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Real Property -- Restrictive Covenants -- Effect of Change of Conditions on Enforcement

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now forwarded to the clerk requesting indeterminate commitment. If a sane person is by some chance being "railroaded" there is little doubt that he would be released by the hospital or would have applied for a writ under the doctrine of *In re Harris*[43] by or before the time that the observation period is terminated.

The effect of this decision is twofold: (1) A more expensive court procedure is now required to commit, and (2) a definite hindrance has been introduced to the effective care and treatment of patients through the adverse effect of a second notice and possible second hearing.

The possibilities of what course of action the next General Assembly will take in light of this decision are innumerable. One possibility already under consideration is to do away altogether with the observation period and have one hearing to decide indeterminate commitment.[44] Thus the final result of a decision meant to protect the constitutional rights of the mentally ill may well cause them to lose one safeguard not afforded in any other state—an observation period after hearing before final commitment.

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Real Property—Restrictive Covenants—Effect of Change of Conditions on Enforcement.

It is well established that under appropriate circumstances equity will invalidate privately imposed restrictive covenants limiting the use of land in unified subdivisions.[1] In general this is deemed appro-

second hearing will be conducted by the same clerk that made the original commitment. N.C. GEN. STAT. § 122-46.1 (Supp. 1961). The idea of a "last ditch stand" with a battery of lawyers cross-examining the hospital psychiatrists in order to secure the patient's release is inconceivable. If the clerk had enough evidence to commit for the observation period it is extremely doubtful that his decision will change, for the psychiatric testimony is in addition to the other positive evidence previously received and will serve to bear out what the clerk had already decided—that the person is mentally ill.

[43] 241 N.C. 179, 84 S.E.2d 808 (1954). It should be noted that there is dictum in the principle case indicating that the court did not fully consider the enlarged writ and its implications. 257 N.C. at 597, 126 S.E.2d at 492.

[44] Durham Morning Herald, Sept. 8, 1962. p. 1B, col. 6.

[1] This can result from two types of actions: affirmative relief granted to parties seeking to have the restrictions lifted, or refusal of the court to issue an injunction preventing violation of the restrictions. Either method being equitable relief, may or may not also preclude a remedy at law. Some courts hold the decree in equity extinguishes the covenant entirely, while others maintain that mere unenforceability in equity does not preclude an action at law for damages for breach of covenant. 2 AMERICAN LAW OF PROPERTY § 9.39, at 444-45 (Casner ed. 1952); 13 N.C.L. REV. 518 (1935).

priate where the factors justifying the original imposition of the restrictions have so changed that it is unconscionable to give further effect to them.[2]

Application of this general principle involves resolution of two subsidiary problems. First, where must the change of conditions, making enforcement of the restrictions inequitable, occur? A basic divergence of opinion has arisen as to whether a sufficient change must have occurred within the restricted tract itself, whether changes in the neighborhood surrounding the covenanted tract, considered alone, justify nonenforcement, or whether the two may be considered together to require non-enforcement. Second, and independent of the first problem, is it appropriate to invalidate the restrictions piece-meal when only some of the lots of a subdivision are directly affected by the change? Here too, conflicting answers are found.

The North Carolina Supreme Court, in *Tull v. Doctors Building, Inc.*,[3] recently held that no change of conditions occurring outside the covenanted area is to be considered in deciding whether restrictions are to be lifted.[4] In the same decision it upheld the lower court's expressed opinion that in any event release from restrictions cannot be made piece-meal.[5] These two holdings when applied in combination represent the most conservative approach to the matter possible, short of flat refusal to deny enforcement for any reason except initial invalidity. Since few if any other courts appear to follow this extreme approach,[6] an examination of its evolution in North Carolina decisions and an evaluation of its practical operation is in order.

