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Equity: Removal of Restrictive Covenants in California--What Constitutes Changed Conditions

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disagreed, pointing out that in the gambling ship situation, the Legislature was dealing with only one immediate problem. Said the court:

> "It is not uncommon for the Legislature to use more explicit language in statutes dealing with limited specific problems than it does in statutes of more general application."[21]

The gamblers' statute showed that the Legislature had the power to make such a law, i.e., to make the mere asking a punishable act despite the fact that the ultimate harm was to occur elsewhere.

And thus ended the case of *People v. Burt*, establishing the law that while one may with impunity *conspire* in California to commit a crime outside of that state, he may not *solicit* in California the doing of an act which, if done within the state, would constitute one of the twelve major crimes enumerated in the Penal Code.

> *"C'est la générale loi des loix, que chacun observe celle du liew où il est."* (It is the general law of laws that everyone should observe that of the place where he is.)[22]

Albert Bianchi.

EQUITY: REMOVAL OF RESTRICTIVE COVENANTS IN CALIFORNIA—WHAT CONSTITUTES CHANGED CONDITIONS.—The removal of restrictive covenants because of changed conditions is a question which looms large on the horizon for California courts. The growing population is a call to business to relocate in areas heretofore exclusively residential. Therefore the answer to the question "What constitutes changed conditions in California?" is of prime importance.

The attitude of the Supreme Court of California upon this subject has been indicated in the recent case of *Wolff v. Fallon*.[1] The plaintiff had purchased his lot in 1938 knowing of the restrictions. The restrictions were of a type common to tract subdivisions, specifying the type of building, the minimum cost, the location of the building in regard to the property lines, and restricting the lot to use as a private dwelling. In subdividing this tract in 1913, the original grantor had imposed these restrictions upon 740 lots. Two separate areas within the tract were set aside for commercial development and left unrestricted. The plaintiff's lot bordered on one of these unrestricted zones. To show the changes which had occurred, affecting his property, the plaintiff introduced the following evidence:

1. The lots along the street, including the plaintiff's, were zoned as a "Commercial District" by a city ordinance in 1921.
2. Four minor violations of the restrictions had occurred within the tract.
3. The boulevard adjoining the plaintiff's lot carried a greatly increased traffic in commercial vehicles, streetcars and buses.
4. Testimony by real estate brokers that the lot in question was now unsuitable for residential purposes and an "intelligent development" for commercial use would not be detrimental to the adjacent residents.

Upon this evidence the trial court granted the declaratory relief the plaintiff sought—removal of the restrictions. The decision was affirmed by the Supreme Court of California on appeal.

Assuming that restrictions are valid when imposed, the removal of these restrictions involves two conflicting interests. The purchaser of a lot has a right to rely

[21] People v. Burt, 45 Cal.2d ——, 288 P.2d 503, 506 (1955).
[22] 1 MONTAIGNE, ESSAYS (1580).

[1] 44 Cal.2d 695, 284 P.2d 802 (1955).

upon the restrictions to preserve the residential character of his neighborhood.[2] Conflicting with this interest is the fact that changes in the general area may cause the restriction to be harsh and inequitable upon a lot owner, without securing any benefits to the other lot owners.[3]

The problem is presented to the courts in two situations.

1. Where an injunction against violating a restriction is sought and the changed conditions are raised as a defense.

2. Where the plaintiff seeks the removal of the restrictions under a declaratory judgment statute,[4] on the basis of changed conditions.

Regardless of whether the question is raised by way of defense against an injunction or in seeking affirmative relief the courts have come to regard certain factors as providing the key to what will amount to changed conditions. In enumerating these factors, cases illustrating the views taken of them will be reviewed.

