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POLICY LIMITATIONS
UPON RESTRICTIONS ON LAND USE

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IN REVIEWING the judicial attitude of the California courts on the restrictions on the use of land, we see a public policy evolving limiting the enforceability of the restrictions imposed. At present, the policy has assumed form and crystallized in four general areas. First, the courts will not enforce conditions and restrictions upon the use of land designed to create a monopoly in favor of the grantor nor will they sustain restrictions placing control over a governmental function in the hands of a private citizen. Secondly, in applying the doctrine of changing conditions, the courts have tended to extend a liberal interpretation in finding that the change sought to be established is in fact present and refused to enjoin the alleged violation. Thirdly, where the party seeking to enforce the restriction is derelict in the exercise of the right to enforce the breach or by his conduct indicates an abandonment of the intent to enforce he may be estopped to enforce that restriction. Fourthly, the courts have extended the judicial bias of strict construction against restrictions imposed in favor of the grantor and have laid down rigid requirements in creating restrictions by way of servitude or running covenant.[1]

In general the California courts have held the right to annex restriction to a conveyance is a necessary incident to the right to own and convey property.[2] Thus, the courts have upheld *restrictions* requiring part of the property to be applied to a particular use.[3] Likewise, they have sustained *restrictions* prohibiting a particular activity—as for example, a slaughterhouse,[4] an oil well,[5] or the use of firearms.[6]

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[1] Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919); King v. Snyder, 189 Cal. App. 2d 482, 11 Cal. Rptr. 328 (1961); Chandler v. Smith, 170 Cal. App. 2d 118, 338 P.2d 522 (1959); Kent v. Koch, 166 Cal. App. 2d 579, 333 P.2d 411 (1958); Weston v. Foreman, 108 Cal. App. 2d 686, 239 P.2d 513 (1952).

[2] Cornbleth v. Allen, 80 Cal. App. 459, 251 Pac. 87 (1926); Los Angeles & Salt Lake R.R. v. United States, 140 F.2d 436 (1944) and cases cited at 438.

[3] Rosecrans v. Pacific Elec. Ry., 21 Cal. 2d 602, 134 P.2d 245 (1943) (for a railroad); Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10 (1901) (for a school); Mitchell v. Cheney Slough Irrigation Co., 57 Cal. App. 2d 138, 134 P.2d 34 (1943) (for construction and maintenance of pumping plant).

[4] Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308 (1902).

[5] Miles v. Clark, 44 Cal. App. 539, 187 Pac. 167 (1920).

[6] Guaranty Realty Co. v. Recreation Gun Club, 12 Cal. App. 383, 107 Pac. 625 (1910).

Covenants and conditions restricting the use of property conveyed for residential purposes; and, building restrictions imposed on the lots conveyed restricting the use of the property to private dwellings are also generally regarded as enforceable.[7]

To what extent has a public policy been evolved by the California courts favoring the free and unrestricted use of land over the grantor's right to place unlimited restrictions on the use of conveyed land?

Monopoly Interference With Government Function

Where the grantor's purpose in attaching conditions or covenants restricting the use of land is to create a monopoly in his favor, the courts have without hesitation held such conditions void as against public policy.[8]

In dealing with conveyances from private citizens to municipalities, the courts have been quick to strike out as void use-restrictions which would enable the private citizen to sit in judgment of the actions of the city. In the leading case of *Wills v. City of Los Angeles*,[9] land was conveyed to the city for the purpose of a street containing the conditions that the same could never be used as a street railway and reserving a right of entry for its breach. In deciding the condition was void, the court went on to say that control of municipal streets is purely a governmental process and a private person may not sit in judgment.

Changed Conditions

Underlying the doctrine of changed conditions, is the principle that a court of equity will not enforce a restriction on property when the original purpose of the conveyor cannot be effected, thus making enforcement unjust or inequitable.

An excellent illustration of this principle and the factors on which the California courts rely is afforded in a series of cases which were litigated in the California courts between 1917 and 1931 involving the same piece of land and the same restrictions.

In the initial action[10] to quiet title, plaintiffs sought to have restrictions limiting the use of their property to single family residences declared no longer enforceable as applied to them. Judgment for the plaintiff was reversed by the appellate court on the grounds that the action was commenced prematurely as no breach had occurred nor

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[7] Hannula v. Hacienda Homes, 34 Cal. 2d 442, 211 P.2d 302, 19 A.L.R.2d 1268 (1949); Weston v. Foreman, 108 Cal. App. 2d 626, 239 P.2d 513, 19 A.L.R.2d 1274 (1952).