Because change of conditions within the area necessarily involves factors making available the equitable defenses of acquiescence, estoppel, or laches against the party opposing invalidation, such change furnishes the strongest possible case for lifting the restric-

[2] See generally Starkey v. Gardner, 194 N.C. 74, 138 S.E. 408 (1927); 2 AMERICAN LAW OF PROPERTY § 9.39 (Casner ed. 1952); 5 POWELL, REAL PROPERTY § 683-84 (1962); 3 TIFFANY, REAL PROPERTY § 871-75 (3d ed. 1939); Annot., 4 A.L.R.2d 1111 (1949).

[3] 255 N.C. 23, 120 S.E.2d 817 (1961).

[4] *Id.* at 38, 120 S.E.2d at 827 (conclusion of law 2).

[5] *Id.* at 41, 120 S.E.2d at 829-30 (discussion of law 5).

[6] While there is authority for either one holding or the other in a large number of cases, the combination of the two is rarely announced. Rather, as is suggested in 2 AMERICAN LAW OF PROPERTY § 9.39, at 447 (Casner ed. 1952) courts denying piece-meal destruction commonly permit the entire subdivision to be released by a surrounding change. See Fairchild v. Raines, 24 Cal. 2d 818, 151 P.2d 260 (1944); Talles v. Rifman, 189 Md. 10, 53 A.2d 396 (1947); Amerman v. Deane, 132 N.Y. 355, 30 N.E. 741 (1892).

tions.[7] It is quite clear then why the courts, including North Carolina, see change of conditions within as furnishing the strongest single ground for relief.[8] Still, many courts allow a change of conditions outside the restricted tract, considered alone, to be sufficient cause for the invalidation,[9] and most will take such change into consideration when it is coupled with some change within the restricted subdivision.[10]

North Carolina seems unequivocally committed to the rule that even a substantial change in the surrounding neighborhood will not warrant release from the restrictions when there is not also evidence of inside change.[11] However, where there has been evidence of some change within the tract, other North Carolina cases have held that this, considered in conjunction with evidence of substantial change outside the area, justifies lifting the restrictions.[12] In these latter

[7] There is a much more equitable basis for denying injunctive relief to a complaining party himself at fault in respect to the changed condition within, whether that fault be characterized as acquiescence, laches, estoppel or unclean hands, than for denying it to one who has had no means of control over the development of a situation which he now seeks to halt.

Change of conditions *within* the area is probably more aptly characterized generically by the term "abandonment," rather than "change of conditions." The latter term should be reserved to define occurrences outside the area. 2 AMERICAN LAW OF PROPERTY § 9.39, at 445-46 (Casner ed. 1952).

[8] 32 C.J. *Injunctions* § 328 & n.40 (1923); 43 C.J.S. *Injunctions* § 87b(4)(f) (1945).

[9] See, *e.g.*, Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930); McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905); Daniels v. Notor, 389 Pa. 510, 133 A.2d 520 (1957); Johnson v. Poteet, 279 S.W. 902 (Tex. Civ. App. 1925) where injunctions seeking to prevent violations of covenants were denied, and Wolff v. Fallon, 269 P.2d 630 (Cal. Dist. Ct. App. 1954), *aff'd*, 44 Cal. 2d 695, 284 P.2d 802 (1955); Norris v. Williams, 189 Md. 73, 54 A.2d 331 (1947); and Welitoff v. Kohl, 105 N.J. Eq. 181, 147 Atl. 390 (Ct. Err. & App. 1929) where affirmative relief was granted.

[10] For cases wherein injunction against violation of residential restrictive covenants was denied because changes had occurred both inside and outside the restricted tract see Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933); Harrigan v. Mulcare, 313 Mich. 594, 22 N.W.2d 103 (1946); Mathews Real Estate Co. v. National Printing and Engraving Co., 330 Mo. 190, 48 S.W.2d 911 (1932); Wood v. Knox, 277 P.2d 982 (Okla. 1954). For decisions granting affirmative relief see Alexander v. Title Ins. and Trust Co., 48 Cal. App. 2d 488, 119 P.2d 992 (Dist. Ct. App. 1941); Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W.2d 1024 (1938); Nashua Hospital Ass'n v. Gage, 85 N.H. 335, 159 Atl. 137 (1932); Overton v. Ragland, 54 S.W.2d 240 (Tex. Civ. App. 1932).

