&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [32 Am. St. Rep. 476.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892011015&pubNum=2150&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) See [Massachusetts Institute of Technology v. Boston Society of Natural History, 218 Mass. 189, 196, 105 N. E. 874;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1914003307&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Goulding v. Phinney, 234 Mass. 411, 125 N. E. 703;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1920134169&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Vorenberg v. Bunnell. 257 Mass. 399, 408, 153 N. E. 884, 48 A. L. R. 1431;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1926112858&pubNum=104&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Jenney v. Hynes, 282 Mass. 182, 195, 184 N. E. 444.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933112975&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) Neither does the violation of some of the less important restrictions, but not of the restriction in question, by some of the plaintiffs deprive them, much less the other plaintiffs, of the right to relief in equity. [Bacon v. Sandberg, 179 Mass. 396, 400, 60 N. E. 936;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901002975&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Stewart v. Finkelstone, 206 Mass. 28, 37, 92 N. E. 37,](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910002970&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910002970&pubNum=474&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Loud v. Pendergast, 206 Mass. 122, 124, 92 N. E. 40;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910002971&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Wilson v. Middlesex Co., 244 Mass. 224, 231, 138 N. E. 699.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1923111758&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) The failure of the plaintiffs to object to a petty business carried on by the grantor of the defendant Van Dam does not bar them from objecting to the large project now undertaken. [Daly v. Foss, 199 Mass. 104, 85 N. E. 94;](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908003073&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)) [Fenton v. Malfas, 286 Mass. 339, 190 N. E. 540](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1934113695&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).

[**[17]**](#co_anchor_F171935114111_1) [G. L. (Ter. Ed.) c. 184, § 23](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S23&originatingDoc=Ie34bf04dce5f11d98ac8f235252e36df&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), provides that ‘restrictions, unlimited as to time, \* \* \* shall be limited to the term of thirty years after the date of the deed or other instrument \* \* \* creating them. \* \* \*’ The defendants contend that **\*487** the restrictions in question were created in 1907, and therefore will expire in 1937 under the statute. But it has already been shown that no restriction existed upon the lot of the defendant Van Dam until January 23, 1923, when the conveyance to his grantor was made. Although the deed was dated January 19, 1923, the registration, which was the operative act of conveyance ([G. L. c. 185, § 57](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST185S57&originatingDoc=Ie34bf04dce5f11d98ac8f235252e36df&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink))), took place on January 23, 1923. The latter date is the one from which the period of thirty years runs. The final decree is to be modified by striking out the word ‘permanently’ in paragraphs 4 and 5, and by inserting a provision limiting the period of the injunction to the time prior to and including January 23, 1953. As thus modified, the final decree is affirmed, with costs.

Ordered accordingly.

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**M.G.L.A. 184 § 27**

**§ 27. Restrictions imposed after December 31, 1961; limitations on enforceability; extension of period**

No restriction imposed after December thirty-first, nineteen hundred and sixty-one shall be enforceable:--

(a) unless the person seeking enforcement (1) is a party to the instrument imposing the restriction and it is stated to be for his benefit or is entitled to such benefit as a successor to such party, or (2) is an owner of an interest in benefited land which either adjoins the subject parcel at the time enforcement is sought or is described in the instrument imposing the restriction and is stated therein to be benefited, and

(b) after thirty years from the imposition of the restriction, unless (1) the restriction is imposed as part of a common scheme applicable to four or more parcels contiguous except for any intervening streets or ways, and provision is made in the instrument or instruments imposing it for extension for further periods of not more than twenty years at a time by owners of record, at the time of recording of the extension, of fifty per cent or more of the restricted area in which the subject parcel is located, and an extension in accordance with such provision is recorded before the expiration of the thirty years or earlier date of termination specified in the instrument and names or is signed by one or more of the persons appearing of record to own the subject parcel at the time of such recording, and in case of such recording, twenty years, or the specified extension term if less than twenty years, has not expired after the recording of any such extension without the recording of a further like extension; or (2) in the case of any other restriction, a notice of restriction is recorded before the expiration of the thirty years, and in case of such recording, twenty years have not expired after the recording of any notice of restriction without the recording of a further notice of restriction.

