VERTEFEUILLE, J., with whom, EVELEIGH, J., joins, concurring. I agree with the majority that the trial court improperly rendered summary judgment in favor of the plaintiff, Wykeham Rise, LLC. I disagree, however, with its reasoning in that the majority does not merely decide that there are questions of fact to be decided on remand to the trial court. The majority goes much further, and, unnecessarily in my opinion, decides questions of law that may or may not arise in a trial of the disputed issues of fact between the parties. I think it inappropriate to reach these issues now, and accordingly, I concur in the judgment.

As noted by the majority, the restrictive covenant at issue in this case provides that the grantee "will not construct any buildings or other structures or any parking lots on that area of the [conveyed] premises lying within 300 feet, more or less, at all points, northerly from the most southerly boundary of said premises, which area is now commonly known as the 'Playing Field.' " The deed also provides that "[t]he foregoing covenants and agreements shall be binding upon the [g]rantee, its successors and assigns, shall inure to the benefit of the [g]rantor [Wykeham Rise School (school)], its successors and assigns, and shall run with the land." The defendants, Eric A. Federer and Wendy R. Federer, claim that, despite the plain language of the deed, the circumstances surrounding its creation show that either they are the personal beneficiaries of the restrictive covenant or that their land is the beneficiary. The trial court rejected their claim, concluding that, even if a restrictive covenant in a deed conveying land from a landowner to its successor in title that identifies a third party as the beneficiary would be cognizable in this state, as a matter of law, the restrictive covenant at issue here does not benefit the defendants or their land because there is no indication on the face of the deed that their predecessor in title, Bertram Read, or his land, was the intended beneficiary.[1]

As the Appellate Court has recognized, however, "[l]anguage in a deed that purports to create a restrictive covenant must be construed in light of the circumstances attending and surrounding the transaction." *Contegni* v. *Payne*, 18 Conn. App. 47, 65, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989). "The meaning and effect of the reservation are to be determined, not by the actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions *and reading it in the light of the surrounding circumstances* . . . . *Kelly* v. *Ivler*, 187 Conn. 31, 39, 450 A.2d 817 (1982). The primary rule of interpretation of such [restrictive] covenants is to gather the intention of the parties from their words, by

reading, not simply a single clause of the agreement but the entire context, *and*, *where the meaning is doubtful*, *by considering such surrounding circumstances as they are presumed to have considered when their minds met*. *B. T. Harris Corporation* v. *Bulova*, 135 Conn. 356, 361, 64 A.2d 542 (1949)." (Emphasis added; internal quotation marks omitted.) *Contegni* v. *Payne*, supra, 65.

In addition, this court has recognized that "[a] latent ambiguity arises from extraneous or collateral facts that make the meaning of a deed uncertain although its language is clear and unambiguous on its face. . . . Latent ambiguity exists where, although language in a deed appears to be certain on its face, it is rendered uncertain when compared to the land that it is purported to describe. . . . Hence, [a] trial court correctly [may conclude] that [a deed is] rendered uncertain by comparing [it] with the land which [it] purported to describe. . . . The latent ambiguity thus disclosed by parol [evidence] could be removed by parol [evidence]. . . . When there is a latent ambiguity, the meaning of the ambiguous term in a deed is an issue of fact for the trial court and we cannot disturb its finding, based as it is upon evidence of the surrounding circumstances and the situation of the property, which legally supports it." (Citations omitted; internal quotation marks omitted.) *Stefanoni* v. *Duncan*, 282 Conn. 686, 704, 923 A.2d 737 (2007). Although these principles have traditionally been applied to property descriptions; see id.; I agree with the majority that there is no reason why they should not apply equally to the terms of a restrictive covenant. See 1 Restatement (Third), Property, Servitudes § 2.11 (a) (2000) ("[t]he creation of a servitude burden may be implied by the circumstances surrounding the conveyance of another interest in land"); id., § 2.11 (b) ("[t]he identity of the beneficiary of a servitude may be implied by the facts or circumstances of the transaction creating the servitude").