[11] See Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949); Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946); Brenizer v. Stephens, 220 N.C. 395, 17 S.E.2d 471 (1941).

[12] Shuford v. Asheville Oil Co., 243 N.C. 636, 91 S.E.2d 903 (1956); Oldham v. McPheeters, 203 N.C. 141, 164 S.E. 731 (1932); Higgins v. Hough, 195 N.C. 652, 143 S.E. 212 (1928); Starkey v. Gardner, 194 N.C. 74, 138 S.E. 408 (1927).

cases, although both were considered, there was no indication of which factor was decisive, nor that either standing alone could have been. There was then, until *Tull,* at least a possibility under this line of cases that a substantial change outside could have tipped the balance in favor of invalidation when coupled with change within which, standing alone, would not have sufficed. The significance of *Tull* in this regard is that it may indicate the end of this possibility,[13] for there the court flatly refused to consider evidence of outside change although there was also evidence of some change within.[14]

When faced with the problem of piece-meal destruction of the restrictions, some jurisdictions allow them to be lifted on a few lots at a time as they are affected.[15] On the other hand, a majority of courts require the covenants to be invalidated *in toto* or not at all.[16] Unlike North Carolina, however, many jurisdictions which reject such step-by-step lifting of restrictions do hold that an outside change will warrant release from the restrictions even though there is no change of circumstances within the restricted tract.[17]

[13] Advocates seeking to have an outside alteration considered in conjunction with some changes within in spite of Tull v. Doctors Building, Inc., may be aided by the fact that all of the North Carolina authority relied upon in that case consisted of cases showing absolutely no change within the covenanted area. Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949); Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946); Turner v. Glenn, 220 N.C. 620, 18 S.E.2d 197 (1942); Brenizer v. Stephens, 220 N.C. 395, 17 S.E.2d 471 (1941). In addition to pointing out that Tull based its decision upon these cases which are distinguishable on the facts, one could also show that there was no mention whatever of the more liberal line of cases in North Carolina whose decisions *were* based on change *both* within *and* in the surrounding area. See cases cited note 12 *supra.* Failure to expressly overrule these decisions should be significant.

[14] The existence of change both inside and outside of the tract is indicated in the findings of fact 20-34. Tull v. Doctors Building, Inc., 255 N.C. at 31-32, 120 S.E.2d at 822-23. At 255 N.C. 39-40, 120 S.E.2d 828-29, the court adjudges the change within to be insufficient to warrant removal of the restrictive covenants. At 255 N.C. 38, 120 S.E.2d 827, in denying consideration of the outside changes the court quotes from the Brenizer case: "It is generally held that the encroachment of business and changes due thereto, in order to undo the force and vitality of the restrictions, must take place within the covenanted area." Brenizer v. Stephens, 220 N.C. 395, 399, 17 S.E.2d 471, 473 (1941).

[15] Wolff v. Fallon, 269 P.2d 630 (Cal. Dist. Ct. App. 1954), *aff'd,* 44 Cal. 2d 695, 284 P.2d 802 (1955); Downs v. Kroger, 200 Cal. 743, 254 Pac. 1101 (1927); Clark v. Vaughan, 131 Kan. 438, 292 Pac. 783 (1930); Cushing v. Lilly, 315 Mich. 307, 24 N.W.2d 94 (1946).

[16] Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 Pac. 132 (1931); Boston-Edison Protective Ass'n v. Goodlove, 248 Mich. 625, 227 N.W. 772 (1929); Rombauer v. Compton Heights Christian Church 328 Mo. 1, 40 S.W.2d 545 (1931); Martin v. Cantrell, 225 S.C. 140, 81 S.E.2d 37 (1954).

[17] See, *e.g.,* Fairchild v. Raines, 24 Cal. 2d 818, 151 P.2d 260 (1944);

The flat pronouncement against piece-meal lifting in the principal case seems to be North Carolina's first definitive holding on the point. Although a prior case possibly furnishes some basis for piece-meal lifting,[18] the decision on this point in *Tull* is unequivocal.[19] Application of this holding in conjunction with the holding against any consideration of outside changes combine to form a doctrine which invites analysis in terms of its commercial and social utility.