A notice of restriction under this section shall not extend the period of enforceability unless it (a) is signed by a person then entitled of record to the benefit of the restriction and describes his benefited land, if any, (b) describes the subject parcel, (c) names one or more of the persons appearing of record to own the subject parcel at the time, and (d) specifies the instrument imposing the restriction and its place of record in the public records.

**Credits**

Added by St.1961, c. 448, § 1. Amended by St.1969, c. 666, § 4; St.1974, c. 527, § 2; St.1975, c. 356, § 1.

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447 Mass. 68

Supreme Judicial Court of Massachusetts, Suffolk.

Joseph A. BREAR, Jr., trustee,

v.

Edward P. FAGAN & another.

Argued May 5, 2006. | Decided June 19, 2006.

[SOSMAN](http://www.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0197803001&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=RQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), J.

**\*68** In this appeal, we are asked to decide whether the common-law rule, which allowed the identity of those benefited by restrictions on land to be inferred from all the circumstances (see [*Baker v. Seneca,* 329 Mass. 736, 739, 110 N.E.2d 325 [1953];](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953108561&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) [*Snow v. Van Dam,* 291 Mass. 477, 481, 291 Mass. 477 [1935] ),](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935114111&pubNum=521&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)#co_pp_sp_521_481) retains vitality in the wake **\*69** of [G.L. c. 184, § 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ), which provides that the identity of persons or lands benefited by such a restriction must be “stated” in the instrument imposing the restriction. We also consider whether a restriction of a specified duration can be extended beyond its stated term by filing a notice of restriction pursuant to [G.L. c. 184, § 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ) (2). For the following reasons, we conclude that [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) requires that the instrument contain an express identification of those persons or lands benefited by a restriction, thus supplanting the common-law rule, and that the stated period of a restriction may not be extended by way of a notice of restriction under [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ) (2). We therefore affirm a judgment in favor of the defendants, as the plaintiff’s land was not expressly identified as land to be benefited by the restrictions imposed on the defendants’ land, and the restrictions had expired by their own terms, notwithstanding the recording of a notice of restriction seeking to extend them.

1. *Background.* Joseph A. Brear, Jr., as trustee of the Buttonwood Nominee Trust (Buttonwood Trust), brought the present action against Edward and Anna Fagan, claiming that the Fagans’ planned subdivision and development of their land violated various restrictions imposed by the deeds to the Fagans’ predecessors in title. The matter was tried before a judge **\*\*213** in the Land Court, whose findings of fact are summarized as follows.

In 1972, the trustees of the Alice H. Burrage Trust (Burrage Trust) owned a tract of land in Ipswich containing in excess of one hundred acres. On September 19, 1972, the Burrage Trust recorded a plan dividing the northerly forty acres of the land into four parcels, and conveyed the northernmost parcel (parcel 4) to Bertha L. Nikas and the adjoining parcel (parcel 3) to George A. Nikas. The deeds to the Nikases contained detailed restrictions concerning the uses of the land conveyed and the structures that could be built thereon. The deeds stated that the restrictive covenants were to run with the land and be binding for a period of thirty years from the date of recording. On November 30, 1972, the Burrage Trust conveyed yet another **\*70** parcel (parcel 2) to George A. Nikas, with identical restrictions and an identical thirty-year period set forth in the deed. The final parcel (parcel 1) was conveyed to a third party.

The Burrage Trust retained the remaining sixty acres (homestead parcel) until January 4, 1978, when the homestead parcel was conveyed to the Buttonwood Trust. The deed to the Buttonwood Trust stated that the property was conveyed “together with the benefit of restrictions contained in prior deeds of record of the [Burrage Trust].” In accordance with the terms of the Buttonwood Trust, one of the beneficiaries resides on the homestead parcel and uses part of the land (along with other land owned by the Buttonwood Trust) for agricultural purposes.

