Louisiana Law Review

Volume 5 | Number 1
December 1942

Building Restrictions - Feasibility and Abandonment of the Original Plan

J. C. W.

Notes

BUILDING RESTRICTIONS—FEASIBILITY AND ABANDONMENT OF THE ORIGINAL PLAN—A housing corporation, although only acquiring seventy of the one hundred ninety-two lots in the total area, purchased all the lots fronting on the street in question. In pursuance of a general plan, the great majority of the deeds provided that any building erected must be set back fifteen feet from the front property line. Although defendant's deed did not contain such restriction, the original, from which his title was derived, did. Plaintiffs, whose deeds contained these restrictions, sued to enjoin defendant from erecting an addition to his business establishment which contemplated a violation of the restriction. *Held,* injunction granted. *Alfortish v. Wagner,* 7 So. (2d) 708 (La. 1942).

Building restrictions have been recognized and enforced in Louisiana by resort to the law of equitable restrictions running with the land, which give rise to equitable defenses.[1] These restrictions may be enforced by anyone within the restricted area who has property near enough to be affected thereby.[2] The defendant in the instant case, necessarily admitting the above legal principles, urged several defenses,[3] the consideration of which will be the purpose of this note.

The first defense was that the original plan was not feasible because the housing corporation did not own all of the property in the area. The court found that the argument, although it might have been forceful as to the other squares, was not convincing since all of the lots in the square in question did contain these restrictions. Concerning this problem of the feasibility of the plan, there have been very few controversies.[4] This is explained by the experience of the planners of the areas who, unless un-

1. Note (1942) 4 LOUISIANA LAW REVIEW 329. An excellent discussion of the cases leading to the acceptance of this doctrine by the court.

2. Hill v. Ross, 166 La. 581, 117 So. 725 (1928); Edwards v. Wiseman, 198 La. 382, 3 So. (2d) 661 (1941).

3. Since the law of equitable restrictions has a common law background, the authorities from the other states will be of necessary importance.

4. Several early cases were concerned with whether or not a general plan was contemplated. See Hano v. Bigelow, 155 Mass. 341, 29 N.E. 628 (1892); Frink v. Hughes, 133 Mich. 63, 94 N.W. 601 (1903); Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317, 36 L.R.A. (N.S.) 890 (1911); Velie v. Richardson, 126 Minn. 334, 148 N.W. 286 (1914); Coates v. Cullingford, 147 App. Div. 39, 131 N. Y. Supp. 700 (1911).

foreseen events interfere,[5] will hardly conceive of an arrangement that is not practical. As a result, the only generalization possible as to the requisites of a feasible plan must proceed by an analogy to those cases dealing with other aspects of this problem, i.e., building restrictions in general. Accordingly, for a plan to be considered as feasible, it seems that the grantor must own a sufficient number of lots on that particular plot as intimated by the instant case; that the lots be large enough to contain buildings which do not violate the restrictions;[6] that the area be suited to the type of plan conceived by the originator[7] that the value of the property will not be decreased unreasonably thereby;[8] and in general, that such conditions exist as to make the plan both desirable and workable.

The defendant's next contention was that the plan had been abandoned. Two conditions were pointed out in support of this view; first, the failure of the restriction to appear in all of the deeds, and second, a change in the neighborhood.

Courts, in considering the failure of the restrictions to appear in some of the deeds, generally inquire as to the effect of this condition upon the original plan.[9] Abandonment is said to depend upon the proportionate number of deeds that do not contain the restrictions.[10] The plan is considered efficacious where the omissions in some deeds are necessary[11] or are designed to make the arrangement more desirable.[12] The fact that the common grantor had conveyed deeds in an adjoining area without the restrictions seems to be of little importance.[13]

---

5. In Lemmon v. Wineland, 255 Mich. 90, 237 N.W. 527 (1931), part of the property was condemned for the widening of the street thus making the lot too small within which to build if the restrictions were enforced. It was held that the plan was not feasible.

