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Real Property - Restrictive Covenants - Effect of Expiration of Time Limitation in Deed Under General Plan

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REAL PROPERTY—RESTRICTIVE COVENANTS—EFFECT OF EXPIRATION OF TIME LIMITATION IN DEED UNDER GENERAL PLAN—Plaintiffs were the owners of two lots in a subdivision originally owned by a real estate development company. Defendants were property owners or lien holders within the subdivision, the development company, and the prospective purchasers of plaintiff's lots who refused to buy on the ground that the lots were subject to certain restrictions. All purchasers of lots within the subdivision had received the same form deed containing the identical provision that restrictions, including one prohibiting nonresidential use, were to be enforceable for twenty-one years *from the date of each conveyance.* The first lot was sold in 1927 and plaintiffs' lots were conveyed in 1944. Plaintiffs brought suit for a declaratory judgment that their lots were no longer subject to the restrictions, since more than twenty-one years had elapsed *from the date of the first conveyance* in 1927. The trial court held that the restrictions were no longer enforceable by the other property owners and were not a cloud on plaintiffs' title. On appeal, *held,* affirmed. From the date of the first conveyance in 1927, negative mutual easements were established for the entire subdivision and were enforceable by purchasers within the plan for a period of twenty-one years. At the end of that time, restrictions on the first purchaser's land being unenforceable, mutuality among lot owners ceased and the restrictions on the remaining land became unenforceable by the lot owners.[1] *Stanton v. Gulf Oil Corp.,* (S.C. 1957) 101 S.E. (2d) 250.

[1] Neither the trial court nor the Supreme Court indicated why the right of the original grantor, a defendant here, to enforce the restrictions was not a cloud on plaintiffs' title. This right was clearly recognized. Principal case at 252. Although the facts

Ever since *Tulk v. Moxhay*,[2] restrictive covenants, similar in nature to the ones involved in the principal case, have been recognized as enforceable in equity by property owners without regard to the requirements of privity of estate in actions at law. The general belief has been that it would be inequitable to allow a property owner to violate a restriction of which he had notice when he purchased the land.[3] Enforcement of restrictive covenants on land sold under a general plan has been especially significant in protecting the proper development of residential subdivisions.[4] Equity has generally allowed these restrictions to be enforced by the various landowners within the subdivision absent a showing that there has been a substantial change in the surrounding neighborhood or evidence of other circumstances which would make enforcement inequitable.[5] While a number of courts have listed mutuality as a requirement for enforcement of restrictions under a general plan, an examination of the cases indicates that only in a few was lack of mutuality actually a factor, since mutuality in fact was present in the others.[6] The rationale behind the mutuality rule is that it would be inequitable to allow one not a party to the covenants to obtain the benefit of the restrictions where there are no corresponding restrictions burdening his own land.[7] In the only case found to be substantially on all fours with the principal case, the fact that the time limitation had expired in two deeds was held

are not clear, it may be that the grantor real estate company no longer owned any lots in the subdivision and would thus be unable to prove any injury sufficient to obtain an injunction or compensatory damages.

2 2 Ph. 774, 41 Eng. Rep. 1143 (1848).

3 There has been a real problem in developing a satisfactory legal theory to give effect to this general belief. Clark, "The Assignability of Easements, Profits, and Equitable Restrictions," 38 YALE L. J. 139 at 153 (1928). The two theories that have been developed are the property theory and the contract theory. Under the former, restrictive covenants are treated as creating something akin to an interest in land. The interest thus created is referred to as an equitable servitude or equitable easement or, in the case of a negative covenant, as a negative equitable easement. See CLARK, REAL COVENANTS, 2d ed., 174 (1947); Pound, "The Progress of the Law, 1918-1919," 33 HARV. L. REV. 813 (1919). Under the contract theory, the covenant is considered as creating contract rights which are enforceable by those parties the covenant was intended directly to benefit. 3 TIFFANY, REAL PROPERTY, 3d ed., §861 (1939). Neither theory has accomplished entirely satisfactory results in all situations and there has been a marked tendency among the courts to apply one or the other theory in a given situation in order to reach a result deemed most desirable. Reno, "The Enforcement of Equitable Servitudes in Land," 28 VA. L. REV. 951 at 978 (1942).