1. The size of the restricted area.

In *Robertson v. Nichols*[5] the restricted tract consisted of 117 lots and the change of conditions occurred along the border of the tract. The court, in holding the restrictions were enforceable, based its decision upon the fact that the changes on the fringe of the restricted area did not destroy the residential value of the interior lots. In another California case[6] the plaintiff, owner of one of two restricted lots, sought relief from the restriction because of the changed conditions. Relief was granted, partially because such a small area cannot retain its residential character as well as a larger area. It is obvious that a small restricted area will be affected by changing conditions in and about the area much more readily than a large restricted tract. One aspect of the size factor is whether the whole area must be affected by the changed conditions or whether affecting a substantial part of the tract will justify the removal of the restrictions. In *Wolff v. Fallon*, in a dissenting opinion,[7] Justice Spence cited *Marra v. Aetna Construction Company*[8] as authority for the view that changed conditions must have "rendered the purpose of the restrictions obsolete." The use of the word *obsolete* would seem to indicate that only when the whole area was affected by the changed conditions can the restriction be removed. It is suggested that "obsolete" was not used in an imperative sense in the cited case as the court stated later in the opinion that "the property in question is no longer sufficiently desirable for residential use to warrant enforcement of the restrictions."[9] The unqualified use of the word "obsolete" to describe the status of the restriction carries with it the implication that courts will enforce restrictions so long as a spark of life remains in them. The opinion does qualify the word and in essence says, if *substantial* benefits may still be derived from the restriction it will be enforced. California[10] and other states[11] have taken

[2] *Id.* at 698, 284 P.2d at 805.

[3] Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691 (1831).

[4] CALIF. CODE CIV. PROC. § 1060; Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931).

[5] 92 Cal.App.2d 201, 206 P.2d 898 (1949).

[6] Marra v. Aetna Const. Co., 15 Cal.2d 375, 101 P.2d 490 (1940).

[7] See note 1 *supra* at 698, 284 P.2d at 805.

[8] See note 6 *supra.*

[9] *Id.* at 379-80, 101 P.2d at 493.

[10] Miles v. Clarke, 44 Cal.App. 539, 187 Pac. 167 (1919).

[11] Neilson v. Hiral Realty Co., 172 Misc. 408, 16 N.Y.S.2d 462 (1939); Wineman Realty Co. v. Pelavin, 267 Mich. 594, 255 N.W. 393 (1934); Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W.2d 545 (1931); Mechling v. Dawson, 234 Ky. 318, 28 S.W.2d 18 (1930); McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905). The view is approved by the RESTATEMENT, PROPERTY, § 564, Com. C. (1944).

the view that restrictive covenants will be enforced if they are of "substantial value" to remaining lot owners and if no "radical" changes have occurred.

2. The location of the changed condition in relation to the restricted area.

In viewing this factor it is easy to see that the greater the distance the commercial activity is from the residential area the less injurious will it be to the home owner. Conversely, business activity carried on next door will be felt immediately. In between the extremes lies the bone of contention. It is largely a matter of discretion for the courts to decide upon the particular facts. The greatest controversy concerning the location of the change has arisen as to whether the change must have occurred within the restricted area or merely in the surrounding area. California has granted affirmative relief where the change in conditions has been entirely outside the restricted area. In *Downs v. Kroeger*[12] the court expressed this view, saying "it would be unjust, oppressive, and inequitable to give effect to the restrictions, if such change has resulted from causes *other than* their breach."[13] (Emphasis added.) The result of such a view is obvious. The only place where change from a residential to a business area can occur *without violating residential restrictions* is outside the restricted tract. A more strict view was taken in *Grady v. Garland*,[14] where the court refused to remove racial restrictions on the basis of changed conditions outside the restricted tract. As pointed out by the dissenting opinion,[15] this holding denies effect to the rule that restrictive covenants will not be enforced when they serve only to burden those seeking their removal without securing any substantial benefits to those seeking to enforce them. The result of a view such as the majority proposed is to create a situation where one lot owner within a restricted tract, by enjoining any attempted violation of the restriction, can maintain the covenants contrary to the wishes of every other lot owner. The view is contrary to the underlying public policy favoring the free and unrestricted use of property. The courts appear to grant relief more freely when the changes have occurred within the tract but they have also removed restrictions when changed conditions wholly outside the area have caused the restrictions to lose their vitality.

3. The type of change that has occurred.

While this factor does not appear to have the weight accorded the two factors previously mentioned, the courts will consider the type of change in balancing the conflicting interests. A business that is compatible with a residential zone may locate within or very near the restricted area without upsetting the general residential character.[16] Some types of business may be of a nature that would clash violently with the residential atmosphere although further removed from the area than those which did not affect the tract. The courts in handling problems concerned with this type of change have made wide use of their discretionary powers in granting or withholding relief.

