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METHODS OF REMOVING RESTRICTIVE COVENANTS IN ILLINOIS

The term "covenant" is usually used to indicate an agreement to do or not to do a particular act.[1] The common usage, however, is principally in connection with agreements concerning the transfer of real property. Restrictive covenants refer to agreements in deeds and other instruments which limit and qualify the full enjoyment of real property.[2] These covenants usually take on a negative character, that is, the grantee and his heirs are forbidden from performing certain acts in relation to the land.[3] There are, however, restrictive covenants that take the form of an affirmative duty to perform some service to the land.[4]

Restrictive covenants are commonly created in the deed that conveys the property,[5] but they have also been created by oral agreement.[6] The courts, however, express a divergence of opinion when confronted with the validity of these oral agreements. The general rule, Illinois included, is that these oral agreements are in fact contracts for the sale of real property and are governed by provisions of the Statute of Frauds.[7] In an Illinois case, *Tinker v. Forbes*,[8] Tinker, the owner of the west half of a lot, sought an injunction to prohibit Forbes, the owner of the east half, from erecting a building on the land. Tinker alleged that the Rockford Water Power Company, the common source of title of the opposing parties, had orally represented to him at the time of the conveyance that the east half of the lot would forever be free of buildings so as not to disturb their enjoyment of light and air. The court held the restriction invalid, and stated that oral representations are not sufficient to create the servitude on the land. As the servitude is an interest in land, the Statute of Frauds requires a writing.

Co-tenancy may also be implied from the circumstances, as when there

1 Leverich v. Roy, 402 Ill. 71, 83 N.E.2d 335 (1948).

2 For a comprehensive discussion of these covenants see Clark, Covenants and Interests Running With the Land (2d ed. 1947); 3 Tiffany, Real Property (3d ed. 1939); Friedman, Contracts and Conveyances of Real Property (2d ed. 1963). Among the restrictions which limit the enjoyment of real property are: those which restrict the right of a party to engage in business in competition with another; restrictions against the sale of intoxicating liquor on the premises; building restrictions which prohibit erection of particular structures, such as, billboards, fences, signs, other than single dwelling houses, balconies, pavilions, porches and patios; restrictions excluding birds and animals or if allowed, where they may be maintained; restrictions on how close to the street the house may be built; and restrictions as to valuations, height and number of buildings allowed on the land.

3 Natural Products Co. v. Dolese & Shepard Co., 309 Ill. 230, 140 N.E. 840 (1923).

4 Hutchinson v. Ulrich, 145 Ill. 336, 34 N.E. 556 (1893); Wise v. Woutens, 288 Ill. 29, 123 N.E. 35 (1919). The service to be performed is usually one that relates to prohibition of waste or the duty to maintain certain structures, such as fences, gates, wells, dams, in a reasonable condition.

5 Bowes v. Chicago, 3 Ill. 2d 175, 120 N.E.2d 15 (1954).

6 Thorton v. Schobe, 79 Colo. 25, 243 Pac. 617 (1926); Hall v. Solomon, 61 Conn. 476, 23 Atl. 876 (1892).

7 Ill. Rev. Stat. ch. 59, § 2 (1967).

8 136 Ill. 221, 26 N.E. 503 (1891); See Annot., 5 A.L.R.2d 1318 (1949).

is an establishment of a permanent building scheme,[9] and also from plats and maps.[10]

A restrictive covenant is usually enforceable only by the person for whom the benefit was intended.[11] This person generally has an interest in some land that is benefited by this restriction. Most jurisdictions hold that when a person no longer holds land that can be benefited by the covenant, he ceases to be entitled to enforce it.[12]

Illinois, however, is in the minority and allows a person to enforce a restrictive covenant even though he owns no other property in the vicinity. In *Van Sant v. Rose*,[13] the owners of land conveyed it by a deed which contained covenants prohibiting any building within thirty feet of the street line by the grantee. The grantee conveyed to his wife and other defendants who were about to build an apartment house in disregard of the covenant. The court held that the right to enjoin a breach of restrictive covenants does not depend on whether the grantor will be damaged by the breach; the mere breach is itself sufficient ground for interference by injunction.

