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been the governing factor. Its importance is readily apparent since the general premise is that the courts will recognize an ordinance that is for the health, safety, and morals of the general welfare. However, even though the public is directly involved, should the city be allowed to depress the land value by such an ordinance if they have an intent to purchase? The decision in the *Manhattan Beach* case put the city in a position to control the use of the land without any future purchase, even though there had been a prior intent to do so.

Since the decisions of *Kissinger* and *Robertson,* would the *Manhattan Beach* case be upheld today? Even with the factor of public use, the decision remains questionable. The important factor in both *Kissinger* and *Robertson* was the intent to depress the value of the land and then to purchase it at a later date. Were these factors and public use both present the problem would be a difficult one. The probable outcome would favor the *Kissinger* and *Robertson* decisions, based on several determinants. First, the decision in the *Kissinger* and *Robertson* cases came later than the *Manhattan Beach* case, and they dealt thoroughly with the intent to depress the value of the land. In the *Manhattan Beach* case, the intent shown to purchase was given little weight if any.[28] Even though the ordinance in the *Manhattan Beach* case was construed as being a valid enactment in favor of the health, safety, morals and general welfare, it was no more so than the ordinances in *Kissinger* and *Robertson.* It could well be argued that even though the public use is involved, the inequity of depriving one of his land without due compensation outweighs the equity of public use. Nevertheless, the importance of the public interest cannot be treated lightly. It would be quite possible to rationalize these cases by narrowly limiting this doctrine so that where a public interest is involved, such as the preserving of public parks and public beaches, the validity of the zoning ordinance even though an intent to depress for future purchase was present will be upheld. Without a showing of this direct public interest the courts are not willing to extend the use of this power.

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[28] 41 Cal. 2d at 895, 264 P.2d at 940.

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KEY v. McCABE; TRAFFIC INCREASE, A CHANGED CONDITION?

In future litigation will an increased flow of automobile traffic constitute an adequate basis for judicial refusal to enforce restrictive covenants under the doctrine of changed conditions? Two forces have constantly vied in Anglo-American property law, viz., the force to make land more alienable and the force favoring controlled use with consequent lessening of transferability. The Rule Against Perpetuities has eliminated indeterminable restraints on alienation, but covenants restricting use have been largely upheld for their economic and aesthetic value in land control.

The restrictive covenant that has outlived its usefulness has proved to be a difficult problem,[1] but most courts will refuse to enforce restrictive

[1] See generally Annot., 4 A.L.R.2d 1122-30 (1949); 14 CAL. JUR. 2d *Covenants* § 113 (1954).

covenants when they are no longer useful. California has followed the general rule, setting aside covenants in a wide variety of cases, *e.g.*, race restrictions,[2] restrictions against the erection of other than single family residences,[3] and restrictions against any type of commercial development.[4]

There have been certain elements considered important in every case in which enforcement of the covenant was in question. These elements include: 1) the location of change—inside the restricted tract or outside its boundaries;[5] 2) the duration of the covenant;[6] and 3) the behavior of the parties or their predecessors in interest.[7] The decisions have followed a regular pattern from case to case with the most important question being, what fact or combination of facts is necessary to nullify the restrictive covenant?

Key v. McCabe[8] is important as one of the first cases which specifically considers traffic conditions as a sole factor in setting aside restrictive covenants. The plaintiffs were twenty lot owners in an Orange County tract. The defendants owned a corner lot within the tract located at Fullerton Road and Las Palmas Drive. In 1940, all of the lots in the tract were subjected to a nineteen year restriction of use for residential, agricultural, or horticultural purposes. All of the lots in the tract were improved with single family residences except defendants' and two others which were vacant. In 1957, the city of La Habra, by annexation proceedings, extended its boundaries to include defendants' lot and it zoned the annexed property as "C-2 Commercial Zone" and "R-3 Limited Multiple-Family Dwelling Zone." The defendants obtained a permit from La Habra to construct a commercial building, the plans for which constituted the basis of this suit for injunction. The immediate surrounding area contained many substantial residences varying in value from 30,000 to 75,000 dollars, and the nearest commercial district was at least one-half mile away. There was much more traffic on Fullerton Road at the time of the litigation than in 1940, and construction of a four-lane divided highway with a traffic light for the corner of Las Palmas Drive and Fullerton Road was proposed. There had been no commercial intrusion into any of this area on either side of Fullerton Road.[9] On this showing of facts the Superior Court of Orange County, sitting without a jury, found for the defendants and set aside the restriction. The District Court of Appeal reversed the ruling of the trial court, holding: 1) re-zoning did not allow violation of the covenants;[10] 2) a mere financial

[2] Fairchild v. Raines, 24 Cal. 2d 818, 151 P.2d 260 (1944); Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932).

