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REAL PROPERTY—UNENFORCEABILITY OF RESTRICTIVE COVENANTS—METHODS OF PROTECTING PLAN—The restrictive covenant[1] is a device by which property owners can gain some degree of assurance that neighboring property will not be used in an objectionable way. The restrictions are usually reciprocal and negative, common examples being building restrictions, regulations as to use for business, and prohibitions against occupancy by certain races. By private agreement much greater protection can be had than is afforded by zoning ordinances[2] and nuisance doctrines.

Yet a plan which burdens the free use of land will seldom be pleasing to all owners during its entire continuance, and it can be confidently predicted that the time will come when some holders want to be free from the covenants. Inasmuch as a release would require the assent of all persons having standing to enforce, the question of enforceability will be carried to the courts. This might be in the form of a suit to enjoin violations, or in an action for a declaration of the validity and effect of the restrictions. Initial questions are those of public policy and of construction, but, even if the meaning and validity of the

Legislature, Mich. Ann Stat. (1943) § 27,3178 (641) to (654). Sec. 27,3178 (646) (2) follows:

"Whenever a fiduciary continues the business of decedent pursuant either to the provisions of the last will and testament of the decedent or the provisions of a continuation agreement, the fiduciary shall not be personally liable . . . to any creditors of the continued business of the decedent . . . for any claims, demands, or causes of action either ex delictu or ex contractu, arising out of, or in connection with, the conduct or operation, or the act of any agent, employee, or copartner of such business, but persons who become creditors . . . shall, in so far as the fiduciary of the decedent's estate is concerned, be limited in the payment or satisfaction of their claims to the assets of the business."

It could be argued that a party injured by tort of the executor's agent is not a "creditor of the continued business of decedent," that under principles existing at the time the statute was passed the injured party could look only to the executor, and that therefore, he does not come within the purview of the statute. It is submitted, however, that such a construction would be a perversion of the express language of the statute. If the statute is not construed to include claims of tort and contract creditors that are technically creditors of the executor or administrator under common law doctrines, the language quoted above is nugatory.

[1] The writer uses the term, "restrictive covenant," advisedly because it is widely used by lawyers, by real estate men, and in the indices to standard reference works. Various other terms have been suggested to aid in theoretical analysis. 5 PROPERTY RESTATEMENT 3147 (1944) and chapter following, uses "Promises Respecting the Use of Land." See CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 170-171 (1947).

[2] Racial restrictive covenants may be imposed even though such restrictions would be unconstitutional as part of a zoning ordinance under the rule of Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16 (1917). See 45 MICH. L. REV. 733 (1947). A zoning ordinance does not nullify restrictive covenants imposing more stringent regulations. 3 TIFFANY, REAL PROPERTY, § 858 (1939).

restrictions in issue are clear, still it does not necessarily follow that they are specifically enforceable.[3] Those interested in enforcement almost invariably ask for injunctive relief, which requires a resort to equity. They must, therefore, meet the standards required of those seeking equitable relief, and are subject to equitable defenses.

The amount of litigation on enforcement of restrictive covenants has been enormous. The covenants have been upheld in most decisions, but enough cases exist in which enforcement has been denied to produce serious uncertainties. Moreover, a justiciable controversy can be presented so easily that parties interested in restrictions may suffer serious inconveniences in protecting their plan. The problem of restrictive covenants will certainly be important in regard to the new construction which will be necessary during the next few years, and a study of the lessons which can be gathered from the litigation on the subject should be of value.

1. *Unenforceability because of fault on the part of parties seeking enforcement*

(a) *Unclean Hands.* A plaintiff's standing in equity is greatly harmed if he himself has violated the very restrictions which he seeks to enforce.[4] If his violation is insignificant he may not lose the power to proceed against more substantial violations,[5] but the risk the violator runs is apparent.[6]

In the early case of *Duke of Bedford v. Trustees of British Museum,*[7] plaintiff was not allowed to enforce a restriction against obstruction of the view between his and defendant's mansions when it was shown that he himself had ruined the view by laying out streets and constructing buildings on adjacent, unrestricted land. This suggests that actions of plaintiff outside the restricted area might cause him to lose the power of enforcement.[8]

[3] On unenforceability of restrictive covenants see 3 TIFFANY, REAL PROPERTY, §§ 871-875 (1939); CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 185-186 (1947); 54 A.L.R. 812 (1928); 85 A.L.R. 985 (1933); 103 A.L.R. 734 (1936).