Whether other persons are entitled to enforce the covenant depends on the intention of the parties who imposed it. Thus, other owners of property in the neighborhood may also benefit by the covenant, as will subsequent grantees and their heirs.

Many owners of land in imposing these restrictive covenants did so at a time when their future implications could not be foreseen. Today many of these covenants have become outmoded and obsolete. As these covenants must be considered enforceable until removed by legal process, they present a serious impediment to any real estate transaction. Future buyers are unwilling to purchase property if their use of it is hindered and restricted. A lawyer, if successful in removing the onus of these covenants from land, can increase its value manifold. Following is a discussion of the different approaches to removing a restrictive covenant, with an assessment of their various strengths and weaknesses.

RELEASE

One of the primary methods of removing a covenant is a written release, or a new covenant operating as a release or a modification of the

9 Starmount Co. v. Greensboro Memorial Park, Inc., 233 N.C. 613, 65 S.E.2d 134, (1951); Annot., 25 A.L.R.2d 898 (1952).

10 As to the effect of covenants contained in the sale of lots with reference to a map or plat showing streets and right of ways, see 23 Am. Jur. 2d *Dedication* § 25 (1965); 2 Tiffany, Real Property § 400 (3d 1939).

11 Henricks v. Bowles, 20 Ill. App. 2d 148, 155 N.E.2d 664 (1st Dist. 1959); Palermo v. Allen, 91 Ariz. 57, 369 P.2d 906 (1962); Johnson v. Guarino, 22 Conn. 257, 168 A.2d 171 (1960).

12 Kent v. Koch, 166 Cal. App. 2d 579, 333 P.2d 411 (1958); Rupel v. General Motors Corp., 120 Ohio 152, 201 N.E.2d 355 (1963); Restatement, Property § 549, 550 (1936).

13 260 Ill. 401, 103 N.E. 194 (1913). *Accord*, Club Manor Inc. v. Oheb Shalom Congregation, 211 Md. 465, 128 A.2d 405 (1957).

original, executed by those who are entitled to enforce it. This method would be governed by the law of contracts and all the indicia of a valid contract would be required. Any breach of this contract could be remedied by a suit for damages or preferably by a suit in equity praying for specific performance.

The grantor of the release, however, does not have the power to release the grantee from the effect of covenants which appeared earlier in the chain of title. In *Raclin v. Village of Winnetka*,[14] the present property owners sought a writ of mandamus to compel issuance of building permits which allowed two residences upon the property. By the terms of their deed from Henriksen the property was subject to certain covenants contained in an earlier deed from Mahen to Zimmer. Later, Henriksen gave a release as to these earlier covenants. The court held that the release by Henriksen amounted to no more than an agreement on his part that he would not prosecute an injunction. Obviously he could not release the covenants of an earlier deed, as such covenants were binding upon him and one cannot release his own obligations. Accordingly, the court denied the writ.

A release is not often easily acquired. Many times the benefiting party, for reasons of his own, will not release the covenant. Often when he is willing to release it, the price necessary to procure it is too expensive to be worthwhile. If the number of benefiting parties is excessive, as in the case where a restriction is uniformly imposed on all the plats in a tract of land, the expense would be too great. Each individual holder of land within the tract would have to accede to the release since each is benefited by the covenant. The circumstances necessary to make a release advantageous are where the benefit is conferred on only one person and the use to him is such that it can easily be acquired.

Merger of Estates

The merger of the benefited and the bound estates is another approach to removing a restriction. The fact situation usually present in such a case is where a number of lots were sold subject to certain building restrictions pursuant to a general scheme or plan, or one where an owner of two or more estates sells one and imposes upon it a restriction for the benefit of the remaining property.