[8] Burdell v. Grandi, 152 Cal. 376, 92 Pac. 1022 (1907) (attempt to monopolize liquor sales).

[9] 209 Cal. 448, 287 Pac. 962, 69 A.L.R. 1044 (1930).

[10] Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159 (1919).

was one threatened,[11] and the fact that the property had become desirable for business purposes would not defeat the application of equitable relief where the restriction was still of substantial benefit to the grantor.

Thus the court laid down a test of substantial value to the grantor as the principle criterion in enforcing the restriction.

Eight years later, the same issue was before the California Supreme Court.[12] This time plaintiff relied on a change in zoning and the fact that other lots in the subdivision had restrictions on use which were limited in duration while the restrictions in question were unlimited in duration. Plaintiff introduced further evidence to show that the character of the surrounding area had undergone a substantial change in that an increase in vehicular traffic was evident. In denying relief from the restriction the court dismissed as immaterial the changes within the subdivision and held that the changes outside the subdivision were changes in degree only and not of kind. The majority opinion went on to say that where a change of conditions was relied upon to obtain relief from enforcement, the change must be complete. The concurring majority opinion, however, indicated that the court had overstated its position on the amount of change necessary in the surrounding area to deny enforcement.

In *Hurd v. Albert*,[13] the California Supreme Court reversed its holding in *Strong v. Hancock*[14] decided five years earlier, on the basis that in the case at bar the trial court had found the property unsuited for residential living whereas in *Hancock* the trial court had found only that the land in question was more desirable for business purposes but that the original purpose could still be effected. In *Hurd*, the Supreme Court in holding that the evidence supported the verdict of the trial court, held that evidence as to change of conditions could be adduced from changes within or outside the tract, thereby expanding the criterion laid down in the leading case of *Downs v. Kroger*.[15]

This liberal construction of what constitutes a change of conditions was further extended in the recent decision by a divided court in *Wolff v. Fallon*.[16] In this case, an injunction to enjoin the land holder who was about to breach a covenant in the deed restricting the use of the land to certain residential uses was denied where the lot burdened with the restrictions was found no longer desirable or suitable for residential purposes and its use for business would not detrimentally affect adjoining property holders and might be beneficial.

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[11] Declaratory judgment legislation adopted subsequent to this decision would now eliminate this objection. See CAL. CODE CIV. PROC. § 1060.

[12] Strong v. Hancock, 201 Cal. 530, 258 Pac. 65 (1927).

[13] 214 Cal. 15, 3 P.2d 545, 76 A.L.R.2d 1348 (1931).

[14] 201 Cal. 530, 258 Pac. 65 (1927).

[15] 200 Cal. 743, 254 Pac. 1101 (1927).

[16] 44 Cal. 2d 695, 284 P.2d 802 (1955).

The majority opinion placed great emphasis on the disparity of value of the property to the owner as a residential site and as a business site. In the dissenting opinion, language found in *Marra v. Aetna Constr.*[17] was relied upon, indicating that before a change of condition could be found to avoid enforcement of conditions, the conditions or restrictions sought to be enforced must be obsolete. Although this statement is found in the opinion, the court held that such an obsolescence was present and other language in the case indicates that the court probably meant no more than that the original purpose of the conditions could be no longer fulfilled.

It is interesting to note that in both *Wolff* and *Marra* the court, in reaching its conclusion that a change of conditions in fact had made it inequitable and unjust to enforce the restrictions, relied on the difference in value to the owner with the restrictions and without them. In both cases the value of the property to the owner was substantially greater without restrictions.[18]

The development of the doctrine of changed conditions indicates an increasingly liberal attitude of the court in holding that the changed conditions do exist. The change may be either inside or outside the tract, and a decision enforcing the restrictions on the use of land is not res judicata[19] and may in the future be denied enforcement if additional evidence of change can be shown. Further, it would seem that the courts in determining whether the change exists, are taking cognizance of the value of the property to the owner with and without the restrictions and, when the disparity is great, this is a significant factor in determining whether the enforcement should be denied.

