Covenants--When a Change of Conditions May Render a Residential Restriction Unenforceable

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to do so would result in an untenable situation and one that would be contrary to the intention of Congress in waiving sovereign immunity. To allow the Government to determine the scope of the employment of its agents by written memoranda would cause many actions under the Federal Tort Claims Act to depend upon the court's interpretation of government correspondence. Such a result would be opposed to the injured individual's right of recovery for harm done to him through no fault of his own and thus opposed to the function of tort law as it is recognized in its relationship to well established principles of agency.

CHARLES CALK

Covenants—When a Change of Conditions May Render a Residential Restriction Unenforceable—The plaintiffs, husband and wife, purchased two lots in a subdivision, which were subject to certain restrictive covenants stating that they were to be used for residential purposes only. The plaintiffs brought an action in equity to have these residential restrictions adjudged unenforceable, alleging that conditions in the neighborhood had changed so as to defeat the purpose of the covenants. Commercial buildings had been built across the street from the subdivision, and the plaintiffs' two lots had been zoned "Commercial" by the City Zoning Commission. However, the chancellor sustained a demurrer to the plaintiffs' petition, finding that conditions had not changed within the subdivision itself so as to defeat the purpose of the restriction, and that the action of the zoning commission did not nullify the covenant. Held: Affirmed. None of the other lot owners within the subdivision had waived or abandoned the covenant, and while the action of the zoning commission indicated a substantial change in the general area from residential to commercial purposes, it did not have the force of destroying the restrictive covenants. Changes must occur and be acquiesced in by the owners of other lots within the subdivision, thus rendering the changes permanent and materially defeating the purpose of the covenant, before equity will declare the restriction unenforceable. Franklin v. Moats 273 S.W. 2d 812 (Ky. 1954).

The situation presented in this case is one of ever-increasing importance. The swift expansion of urban districts within the past fifty years, especially the expansion of business and industry into suburban areas, has created a conflict between the interests of homeowners in preserving the residential character of the area and the interests of
commerce and industry in acquiring new sites. Developers of subdivisions normally handle the problem temporarily by inserting in their deeds residential restrictions limiting the character and usage of structures to be erected. However, the property may soon become more valuable for business purposes, and it is usually then that the attempted breach of the covenant occurs.

In deciding whether or not to enjoin the violation of a restrictive covenant, or to declare such covenants unenforceable, a court will usually consider the equitable result in light of all the circumstances. Injunctive relief will sometimes be denied where to grant it would be inequitable, or where those seeking relief have estopped themselves by their abandonment of the restriction or by their inaction.\(^1\) This is the general rule applicable to the enforcement of these restrictions. In applying this general rule, however, the courts differ in their interpretation of how extensive the changes in the neighborhood must have been in order to render inequitable the enforcement of the restriction. A majority of courts hold that changes outside the restricted tract do not necessarily justify the denial of injunctive relief, since such changes might reasonably have been within the contemplation of the original parties to the restrictive covenants.\(^2\) These changes outside the area do not render the restriction valueless, but, on the contrary, protect the entire tract against destruction of the covenants by successive enroachments. The theory which courts have adopted in enforcing these restrictions is illustrated by the language used in Swan v. Mitshkun:\(^3\)

\[\ldots\] those owning property in a restricted residential district or neighborhood, and especially those who have their homes there and have been led to buy or build in such locality by reason of restrictive

\(^1\) Cherry v. Board of Home Missions, etc., 254 Mich. 496, 236 N.W. 841 (1931).

\(^2\) Strong v. Hancock, 201 Cal. 590, 258 Pac. 60 (1927) (Changed conditions in surrounding neighborhood, but outside the tract restricted to residential use, did not make it inequitable to enforce the covenants); Wineman Realty Co. v. Pelavin, 267 Mich. 594, 255 N.W. 393 (1934) (Injunction against violations of restrictions was granted where owners in the subdivision had observed the restrictions, though there were business inroads around the area.); Moreton v. Louis G. Palmer Co., 230 Mich. 409, 203 N.W. 116 (1925) (Increased traffic and other changes outside the immediate neighborhood held insufficient to warrant denial of injunction); Strauss v. Ginzberg, 218 Minn. 57, 15 N.W. 2d 130 (1944) (Insufficient change in the character of the neighborhood acquiesced in by other owners in the addition); Brown v. Huber, 80 Ohio St. 183, 88 N.E. 322 (1909) (Changes in the character of the locality were not within the particular neighborhood in which the plaintiff's property was situated. Injunction granted.); Magnolia Petroleum Co. v. Drauver, 183 Okla. 579, 83 P. 2d 840 (1938) (Unless there is a release or violation of restrictions within the same block, an injunction will issue against violation of such restrictions by a single lot owner.).

\(^3\) 207 Mich. 70, 173 N.W. 529, 530 (1919).
covenants running with the land imposed upon the street, block, or subdivision in which they have purchased, are entitled to protection against prohibited invasion regardless of how close business may crowd around them on unrestricted property, provided the original plan for a residential district has not been departed from in the restricted district, street, or block and the restrictive requirements have been generally enforced, or accepted and complied with by purchasers.