In a New Jersey case,[15] the owner of four adjoining lots conveyed three of them to a grantee subject to a restriction that only residential buildings could be constructed on the land. The benefit of this restriction was conferred in favor of the owner of the fourth lot. Through a series of conveyances, title to the four lots were all merged in a common owner, who desired to build a commercial structure. The court held the restriction was

14 369 Ill. 532, 17 N.E.2d 324 (1938).
15 Olson v. Jantausch, 44 N.J. Super., 380, 130 A.2d 650 (App. Div. 1957).

terminated and unenforceable since "the benefit and the burden coming into the hands of one person the obligation is extinguished."[16]

Illinois follows the general rule, which is that a covenant in a deed of land which restricts its use, and is inserted for the benefit of other land, will be extinguished by the vesting of the title to both tracts of land in one person. The only case *contra* is *Wiegman v. Kusel*,[17] which can be distinguished on the facts. The grantor conveyed a number of lots out of a certain tract which was bound by restrictions for the benefit of the remainder of the tract. At the time of the grantor's repurchase of the bound lots, some lots in the original tract were owned by other parties. Effective merger had not taken place since all the restricted and benefited property must be in the hands of a common owner at one time. Herein, the land was still bound by the restrictions as the land was in the hands of different parties and not a common owner.

The disadvantages of using such a method are apparent. The remaining property may be unobtainable for diverse reasons. In other cases, the cost of purchasing all of the land necessary to effectuate a merger may be prohibitive. Thus, in a minority of situations will such a method be used.

The above two methods—release and merger—were based on the contractual method of terminating the covenant, that is, an agreement by the parties to end the obligation of the covenant evidenced by a written contract. Following are methods that are more in the nature of a defense to the enforcement of restrictive covenants.

Acquiescence of a Breach of Covenant

The first of these defenses is to show that violations of the covenants have been previously acquiesced to by the parties entitled to the benefit. The factual situation necessary for acquiescence to occur is when violations have been allowed certain owners and now the parties seek to enforce the covenant against a new violator. The law is settled that even where a general plan is shown the restrictions under the plan will not be enforced where there has been acquiescence to previous violations.[18]

In *Wallace v. Hoffman*,[19] lot owners sought to enforce building line restrictions against another owner. Many uses of the property inconsistent with the restriction had been adopted over a twenty-year span. The court held the restrictions unenforceable because the owners, by not complaining of the previous clear-cut violations of the covenant, had acquiesced to them. They could not now ask for the enforcement of the covenant, as its object, the restricting of all building to a certain line, had long been defeated.

16 *Id.* at 385, 130 A.2d at 655.

17 270 Ill. 520, 110 N.E. 884 (1915).

18 McGovern v. Brown, 317 Ill. 73, 147 N.E. 664 (1925); Curtis v. Rubin, 244 Ill. 88, 91 N.E. 84 (1910); Hoffman v. Schwan, 312 Ill. App. 160, 38 N.E.2d 53 (1st Dist. 1941).

19 336 Ill. App. 545, 84 N.E.2d 654 (3d Dist. 1940).

This defense can be compared with the doctrine of estoppel. The party bringing the action once having acquiesced to the violations is now estopped from complaining of new infractions.

ABANDONMENT

Another defense to enforcement of a restrictive covenant is the theory of abandonment. It differs from acquiescence in that acquiescence refers to submission to individual violations, while abandonment refers to the yielding of the general scheme or plan.[20] Equity will not enjoin a breach of a restriction where the original plan has been abandoned.[21]

Abandonment of uniform restrictions on lots depends upon the existence of conduct by owners of benefited land which shows an intent to relinquish the benefit of the servitude. This intent is evinced by violation of the covenants. The violations must not be sporadic or distant but must take place over much of the restricted land. The breach must be a material and substantial one.[22] Courts are not too inclined to declare that the benefit of a restrictive covenant has been abandoned. In *Shipley v. Oak Park Trust & Savings Bank*,[23] the court held that slight variations from restrictions did not constitute an abandonment of the general plan. The restrictions were thus enforceable. In that case, there were variations in the minimum ground floor area of the buildings in the subdivision. *Curtis v. Rubin*[24] is illustrative of a situation where the court held an abandonment had taken place. The plaintiffs, owners of land benefited by a covenant which established the building line fifteen feet from the street, sued to enjoin the defendants from violating it. The defendants had gone over this line by three or four feet in various places. The defendants, in answering, admitted the existence of the original plan but alleged that the plaintiffs had themselves violated the restriction. The court held that if the plaintiffs had observed the line themselves, equity would have protected their rights. Their disregard of the building line demonstrated an intent to abandon the original plan and the defendants should be allowed to violate the covenant to the same degree.