[4] Curtis v. Rubin, 244 Ill. 88, 91 N.E. 84 (1910); Hamburger v. Kramp, 268 Mich. 611, 256 N.W. 566 (1934); Gilbert v. Repertory, 302 Mass. 105, 18 N.E. (2d) 437 (1939); 3 TIFFANY, REAL PROPERTY § 873 (1939).

[5] Dalstan v. Circle Amusement Co., 130 N.J. Eq. 354, 22 A. (2d) 245 (1941); Pink v. Elder, 299 Mich. 320, 300 N.W. 104 (1941); Garvin and Co. v. Lancaster County, 290 Pa. 448, 139 A. 154 (1927).

[6] Curtis v. Rubin, 244 Ill. 88, 91 N.E. 84 (1910), in which violation of building restrictions by constructing a bay projecting several feet beyond the line was held to preclude an injunction against building clear to the street.

[7] 2 Myl. and K. 552, 39 Eng. Rep. 1055 (1822).

[8] This argument was tried without success in Bohm v. Silberstein, 220 Mich. 278, 189 N.W. 899 (1922), in which plaintiff had sold land abutting a restricted tract of eighteen blocks to one who was known to want the land for factory purposes.

The defense of unclean hands has been made in other situations, but usually without success.[9] An obvious difficulty for the defendant is that normally many persons have standing to enforce restrictions, and a dismissal as to one plaintiff will not foreclose the rights of others.[10] Parties to restrictions should nevertheless be warned that they may be precluded from enforcement by acts which prejudice the integrity of the restrictive plan.

(b) *Failure to Object to Violations.* If a violator of restrictions is allowed to incur expense and detriment even though those having power to enforce know that violations are going on, then the restrictions may be held unenforceable against him.[11] One cannot watch a building go up and then sue to have it taken down. Problems in this situation involve the time within which objection must be made and the degree of detriment which defendant must show.[12]

Usually courts have not hesitated to order the removal of structures built in knowing violation of restrictions and over the objections of other owners,[13] but in a few cases damages have been awarded in lieu of specific relief.[14] There has been a general reluctance to order the

[9] Sale of unrestricted lots in the same tract held to preclude enforcement by grantor in Burden v. Doucette, 240 Wis. 230, 2 N.W. (2d) 204 (1942), but not in Laverack v. Allen, 2 N.J. Misc. 637, 130 A. 615 (1924). Retention of power to modify restrictions held to make them unenforceable for want of mutuality in Kew Gardens Corporation v. Ciro's Plaza, 261 App. Div. 576, 26 N.Y.S. (2d) 553 (1941) but not in Matthews v. Kernewood, 184 Md. 297, 40 A. (2d) 522 (1944). Improper motive has been argued without success in several cases. Jenney v. Hynes, 282 Mass. 182, 184 N.E. 444 (1933), involving alleged motive of preventing competition; Schwartz v. Hubbard, (Okla. 1947) 177 P. (2d) 117, in which defendant alleged that plaintiff wanted to use the restricted tract as a barrier to protect his outside landholdings.

[10] Taylor Ave. Improvement Assn. v. Detroit Trust Co., 283 Mich. 304, 278 N.W. 75 (1938); Tubbs v. Green, (Del. Ch. 1947) 55 A. (2d) 445.

[11] Pappas v. Excelsior Brewing Co., 170 App. Div. 692, 156 N.Y.S. 845 (1915) and Orne v. Fridenburg, 143 Pa. 487, 22 A. 832 (1891), delay in objecting to construction of buildings; Sayers v. Collyer, L.R. 28 Ch. 103 (1884), allowing business to become established without protest. A knowing violation reduces the standing of the violator in equity so that he may not be able to complain of a comparatively slight delay. Carey v. Lauhoff, 301 Mich. 168, 3 N.W. (2d) 67 (1942); Williamson v. Needles, 191 Okla. 560, 133 P. (2d) 211 (1942).