A minority of courts hold that changed conditions within the neighborhood, though outside the restricted tract itself, are sufficient grounds for refusal to enforce restrictive covenants. These courts usually refuse injunctive relief, or declare the covenant unenforceable, where the restricted lot in question has been rendered undesirable or unsuitable for residential purposes, and where maintenance of the infringing structure would not seriously injure the interest of the lot owner in whose favor the restriction is sought to be enforced.4

Although there is a conflict of authority as to whether changes must be within the restricted tract itself in order to preclude enforcement of restrictive covenants, courts have generally held that a ordinance which rezones certain areas for business or commercial purposes does not supersede existing residential restrictions so as to prevent their enforcement.5 A leading case on this point, Vorenberg v. Bunnell,6 involved a suit to enjoin a violation of equitable restrictions. The defendant sought to build a public garage in an area developed for residential purposes, and, in defense to the plaintiffs' suit, relied upon the fact that the lots had been zoned commercial by a zoning ordinance. The court, in granting the injunction, stated:

The zoning law . . . can not constitutionally relieve land within the district covered by it from lawful restrictions affecting its use for business purposes. The question, whether equity will specifically enforce such restrictions, is . . . a matter for the exercise of sound equitable discretion in the light of all attendant circumstances.7

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4 Downs v. Kroeger, 200 Cal. 793, 254 P. 1101 (1927) (Terms and restrictions of the covenant no longer applicable to the existing state of things); Windermere-Grand Improvement & Protective Ass'n v. American State Bank of Highland Park, 205 Mich. 539, 172 N.W. 29 (1919) (Growth of manufacturing in the neighborhood and increased traffic on the street fronting the restricted area defeated the purpose of the residential restrictive covenants); Forstmann v. Joray Holding Co. 244 N.Y. 22, 154 N.E. 652 (1926) (Action to remove a building which violated restrictions. The court held that the restricted block had no special advantages for residence purposes, which would offset the encroachment of business, since surrounding area was commercial and the value of the property for residence purposes was relatively small.).

5 Gordon v. Caldwell, 235 Ill. App. 170 (1924); Magnolia Petroleum Co. v. Druver, 183 Okla. 579, 83 P. 2d 840 (1938); Spencer v. Maverick, 146 S.W. 2d 819 (Texas 1941); Faubian v. Busch, 240 S.W. 2d 861 (Texas 1951).

6 257 Mass. 399, 153 N.E. 884 (1926).

7 Id. 153 N.E. at 887.
The Kentucky Court of Appeals first adopted this view with regard to zoning regulations in the case of *Goodwin Bros. v. Combs Lumber Co.* There the court refused injunctive relief against the violation of restrictive covenants because the restrictions had been disregarded by owners within the area for a number of years. The court stated, by way of dictum, that a regulation zoning the area for commercial purposes, while indicating a change in the nature of the subdivision, did not have the force of destroying the restrictive covenants.

The problem of changes in the neighborhood had been considered previously by the Kentucky Court in the case of *Mechling v. Dawson.* It was held in this case that since the street on which the plaintiff lived still retained its quiet residential character, and in view of the fact that there had been no fundamental change over to business within the restricted area itself, the covenant was properly enforced. The covenant, which restricted the owners to residential construction, had been technically violated by the erection of a church, but the court said that this was not the same as establishing business within the tract, and that this violation was too inconsequential to effect a material change in the character of the neighborhood.

A minority of courts, while declaring covenants unenforceable because of a change of conditions in the neighborhood, also hold that the covenants are still enforceable at law in an action for damages resulting from a breach. This result, of course, creates a cloud on the title to the property. In a growing number of cases, however, courts have held that if the restriction is terminated in equity, the covenant creating it is also terminated at law. The result is to remove any cloud on the title which might render it unmarketable and to bar any action at law seeking damages for breach of covenant.

It is believed that the Kentucky court has adopted the better view in holding that a change of conditions in the neighborhood, outside the restricted area, does not preclude the enforcement of restrictive covenants. Many persons purchase property in restricted areas relying on the fact that their quiet and residential neighborhood will not be invaded by the increased traffic and congestion that usually

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8 *275 Ky. 114, 120 S.W. 2d 1024 (1938).*
9 *234 Ky. 318, 28 S.W. 2d 18 (1930).* See also *Greer v. Bornstein* 246 Ky. 286, 54 S.W. 2d 997 (1932); There it was held that changes in the neighborhood would not preclude enforcement of a restrictive covenant when they occurred on property adjacent to the development but not on any part of it.
10 See also *Vorenburg v. Bunnell,* *supra* note 6.
accompany a business district. Of course, allowing one business to be established within a subdivision obviously would not affect the whole area and would probably cause only slight inconvenience to adjoining lot owners. But the successive encroachment of perhaps three or four businesses, although in only one section of the subdivision, might constitute a waiver which would allow the whole area to be converted to commercial use; and as more businesses are established, the realty would become more valuable as commercial property, thus inducing lot owners to sell property for business rather than residential use. It is sometimes necessary in cities that residential and business districts adjoin one another, but the right of homeowners to injunctive relief against violations of restrictive covenants should be upheld, until such owners themselves allow the covenants to lapse by waiver or abandonment.

Robert A. Palmer

—See the dissenting opinion in Downs v. Kroeger, supra note 4.