Abandonment would then only occur under the most severe circumstances. The violations of one seeking enforcement of a covenant must be permanent and of such frequent occurrence as to indicate to the unjaundiced eye an intent to abandon. The courts, even though not favoring such restrictions, viewing them as a detriment to the free alienation of real property, will nevertheless enforce them if they are clear and unambiguous.[25]

20 Curtis v. Rubin, 244 Ill. 88, 94 N.E. 84 (1910).
21 Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N.E. 1051 (1900).
22 Punzak v. Delano, 11 Ill. 2d 117, 142 N.E.2d 64 (1957).
23 30 Ill. App. 2d 335, 174 N.E.2d 216 (2d Dist. 1961) (abstr.).
24 *Supra* note 20.
25 Hutchinson v. Ulrich, 145 Ill. 336, 34 N.E. 556 (1893); Eckhart v. Irons, 128 Ill. 568, 20 N.E. 687 (1889).

LACHES

Since the validity of the covenants is decided in a court of equity, equitable defenses will prevail to defeat the enforcement of them. The two most prominent are laches and unclean hands. The doctrine of laches is similar to acquiescence, in that the complaining party has acquiesced to the violation for such an amount of time as to preclude him from relief. Exactly what conduct on the plaintiff's part will amount to laches depends on the facts and circumstances of each individual case. The plaintiff should act promptly in asserting his rights; however, mere delay in bringing suit does not in itself establish laches.[26] There must be some damage caused to the defendant because of the delay.[27]

In an Illinois case, *Brandenburg v. Country Club Bldg. Corp.*,[28] the defendant proceeded to build an apartment building in violation of a restrictive covenant covering the property. The plaintiff was aware of the violation but did not complain of it until three months after the building was completed, although the duration of construction was over a year. The court held that the plaintiff's laches precluded the giving of any relief. The court decided that the harm to the defendant in view of the plaintiff's delay would be too great if the covenant were enforced. The plaintiff should have complained within a reasonable time after he first had notice of the breach. In contrast, if the plaintiff complained as soon as he was aware of the violations, the fact that the building was almost complete did not absolve the defendant of the restriction, and the court held that laches had not been established.[29] Similarly, when the purchaser of the property delays the plaintiffs in locating and protesting to the true owner—the party for whom the property was purchased—laches will not lie. In *Fick v. Burnham*,[30] restrictions were imposed on all the lots in a subdivision of Lincolnwood, Illinois. They provided only one residence should be erected on each lot. When Fick learned that an improvement was to take place she tried to contact Burnham—the purchaser of the property. Tyson, the true owner could not be found and when suit was filed the rate of construction increased on the second building while construction on the main building stopped. The court held laches had not been established and that the second building must be removed.

UNCLEAN HANDS

The "clean hands" doctrine is similar to abandonment because the complaining party must have committed some acts that are themselves violations of the covenant. In *Kneip v. Schroeder*,[31] owners of lots brought suit

26 Stewart v. Finkelstone, 206 Mass. 28, 92 N.E. 37 (1910).
27 Brandenburg v. Country Club Bldg. Corp., 332 Ill. 136, 163 N.E. 440 (1928).
28 *Ibid.*
29 Hartman v. Wells, 257 Ill. 167, 100 N.E. 500 (1912).
30 251 Ill. App. 333 (1st Dist. 1929).
31 255 Ill. 621, 99 N.E. 617 (1912).

to enjoin the defendant from encroaching upon a building line. The owners themselves had in the past been guilty of the same violations. The court reasoned that the complaining parties, by their own violations, did not have clean hands and a court of equity would not enforce the restrictions against others.