[12] Showing of actual detriment is required. Sanders v. Campbell, 231 Mich. 592, 204 N.W. 767 (1925). A delay of two months in objecting to the conversion of a bowling alley into a bar was held not objectionable in Manheim v. Urbani, 318 Mich. 552, 28 N.W. (2d) 907 (1947).

[13] Nechman v. Supplee, 236 Mich. 116, 210 N.W. 323 (1926); Friedman v. Cicoria, 140 N.J. Eq. 404, 54 A. (2d) 922 (1947); 57 A.L.R. 336 (1928). In McComb v. Hanly, 128 N.J. Eq. 316, 16 A. (2d) 74 (1940), defendant was ordered either to spend more money on his house so as to comply with cost restrictions or tear it down.

[14] Amerman v. Deane, 132 N.Y. 355, 30 N.E. 741 (1892); McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905); Sharp v. Harrison, [1922] 1 Ch. 502.

destruction of valuable property,[15] however, and if a building violation is threatened it might be prudent to ask for an interlocutory injunction.

The greatest danger arising from failure to object to violations is that, if some violations are allowed to continue without objection, then a whole series of restrictions may be rendered unenforceable.[16] Reciprocal restrictions must be complied with in order to serve their purpose, and by acquiescing in violations the owners in effect consent to a change in their own neighborhood which was not contemplated when the restrictions were instituted and which may so frustrate the original purpose that further compliance will be excused.

Acquiescence in unsubstantial violations, however, does not necessarily result in unenforceability of an entire series of restrictions.[17] Owners do not have to object to violations at so great a distance from their property that they suffer no substantial harm.[18] Indeed it is quite possible that restrictions in one part of a large tract might be abandoned without affecting the enforceability of restrictions in another part.[19] Construction of a filling station in an area restricted against all business could probably be enjoined even though no objections have been made to the use of some residences for business.[20]

[15] See Smith v. Staso Milling Co., (C.C.A. 2d, 1927) 18 F. (2d) 736.

[16] Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N.E. 1051 (1900); Loud v. Pendergast, 206 Mass. 122, 92 N.E. 40 (1910); Harrigan v. Mulcare, 313 Mich. 594, 22 N.W. (2d) 103 (1946), all involving building restrictions. Gospel Spreading Assn. v. Bennetts, (App. D.C. 1945) 147 F. (2d) 878, involving racial restrictions.

[17] Misch v. Lehman, 178 Mich. 225, 144 N.W. 556 (1913); Crawford v. Senosky, 128 Ore. 229, 274 P. 306 (1929); Deitrick v. Leadbetter, 175 Va. 170, 8 S.E. (2d) 276 (1940); Klein v. Palmer, (Tex. 1941) 151 S.W. (2d) 652. But see Kneip v. Schroeder, 255 Ill. 621, 99 N.E. 617 (1912) and Gableman v. Department of Conservation, 309 Mich. 416, 15 N.W. (2d) 689 (1944). 3 TIFFANY, REAL PROPERTY, § 874 (1939) suggests that whether violations of the identical restrictions sued on have been acquiesced in is the material issue, but since all restrictions are a part of an entire scheme the important question should be the degree of damage from the violations.

[18] Kokenge v. Whetstone, 60 Ohio App. 302, 20 N.E. (2d) 965 (1938); Palmer v. Circle Amusement Co., 130 N.J. Eq. 356, 22 A. (2d) 241 (1941); Spence v. Kuznia, 307 Mich. 219, 11 N.W. (2d) 865 (1943). A plaintiff's standing to question violations which do him no substantial harm is doubtful. Batchelor v. Hinkle, 210 N.Y. 243, 104 N.E. 629 (1914).

[19] Sanford v. Keer, 80 N.J. Eq. 240, 83 A. 225 (1912); Vorenberg v. Bunnell, 257 Mass. 399, 153 N.E. 884 (1926); Hemphill v. Cayce, (Texas 1946) 197 S.W. (2d) 137.