If these two rules are uniformly and inflexibly applied they presumably will equally affect small restricted tracts of two or more lots and large tracts with hundreds of lots. It is obvious that a wholesale change from residential to commercial use of property surrounding a two or three lot subdivision should much more readily warrant releasing all the lots from the restrictions than should a similar

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Esso Standard Oil Co. v. Mullen, 200 Md. 487, 90 A.2d 192 (1952); Page v. Murray, 46 N.J. Eq. 325, 19 Atl. 11 (Ch. 1890).

[18] The opinions of supreme court cases prior to Tull contains no discussion of this point as far as this writer has been able to ascertain. However, Oldham v. McPheeters, 203 N.C. 141, 164 S.E. 731 (1932), consists of a short opinion affirming the lower court's ruling which released from the restrictions only the two lots affected. The court did not discuss this particular result of their affirmation. However, the superior court judge did dwell on the subject at length.

"It has been seriously suggested that any deviation from the original scheme must of necessity destroy the whole scheme in the whole development. This Court can not arrive at such a conclusion. To do so would be to hold that equity is without power or authority to do exact justice with a nicety. This Court conceives it has been of the very essence of equity in all of its past history to venture into new paths if necessary to discover a way to do exact justice in such fashion that it will work no undue hardship to the other interested parties related to the situation. It is in an effort to reach such an end that this Court holds upon the evidence and the findings of fact that a radical change has been wrought in the area affected by the conditions existing at and near the intersection of McDowell and Morehead Streets, but that this change in this particular area does not change the remainder of the development and does not release the remainder of the development from the original restrictions in reference to residential purposes." Record, p. 46, Oldham v. McPheeters, 203 N.C. 141, 164 S.E. 731 (1932), *as quoted in* Brief for Plaintiff, p. 14, Tull v. Doctors Building, Inc., 255 N.C. 23, 120 S.E.2d 817 (1961).

[19] "It is not necessary for us to approve or disapprove of the judge's opinion that all of the lots in Block G and Lots 15, 16, and 17 in Block P should be released from the restrictions requiring residential use, but we do concur in his opinion as to the law set forth in conclusion of law 5." Tull v. Doctors Building, Inc., 255 N.C. 23, 41, 120 S.E.2d 817, 829-30. Conclusion of law 5 reads: "The court is of the opinion that Lots 4, 5, 6, 7, 8 in Block G and Lots 15, 16, and 17 in Block P, as shown on plaintiffs' Exhibit 1, should be released from the restrictions requiring residential use; that the court would adjudge that these lots are so released, except for the court's further opinion that the law requires either a complete abrogation of the restrictive covenants on all of the lots in the subdivision, or a complete enforcement of the restrictive covenants as to all of the lots in the subdivision." *Id.* at 34-35, 120 S.E.2d at 825.

change around a much larger residential area. Furthermore, piecemeal lifting has not at all the same practical significance in a small subdivision that it has in a large one, whatever the basis for invalidation.

Another factor which militates against an inflexible application of these two rules arises out of the common practice of developing large subdivisions in successively platted portions of the whole tract under identical restrictions. As a practical matter the residents of one of these subdivisions are apt to consider it a single unit in the sense of its geography and of their social and economic identity of interest as residents.[20] But the North Carolina court considers that for related legal purposes each of the successively platted tracts is a *separate* unit.[21] The question then arises as to whether in application of the *Tull* rule against consideration of changes occurring outside a restricted subdivision, the court will focus on the unified whole or the separate units as the critical area to determine what is "outside." If the separate unit concept is applied, an anomalous situation could result. Abandonment of restrictions in several of these legal units, actually portions of a unified subdivision, could result in a radical change in the very heart of the overall residential district similarly restricted. Yet, the holding in *Tull* inflexibly applied could deny relief to a lot immediately adjacent to the completely changed tract because there had been no change "within the subdivision."