This is the most practicable method for invalidating a covenant if a breach by the complaining parties has occurred. The advantage of using this method, as opposed to proving that the plaintiff has abandoned the general plan, is obvious. In proving abandonment, one must show a series of violations permanent in character which evince an intent to abandon the plan; however, in pleading lack of clean hands one need show only a single violation by the complaining party. This violation must be intentional and of a serious nature since more than one negligent act may be needed to sanction the defense of lack of clean hands.

Eminent Domain

A municipal or state government may, through its exercise of the power of eminent domain, remove the restrictions from the land.[32] The government does not remove the restrictions per se, but their removal is automatic as a result of the action. When the government acquires the land, it is of necessity procured free of all burdens. The government, under the fourteenth amendment, cannot take private property for public use without paying just compensation. Thus, if the government condemns property for its own use, the holders of the benefits of the restrictions on that property must be compensated. These benefits are a property right that have been taken.[33]

Zoning Laws

A state government may exercise its police power and legislate zoning laws that clash with the restrictive covenants. The state's police power is used to protect the health, safety or general welfare of the community.[34] If the covenant does not conflict with the purpose of the police power, the state has no authority to resort to it to rid the property of the covenant.[35] Thus, in *Dolan v. Brown*,[36] the land was bound by covenants that restricted its use to residential. The city council passed a zoning ordinance under

32 Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 (1899).

33 Town of Stamford v. Vuono, 108 Conn. 359, 143 Atl. 245 (1928); Peters v. Buckner 288 Mo. 618, 232 S.W. 1024 (1921). *Contra*, City of Houston v. Wynne, 279 S.W. 916 (Tex. Civ. 1926). The arguments for both sides are discussed in 1 Nichols, Eminent Domain § 142 (1950); 2 Nichols, Eminent Domain § 575 (1950); 1 Lewis, Eminent Domain § 262 (1900); See also 3 U.C.L.A.L. Rev. 258 (1956); 55 Mich. L. Rev. 877 (1957).

34 Palangio v. City of Chicago, 23 Ill. 2d 570, 179 N.E.2d 663 (1962); Village of La Grange v. Leitch, 377 Ill. 99, 35 N.E.2d 346 (1941).

35 Finn v. Emmaus Evangelical Lutheran Church, 329 Ill. App. 343, 68 N.E.2d 541 (1st Dist. 1946) (abstr.).

36 338 Ill. 412, 170 N.E. 425 (1930).

which the lot owned by Brown was classified for commercial uses. Brown proceeded to erect a gas station and the plaintiff brought suit to enjoin him. Brown contended that the enforcement of the ordinance could not be enjoined. The court held that a valid restriction on the use of real property, which in no way threatens or endangers the health, safety or general welfare of the community, is neither nullified nor superseded by the adoption of a zoning ordinance. However, if the purpose of the zoning law is to further the scope of the restriction, then it will prevail.[37]

Eminent domain and zoning laws, being procedures used exclusively by governmental bodies, are not available to the private individual as a means of removing restrictive covenants.[38]

Change in the Condition of the Neighborhood

The most common defense given to prohibit enforcement of or terminate restrictive covenants is that the neighborhood has so changed that there is no purpose in enforcing the covenants. It would seem that the courts would give a liberal use to this defense as restrictions which interfere with the free use of property are not favored in the law.[39] This, however, is not the case since courts are very conservative in determining what actually constitutes a sufficient change so as to bring about invalidation. There are no precise rules for ascertaining when changed conditions exist, and each case will have to be decided on its specific circumstances. In *Ewertsen v. Gerstenberg*,[40] the court stated the general proposition to be:

> The general rule is that equity will not enforce a restriction where the property and that in the vicinity has so changed in its character and environment and in the uses to which it may be put, as to make it unfit or unprofitable for use if the restriction be enforced; or where to grant an injunction against violation of such restriction would be a great hardship on the owner and of no benefit to the complainant.