[20] Rairigh v. Carnell, 277 Mich. 62, 268 N.W. 811 (1936). Nor would allowing duplexes in an area restricted to single-family dwellings necessarily preclude an injunction against construction of apartments. Rosenzweig v. Rose, 201 Mich. 681, 167 N.W. 1008 (1918); Ward v. Prospect Manor Corp., 188 Wis. 534, 206 N.W. 856 (1926). See also Boston-Edison Protective Assn. v. Goodlove, 248 Mich. 625, 227 N.W. 772 (1929).

In *Borgman v. Markland*,[21] suit was brought to enjoin defendant from using a dwelling-house as a shop for furniture display in violation of restrictions against all business uses. It was shown that other houses in the tract had been used for business without objection. The court denied the relief sought on the ground that defendant was threatening a violation no more substantial than those previously existing. A carefully-worded decree was issued, however, indicating that the restrictions remained generally enforceable and specifying in detail the extent to which defendant would be permitted to violate them. Acquiescence was held to bring about a relaxation of restrictions without rendering them nugatory.

A charge of laches is nevertheless a serious threat to a restrictive plan, especially since the charge can usually be made against all possible plaintiffs if it can be made at all. Prompt action against all violations is necessary. If relaxation of restrictions is desired the only safe course is to draw up a new agreement superseding the old.[22]

2. *Unenforceability when protected owners not at fault*

Restrictive covenants may become unenforceable without fault on the part of the protected owners if, because of changes in circumstances, the covenants produce undue hardship. The leading case is *Trustees of Columbia College v. Thatcher*,[23] in which covenants applying to a very small area were not enforced because the construction of an elevated railroad and station on the adjoining street had made the neighborhood undesirable for residence.

Hardship resulting from causes other than changed conditions in the neighborhood has usually been held not to affect the enforceability of restrictive covenants. In several recent cases it has been argued that racial restrictions lead to undue hardships in certain areas because they are so prevalent that negroes cannot find sufficient housing, but no court has seen fit to accept this argument as a basis for denying enforcement.[24] In *Ockenga v. Alken*,[25] the unusual restrictions in issue permitted the construction only of apartments on certain lots. Defendants to an injunction suit argued that construction of apartments was un-

[21] 318 Mich. 676, 29 N.W. (2d) 121 (1947).

[22] See Kneip v. Schroeder, 255 Ill. 621, 99 N.E. 617 (1912), in which slight ornamental projections over a building line, not objected to, were held to make the line completely unmaintainable.

[23] 87 N.Y. 311 (1881).

[24] Fairchild v. Raines, 24 Cal. (2d) 818, 151 P. (2d) 260 (1944); Hurd v. Hodge, (App. D.C. 1947) 162 F. (2d) 233; Kraemer v. Shelley, (Mo. 1946) 198 S.W. (2d) 679. The argument of hardship was accepted by one concurring justice in the Fairchild case, and by a dissenting judge in the Hurd case.

[25] 314 Ill. App. 389, 41 N.E. (2d) 548 (1942).

profitable whereas extensive governmental aid had made the construction of dwelling houses highly profitable, but the court stated that changes in prevailing economic conditions would not be considered. In *Southwest Petroleum Co. v. Logan*,[26] the discovery of oil underlying a restricted area was held not to affect the enforceability of restrictions. The Supreme Court of Connecticut has suggested, however, that it would not enforce minimum cost restrictions literally if building costs should decline to such an extent that houses equivalent to those already built could be constructed for less than the specified cost.[27]

The language used in some cases suggests that changes outside the restricted area can have no bearing on enforceability.[28] If so, cases of unenforceability in which the owners were not at fault would be extremely rare. With the growth of cities and the shift of population, however, changes on the outside can bring about pressures which a restricted area cannot withstand, so that enforcement of restrictions would produce hardship. The prevailing view is that external changes can operate to render restrictions unenforceable.[29]

Such changes must, however, affect substantially all of the area under restriction. Changes on the outside may have a detrimental effect on property on the borders of a restricted area; but the courts quite properly have seen that the borders cannot be allowed to recede without threatening the integrity of the entire plan of restriction, and in such cases the restrictions have usually been enforced if beneficial

[26] 180 Okla. 477, 71 P. (2d) 759 (1937).