6. Lemmon v. Wineland, 255 Mich. 90, 237 N.W. 527 (1931).

7. Elrod v. Phillips, 214 N.C. 472, 199 S.E. 722 (1938).

8. Cevasco v. Westwood Homes, 128 N.J.Eq. 53, 15 A. (2d) 140 (1940).

9. Bacon v. Sandberg, 179 Mass. 396, 60 N.E. 936 (1901); Sailer v. Podolski, 82 N.J. Eq. 459, 88 Atl. 967 (1913).

10. Hano v. Bigelow, 155 Mass. 341, 29 N.E. 628 (1892); Bacon v. Sandberg, 179 Mass. 396, 60 N.E. 936 (1901). In both cases only two lots did not have restrictions. In Beach v. Jenkins, 174 App. Div. 813, 159 N.Y. Supp. 652 (1916), twenty lots out of two hundred fifty did not have the restrictions. In Sailer v. Podolski, 82 N.J. Eq. 459, 88 Atl. 967 (1913), where fifteen out of the thirty-three lots did not have the restrictions, the court held that there was no general plan or scheme although all six lots on the avenue where plaintiff's and defendant's lots were located did contain the restrictions. (It is submitted that since the court was considering the existence of a plan and not the feasibility of one, it is distinguishable from the present case.)

11. Hooper v. Lottman, 171 S.W. 270 (Tex. Civ. App. 1914).

12. Setchal v. Lawrence, 121 Misc. 359, 201 N.Y. Supp. 121 (1923).

13. See Bohm v. Silberstein, 220 Mich. 228, 229, 189 N.W. 889, 901 (1922).

The most usual form of abandonment occurs where the area changes[14] so as not to afford the original protection contemplated,[15] or so as to practically destroy the essential objects and purposes of the restrictions.[16] The change may be complete[17] so that the plan cannot possibly be carried out in an equitable manner.[18] The restrictions may be obsolete[19] or their value substantially destroyed.[20] The person complaining must show that he had purchased the lot prior to the change,[21] and that the change has neutralized the benefits of the restrictions,[22] or that the changes are radical and fundamental.[23] Another problem occurs when the expansion of a city and the spread of industry alters the community so that the character of the property within[24] or without[25] the subdivision undergoes a substantial change. The courts consider this an abandonment.[26]

At this point, it may be well to consider some problems with regard to an abandonment of a plan other than those raised by the defendant in the instant case. Abandonment must be shown

14. Whether or not a change constitutes an abandonment of the plan is a question to be decided upon the facts of each case. Taylor Avenue Improvement Ass'n v. Detroit Trust Co., 283 Mich. 304, 278 N.W. 75 (1938); Southwest Petroleum Co. v. Logan, 180 Okla. 477, 71 P. (2d) 759 (1937).

15. Bickell v. Moraio, 117 Conn. 176, 167 Atl. 722 (1933); Fidelity Title & Trust Co. v. Lomas & Nettleton Co., 125 Conn. 373, 5 A. (2d) 700 (1939).

16. Osius v. Barton, 109 Fla. 556, 147 So. 862, 88 A.L.R. 394 (1933); Bachman v. Colpaert Realty Corp., 194 N.E. 783 (Ind. App. 1935); Rombauer v. Compton Heights Christian Church, 40 S.W. (2d) 545 (Mo. 1931); Pickel v. McCawley, 329 Mo. 166, 44 S.W. (2d) 857 (1931); Wuertenbaecher v. Feik, 43 S.W. (2d) 848 (Mo. App. 1931); Hall v. Koehler, 347 Mo. 658, 148 S.W. (2d) 489 (1941); Pulitzer v. Campbell, 147 Misc. 700, 262 N.Y. Supp. 743 (1933); Heitkemper v. Schmeer, 146 Ore. 304, 29 P. (2d) 540 (1934); Deituck v. Leadbetter, 175 Va. 170, 8 S.E. (2d) 276, 127 A.L.R. 849 (1940).

17. Letteau v. Ellis, 122 Cal. App. 584, 10 P. (2d) 496 (1932). The restrictions against negroes were no longer good since the district had become a negro district. Rombuer v. Compton Heights Christian Church, 40 S.W. (2d) 545 (Mo. 1931).