4 DeGray v. Monmouth Beach Clubhouse Co., 50 N.J. Eq. 329, 24 A. 388 (1892).

5 McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N.E. 162 (1915).

6 See, e.g., DeGray v. Monmouth Beach Clubhouse Co., note 4 supra, and Houston Petroleum Co. v. Automotive Products Credit Assn., 9 N.J. 122, 87 A. (2d) 319 (1952), where mutuality was made a requirement to enforcement but was not a factor in either decision. But see Coulter v. Seybold, (Ohio Com. Pl. 1949) 94 N.E. (2d) 47, for actual application of the mutuality rule in a case involving a general plan.

7 O'Malley v. Central Methodist Church, 67 Ariz. 245, 194 P. (2d) 444 (1948).

not to bar enforcement of the covenant.[8] The court in that case made an examination of all the circumstances of the execution of the covenants and determined that they were made for the benefit of other property owners within the development and that it would be inequitable not to allow the restrictions to be enforced according to their terms.[9] It is submitted that lack of complete mutuality should not be conclusive against enforcement, but rather that other factors should be taken into consideration before a court makes a determination that the restrictions either should or should not remain enforceable.[10] This would seem to be the approach adopted in a number of cases where restrictions were held to be enforceable as part of a general plan although the covenants were not strictly mutual.[11] Factors indicating that it might be inequitable to refuse to enforce the restrictions according to their terms would include evidence that purchases were made in reliance on the restrictions remaining enforceable as stated in the form deed by one property owner within the development against another and that those landowners no longer legally bound are nevertheless complying with the terms of the covenants.[12] Enforcement of the restrictions could still be refused upon a showing by the purchaser that the time limitations in so many other deeds had expired that the uniform plan was no longer in effect at the time of his purchase. All in all, the simplest method of avoiding the problem involved in the principal case would be to insert into the form deed a specific future date at which time all restrictions within the development would terminate,[13] rather than specifying a period of time to be measured from the date of each conveyance.

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[8] Hooker v. Alexander, 129 Conn. 433, 29 A. (2d) 308 (1942). The grantor was one of the parties seeking enforcement of the restrictions by injunction, but the court's language indicates the decision was not based on this factor.

[9] Ibid.

[10] Wolff v. Green, 199 Misc. 758, 99 N.Y.S. (2d) 495 (1950); Coughlin v. Barker, 46 Mo. App. 54 (1891); 4 THOMPSON, REAL PROPERTY §3403 (1924).

[11] Tubbs v. Green, 30 Del. Ch. 151, 55 A. (2d) 445 (1947) (restrictions omitted from a few deeds in general plan); Elliot v. Keely, 121 Ind. App. 529, 98 N.E. (2d) 374 (1951) (restrictions differed as to minimum amount owner had to expend in constructing residence on lot); Allen v. Barrett, 213 Mass. 36, 99 N.E. 575 (1912); Hartt v. Rueter, 223 Mass. 207, 111 N.E. 1045 (1916); Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224 (1935); Velie v. Richardson, 126 Minn. 334, 148 N.W. 286 (1914); Rowe v. May, 44 N.M. 264, 101 P. (2d) 391 (1940); Hayes v. Gibbs, 110 Utah 54, 169 P. (2d) 781 (1946) (not all deeds under general plan contained restrictions).

[12] Bauby v. Krasow, 107 Conn. 109, 139 A. 508 (1927); Rossini v. Freeman, 136 Conn. 321, 71 A. (2d) 98 (1949); Turner v. Bracato, 206 Md. 336, 111 A. (2d) 855 (1955); Cheatham v. Taylor, 148 Va. 26, 138 S.E. 545 (1927). Note that this approach would be impossible in California under Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919), which requires that there be a specific statement in the deed granting benefit to third parties before they are entitled to enforce restrictions.

[13] Moore v. Kimball, 291 Mich. 455, 289 N.W. 213 (1939); Gardner v. Maffitt, 335 Mo. 959, 74 S.W. (2d) 604 (1934).