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COVENANTS - EFFECT OF CHANGE OF CONDITIONS ON EQUITABLE RESTRICTIONS

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COVENANTS — EFFECT OF CHANGE OF CONDITIONS ON EQUITABLE RESTRICTIONS — Plaintiff was a lot owner in a residential district consisting of twenty-three blocks. Each lot in the district was subject to a restriction, imposed by the grantor, which limited the use of the lots to residence purposes. Subsequent to the imposition of this restriction, numerous oil and gas wells had been drilled in the territory surrounding the district, so that the lots in the district had depreciated in value approximately thirty-five to fifty per cent. By ordinance, the use zoning area which included the district had been changed from a residence use to an oil and gas use. At the time of the plaintiff's action, approximately half of the lot owners had manifested a desire to be relieved from the restriction, either by making oil and gas leases, or by signing circulated petitions of waiver of the restriction. In an action by the plaintiff, it was *held*, in a seven to two decision, that there had not been a sufficient change of condition to warrant the denial of an injunction. *Southwest Petroleum Co. v. Logan*, 180 Okla. 477, 71 P. (2d) 759 (1937).

Equity will enforce by injunction restrictions which are imposed on the use of land in conformance to a general plan for the development of such land.[1] However, there may be such a change in the condition and character of the use, either of the restricted land itself, or of the adjacent property, that a court of equity will refuse to grant an injunction to enforce the restriction.[2] Similarly, changes of conditions have been the basis of affirmative relief in the form of cancellation of equitable restrictions,[3] and declaratory judgments have been rendered in which these equitable restrictions have been set aside because of

[1] 2 TIFFANY, REAL PROPERTY, 2d ed., 1425 et seq. (1920).

[2] Cases are collected in: 103 A. L. R. 734 (1936); 85 A. L. R. 985 (1933); 54 A. L. R. 812 (1928).

[3] Cases are collected in 88 A. L. R. 405 (1934); 103 A. L. R. 734 (1936).

change of condition.[4] The law is clear that, in order to bar the enforcement of the restriction by injunction,[5] the change of condition must be one which is so substantial that the original purpose and intention of the parties creating the restriction has been destroyed by the changed conditions.[6] Difficulties arise in the application of this rule to the facts of each particular case. The mere fact, by itself, that the restricted land will be greatly enhanced in value, if the restriction is removed, is not ordinarily deemed to be a sufficient change to warrant the denial of an injunction.[7] And, in accord with the principal case, it has generally been held that the mere fact that a zoning ordinance which permits a violation of the restriction has been enacted subsequent to the creation of the restriction is not, in itself, such a change as to warrant the denial of an injunction.[8] It should also be noted that, generally speaking, a change in the condition of property adjacent to the restricted property is less likely to result in a refusal to grant injunctive relief, than a change in the condition of the restricted property itself.[9] This is because the latter type of change will be quite likely to introduce such factors as laches, estoppel, or abandonment of the restriction; any of these, independently of any change of condition, will justify a barring of the equitable enforcement of the restriction.[10] However, beyond the above-mentioned broad

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

[5] It should be noted that, although the specific enforcement of the restriction by means of an injunction is denied, damages may be still recovered. See: Alderson v. Cutting, 163 Cal. 503, 127 P. 157 (1912); Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741 (1892). The awarding of damages in such cases has been criticized as a private condemnation of property rights, in 31 HARV. L. REV. 876 (1918).

[6] 4 THOMPSON, REAL PROPERTY 557 et seq. (1924).

[7] Van Meter v. Manion, 170 Okla. 81, 38 P. (2d) 557 (1934); Reeves v. Comfort, 172 Ga. 331, 157 S. E. 629 (1931); Drexel State Bank v. O'Donnell, 344 Ill. 173, 176 N. E. 348 (1931); Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 P. 132 (1931); Miller v. Klein, 177 Mo. App. 557, 160 S. W. 562 (1913); Evans v. Foss, 194 Mass. 513, 80 N. E. 587 (1907). It should be noted, however, that enhancement of value is very frequently one of the many factors which contribute to the denial of an injunction. See: Oldham v. McPheeters, 203 N. C. 141, 164 S. E. 731 (1932); Austin v. Van Horn, 255 Mich. 117, 237 N. W. 550 (1931); Hess v. Country Club Park, 213 Cal. 613, 2 P. (2d) 782 (1931); Forstmann v. Joray Holding Co., 244 N. Y. 22, 154 N. E. 652 (1926); Moreton v. Louis G. Palmer & Co., 230 Mich. 409, 203 N. W. 116 (1925).

[8] Backman v. Colpaert Realty Corp., 101 Ind. App. 306, 194 N. E. 783 (1935); Heitkemper v. Schmeer, 146 Ore. 304, 29 P. (2d) 540 (1934); Dolan v. Brown, 338 Ill. 412, 170 N. E. 425 (1930); Ludgate v. Somerville, 121 Ore. 643, 256 P. 1043 (1927); Vorenberg v. Bunnell, 257 Mass. 399, 153 N. E. 884 (1926).

[9] Compare: Klug v. Kreisch, 246 Mich. 14, 224 N. W. 339 (1929), and Boston-Edison Protective Assn. v. Goodlove, 248 Mich. 625, 227 N. W. 772 (1929); Mathews Real Estate Co. v. National Printing & Engraving Co., 330 Mo. 190, 48 S. W. (2d) 911 (1932), and Van Meter v. Manion, 170 Okla. 81, 38 P. (2d) 557 (1934); Bohm v. Silberstein, 220 Mich. 278, 189 N. W. 899 (1922) and Starkey v. Gardner, 194 N. C. 74, 138 S. E. 408 (1927).

[10] That is to say, a change of condition within the restricted district, especially if, as is quite likely, the change consists of violations of the restriction in question,

generalities, one cannot with any degree of certainty predict future holdings. One can do no better than to point out the numerous factors which in varying degrees influence the decision of the court. A few of these factors are: (1) the type of restriction imposed, (2) the nature, location, and duration of the change of condition, and (3) the public policy which discourages restraints on the alienability of land.[11]

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may very well be (if the plaintiff has participated in the change) a sound basis for estopping the plaintiff from specifically enforcing the restriction, or may manifest an intention, on the part of all concerned, to abandon the restriction, which will similarly preclude the plaintiff from obtaining equitable relief. See: Klug v. Kreisch, 246 Mich. 14, 224 N. W. 339 (1929); Loud v. Pendergast, 206 Mass. 122, 92 N. E. 40 (1910).

[11] Notice that although it is readily apparent that a burdensome equitable restriction may become a serious restraint on the alienability of the restricted land, this policy argument may be twisted to obtain a contrary result. That is to say, it can be argued that the alienability of land may be somewhat impaired by the vendor's inability to offer to the purchaser a binding equitable restriction which will permanently benefit the purchased land.