In the present case, I would conclude that, although the restrictive covenant expressly identifies the "grantor" of the deed, the school, as the beneficiary, a latent ambiguity exists because an intent to benefit the school would be problematic in light of the circumstances surrounding the restrictive covenant's creation. First, if, as the language of the deed indicates, the restrictive covenant was intended to run with the land in the sense that its benefits were intended to pass automatically to the school's successors in title, then the beneficiary of the covenant would be the plaintiff, the successor in title that currently owns the land, which, as the sole beneficiary, could waive its enforcement at will.[2] Thus, the restrictive covenant would have been entirely unenforceable by the school immediately upon its sale of the property.[3] As the majority suggests, it is difficult to understand why the school ever would have intended to create such a pointless condition on

the sale. Second, a number of courts—including this one—have held that a *personal* covenant that benefits the owner of a property does not survive the sale of that property.[4] Thus, it is at least arguable that any personal covenant benefiting the school would not have survived the sale of the property to the plaintiff's predecessor in title. In addition, there is authority for the proposition that personal covenants that benefit a corporation terminate upon the corporation's dissolution.[5] The school was dissolved one year after it sold the property, and facts developed at trial could establish that the parties to the transaction were aware at the time of the sale that the school was no longer a viable entity. If this rule applies, and the school was aware of its imminent dissolution, it is difficult to understand why it would have had any interest in preserving the undeveloped state of the property during the short interim period between the sale of the property and the school's dissolution. Again, these circumstances cast significant doubt on the notion that the parties to the deed intended that the school would be a personal beneficiary. Third, the defendants point to evidence that the school created the restrictive covenant at Read's request in order to benefit his property by prohibiting development on the area of the school's property immediately adjacent to his property, which they characterize as "the most beautiful and quietest part of the property." Finally, I would note that the Restatement (Third) indicates that, under these precise circumstances, an intent to benefit a third party landowner, who was not a party to the restrictive covenant, reasonably may be inferred.[6] 1 Restatement (Third), supra, § 2.11, illustration (4).

In light of this latent ambiguity, I believe that there is a genuine issue of material fact that must be resolved at trial as to whether the restrictive covenant was intended to benefit the school or, instead, it was intended to benefit Read. If the court determines that Read was the intended beneficiary, the court must then determine whether the covenant was valid under the unity of title doctrine.[7] If the court answers that question in the affirmative, it must then decide whether the restrictive covenant was personal or was intended to run with Read's land. If it was intended to run with the land, then the defendants will prevail. If it was a personal covenant, then the defendants cannot prevail unless they establish that the restrictive covenant survived Read's death and that Read or his executors successfully conveyed Read's rights under the covenant to them.[8]

If, on the other hand, the trial court determines that the restrictive covenant was intended to benefit the school, the court, again, must determine whether the covenant was personal or ran with the land.[9] If the court finds that it ran with the land then, as I have explained, the defendants cannot prevail. If the court determines that the restrictive covenant was personal, the court

must then determine whether the covenant survived the school's sale of the property and, if so, whether the 2005 assignment to the defendants of the school's rights under the covenant was valid. See footnotes 4 and 5 of this concurring opinion.

In my view, the only issue to be decided by this court at this point in the proceedings is whether a genuine issue of material facts exists. I would conclude that there is a genuine issue of material fact as to the identity of the intended beneficiary of the restrictive covenant and, accordingly, I would reverse the judgment of the trial court. Because the majority has ventured far beyond this question and has expressed opinions on questions of law and fact that are not properly before us, I respectfully decline to join in the majority opinion. For the foregoing reasons, however, I concur in the judgment.

[1] The majority states that the trial court concluded that the restrictive covenant was null and void largely because it "[does] not fall within any of the three classes [of restrictive covenants] recognized by the appellate authority of this state." (Internal quotation marks omitted.) The trial court expressly recognized, however, that there are enforceable covenants that do not fall within one of these categories. It ultimately concluded that, even if the school and its successor in title *could have* entered into a restrictive covenant that was intended to benefit Read, it was clear that they had no such intent because "the deed clearly and specifically states that the covenants were for the benefit of the grantor, which was the *school*, and its heirs and assigns." (Emphasis in original.)

[2] According to the Restatement (Third), "[r]unning with land means that *the benefit or burden passes automatically to successors*; appurtenant means that the benefit can be used only in conjunction with ownership or occupancy of a particular parcel of land, or that only the owner or occupier of a particular parcel is liable for failure to perform a servitude obligation. Appurtenant benefits and burdens ordinarily run with land, but they may be made personal to particular owners or occupiers of the land." (Emphasis added.) 1 Restatement (Third), supra, § 1.5, comment (a). In other words, all servitudes that run with the land are appurtenant, but not all appurtenant servitudes run with the land. " 'In gross' means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land." Id., § 1.5 (2). "Interests that are held in gross may be either transferable or personal. They do not run with the land and are transferred by assignment or delegation. If personal, they are not transferable." Id., § 1.5, comment (b). For convenience, in this concurring opinion I refer to all covenants that do not run with the land as "personal covenants," regardless of whether they are appurtenant or in gross or, if they are in gross, whether they are transferable or nontransferable.