18. Armstrong v. Leverone, 105 Conn. 464, 136 Atl. 71 (1927); Van Meter v. Manion, 170 Okla. 1, 38 P. (2d) 557 (1934); Commercial Realty Co. v. Pope, 171 Okla. 331, 43 P. (2d) 62 (1935).

19. Marra v. Aetna Const. Co., 15 Cal. (2d) 375, 101 P. (2d) 490 (1940).

20. Hayslett v. Shell Petroleum Corp., 38 Ohio App. 164, 175 N.E. 888 (1930).

21. Allen v. Avondale Co., 135 Fla. 6, 185 So. 137 (1938).

22. Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W. (2d) 1024 (1938); Sandusky v. Allsopp, 99 N.J. Eq. 61, 131 Atl. 633 (1926); Humphreys v. Ibach, 110 N.J. Eq. 647, 160 Atl. 531, 85 A.L.R. 980 (1932).

23. Higgins v. Hough, 195 N.C. 652, 143 S.E. 212 (1928); Stroupe v. Truesdell, 196 N.C. 303, 145 S.E. 925 (1928). In Greer v. Bornstein, 246 Ky. 286, 54 S.W. (2d) 927 (1932), it was said that changes are immaterial unless they interfere with complainants' enjoyment of the lot or they show an intention to abandon the plan.

24. Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W. (2d) 1024 (1938).

25. Elrod v. Phillips, 214 N.C. 472, 199 S.E. 722 (1938).

26. See notes 24 and 25, supra.

by the clear intent of the property owners generally[27] or by facts that reasonably lead to that conclusion.[28] In cases where the restrictions deal with the cost of edifices erected on the property and the cost of building has so fluctuated so as to make enforcement of the restrictions which are no longer beneficient unreasonable, the plan is considered abandoned.[29] But the mere fact that the property of the bordering[30] or of the restricted[31] area would be more valuable for business, or that it would be more valuable generally if the restrictions were removed,[32] does not constitute an abandonment. The courts usually look to the number of violations on that particular street[33] to determine whether or not there has been an abandonment, since violations on the other streets are not pertinent.[34] But to determine the right of a person to violate a restriction because there has been an abandonment of the plan, the particular lot in question cannot be considered apart from its relationship to the entire restricted area.[35] As a general rule, the restrictive covenants will be enforced in equity where they remain of substantial value despite a hardship on the servient estate,[36] unless the evidence indicates that the original purpose cannot be accomplished.[37] The originator of the plan cannot cause its abandonment by reserving to himself the authority to modify the restrictions,[38] or by failing to put similar restrictions

27. La Fetra v. Beveridge, 124 N.J. Eq. 24, 199 Atl. 70 (1938).

28. Plaster v. Stutzman, 8 S.W. (2d) 750 (Tex. Civ. App. 1928).

29. Cevasco v. Westwood Homes, 128 N.J. Eq. 53, 15 A. (2d) 140 (1940); McComb v. Hanly, 128 N.J. Eq. 316, 16 A. (2d) 74 (1940).

30. Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 Pac. 132 (1931).

31. Van Meter v. Manion, 170 Okla. 1, 38 P. (2d) 557 (1934); Abernathy v. Adoue, 49 S.W. (2d) 476 (Tex. Civ. App. 1932).

32. Bickell v. Moraio, 117 Conn. 176, 167 Atl. 722 (1933); Reeves v. Comfort, 172 Ga. 331, 157 S.E. 629 (1931); Drexel State Bank of Chicago v. O'Donnell, 344 Ill. 173, 176 N.E. 348 (1931); Wineman Realty Co. v. Pelavin, 267 Mich. 594, 255 N.W. 393 (1934); Rombauer v. Compton Heights Christian Church, 40 S.W. (2d) 545 (Mo. 1931); Thornhill v. Herdt, 130 S.W. (2d) 175 (Mo. App. 1939).

