Key v. McCabe; Traffic Increase, a Changed Condition

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been the governing factor. Its importance is readily apparent since the
genral 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 deci-
sion remains questionable. The important factor in both Kissinger and
Robertson was the intent to depress the value of the land and then to pur-
chase 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 Man-
hattan 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. 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. Never-
theless, 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 transfer-
ability. The Rule Against Perpetuities has eliminated indeterminable re-
straints 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, 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, restrictions against the erection of other than single family residences, and restrictions against any type of commercial development.

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; 2) the duration of the covenant; and 3) the behavior of the parties or their predecessors in interest. 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 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. 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; 2) a mere financial

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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.
9 4 Cal. Rptr. 91, 93.
hardship on the person seeking to remove the restriction will not deter an 
equity court from an enforcement of that restriction;\textsuperscript{11} 3) increased vehi-
cular traffic over a street adjacent to property restricted to residential uses 
does not destroy or abrogate the residential restriction.\textsuperscript{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 Fuller-
ton; (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 split-
ting, and the re-zoning.\textsuperscript{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.\textsuperscript{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.\textsuperscript{15} Also 
the testimony of witnesses as to better and more profitable land use has 
ever been enough to sway the court in the usual case.\textsuperscript{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\textsuperscript{17} which as men-
tioned 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 in-
creased 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 Com-
mission 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 thor-
oughfare? If this be so, no developer whether an individual property owner,

\textsuperscript{12} See Strong v. Hancock, 201 Cal. 530, 258 Pac. 60 (1927); O'Rourke v. Teeters, 
\textsuperscript{13} Strong v. Hancock, 201 Cal. 530, 258 Pac. 60 (1927); O'Rourke v. Teeters, 63 
\textsuperscript{16} 4 Cal. Rptr. 91.