By way of a series of conveyances, Edward and Anna Fagan acquired portions of parcels 2, 3, and 4 in March and December of 1979. The deeds to the Fagans each recited that the premises were conveyed subject to and with the benefit of restrictions previously recorded, to the extent that those restrictions were “in force and applicable.” The Fagans ultimately decided to subdivide their land, planning to keep one lot as their own residence and to develop the remaining six lots in the subdivision. After initially disapproving the Fagans’ subdivision in May, 2003, the planning board of Ipswich ultimately voted to approve the subdivision, filing the approval decision on December 12, 2003.

Meanwhile, apparently in response to the Fagans’ plans, the plaintiff filed the present action on March 5, 2002, seeking a declaration that the deed restrictions on the Fagans’ property were valid and enforceable and that they would limit the number of structures that could be built on that property. On June 6, 2002, the plaintiff recorded three instruments, each of which recited that “[t]his instrument is a NOTICE OF EXTENSION OF RESTRICTIONS pursuant to [Massachusetts General Laws, Chapter 184, Sections 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite))–[29](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S29&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)).” The notices, all signed by the plaintiff as trustee of the Buttonwood Trust, described the homestead parcel as the land benefited by the restrictions, described the Fagans’ portions of parcels 2, 3, and 4 as the lands subject to the restrictions, identified the Fagans as the current owners of those lands, and specified the deeds imposing **\*71** the restrictions along with the recording information for those deeds.

Based on these facts, the judge concluded that the recording of the notices of restriction pursuant to [G.L. c. 184, § 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ) (2), within thirty years of the date that **\*\*214** the restrictions had first been imposed by the deeds from the Burrage Trust, operated to extend those restrictions. However, where the deeds creating the restrictions contained no express identification of any person or land benefited by the restrictions, [G.L. c. 184, § 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ), precluded the Buttonwood Trust from enforcing the restrictions. The plaintiff appealed, and we granted his application for direct appellate review.

[**[1]**](#co_anchor_F12009371023_1) 2. *Discussion.* a. *Identification of persons and lands benefited by restrictions on land.* At common law, if a deed or other instrument imposing a restriction on land was silent or ambiguous with respect to what other land was to be benefited by the restriction, the identity of the benefited lands could be determined by resort to inference from “the situation of the property and the surrounding circumstances.” [*Peck v. Conway,* 119 Mass. 546, 549, 1876 WL 10685 (1876)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1876017125&pubNum=0000999&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)). See [*Baker v. Seneca,* 329 Mass. 736, 739, 110 N.E.2d 325 (1953)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953108561&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)); [*Lovell v. Columbian Nat’l Life Ins. Co.,* 294 Mass. 473, 477–478, 2 N.E.2d 545 (1936)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1936113474&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)); [*Snow v. Van Dam,* 291 Mass. 477, 481, 197 N.E. 224 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935114111&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)); [*Sprague v. Kimball,* 213 Mass. 380, 382, 100 N.E. 622 (1913)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913003267&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)); [*Welch v. Austin,* 187 Mass. 256, 259–260, 72 N.E. 972 (1905)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1905003303&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)); [*Hano v. Bigelow,* 155 Mass. 341, 343, 29 N.E. 628 (1892)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892011613&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)); [*Hogan v. Barry,* 143 Mass. 538, 539, 10 N.E. 253 (1887)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1887166164&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)). A plaintiff seeking to enforce such a restriction had the burden to show that the benefit of that restriction was appurtenant to his land; if, after analysis of the terms of the instrument and the surrounding circumstances, there remained ambiguity on the point, that ambiguity was to be resolved in favor of freeing the land from restriction. [*Lovell v. Columbian Nat’l Life Ins. Co., supra* at 477, 2 N.E.2d 545.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1936113474&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) [*St. Botolph Club, Inc. v. Brookline Trust Co.,* 292 Mass. 430, 433, 198 N.E. 903 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1936113228&pubNum=577&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)). The plaintiff claims that where the Burrage Trust retained land (i.e., the homestead parcel) in the immediate vicinity of the northern parcels that were conveyed subject to the restrictions, and indicated in the deed to the Buttonwood Trust that the **\*72** homestead parcel was benefited by the restrictions imposed in prior deeds of the Burrage Trust, the judge should have inferred that the Burrage Trust intended the homestead parcel to be benefited by the restrictions imposed on parcels 2, 3, and 4. See [*Baker v. Seneca, supra*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953108561&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (inferring that restriction was imposed for benefit of grantor’s other land); [*Welch v. Austin, supra;*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1905003303&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) *Peck v. Conway, supra.*