[27] Fidelity Title and Trust Co. v. Lomas & Nettleton, 125 Conn. 373, 5 A. (2d) 700 (1939), in which the court refused to declare a general reduction of the minimum cost. Description of the type of house desired is to be preferred to a minimum cost restriction. The minimum will not be raised if building costs increase, Fritz v. Beem, 199 Ga. 783, 35 S.E. (2d) 513 (1945); 161 A.L.R. 1131 (1946), and a decline in building costs produces unnecessary hardship.

[28] The strongest statement of this view is found in Brenizer v. Stephens, 220 N.C. 395, 17 S.E. (2d) 471 (1941), in which a petition for declaration of unenforceability alleging only changes outside the area was held demurrable. See also Frick v. Foley, 102 N.J. Eq. 430 at 433-43, 141 A. 172 (1928); Reeves v. Comfort, 172 Ga. 331, 157 S.E. 629 (1931); Greer v. Bornstein, 246 Ky. 286, at 292, 54 S.W. (2d) 927 (1932), all involving building restrictions. In Grady v. Garland, (App. D.C. 1937) 89 F. (2d) 817, involving racial restrictions, the dissenting judge accused the majority of adopting this rule.

[29] Downs v. Kroeger, 200 Cal. 743, 254 P. 1101 (1927); Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W. (2d) 545 (1931); Osius v. Barton, 109 Fla. 556, 147 S. 862 (1933); Stephenson v. Clement, 171 Okla. 333, 43 P. (2d) 430 (1935); Gulf Oil Co. v. Levy, 181 Md. 488, 30 A. (2d) 740 (1943). See annotations cited in note 3, supra. The changes must be actual, not merely threatened. McLaughlin v. Eldredge, 266 Mass. 387, 165 N.E. 419 (1929); Mays v. Burgess, (App. D.C. 1945) 152 F. (2d) 123.

to most of the property covered.[30] But there are cases in which such border property has not been held to the restrictions.[31] In planning a tract it might be wise to provide for a cushioning row of apartments or small stores on the borders of the area.[32] This will reduce the danger of pressures from without.

Another situation in which restrictions produce hardship on particular owners, while serving their purpose as to most property, arises when some lots are reduced in size by condemnation so that they are too small to be used as contemplated. It would seem that owners whose property is thus taken should be able to recover full compensation from the public authorities, and that therefore the restrictions should not be adversely affected. Such has been the usual holding,[33] but exceptions have been made.[34] Restrictions might be drafted which prescribe specifically that reduction in size is not to affect enforceability.

Even if a change can be shown which affects substantially all of the lots in a restricted area, still the question of how great a change is necessary must be answered. The usual answer found in the cases is that the change must be sufficient to defeat the essential purpose of the restrictions. Residential restrictions, however, have a dual purpose—to maintain values, and to provide a pleasant residential neighborhood. It is quite possible that property might be more valuable for business than for residence in a neighborhood which remains essentially residential.[35] If this happens then those owners who are anxious to sell will probably want to free themselves from restrictions, while the remaining owners will usually attempt to hold the line. The courts are going to have to balance economic interests against intangible, psychological interests in determining the effect of changed conditions.

[30] Swan v. Mitshkun, 207 Mich. 70, 173 N.W. 529 (1919); Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 P. 132 (1931); Scaling v. Sutton, (Texas 1942) 167 S.W. (2d) 275; Williamson v. Needles, 191 Okla. 560, 133 P. (2d) 211 (1942).

[31] Scull v. Eilenberg, 94 N.J. Eq. 759, 121 A. 788 (1923); Golden v. Davis, 266 Mich. 7, 253 N.W. 195 (1934); Elrod v. Phillips, 214 N.C. 472, 199 S.E. 722 (1938); Cushing v. Lilly, 315 Mich. 307, 24 N.W. (2d) 94 (1946). See also Downs v. Kroeger, 200 Cal. 743, 254 P. 1101 (1927).

[32] In Ockenga v. Alken, 314 Ill. App. 389, 41 N.E. (2d) 548 (1942), restrictions were held enforceable which permitted the construction of no buildings except apartments.