The fact that changes have taken place and that property from which it is sought to remove restrictions would be more valuable without them does not alone authorize equity to terminate restrictive covenants.[41]

37 Bluett v. County of Cook, 19 Ill. App. 2d 172, 153 N.E.2d 305 (1st Dist. 1958).

38 For an extensive discussion of the general problems involved when a zoning law conflicts with a restrictive covenant see, Zoning Law & Practice, Yokely (1953); Bergen, *Conflicts between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 Neb. L. Rev. 449 (1963); 2 Ruthkopf, Zoning & Planning, ch. 74 (3d ed. 1962); Van Hecke, *Zoning Ordinances & Restrictions in Deeds*, 37 Yale L.J. 407 (1928).

39 Staley v. Means, 13 Ill. App. 2d 451, 142 N.E.2d 835 (3d Dist. 1957); Wallace v. Hoffman, 336 Ill. App. 545, 84 N.E.2d 654 (3d Dist. 1949).

40 O'Neill v. Wolf, 338 Ill. 508, 170 N.E. 669 (1930); Cuneo v. Chicago Title & Trust Co., 337 Ill. 589, 169 N.E. 760 (1929).

41 186 Ill. 34, 346, 57 N.E. 1051, 1054 (1900). *Accord*, Mangini v. Oak Park Trust & Savings Bank, 43 Ill. App. 2d 318, 193 N.E.2d 479 (2d Dist. 1963) (not enough alteration in land use to show an adequate change); Star Brewery Co. v. Primas, 163 Ill. 652, 45 N.E. 145 (1896); McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N.E. 162 (1915).

In the case of *Drexel State Bank of Chicago v. O'Donnell*,[42] the plaintiff bank brought suit to remove building restrictions on a certain lot. The plaintiff pleaded that it would cause a financial hardship for the court to enforce the single dwelling restrictions on this land. The evidence showed that in the past three years single residence houses had been torn down on the opposite side of the street and that apartment buildings had been built in their place. The court held that while it might be a financial hardship, the extent of the change was not substantial enough for the court to remove the restrictions. "Where the restriction involved still remains of such substantial advantage to the property which it was created to protect the court cannot undertake to wipe out the covenants."[43] The court concluded that the restrictions were set up for the adjoining property owners for easements of light and air, and that the benefits were still apparent, even though the change occurred, and the restrictions were still in force.

The mere fact that there have been some changes in the neighborhood is not enough. In *Burke v. Kleiman*,[44] five hundred white persons entered into a restrictive agreement. The covenant contained therein provided against leasing or selling of any premises included in the agreement to any person of the colored race. Defendant leased an apartment to a Negro. The plaintiffs sought an injunction requiring that the defendants remove all persons coming within the description of the restrictive covenants. The defendant answered that since the agreement was signed conditions had so changed that the granting of the injunction would be inequitable. Four apartments had previously been rented in violation of the agreement. The court held that this was not sufficient evidence to show a change of conditions and that the restrictive agreements were still operative.[45]

In *Punzak v. De Lano*,[46] suit was brought to enjoin the defendants from violating building line restrictions. At the time of the creation of the covenants the character of the neighborhood was strictly residential. The defendants argued that the restriction should not be enforced because the character of the neighborhood had changed into one that was predominantly commercial. The court, pointing out that the neighborhood was not originally limited to residential use, held the covenants valid. "The mere fact that a change has occurred does not alone, warrant a court of equity in relieving property of restrictions."[47]

Thus, the courts have held that even though the neighborhood has changed, this will not by itself terminate the restriction where 1) it appears that the the covenant is still of substantial benefit to a dominant estate, as

42 344 Ill. 173, 176 N.E. 348 (1931).
43 *Id.* at 175, 176 N.E. at 350.
44 277 Ill. App. 519, transferred 355 Ill. 390, 189 N.E. 372 (1934).
45 Today these racial restrictions are prohibited under the equal protection clause of the fourteenth amendment. Shelly v. Kraemer, 334 U.S. 1, 68 S. Ct. 836 (1948).
46 11 Ill. 2d 17, 142 N.E.2d 64 (1957).
47 *Id.* at 121, 142 N.E.2d at 66.