Assuming (without deciding) that the suggested inference is sound, the plaintiff’s ability to enforce the restrictions still depends on [G.L. c. 184, § 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), which provides in relevant part as follows: “No restriction imposed after [December 31, 1961,] shall be enforceable:—(*a* ) unless the person seeking enforcement (1) is a party to the instrument imposing the restriction and it is stated to be for his benefit or is entitled to such benefit as a successor to such party, or (2) is an owner of an interest in benefited land which either adjoins the subject parcel at the time enforcement is sought or is described in the instrument imposing the restriction and is stated therein to be benefited....”

[**[2]**](#co_anchor_F22009371023_1) When interpreting this language, we recognize that we should not interpret a statute “as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed.” [*Pineo v. White,* 320 Mass. 487, 491, 70 N.E.2d 294 (1946)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947107822&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)). See [*Commercial Wharf E. Condominium Ass’n v. Waterfront Parking Corp.,* 407 Mass. 123, 129, 552 N.E.2d 66 (1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990057473&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), *S.C.,* [412 Mass. 309, 588 N.E.2d 675 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992063514&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (court does not presume that Legislature intended “a radical change in the common law without a clear **\*\*215** expression of such intent”). Here, we are satisfied that the Legislature’s intent to modify the common law has been expressed with the requisite clarity by both the language of [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) and the legislative history of that provision.

Turning first to the language, the plaintiff argues that the statutory requirement that the identity of the restriction’s beneficiaries be “stated” in the instrument may be satisfied by an “implied” statement in that instrument, thereby harmonizing [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) with the common law. The plaintiff thus contends that [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) was not intended to supplant the common-law rule, at least with regard to such ostensibly obvious beneficiaries as the original grantor, the grantor’s retained land, and the grantor’s successors in title to that land. We disagree.

**\*73** Even with regard to an original “party” to the instrument imposing the restriction (i.e., the grantor), [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) precludes enforcement unless the restriction is “stated to be for his benefit.” If, as plaintiff contends, one could readily infer that any grantor intended that his own land be benefited by the restrictions he imposed, the requirement that there be a “state[ment]” that the restriction is “for [the grantor’s] benefit” would be superfluous. See [*Bynes v. School Comm. of Boston,* 411 Mass. 264, 268, 581 N.E.2d 1019 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991193875&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), and cases cited (court should interpret statute in manner that avoids making terms superfluous). Thus, under [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) (1), not even the Burrage Trust as original grantor had the power to enforce the restrictions, and the Buttonwood Trust’s status as the successor in title to the Burrage Trust is of no avail. Beyond the requirement imposed on the grantor as an original party to the instrument, other owners of land must meet the requirement that the benefited land be “*described in* the instrument imposing the restriction” and be “*stated therein* to be benefited” (emphasis added). This wording makes clear that both the description of the land and a stated intention to benefit that land must be expressed “in” the deed itself, not supplied by reference to surrounding facts and circumstances.