33. Edwards v. Wiseman, 198 La. 382, 3 So. (2d) 661 (1941); Barton v. Slifer, 66 Atl. 899 (N.J. Ch. 1907); Newberry v. Barkalow, 75 N.J. Eq. 128, 71 Atl. 752 (1909).

34. Morrow v. Hasselman, 69 N.J. Eq. 612, 61 Atl. 369 (1905); Brode v. Smith, 118 Atl. 742 (N.J. Ch. 1922).

35. Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 Pac. 132 (1931); Van Meter v. Manion, 170 Okla. 1, 38 P. (2d) 557 (1934); Commercial Realty Co. v. Pope, 171 Okla. 331, 43 P. (2d) 62 (1935).

36. Barton v. Moline Properties, 121 Fla. 683, 164 So. 551 (1935); Rombauer v. Compton Heights Christian Church, 40 S.W. (2d) 545 (Mo. 1931); Benner v. Tacony Athletic Ass'n, 328 Pa. 577, 196 Atl. 390 (1938).

37. Taylor Avenue Improvement Ass'n v. Detroit Trust Co., 283 Mich. 304, 278 N.W. 75 (1938); Van Meter v. Manion, 170 Okla. 1, 38 P. (2d) 557 (1934); Commercial Realty Co. v. Pope, 171 Okla. 331, 43 P. (2d) 62 (1935).

38. Franklin v. Elizabeth Realty Co., 202 N.C. 212, 162 S.E. 199 (1932).

in a subsequent deed[39] unless the original deed stipulates to the contrary.[40]

Although the plan may not have been abandoned, certain property owners may lose their right to enforce the restrictions. Such right is lost when there is a general substantial violation of the restrictions without any protest;[41] but the fact that the individual complaining did not protest in connection with several previous violations in a remote part which did not affect him does not mean that he has lost his right,[42] particularly where the present breach affects enjoyment of his home.[43] Furthermore, if the complainant be the adjacent landowner he may still enforce his rights despite many violations in a more remote part.[44]

The final contention of the defendant in the instant case was that a zoning ordinance changed the area from residential to commercial property, thus operating as an abandonment of the plan. The purchaser who acquires property subject to the restriction acquires a property right that cannot be constitutionally abrogated,[45] provided it in no way threatens or endangers the safety, health, comfort or general welfare of the community.[46] The ordinance changing the character of the area does not destroy the

39. Donahoe v. Turner, 204 Mass. 274, 90 N.E. 549 (1910); Bailey v. Jackson-Campbell, 191 N.C. 61, 131 S.E. 567 (1926); Franklin v. Elizabeth Realty Co., 202 N.C. 212, 162 S.E. 199 (1932). In Alamogordo Improvement Co. v. Prendergast, 45 N.M. 40, 109 P. (2d) 254 (1940), as a result of growth of the town, new additions to the area took place without restrictions in the deeds as to the prohibition of liquor establishments. See Thompson v. Glenwood Community Club, Inc., 191 Ga. 196, 12 S.E. (2d) 623 (1940), to the effect that person with a waiver of the restriction in his deed could not be enjoined from violating same, although the deed stated that the covenants were stipulated in favor of grantor and "every other owner of land in said subdivision."

40. In re Pidgeon's Estate, 152 Misc. 71, 273 N.Y. Supp. 704 (1934).

41. Edwards v Wiseman, 198 La. 382, 3 So. (2d) 661 (1941); Meany v. Stork, 81 N.J. Eq. 210, 86 Atl. 398 (1913).

42. German v. Chapman, L.R. 7 Ch. Div. 271 (1877); Rogers v. Zwolak, 12 Del. Ch. 200, 110 Atl. 674 (1920); Allen v. Massachusetts Bonding & Ins. Co., 248 Mass. 370, 143 N.E. 499, 33 A.L.R. 669 (1924).

43. Brode v. Smith, 69 N.J. Eq. 619, 118 Atl. 742 (1922).

44. Hill v. Ross, 166 La. 581, 117 So. 725 (1928); O'Neill v. Wolff, 338 Ill. 508, 170 N.E. 669 (1930); Bischoff v. Morgan, 236 Mich. 251, 210 N.W. 226 (1926); Kumble v. Jaffee, 100 N.J. Eq. 290, 134 Atl. 673 (1926).