Equity might better be served[22] if some flexibility of doctrine in both regards were maintained to take into account the widely varying

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[20] See generally 2 AMERICAN LAW OF PROPERTY § 9.39 (Casner ed. 1952); 5 POWELL, REAL PROPERTY § 683-84 (1962); 3 TIFFANY, REAL PROPERTY § 871-75 (3d ed. 1939).

[21] In Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949), the court seemingly disposed of this problem with finality in discussing a contention of the defendant. "They assert initially that the Stephens Company had developed Myers Park as a unit composed of its different subdivisions . . . which are merely parts of Myers Park as a whole . . . . The defendants overlook the fact that this identical contention has been expressly rejected by this Court on at least four occasions. McCleskey v. Heinlein, 200 N.C. 290, 156 S.E. 489; Johnson v. Garrett, 190 N.C. 835, 130 S.E. 835; Homes Co. v. Falls, *supra* [184 N.C. 426, 115 S.E. 184 (1922)]; Stephens Co. v. Homes Co., 181 N.C. 335, 107 S.E. 233. The land shown on the map of Blocks 11-C and 11-D of Myers Park 'is in fact, and was designed to be, a separate, distinct and integral subdivision,' bearing no relationship whatever in the present field of law to any other subdivision of Myers Park. Stephens Co. v. Homes Co., *supra*."

[22] See note 18, *supra*.

circumstances under which restricted subdivisions are created, and the widely varying sizes of subdivisions however created.

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Torts—Libel and Slander—Defenses of Qualtified Privilege and Fair Comment

The law early recognized the desirability of encouraging free public discussion and criticism of the official conduct of persons in public life in order to combat corruption. This was severely hampered, however, by the strictures of the common-law actions of libel and slander.[1] In time, the courts devised a defense to these actions sometimes labelled qualified or conditional privilege and sometimes fair comment. Whether these labels carry with them any substantive distinction has been a matter of considerable controversy.

Fair comment embraces within its protection the right to criticize the public conduct of government officers and employees[2] at every level.[3] No comment or criticism, however, is fair if it is made through actual malice.[4] Neither is it fair comment if it is unreasonable or made without an honest purpose.[5] Furthermore, the doc-

[1] See PROSSER, TORTS 572 (2d ed. 1955). Libel and slander generally are actions which have not been blessed by agreement or uniformity of opinion among those learned in the law. Mr. Justice Black has said: "I have no doubt myself that the provision, [U.S. CONST. amend. I] as written and adopted, intended that there should be no libel or defamation law in the United States . . . just absolutely none so far as I am concerned." *Justice Black & First Amendment Absolutes: A Public Interview,* 37 N.Y.U.L. REV. 549, 557 (1962). Compare the advocacy of absolute liability for defamation even, in certain situations, where the statements are in fact true in Riesman, *Democracy and Defamation: Fair Game and Fair Comment II,* 42 COLUM. L. REV. 1282 (1942).

[2] This comment is limited in scope to a discussion of the doctrine of fair comment as it relates to public officers and candidates. Other areas in which it has been applied are: works of art and literature, Triggs v. Sun Printing & Publishing Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904); RESTATEMENT, TORTS § 609 (1938); the commodities, wares and merchandise of those who appeal to the public to buy, Schwarz Bros. Co. v. Evening News Publishing Co., 84 N.J.L. 486, 87 Atl. 148 (Sup. Ct. 1913); RESTATEMENT, TORTS § 610 (1938); and those in charge of educational, religious and charitable institutions and other organizations in which the public has a substantial interest, Klos v. Zahorik, 113 Iowa 161, 84 N.W. 1046 (1901); RESTATEMENT, TORTS § 610 (1938). See generally 1 HARPER & JAMES, THE LAW OF TORTS 420 (1956).

[3] RESTATEMENT, TORTS § 607 (1938).

[4] Brinsfield v. Howeth, 107 Md. 278, 68 Atl. 566 (1908).

[5] Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955); England v. Daily Gazette Co., 143 W.Va. 700, 104 S.E.2d 306 (1958).