[3] In fact, the plaintiff attempted to release itself from the burdens of the restrictive covenant. In reference to this act, the majority states that it is not aware of any authority for "the perplexing proposition that a grantee of land burdened by a covenant may unilaterally release itself or its successors from the covenant, whose benefits inured to the grantor." See footnote 27 of the majority opinion. The majority assumes, however, that the restrictive covenant was not intended to benefit the school as the owner of the land. The plaintiff apparently made the opposite assumption when it stated in the release that it "releases and waives *any right it may have as a successor in title to* [*the school*] to enforce the [restrictive covenant]." (Emphasis added.)

[4] In *Pulver* v. *Mascolo*, 155 Conn. 644, 653, 237 A.2d 97 (1967), this court held that, because the restrictive covenant at issue in that case was personal to the beneficiary, it ceased to be effective when the beneficiary disposed of its interest in the land. See also *Smith* v. *First Savings of Louisiana, FSA*, 575 So. 2d 1033, 1037 (Ala. 1991) (personal covenants cease to exist when beneficiary loses interest in benefited land); *Munro* v. *Syracuse, Lake Shore & Northern Railroad Co.*, 128 App. Div. 388, 389–90, 112 N.Y.S. 938 (1908) (personal covenant cease to be effective when original grantee ceases to own property), rev'd on other grounds, 200 N.Y. 224, 93 N.E. 516 (1910); *Allison* v. *Greear*, 188 Va. 64, 67, 49 S.E.2d 279 (1948) ("[a] covenant personal to one is terminated . . . by his ceasing to have an interest in the property,

his use of which is benefited by the restriction" [internal quotation marks omitted]); 1 Restatement (Third), supra, § 1.2, comment (h), pp. 16–17 (in nineteenth century, "American courts generally, although not universally, adopted the English position that restrictive-covenant benefits held in gross were not enforceable in equity"); but see 1 Restatement (Third), supra, § 1.2, comment (h), p. 17 ("In modern American law as set forth in this Restatement, there are no differences between negative easements and restrictive covenants. The benefit of any servitude may be created and held in gross . . . .").

The majority states that "a 'personal' covenant benefit is traditionally one that is *not* dependent on ownership of a parcel of land"; (emphasis in original) see footnote 29 of the majority opinion; thereby suggesting that, if the covenant in the present case was personal to the school, it necessarily survived the school's sale of the property. In support of this proposition, the majority cites *Hartford National Bank & Trust Co.* v. *Redevelopment Agency*, 164 Conn. 337, 342, 321 A.2d 469 (1973), in which this court stated that "[a]n easement in gross belongs to the owner of it independently of his ownership or possession of any specific land. Therefore, in contrast to an easement appurtenant, its ownership may be described as being personal to the owner of it." (Internal quotation marks omitted.) Not *all* personal covenants, however, are independent of the beneficiary's use of the land. See footnote 2 of this concurring opinion. Thus, it appears that *Hartford National Bank & Trust Co.* and *Pulver* may be reconciled on the ground that *Pulver* applies to personal covenants that are intended to be appurtenant to the land, while *Hartford Bank & Trust Co.* applies to personal covenants that are intended to be in gross. I do not believe that it is proper for this court to resolve the question of which principle applies in the present case because doing so would require us to resolve a factual issue of the parties' intent.

[5] See *Phillips* v. *Wearn*, 226 N.C. 290, 294, 37 S.E.2d 895 (1946) (personal covenants in favor of corporations became unenforceable with final dissolution and liquidation of those corporations); cf. *Thomas* v. *Rogers*, 191 N.C. 736, 739–40, 133 S.E. 18 (1926) (when corporation that was only party that could have enforced restrictive covenant had been dissolved and ceased to exist, court declined to decide whether "any release [by trustees charged with winding up the corporation's affairs] was required in order to relieve [the] plaintiff or the lot of the burden imposed by the restrictions and the conditions in the deed," because trustees were not seeking to enforce restrictions). I see no need for this court to determine at this point in the proceedings whether, as a matter of law, the dissolution of the school would have terminated any personal covenant in its favor. My point here is only that the deed is ambiguous because, even if a personal covenant benefiting the school would not have been automatically terminated by its dissolution, and even if an assignment of the rights created by the restrictive covenant fourteen years after dissolution could be valid, there still would have been no practical reason for the school to create a personal covenant in its own favor if it was aware of its imminently pending dissolution. Indeed, the attempt by the school's trustees to assign the school's rights under the covenant to the defendants suggests that the school, per se, had no real interest in those rights. Only in the event that the trial court determines on remand that the covenant was intended to be personal and to benefit the school will it be required to resolve this issue.