45. Gordon v. Caldwell, 235 Ill. App. 170 (1922); Ludgate v. Somerville, 121 Ore. 643, 256 Pac. 1043, 54 A.L.R. 837 (1927). In Southwest Petroleum Co. v. Logan, 180 Okla. 477, 71 P. (2d) 759 (1937), it was urged that since an ordinance is not of equal dignity with a state statute it would not be contrary to the United States Constitution. Although a private contract may be impaired by the ordinance, the state did not so impair. The court did not feel it necessary to consider and pass upon the argument.

46. Dolan v. Brown, 338 Ill. 412, 170 N.E. 425 (1930); Gordon v. Caldwell, 235 Ill. App. 170 (1922); Vorenberg v. Bunnell, 257 Mass. 399, 153 N.E. 884, 48 A.L.R. 1431 (1926); Olberding v. Smith, 34 N.E. (2d) 296 (Ohio App. 1934); Ludgate v. Sommerville, 121 Ore. 643, 256 Pac. 1043, 54 A.L.R. 837 (1927); Crawford v. Senosky, 128 Ore. 229, 274 Pac. 306 (1929).

restrictions,[47] but it may nevertheless show a substantial transformation.[48] A subsequent zoning ordinance will not prevent enforcement of the plan if the development of the area is in substantial conformity therewith.[49] Especially is this true when the ordinance negatives any idea of interfering with the existing restrictions.[50]

It is submitted that the decision in the instant case, being in accord with the great weight of American authority, was correctly decided and the injunction properly issued.

J. C. W.

CRIMINAL NEGLIGENCE—INVOLUNTARY HOMICIDE STATUTES—LOUISIANA CRIMINAL CODE—The defendant, while driving on a public highway at night, accidentally hit and caused the death of Robert McCrory. Evidence showed that only one headlight was burning at the time of the accident and that alcohol was found in the automobile. The defendant was convicted of the crime of involuntary homicide, as defined by Act 64 of 1930.[1] The information stated that the defendant caused the death of McCrory "by the operation and use of a motor vehicle, to-wit: an automobile in a grossly negligent and grossly reckless manner, but not wilfully or wantonly." The defendant argued that the allegation in the bill that the act was not done wilfully or wantonly is contrary to the charge of gross negligence and gross recklessness, because to charge that the act is done in a grossly negligent and grossly reckless manner is equivalent to charging that the act was done wilfully and wantonly. *Held,* the words "wilfully" and "wantonly" are not synonymous with words "negligently" and "recklessly," the former implying intention or deliberation and the latter mere

47. Burgess v. Magarian, 214 Iowa 694, 243 N.W. 356 (1932); Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W. (2d) 1024 (1938); Hayslett v. Shell Petroleum Corp., 38 Ohio App. 164, 175 N.E. 888 (1930).

48. Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W. (2d) 1024 (1938); Hayslett v. Shell Petroleum Corp., 38 Ohio App. 164, 175 N.E. 888 (1930).

49. Bachman v. Colpaert Realty Corp., 101 Ind. App. 306, 194 N.E. 783 (1935); Magnolia Petroleum Co. v. Drauver, 183 Okla. 579, 83 P. (2d) 840, 119 A.L.R. 1112 (1938).

50. Castleman v. Avignone, 56 App. D.C. 253, 12 F. (2d) 326 (1926); Burgess v. Magarian, 214 Iowa 694, 243 N.W. 356 (1932); Kramer v. Nelson, 189 Wis. 560, 208 N.W. 252 (1926).

1. La. Act 64 of 1930, § 1 [Dart's Crim. Stats. (1932) § 1047] provides that "any person who, by operation or use of any vehicle in a grossly negligent or grossly reckless manner, but not wilfully or wantonly, causes the death of another person, shall be guilty of the crime of involuntary homicide. . . ."