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John Butler

found no evidence that such ordinance was essential to the public health or safety.[20] Mention is often made of the fact that the air-travelling public is a small part of the public. This is no longer true. Air travel is clearly an interest of the public at large.

The field of height zoning seems to present us with the strange situation of being universally upheld under the police powers, where such necessity could be disputed, and yet airport zoning, which is for the single purpose of safety, is often found invalid. This must be explained as the natural reluctance of the courts to impose restrictions on property, coupled with the emergence of a relatively new industry. It can only be hoped that the courts follow the lead of the legislatures and the few cases which have upheld such zoning in the interests of the public health, safety and welfare, and not limit the use control for airports to the easement device.

*Clyde L. MacGowan**

[20] Dutton v. Mendocino County, U.S. Av. 1 (Cal. 1949).

* Member, Second Year class.

GRANTOR'S RESERVATION OF POWER TO MODIFY USE RESTRICTIONS

Subdividers are anxious to develop a uniform tract to assure purchasers that their property values will be increased. Many times the subdivider desires to give the grantees themselves the power to enforce these deed restrictions, which they place in the deeds in order to maintain the uniformity of the tract; yet at the same time wish to reserve to themselves some power to alter these restrictions with changing times. The validity of these reservations of power to alter restrictions has been severely questioned in other jurisdictions, but California seems to accord them validity.

In the New Mexico case of *Suttle v. Bailey*,[1] the court held such a reservation of a right in the grantor to alter, modify, or annul any restriction in any of the grantee's deeds made the covenants and restrictions in the deeds personal in nature and not of the type which run with the land. There was, therefore, no mutuality of covenant between grantees, and one grantee had no right to sue another in equity for breach of covenant. They held that the clause in question destroyed the uniformity in the tract necessary to uphold an equitable servitude because by exercising his power the grantor will vary the restrictions in each deed and the necessary general plan would be destroyed. In California, the requirement of tract uniformity to create a valid equitable servitude was required by the early cases,[2] but this has been ignored by the later decisions.[3] California courts uniformly hold that each deed in the tract must contain some express provision of intent that the restrictions are for the benefit of the grantees.[4] The deed is

[1] 68 N.M. 283, 361 P.2d 325 (1961).

[2] See Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919). See also McBride v. Freeman, 191 Cal. 152, 215 Pac. 678 (1923).

[3] Collani v. White, 38 Cal. App. 2d 539, 101 P.2d 767 (1940).

[4] See Wing v. Forest Lawn Cemetery Ass'n, 15 Cal. 2d 472, 101 P.2d 1099 (1940); CAL. CIV. CODE § 1468.

the final muniment of the transaction and must express this intent before any equitable right of enforcing a restriction will accrue to the grantees of the subdivision. The majority rule,[5] followed in *Suttle*, allows this intent to be implied from the circumstance of tract uniformity, but California does not so hold.

What effect does this added requirement for setting up equitable servitudes have on the cases coming before the California courts? Once the requirements for setting up the servitude are met, the California court will uphold the servitude in the presence of a clause reserving a power in the grantor to change, alter, or modify the restrictions in the deed.[6]

Sharp v. Quinn[7] is in point with *Suttle*. In this case the grantor provided certain building restrictions in all the deeds to lots in the tract and expressly stated that these restrictions were for the benefit of all lot owners in the tract. Further, the grantor provided that after sixteen lots had been sold, the restrictions could be annulled, modified, or abrogated by the owners of not less than sixteen of the lots in the tract. The agreement had to be in writing and recorded. Sixteen of the lot owners executed and recorded a writing abrogating the restrictions. The plaintiff was a lot owner but did not join in the agreement. The court held that the clause was valid and the restrictions as to all lot owners had been annulled. The deeds complied with the requirements for setting up an equitable servitude and one was set up prior to the execution of the clause. Prior to the execution of the writing abrogating the restrictions, one grantee could obtain equitable enforcement of the restrictions against another grantee. In *Suttle*, no equitable servitude was set up because of the clause reserving the power to change or modify, but the reservation itself was upheld. The court upheld the power in the grantor but gave the grantees no right in equity to enforce the restrictions. In the *Sharp* case the court recognized this right in the grantees.

The most liberal decision of the California courts is *Collani v. White*.[8] The grantor set up building restrictions in the deeds and gave the grantees within a specified area the right to enforce them. Further, he provided that he reserved the right to create, make, apply or omit similar or varying conditions in other lots sold in the tract. The grantor also reserved the right to change or modify any restrictions in any grantees deed at his discretion. The court upheld the plaintiff's (grantee) right to enforce the building restrictions against defendant (grantee). The court said that the grantor's intent was to set up the restrictions for the benefit of the other lot owners and no consideration need be made of whether the covenants were personal or whether they ran with the land. The court said that a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another, and that this interest may be enforced against him. Here the court says that all that needs to be considered is whether the intent is manifested and the purchaser took with notice. The court paid no attention to the fact that tract uniformity would not be maintained since

[5] Rowe v. May, 44 N.M. 264, 101 P.2d 391 (1940).

[6] Sharp v. Quinn, 214 Cal. 194, 4 P.2d 942, 78 A.L.R. 501 (1931); Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P.2d 720 (1944).

[7] 214 Cal. 194, 4 P.2d 942, 78 A.L.R. 501 (1931).

[8] 38 Cal. App. 2d 539, 101 P.2d 767 (1940).