in *Drexel State Bank of Chicago v. O'Donnell*;[48] 2) it appears that the change has not been so thorough or extensive so as to defeat the purpose of the covenant, as in *Burke v. Kleiman*;[49] and 3) it appears that the change does not conflict with the purpose of the covenant.[50]

What then are considered changes worthy of removing these restrictions? Courts generally agree it is not the quality of the change, but what it accomplishes that will be decisive, and when the object of the restriction can no longer be achieved it will be negated.[51]

Illinois courts will not enforce restrictive covenants under a theory of a change in the neighborhood unless either of two elements is present. The first is that there has been such a change in the character and environment of the property that the objective of the restrictions cannot be accomplished,[52] and second that the change causes their enforcement to be oppressive and brings undue hardship on the party breaching.[53]

In an Illinois case, *Piper v. Reder*,[54] the original plat of the subdivision established a thirty foot building restriction from every street line. The plaintiff's and defendant's lots were separated by Balmoral Avenue. In 1962, the village enacted an ordinance that in effect vacated the section of Balmoral Avenue between their lots. The defendant thereafter acquired title to the property and built over the thirty foot line. The plaintiff then brought suit to enjoin the violation and the court dismissed the action. There had been a marked change in the condition of the property. As Balmoral Avenue was vacated, the defendants claimed that the thirty foot restriction was terminated. The court reasoned that building line restrictions are commonly established adjacent to a street to provide easements of light and air for it. Since the street had been vacated, there was no reason for the easements to exist. Therefore, since the purpose had dissolved the restriction should cease.

In another case, *Ewersten v. Gerstenberg*,[55] the court again refused to enforce a building line restriction. The purpose of the line was to promote a uniform row of houses. The line had been disregarded by a number of the other lot owners in the neighborhood in previous instances. The court held that the conditions had so changed that the object of the restriction could

48 *Supra* note 42.

49 *Supra* note 44.

50 *Supra* note 46. See, Paschen v. Pashkov, 63 Ill. App. 2d 56, 211 N.E.2d 576 (1st Dist. 1965), where it has been held that construction of a school at one end of the area did not constitute a change of conditions that would warrant the removal of single family restrictive covenants in deeds, but could be regarded as a buffer zone between the residential area and the area across from the school.

51 Marra v. Aetna Const. Co., 15 Cal. 2d 375, 101 P.2d 490 (1940); Thodos v. Shirk, 248 Iowa 172, 79 N.W.2d 733 (1956); Price v. Anderson, 358 Pa. 209, 56 A.2d 215 (1948).

52 Mangini v. Oak Park Trust & Savings Bank, 43 Ill. App. 2d 318, 193 N.E.2d 479 (1963).

53 Piper v. Reder, 44 Ill. App. 2d 431, 195 N.E.2d 224 (1st Dist. 1963).

54 *Ibid.*

55 186 Ill. 344, 57 N.E. 1051 (1900).

no longer be accomplished and that it would thus be unjust to require the defendants to abide by them.

Where a covenant restricted all structures in the neighborhood to a residential character, and apartment and commercial buildings had been erected, the court held a sufficient change had taken place[56] to terminate the covenants. The purpose of the covenant was obviously gone and an undue hardship would occur if it were enforced.

Thus, in Illinois, restrictive covenants will not be enforced where the change is such that it is no longer possible to accomplish the original intention of the restriction, or where the enforcement would be unreasonable and oppressive, in that it would impose an undue hardship on the parties bound by the restrictions.

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56 Gilmore v. Keough, 241 Ill. App. 28 (1st Dist. 1926); *Accord*, Kneip v. Schroeder, 255 Ill. 621, 99 N.E. 617 (1912), where there had not only been extensions over the building line but an elevated raliroad had been erected through the block.