The legislative history reinforces the conclusion that the Legislature intended to modify the common law with respect to enforcement of restrictions on land. The various reforms set forth in [G.L. c. 184, §§ 26](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S26&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite))–[30](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S30&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), were first enacted in 1961 (St.1961, c. 448, § 1), after proposed legislation had been reviewed and revised by the Judicial Council (Council). See Thirty–Sixth Report of the Judicial Council, Pub. Doc. No. 144 at 80–87 (1960) (Council Report). The purpose of the legislation was to provide a way for landowners “to remove or prevent the **\*74** enforcement of obsolete, uncertain or unreasonable restrictions.” *Id.* at 81. In the draft legislation that accompanied the Council Report, the Council noted that restrictions posed an obstacle to the optimal use of land and impaired marketability, that restrictions were “often common to many parcels in different ownership and imposed by many different deeds over periods of years so **\*\*216** that it is exceedingly difficult to determine all who may have rights to enforce them,” that many titles were encumbered by restrictions that had become “obsolete,” that “the grounds upon which such restrictions may be declared unenforceable are not now sufficiently clear or adequate to protect the public interest,” and that “proceedings now available for determining enforceability of such restrictions are inadequate.” *Id.* at 82–83. In short, the Council’s view was that existing common-law rules governing restrictions on land, including rules with respect to the identification of those who could properly enforce such restrictions, were not suitable in light of modern conditions. The legislation was explicitly designed to supplant those common-law rules with clearer, more definitive, and more efficient methods of resolving the enforceability of land restrictions.

As a result of the Council’s recommendations, the specific requirements that are now part of [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) were expanded and strengthened. The original bill, 1960 House Doc. No. 1367, was referred to the Council for its study and report. Council Report, *supra* at 80, 81. In that original version, the provision with respect to the identity of beneficiaries dealt only with land that did not adjoin the land subject to the restriction, and merely required that the lands in question be described in the instrument: restrictions were not enforceable “[b]y owners of any land intended to have the benefit not adjoining the lot unless the lot restricted and the land intended to be benefited are both described in the instrument imposing the restriction by reference to a recorded plan or plans showing them.” 1960 House Doc. No. 1367, § 1. The Council’s proposed legislation added the requirement that even a “party to the instrument” could not enforce the restriction unless “it is stated to be for his benefit,” and the requirement that other benefited land had to be “described in the instrument imposing the restriction *and* ... stated therein to be benefited” (emphasis added). Council **\*75** Report, *supra* at 84. The mere description of benefited land by deed reference to a plan did not suffice—without an actual statement that the restriction was for the benefit of the described land, that land owner could not enforce the restriction. [Section 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) as originally enacted was identical to the version recommended by the Council, see St.1961, c. 448, § 1, indicating that the Legislature concurred in the Council’s assessment that the identification of beneficiaries who could enforce land restrictions had become “exceedingly difficult” under the common-law rule, Council Report, *supra* at 83, and that the identity of beneficiaries should be explicitly stated in the instrument creating the restrictions.

[**[3]**](#co_anchor_F32009371023_1) Thus, with respect to the identification of the beneficiaries of land restrictions, [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) requires specificity and supplants the common-law rule that allowed identification to be a matter of inference. Here, the deeds imposing the restrictions **\*\*217** on parcels 2, 3, and 4 failed to identify any land or person to be benefited from those restrictions. Cf. [*Atwood v. Walter,* 47 Mass.App.Ct. 508, 512, 714 N.E.2d 365 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999181244&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (instrument stated that restrictions were “[f]or” plaintiff and “enforceable by” plaintiff; purpose to benefit plaintiff adequately expressed in compliance with [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) [*a* ] ).

The plaintiff protests that our interpretation of [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) renders the restrictions in the Burrage Trust deeds a nullity from their inception (as there has never been anyone entitled to **\*76** enforce them), whereas the parties must have intended that someone have the benefit of the extensive and carefully crafted restrictions set forth in the deeds. It is true that the restrictions have been rendered unenforceable, notwithstanding the parties’ presumed intent that they have some practical application, but that is because the instruments in question failed to comply with [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ). Failure to heed the technical requirements of various statutes may operate to frustrate the original intent of the parties, but in such cases, the Legislature has determined that some other purpose should outweigh the parties’ intent. Here, the Legislature has determined that the need for precision and clarity with respect to the enforceability of land restrictions is of paramount importance, and if an instrument creating restrictions fails to provide the requisite precision and clarity, alternative but less certain methods of demonstrating the intent of the parties are not to be employed. Where the deeds from the Burrage Trust did not state that the homestead parcel (or any other parcel) was to be benefited, the plaintiff, as current owner of the homestead parcel, may not enforce the restrictions.