4. The conduct of the parties or their predecessors in title.

When the grantor or his grantees, after acquiring actual knowledge of a violation of the restriction, fail to enforce the restriction by an injunction they waive the

[12] 200 Cal. 743, 254 Pac. 1101 (1927).
[13] *Id.* 200 Cal. at 747, 254 Pac. at 1102.
[14] 89 F.2d 817 (Wash. D.C. 1937).
[15] *Id.* at 820; see McCLINTOCK, EQUITY, § 128 (2d Ed. 1948).
[16] Jackson v. Lane, 142 N.J. Eq. 193, 59 A.2d 662 (1948); Braswell v. Woods, Tex. Civ. App., 199 S.W.2d 253 (1947); McLaughin v. Eldredge, 266 Mass. 387, 165 N.E. 419 (1929).

right to enforce it.[17] A failure to notify the breaching party[18] or to declare the power to enforce the restriction a reasonable time after its breach,[19] will result in a loss of the power to enforce the restriction. However, to maintain this defense, the party invoking it must show a financial loss as a result of the plaintiff's waiver.[20] It is doubtful that such a waiver could occur in a large tract as the violation would have to come within the actual knowledge of every home owner in the tract, without any action being taken. Every owner of a restricted lot has the power to enforce the restrictions imposed upon the other lots in his tract.[21]

5. The intention of the original grantor imposing the restrictions upon the land.

This factor is considered by the courts to determine if the changed conditions have thwarted the purpose of the grantor in imposing the restrictions, or if his plan may still yield substantial benefits. Public policy, favoring the free and unencumbered passage of property, calls for a strict construction of the language in the deed against the grantor.[22] For this reason the grantor must clearly express the purpose of imposing the restriction.

6. The time remaining in the restrictive covenant.

The oppressive features of a restrictive covenant are not generally so harsh if they are to remain only for a short time, whereas those of long or unlimited duration will weigh heavily upon the party seeking their removal. The courts are apparently more willing to grant relief when the restriction is long or of unlimited time. In either case the time remaining is not conclusive.[23]

A review of cases where changed conditions are raised in defense against an injunction or in seeking the removal of a restriction reveals the absence of any precise rules. It is submitted that the use of legislative measures to achieve a degree of precision in this field of the law does not provide the solution to the over-all problem. The use of statutes could perhaps crystallize this body of the law into definite rules, but at too great a price. They would place severe limitations upon the discretionary power so vital to problems of this nature. The questions come within equity's jurisdiction[24] and to settle the conflicts equity has exercised its inherent discretionary powers. The absence of precise rules is a natural by-product of this discretion. To shackle this power of discretion is to remove the essential element, which when applied to the peculiar facts of each controversy insures a just decision.

Perhaps the future litigation will reveal an even wider use of this discretion. Much of the harshness that results from a complete denial of an injunction or of affirmative relief from restrictions could be prevented by an extended use of modified decrees and injunctions. A court of equity could lift the restriction for only specified businesses, or readjust the boundary of the restricted area to conform with the changed

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[17] German-American Savings Bank v. Grollmer, 155 Cal. 683, 102 Pac. 932 (1909).

[18] Morgan v. Veach, 59 Cal.App.2d 682, 139 P.2d 976 (1943).

[19] Wedum-Aldahl Co. v. Miller, 18 Cal.App.2d 745, 64 P.2d 762 (1937).

[20] Thornton v. Middletown Educational Corp., 21 Cal.App.2d 707, 70 P.2d 234 (1937).

[21] Robertson v. Nichols, 92 Cal.App.2d 201, 206 P.2d 898 (1949); Martin v. Ray, 76 Cal.App.2d 471, 173 P.2d 573 (1946); Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931); Wayt v. Patee, 205 Cal. 46, 269 Pac. 660 (1928); McBride v. Freeman, 191 Cal. 152, 215 Pac. 678 (1923); Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919).

[22] Fairchild v. Raines, 24 Cal.2d 818, 151 P.2d 260 (1944); Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919).

[23] Marra v. Aetna Const. Co., 15 Cal.2d 375, 101 P.2d 490 (1940).

[24] McCLINTOCK, EQUITY, § 124 (2d Ed. 1948).