[6] The Restatement (Third) provides the following illustration: "O, the owner of Blackacre, conveys Blackacre to C, subject to a restriction that no structure shall be built, nor shall any vegetation be permitted to grow on Blackacre to a height exceeding [twenty-five] feet. No such restriction has previously been created on Blackacre. The deed states that the covenant shall run with the land, but does not identify the beneficiary. O owns no other property in the vicinity. The adjacent property, Whiteacre, enjoys a view across Blackacre, which could be destroyed by development in violation of the restriction. No other property would be affected. The inference is justified that the holder of Whiteacre is the intended beneficiary of the servitude." 1 Restatement (Third), supra, § 2.11, illustration (4).

I recognize that, unlike the situation in the present case, this illustration in the Restatement (Third) assumes that the covenant did not identify the beneficiary. As I have indicated, however, the identification of the school as the beneficiary in the deed creates a latent ambiguity because it is entirely unclear how the school could have benefited in any significant way from the creation of the covenant. I also recognize that the illustration in the Restatement (Third) assumes the validity of this type of restrictive covenant, a question that is unsettled in this state under the unity of title doctrine. I express no opinion on that question here. I conclude only that the language of the deed does not rule out the possibility that the parties could have

intended to create a restrictive covenant for the benefit of Read or his property.

[7] Because it is possible that the trial court may not be required to resolve this question, I, unlike the majority, see no need for the court to determine at this juncture whether the unity of title doctrine applies to the restrictive covenant.

[8] See *Pulver* v. *Mascolo*, 155 Conn. 644, 651, 237 A.2d 97 (1967) (stating in dictum that personal covenant ends at beneficiary's death); *Julian* v. *Lawton*, 240 N.C. 436, 440, 82 S.E.2d 210 (1954) (personal covenant ended when beneficiary died); *Maples* v. *Horton*, 239 N.C. 394, 399, 80 S.E.2d 38 (1954) ("One cannot at common law maintain any action upon a personal covenant merely by force of the fact that he is the successor in title of the owner with whom such covenant was made. . . . The general rule is that only the covenantor or his executors or administrators are bound on a personal covenant. Hence, a personal covenant does not bind the assignee of the covenantor. A personal covenant will not descend to the heir, upon the theory that all personal covenants made by an ancestor terminate with his death. A personal covenant, upon the death of the obligee, goes to his administrator, and he alone is entitled to maintain suit upon the agreement." [Citations omitted; internal quotation marks omitted.]); *Allison* v. *Greear*, 188 Va. 64, 67, 49 S.E.2d 279 (1948) (personal covenant is terminated by death). Because the question of whether a personal covenant survives the beneficiary's death and, if so, how it may be assigned, has not been briefed and need not be reached by the trial court on remand unless it finds that Read was the intended beneficiary, I see no need to address it at this time.

The majority states that "[t]he record provides no basis for concluding that the covenanting parties intended to confer a benefit on Read *independent of his ownership in the land adjacent to the school* . . . ." (Emphasis added.) See footnote 20 of the majority opinion. As I previously have indicated, if the court determines that the restrictive covenant was intended to be personal to Read, that will not necessarily mean that it was intended to be independent of his ownership of the land. See footnote 4 of this concurring opinion. In any event, I believe that it is inappropriate for this court to make a factual finding that the restrictive covenant was not intended to be personal to Read. Rather, the circumstances surrounding the creation of the restrictive covenant render the intent of the parties ambiguous and create a genuine issue of material fact for resolution by the trial court, not this court.

[9] The majority states that it finds it "implausible" that the benefits of the restrictive covenant "inured to the school as owner of a piece of land," because, if that were the case, the school "could not possibly receive any benefits associated with ownership of the land . . . ." See footnote 19 of the majority opinion and accompanying text. The majority also finds it unlikely that the restrictive covenant was intended to benefit the school personally because it retained no land after selling the property to the plaintiff's predecessor in title. The trustees of the school, however, apparently believed otherwise because they attempted to assign the school's rights under the restrictive covenant to the defendants after the school sold the land. As I have indicated, I would agree with the majority to the extent that it concludes that these circumstances create an ambiguity in the restrictive covenant to be resolved at trial. I think it inappropriate, however, for this court to express an opinion as to the existence or nonexistence of any particular fact.