[**[4]**](#co_anchor_F42009371023_1) [**[5]**](#co_anchor_F52009371023_1) b. *Extension of restrictions under* [*G.L. c. 184, § 27*](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) *(* b*) (2).* Although the inability of the plaintiff to satisfy [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*a* ) is dispositive of the present appeal, we address the alternative ground raised by the defendants, namely, that the restrictions had already expired by their own terms. The judge concluded that the restrictions themselves were still in effect because the plaintiff had filed notices pursuant to [G.L. c. 184, § 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ) (2). This was error, as nothing in [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ) (2) allows a party unilaterally to extend the restrictions beyond the term previously agreed to by the parties.

[**[6]**](#co_anchor_F62009371023_1) [Section 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite))(*b* ) (2) provides that no restriction shall be “enforceable” after thirty years from its imposition, unless “a notice of restriction is recorded before the expiration of the thirty years, and in case of such recording, twenty years have **\*77** not expired after the recording of any notice of restriction without the recording of a further notice of restriction.” The statute **\*\*218** then provides that a notice of restriction shall not “extend the period of enforceability” unless the notices meet certain technical requirements. *Id.* Once the stated term of a restriction has expired, the prior filing of a notice that would extend the “period of enforceability” accomplishes nothing, because there is nothing left to “enforce[ ].” As we explained in [*Stop & Shop Supermarket Co. v. Urstadt Biddle Props., Inc.,* 433 Mass. 285, 289, 740 N.E.2d 1286 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001092233&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), the effect of filing a notice of restriction under [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ) is to “extend the ‘period of enforceability’ for any agreed term of restriction that is longer than thirty years.” The filing cannot operate to extend the term of the restriction itself, but is merely a prerequisite to the continued “enforceability” of a restriction that is still in effect.

[**[7]**](#co_anchor_F72009371023_1) The defendants correctly note that if a notice of restriction under [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ) (2) operated to extend the term of the restriction itself, a restriction for a stated period could be made to last forever merely by one party’s filing of successive notices of restriction at the appropriate intervals. However, restrictions that are “unlimited as to time” are “limited to the term of thirty years” by operation of [G.L. c. 184, § 23](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S23&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), and they may not be extended beyond that thirty-year term by filing a notice of restriction under [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ). [*Stop & Shop Supermarket Co. v. Urstadt Biddle Props., Inc., supra* at 288–289, 740 N.E.2d 1286.](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001092233&pubNum=578&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) It would be anomalous to restrict to thirty years a restriction that the parties intended to last permanently, while allowing one party to create a permanent restriction when the parties originally agreed that the restriction would last only thirty years. Moreover, as discussed above, one of the purposes of the reforms enacted as [G.L. c. 184, §§ 26](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S26&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite))–[30](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S30&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), was to enable landowners to rid their land of obsolete restrictions, and to provide definitive endpoints to the term of such restrictions. As in [*Stop & Shop Supermarket Co. v*. *Urstadt Biddle Props., Inc., supra,*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001092233&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) we must interpret [§ 27](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S27&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) (*b* ) in a manner consistent with [§ 23](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST184S23&originatingDoc=Ifb57ca25fd7011da8b56def3c325596e&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Keycite)), which expressly precludes the imposition of perpetual restrictions on land.

**\*78** Here, the deeds imposing the restrictions on parcels 2, 3, and 4 stated that the restrictions would last for a period of thirty years, and those deeds were delivered and recorded in September and November, 1972. The plaintiff’s filing of notices of restriction in June, 2002, did nothing to extend the period of the restrictions. Once that thirty-year period ended in the fall of 2002, the restrictions were no longer in effect.

*Judgment affirmed.*