Waiver and Laches

Once a breach has occurred the party for whose benefit the restriction was reserved may lose the right to enforce the limitation upon the use of the land. This rule is based on the fundamental principle that when in the general course of dealing between the parties one of them is led to believe strict compliance with the conditions will not be required the party in whose favor the limitation is created may be estopped to assert that right.[20]

The grantor has reasonable time after a breach to declare a forfeiture and if he fails to do so within that time his power to do so expires.[21] Thus where land was originally intended to be set aside for

[17] 15 Cal. 2d 375, 101 P.2d 490 (1940).

[18] Approving the loss of money profit to the owner as an important factor in setting aside the restrictions of the deed see Hirsch v. Hancock, 173 Cal. App. 2d 745, 343 P.2d 959 (1959) (where the value to the land holder with restrictions forbidding the use of the property for drilling purposes was $250 to $400 a foot as opposed to $1,000 to $1,200 without the restriction).

[19] Hurd v. Albert, 214 Cal. 15, 3 P.2d 545, 76 A.L.R.2d 1348 (1931).

[20] See generally, CAL. JUR. 2d *Covenants* §§ 120, 125 (1954).

[21] City of Santa Monica v. Jones, 104 Cal. App. 2d 463, 232 P.2d 55 (1951).

a model prohibition city and lots were conveyed pursuant to this general scheme containing restrictions on the sale of liquor, but subsequently the project was abandoned and other lots in the development were sold without liquor restrictions, the restriction was waived.[22]

Lapse of time, however, need not be the controlling factor. Where one sold a lot subject to restriction for residential purposes and plans for construction of a building for business purposes were approved by the grantor and the grantor watched the building being constructed without notice of intention to enforce, the grantor thereafter was estopped to assert the condition. [23]

The right to enforce restrictions may also be lost by laches. Here the party subject to the restrictions must show he has been unduly prejudiced and has suffered financial loss as a result of the grantor's continued acquiescence. Mere lapse of time is not sufficient.[24]

The Doctrine of Strict Construction

In determining whether the conduct involved constitutes a breach of the restrictive covenants, the California courts are aided by statutory authority providing that a restriction is construed against the party for whose benefit it was created,[25] often the grantor. Thus it has been held that a restriction upon the use of land "for residence purpose only and in no wise for business purposes" did not prevent the land holder from constructing multiple dwelling apartments.[26]

In general, the courts have adopted the common law rules of construction and have extended the judicial bias against restrictions providing forfeiture. Restrictive covenants are to be strictly construed and will not be extended by implication.[27] Whenever possible, a condition will be construed as a covenant.[28] Terms of the forfeiture will also be strictly construed.[29]

Thus independent of legislation, the California courts have evinced a strong inclination to deny enforcement of restrictions and conditions limiting the use of land when the original intent of the grantor can no

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

[23] Fontana Farms Co. v. Criss, 77 Cal. App. 2d 190, 174 P.2d 890 (1946).

[24] On waiver and estoppel generally, see 4 THOMPSON, REAL PROPERTY §§ 547 (1924); TIFFANY, REAL PROPERTY (2d ed. 1920).

[25] CAL. CIV. CODE § 1442.

[26] Weber v. Graner, 137 Cal. App. 2d 771, 291 P.2d 173 (1955).

[27] *Ibid.*; Bramwell v. Kuhle, 183 Cal. App. 2d 767, 6 Cal. Rptr. 839 (1960).

[28] Alamo School Dist. v. Jones, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960); People v. Los Angeles, 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (1960).

[29] Savanna School Dist. v. McCleod, 137 Cal. App. 2d 491, 290 P.2d 593 (1955) (condition in deed providing for reversion to grantors on failure to use land for a school was construed as limiting the condition to the lifetime of the grantors); Atkins v. Anderson, 139 Cal. App. 2d 918, 294 P.2d 727 (1956) (forfeiture denied when plaintiff accepted the purchase price with knowledge of violation of the restriction and at the time of the trial the restriction had been complied with).

longer be legitimately effected. But are the judicial tools presently available adequate? It is argued that, by the very nature of the questions presented in litigation involving restrictions upon the use of land, each being individual as to its factual content, legislation in this area would be undesirable, since it would deprive the courts of their discretionary power in deciding the issues presented and instead substitute a rigid legislative standard.