[33] Abernathy v. Adoue, (Texas 1932) 49 S.W. (2d) 476; Mack Outer Drive Improvement Assn. v. Merrill, 317 Mich. 24, 26 N.W. (2d) 583 (1947).

[34] Klug v. Kreisch, 246 Mich. 14, 224 N.W. 339 (1929); Austin v. Van Horn, 255 Mich. 117, 237 N.W. 550 (1931).

[35] A striking example was presented in Windemere-Grand Improvement and Protective Assn. v. American State Bank, 205 Mich. 539, 172 N.W. 29 (1919), involving a vacant lot in a restricted area so antiquated that new construction was not profitable even though the area remained essentially residential. Enforcement was denied.

Some courts seem to be quite willing to deny enforcement of covenants against business, and building restrictions, if changes in conditions produce a situation in which the restrictions operate to depress values rather than to uphold them.[35a] Others indicate that such restrictions will be enforced so long as the restricted area remains primarily residential.[36]

Racial restrictions present a different picture. The great weight of authority declares that advancement by the interdicted races to the borders of a restricted area has no effect on the enforceability of restrictions.[37] This rule has been applied even though the restricted area is very small.[38] Some courts which have quite readily denied enforcement of building and business restrictions have handed down decisions in racial restriction cases showing a marked contrast.[39] Racial restrictions owe their existence both to the desire to uphold values and to popular prejudice, but the courts seem to feel that the element of prejudice predominates.[40]

Most durable of all restrictions are those on the liquor trade.[41] No

[35a] McClure v. Leaycraft, 183 N.Y. 36, 75 N.E. 961 (1905); Downs v. Kroeger, 200 Cal. 743, 254 P. 1101 (1927); Barton v. Moline Properties, 121 Fla. 683, 164 S. 551 (1935); Gulf Oil Co. v. Levy, 181 Md. 488, 30 A. (2d) 740 (1943); Purdy v. Mulroney, (Monroe Co. S.Ct. 1941) 31 N.Y.S. (2d) 1006.

[36] Cuneo v. Chicago Title and Trust Co., 337 Ill. 589, 169 N.E. 760 (1929); Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W. (2d) 545 (1931); O'Neal v. Vose, 193 Okla. 451, 145 P. (2d) 411 (1944); Monroe v. Menke, 314 Mich. 268, 22 N.W. (2d) 369 (1946). Compare Chatsworth Estates Co. v. Fewell, [1931] 1 Ch. 224, in which the court states that restrictive covenants will be enforced so long as any owner can bring an action in good faith to enforce.

[37] The leading case is Grady v. Garland, (App. D.C. 1937) 89 F. (2d) 817, followed in Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1938); Vernon v. Reynolds Realty Co., 226 N.C. 58, 36 S.E. (2d) 710 (1946); Kemp v. Rubin, 188 Misc. 310, 69 N.Y.S. (2d) 680 (1947). *Contra:* Clark v. Vaughan, 131 Kan. 438, 292 P. 783 (1930).

[38] Swain v. Maxwell, (Mo. 1946) 196 S.W. (2d) 780, involving an area of about three city blocks; Schwartz v. Hubbard, (Okla. 1947) 177 P. (2d) 117, in which the area covered only one-half of one block.

[39] Compare Kneip v. Schroeder, 255 Ill. 621, 99 N.E. 617 (1912) and Burke v. Kleiman, 277 Ill. App. 519 (1934); Purdy v. Mulroney, (Monroe Co. S.Ct. 1941) 31 N.Y.S. (2d) 1006, and Kemp v. Rubin, (Queens Co. S.Ct. 1947) 69 N.Y.S. (2d) 680 (1947); Talles v. Rifman, (Md. 1947) 53 A. (2d) 396 and Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1938). The first case cited for each jurisdiction deals with business or building restrictions, and the second with racial restrictions.

[40] In Burke v. Kleiman, 277 Ill. App. 519 (1934), and Dooley v. Savannah Trust Co., 199 Ga. 353, 43 S.E. (2d) 522 (1945), acquiescence for considerable periods in violations of racial restrictions was held insufficient to preclude injunctive relief against other violations.