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

[4] Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931).

[5] Wolff v. Fallon, 44 Cal. 2d 695, 284 P.2d 802 (1955); Downs v. Kroeger, 200 Cal. 743, 254 Pac. 1101 (1927).

[6] Fairchild v. Raines, 24 Cal. 2d 818, 151 P.2d 260 (1944); Shideler v. Roberts, 69 Cal. App. 2d 594, 160 P.2d 67 (1945).

[7] Briefly the complainant must come into court according to equitable principles: with clean hands, and guiltless of *laches*, waiver, or estoppel. See generally Annot., 4 A.L.R.2d 1140-50 (1954) for an exhaustive survey of cases on these points.

[8] 4 Cal. Rptr. 91, *rev'd*, 54 Cal. 2d 736, 356 P.2d 169, 8 Cal. Rptr. 425 (1960).

[9] 4 Cal. Rptr. 91, 93.

[10] *Accord*, Rice v. Heggy, 158 Cal. App. 2d 89, 322 P.2d 53 (1958), and Wilkman v. Banks, 124 Cal. App. 2d 451, 269 P.2d 33 (1954).

hardship on the person seeking to remove the restriction will not deter an equity court from an enforcement of that restriction;[11] 3) increased vehicular traffic over a street adjacent to property restricted to residential uses does not destroy or abrogate the residential restriction.[12]

The Supreme Court reversed the decision of the district court and found for the defendants. The decision for reversal, written by Justice McComb, held that there was sufficient evidence to uphold the trial court's finding that the restriction should be terminated. The court divided the factors for the decision into eleven points: (1) the increased traffic and noise on Fullerton; (2) the proposal for the construction of the four-lane divided road and the new traffic light; (3-11) the testimony of witnesses and their opinions of best land use, and the fact of some existent set-back violations, lot splitting, and the re-zoning.[13]

The unquestioned position in this state has been that increased vehicular traffic on a street bordering the property in question was not in itself a changed condition sufficient to set aside the restrictive covenants.[14] Changes such as the violation of set-back lines, and division of lots which do not affect the original purpose of the restriction directly involved have been thought of as indirect consequences and not regarded as material.[15] Also the testimony of witnesses as to better and more profitable land use has never been enough to sway the court in the usual case.[16]

While the Supreme Court did not hold directly that traffic increase was the sole factor, the District Court of Appeal seemed to hold that the traffic increase was the only valid basis of change in the case[17] which as mentioned above has not been enough in this jurisdiction to set aside a covenant. Thus, at least the Supreme Court has impliedly approved the increased traffic element if not as a sufficient change, as a very important factor. In any event, in future cases, traffic considerations must be more carefully analyzed.

Should the Supreme Court set aside covenants only on the basis of increased traffic conditions? Vehicular traffic growth is a certainty in rapidly growing California both in downtown and residential areas. If an increase in traffic should become enough to set aside residential restrictions, here would be the degree of certainty sought by many in this heretofore unsettled area. It would become relatively easy to predict success in court on such a requirement, but is the price of this type of certainty too high? Could it not be said that the uncertainty is merely relegated to the Planning Commission rather than the courts? Further, could it not become possible for a city, which cannot change private restrictions directly by re-zoning, to obtain the same result indirectly by re-routing traffic or constructing a thoroughfare? If this be so, no developer whether an individual property owner,

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[11] See Marra v. Aetna Constr. Co., 15 Cal. 2d 375, 101 P.2d 490 (1940).

[12] See Strong v. Hancock, 201 Cal. 530, 258 Pac. 60 (1927); O'Rourke v. Teeters, 63 Cal. App. 2d 349, 146 P.2d 983 (1944).

[13] 54 Cal. 2d 736, 356 P.2d 169, 8 Cal. Rptr. 425 (1960).

[14] Strong v. Hancock, 201 Cal. 530, 258 Pac. 60 (1927); O'Rourke v. Teeters, 63 Cal. App. 2d 349, 146 P.2d 983 (1944).

[15] Stone v. Jones, 66 Cal. App. 2d 264, 152 P.2d 19 (1944).

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

[17] 4 Cal. Rptr. 91.