The basic inadequacy of the judicial methods presently available is revealed in the following areas: (1) Restrictions on the use of land by way of condition subsequent or special limitation are allowed to remain as clouds on the title until litigated. This has a twofold effect. It reduces the marketability of the property and it may depreciate the value of the property to the owner as for example where the condition burdening the property is one restricting it to residential use and the property is no longer desirable as residential property but has a great commercial or business value. (2) Under the present law, the holder of a right of entry or possibility of reverter, whether the original grantor or a successor to the interest of the grantor, continues to hold that interest without limitation of the rule against perpetuities and may exercise the power incident to that right years after the original limitation was imposed notwithstanding the fact that the original intention of the grantor may no longer be applicable to his successor in interest. (3) Cities in the development of effective planning of subdivision expansion as well as wise use of urban property are hindered by restrictions imposed at an earlier time. (4) The courts are unduly handicapped in the solutions available to them in adjudicating the litigation arising from the breach of conditions and limitations imposed by way of condition subsequent and determinable fee. At present if a construction of a determinable fee is impressed upon the court, by operation of law the possessory estate is determined and the absolute fee vests in the holder of the possibility of reverter. This is so even though no damage has been inflicted upon the holder of the possibility. It would seem that a far better solution would enable the court to test the enforceability of this limitation by the generally accepted standard in equity of balancing the conveniences, awarding damages if any and quieting the possessory holder's title; or if the limitation is still capable of securing its original purpose enter a decree of specific performance in favor of the holder of the possibility.

In short, assuming the restrictions to have been validly created in the first place, the courts are at present limited to three judicial devices: (1) strict construction of forfeitures and the scope of restrictive covenants, (2) waiver and estoppel, and (3) the doctrine of changing conditions. Although the courts have been liberal in applying these rules other considerations ought to be available for the court's determination in reaching a decision.

The New York code provisions[30] adopted recently afford an enlightened step in the right direction in the solution of these problems.[31] One of the provisions provides for a recording of a declaration of intention to preserve certain interests in lands arising from the ancient restrictions on the use of land by way of condition subsequent and special limitation and extinguishes such interests if a declaration of intention is not recorded within the prescribed time.[32] This provision would extinguish possibilities of reverter and rights of entry held by grantors and their successors in interest restricting the use of land upon failure to record a declaration and thereby quiet title and eliminate a restriction upon the use of the land.

Another of the New York code provisions codifies the common law doctrines under which promissory conditions on the use of land are denied enforcement or extinguished upon payment of damages. This provision also subjects restrictions created subsequent to its enactment by way of condition subsequent and special limitation to the same doctrines. The code further authorizes the court to exercise its discretion in declaring the restrictions unenforceable "if the restrictions are of no substantial benefit to the person seeking enforcement either because the restriction has been accomplished or by reason of changed condition, or other cause, its purpose is not capable of enforcement or for any other reason."[33] This provision fully incorporates the common law doctrines applicable to the enforcement of restrictions and at the same time confers upon the court discretion upon which to base their holding. This would enable the courts to rely on other factors beyond the traditional area of changing conditions and waiver in weighing the equities of the case as the merits would indicate, without the necessity of adhering to an artificial standard and stretching the meaning of these doctrines in order to obtain the desired results. This provision would meet the objection of those who oppose legislation in this area on the basis that it would deprive the court of its discretion in deciding each case on the merits. It would in fact give the court a greater latitude of discretion than it already has.

A third provision empowers the court to apply the tests of enforceability, cited above in the other code provisions, in determining the means of relief against existing restrictions on the use of land created

[30] For an excellent discussion on the remedial features of the New York Code provisions and considerations prompting their adoption see the report of the N.Y. Legislative Commission, in McKinney's Session Laws of N.Y. (1958).

[31] For a discussion of similar legislation enacted in other jurisdictions and full citation on law-review articles see CLARK, COVENANTS & INTERESTS RUNNING WITH THE LAND 197 (2d ed. 1947).

[32] N.Y. REAL PROP. LAW § 345, pp. 133-36.

[33] N.Y. REAL PROP. LAW § 346, pp. 136-37.

by special limitation or condition subsequent which unreasonably limits the use of land.[34]

Based upon a consideration of the means at present available to the courts to declare limitations on the use of land void and unenforceable and the inadequacies posed by those devices, California should adopt legislation which would enable the courts to better strike the balance in determining which restrictions shall be deemed unenforceable as contrary to provisions of public policy. The New York code affords a desirable approach.

[34] N.Y. REAL PROP. LAW § 348, p. 138.