[41] Apparently no change from residence to business uses will make liquor restrictions unenforceable. Jameson v. Brown, (App. D.C. 1939) 109 F. (2d) 830; Sorrentino v. Cunningham, 111 Ind. App. 212, 39 N.E. (2d) 473 (1942). The courts

case has been found in which any change of condition has been held to make these restrictions unenforceable.

The contrast among the cases dealing with different sorts of restrictions shows the attempts of the courts to guess the motives and desires of the parties. The parties are certainly the best judges of their own desires, but it is practically impossible to give the court a satisfactory clue to these in drafting restrictions. The alternative is to provide a means of egress when a large proportion of the owners feel that restrictions are no longer beneficial. Some draftsmen have included a provision that restrictions may be revoked at any time by agreement of a specified proportion of the owners. An alternative method, making the restrictions somewhat more stringent, is to prescribe a time limit and specify that the restrictions will be automatically renewed for another definite period unless notice of dissent is filed by a certain percentage of owners prior to the renewal date.

Suppose that only part of the owners in an area enter into a restrictive agreement, so that islands of unrestricted property are left. Some courts severely restrict the enforceability of restrictive covenants which are not part of a general plan,[42] but most courts will enforce partial restrictions in their usual manner.[43] A good case for unenforceability can be presented, however, if the unrestricted property is used to the prejudice of the restrictive scheme.[44] A common practice in drafting is to provide that restrictions are to have no effect unless a specified, large proportion of the owners in the area agree to the restrictions. Such a provision avoids the difficulties which are certain to arise if restricted property adjoins unrestricted.

Many of the difficulties concerning restrictive covenants are a result of want of foresight on the part of the signatories. The counsellor

also seem to be reluctant to find laches from acquiescence. Smith v. Nickoloff, 283 Mich. 188, 277 N.W. 880 (1938); Schlicht v. Wengert, (Md. 1940) 15 A. (2d) 911. The English courts seem more tolerant of the liquor trade. Sayers v. Collyer, 24 Ch. 180 (1883), L.R. 28 Ch. 103 (1884).

[42] The most serious limitation is that the covenants will not be enforced other than among the original parties. Scull v. Eilenberg, 94 N.J. Eq. 759, 121 A. 788 (1923); Whitmarsh v. Richmond, 179 Md. 523, 20 A. (2d) 161 (1941); Burden v. Doucette, 240 Wis. 230, 2 N.W. (2d) 204 (1942); Tubbs v. Green, (Del. Ch. 1947) 55 A. (2d) 445. In Humphreys v. Ibach, 110 N.J. Eq. 647, 160 A. 531 (1932), the court emphasized that all restrictions over an area do not have to be uniform in order to meet the requirement of general plan.

[43] Harvey v. Rubin, 219 Mich. 307, 189 N.W. (2d) 17 (1922);Alfortish v. Wagner, 200 La. 198, 7 S. (2d) 708 (1942); Kraemer v. Shelley, (Mo. 1946) 198 S.W. (2d) 679; Bogan v. Saunders, (D.C. D.C. 1947) 71 F. Supp. 587.

[44] Thornhill v. Herdt, (Mo. 1939) 130 S.W. (2d) 175; Cevasco v. Westwood Homes, 128 N.J. Eq. 53, 15 A. (2d) 140 (1940); Fairchild v. Raines, 24 Cal. (2d) 818, 151 P. (2d) 260 (1944).

should outline the possible situations which may arise in the future and should ascertain the desires of his clients in the event that these contingencies actually occur. If only a small tract can be covered, or if only partial coverage can be secured, then the wisdom of having any restrictions at all should be debated. Limitations as to time should almost always be utilized in order to guard against ventures into the unforeseeable future;[45] and escape clauses as described above should be considered. The parties should not sign a stricter agreement than they intend.

More restrictive plans are probably inaugurated by developers and promoters than by individual owners. Those who develop tracts will often retain financial interests for an extended period, however, and it is therefore important to them that the restrictions be somewhat flexible.

After the parties have agreed on how strict an agreement they want, changes which can be anticipated should be provided for in express language. If it can be shown that changes which have occurred were fully contemplated, then the courts are less likely to hold restrictions unenforceable than if the changes are unanticipated.[46] Two Missouri cases illustrate the point. The facts were almost identical: in both, some, but not all, of the property in several continguous blocks was restricted against occupancy by negroes. At the time of suit in both cases negroes occupied almost all of the unrestricted property. In one case the restrictions were not enforced, the court stating that the parties would not have intended to be bound under the circumstances which actually came to pass.[47] In the other case a different conclusion was reached because the restrictions provided that complete coverage of the area was not essential, and because some negroes were occupying

[45] On statutes prescribing a time limit for restrictions see Clark, "Limiting Land Restrictions," 27 A.B.A.J. 737 (1941). In Gulf Oil Co. v. Levy, 181 Md. 488, 30 A. (2d) 740 (1943), the court stated that it would be presumed that a reasonable time limit was intended even though none appears expressly. Landell v. Hamilton, 175 Pa. 327, 34 A. 663 (1896), suggests that restrictions are unlimited unless a time limit appears. In Norris v. Williams, (Md. 1947) 54 A. (2d) 331, the court indicated that the presence of a time limit would not prevent a holding of unenforceability at an earlier date.

[46] Evans v. Foss, 194 Mass. 513, 80 N.E. 587 (1907); Starkey v. Gardner, 194 N.C. 74, 138 S.E. 408 (1927); Cuneo v. Chicago Title and Trust Co., 337 Ill. 589, 169 N.E. 760 (1929); Frick v. Foley, 102 N.J. Eq. 430, 141 A. 172 (1928), all involving business restrictions. Grady v. Garland, (App. D.C. 1937) 89 F. (2d) 817 and Kraemer v. Shelley, (Mo. 1946) 198 S.W. (2d) 679, involving racial restrictions.

[47] Thornhill v. Herdt, (Mo. App. 1939) 130 S.W. (2d) 175. See also Hundley v. Gorewitz, (App. D.C. 1942) 132 F. (2d) 23; Pickel v. McCawley, 329 Mo. 166, 44 S.W. (2d) 857 (1931); Gilliam v. Hall, (Okla. 1947) 186 P. (2d) 652.

unrestricted property when the agreement was made.[48] If a means of terminating restrictions by vote is provided, it is possible that the owners will want the restrictions to remain fully enforceable unless so terminated.[49] By providing for specific, foreseeable contingencies expressly, the possibility of a holding of unenforceability will be reduced.

It can hardly be expected that a restrictive agreement can be drawn which will be immune from all changes of circumstance, nor is such an agreement probably desirable. If, however, restrictions are no more strict than is actually desired; if a means of egress is provided so that owners may bring about changes deliberately; and if specific situations which may arise are specifically provided for; then a series of restrictions can better accomplish its purposes, will work a less severe burden, and will not be subject to constant litigation.

Conclusion

In almost every case involving enforcement of restrictive covenants, the plea is made that enforceability should be denied because of change in circumstances. Decisions are usually in favor of the restrictions unless a very great change is shown, and arguments for non-enforcement are sometimes cast aside quite curtly,[50] but there are enough cases denying enforcement to create serious uncertainties. So long as these uncertainties are present the question of enforceability can always be litigated, speculators have a chance for large windfalls, and no owner can be sure of his rights. By careful area planning, care in framing, prompt action against violations, and diligent attention to litigation, the interested property owners can do much to remove the uncertainties which attend restrictions.

Charles B. Blackmar, S.Ed.

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[48] Kraemer v. Shelley, (Mo. 1946) 198 S.W. (2d) 679. See also Bogan v. Saunders, (D.C. D.C. 1947) 71 F. Supp. 587 and Schwartz v. Hubbard, (Okla. 1947) 177 P. (2d) 117, involving restrictions against negroes entered into at a time when negroes were occupying adjacent property.

[49] In Porter v. Johnson, 232 Mo. App. 1150, 115 S.W. (2d) 529 (1938), the court indicated that the presence of such a restriction could be set up to refute an allegation that the restrictions had been abandoned, stating that the power to terminate would have been exercised if termination had been desired.

[50] See opinion of Bigelow, V. C., in Speidel v. Weiner, 129 N.J. Eq. 434, 19 A. (2d) 875 (1941).