CHANGE IN THE CHARACTER OF A NEIGHBOURHOOD AS A DEFENCE TO THE ENFORCEMENT OF RESTRICTIVE COVENANTS BY INJUNCTION—A COMPARATIVE STUDY

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Part II[1]

4. THE NATURE OF THE DOCTRINE

To argue that the doctrine's existence is based upon the requirement of a personal equity, and so bring into its scope decisions such as *Sayers v. Collyer,* is, as has been noted,[2] to deny its very existence. But at least two other explanations of the doctrine may be predicated.

A. *A question of construction*

It has been suggested that the effect of a change in the character of the neighbourhood should be attributed to the terms of the contract.[3] On this basis it has been submitted that a change in the character of the neighbourhood, not due to the acts of the plaintiff or of his predecessors in title, can never be a defence unless the terms of the contract so provide, expressly or by implication.[4]

Certainly, a change in the character of a neighbourheed is a factor, the effect of which may quite properly be referred to the canons of construction. In *Anstruther-Gough-Calthorpe v. McOscar,*[5] an action for damages, the Court had to decide whether the obligations under a repairing covenant in a lease were to be measured by having regard to the character of the property and its ordinary use at the time of the lease, or whether a change in the character of the tenants likely to occupy the property, or of the neighbourhood itself, should vary the standard of repair required. In denying a rule that future changes could be taken into account, Banks L.J. spoke of 'so extraordinary a

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[1] Part I of this article appears at p. 205 supra.

[2] Supra p. 209.

[3] Pound, 'The Progress of the Law, 1918-1919' (1920) 33 *Harvard Law Review* 813; also supra p. 229; Elphinstone, *Covenants Affecting Land* (1946) 111.

[4] Elphinstone, *op. cit.* 111. See also, *Duke of Bedford v. Trustees of the British Museum* (1822) 2 My. & K. 552, 573, *per* Sir T. Plumer M.R.: 'There were here two large mansions—one erected, the other to be erected, contigous to each other—to be enjoyed by two noble families, with their appendages of gardens and offices; and the question is, whether the obligation did not remain so long as those two mansions remained, the parties mutually contemplating all the enjoyment to be derived from everything which could contribute reciprocally to their beauty, ornament, and use.'

[5] [1924] 1 K.B. 716. And see, *Morgan v. Hardy* (1886) 17 Q.B.D. 770; (1887) 35 W.R. 588. Also, *Proudfoot v. Hart* (1890) 25 Q.B.D. 42.

construction to be placed upon the covenant in the present case',[6] and later spoke of 'construing the covenant in the present case, or any other covenant . . .'[7]

But does the operation of the doctrine merely involve the construction of a covenant? There are some cases which seem to say that it does.[8] There may be merit in this approach where what is in issue is the *extinguishment* of a restriction. But the discussion in the authorities relates to covenants in which no time was specified during which they were limited to continue. It seems clear that the question whether to *enjoin* breach of a restriction which has been expressly limited in its duration has not been judicially considered in this context.[9] And there is no reason to suppose that the nature of the doctrine varies depending upon whether or not the covenant is limited in point of duration. Indeed, as mentioned above, there are reasons which militate against this view.[10]

B. *Equitable frustration*

Much more convincing is the reasoning of Danforth J. in *Trustees of Columbia College v. Thacher*:

> It is true, the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties. The road was authorized by the legislature, and, by reason of it, there has been imposed upon the property a condition of things *which frustrates the scheme devised by the parties,* and deprives the property of the benefit which might otherwise accrue from its observance.[11]

So too in *Chuba v. Glasgow,* the Supreme Court of New Mexico spoke of changes being so radical as 'to frustrate the original purposes and intention of the parties'.[12]

The doctrine of change of neighbourhood seems to bear to the equitable remedy of an injunction the same relationship as frustration at common law bears to the termination of contracts.[13] It is suggested that the true nature of the doctrine is that it is a species of equitable frustration. But unlike frustration at common law, the doctrine, as

6 *Anstruther-Gough-Calthorpe v. McOscar* [1924] 1 K.B. 716, 726.
7 *Ibid.*
8 *Barton v. Moline Properties, Inc.* (1935) 164 So. 551; *Gulf Oil Corporation v. Levy* (1943) 30 A.2d. 740; *Metropolitan Investment Company v. Sine* (1962) 376 P.2d. 940 Generally, Casner, *American Law of Property* (1952), ii. ss. 9.22, 9.37.
9 *Infra* p. 300.
10 *Supra.*
11 (1882) 87 N.Y. 311, 320. Italics supplied.
12 (1956) 299 P.2d. 774, 776, *per* Compton C.J. Also, *Daniels v. Notor* (1957), 133 A.2d. 520, 524, *per* Jones C.J.: 'It is too clear for dispute that Miss Bennett's intention was completely frustrated by the course of subsequent events.' And see, *Bogan v. Saunders* (1947), 71 F.Supp. 587 (D.C. Cir).
13 *Osius v. Barton* (1933) 147 So. 862, 867, *per* Davis C.J.: 'The foregoing doctrine, as applied to real covenants restricting the use of land, may be said to rest upon what is now the generally accepted principle of contract law known as discharge of contractual obligation by frustration of contractual object.'

noted,[14] operates not to determine an *obligation*, but only to deny a *remedy*. This suggestion is in harmony not only with the American cases, which are discussed below, but also with the reasoning of the English Court in *German v. Chapman*,[15] that the ground for refusing injunctive relief is that the preservation as intended of land burdened by the covenant is no longer possible.

From this several points of interest emerge.

(i) *Principles of equity apply*

In most American jurisdictions the burden of a restrictive covenant may run at law.[16] This apart, however, restrictive covenants create rights only in equity. Therefore insofar as the relief sought is an injunction, a double equity is involved. Accordingly, the enforceability of a covenant is a question for determination either in equity or in a court of law, in accordance with equitable principles.[17] For as a defence to an injunctive suit, the change of neighbourhood doctrine is only incidentally related to the law of real property, and should properly be regarded as only one of the functions of equity. This was well put by Douglas J. in *Swain v. Maxwell*:

> Enforcement of valid and proper restrictive covenants affecting real property is one of the well-established functions of equity. Equitable principles govern their enforcement. A threatened violation may be restrained by injunction. If the forbidden act has been done a mandatory injunction may be issued to undo it.[18]

Therefore, subject to the provisions of any recording act, where it is sought to enforce the burden of a covenant in *equity*, the doctrine of notice applies,[18] and relief is granted only when sought with promptness.[19] Further, the plaintiff must have a standing entitling him to seek equitable relief,[20] and the maxims of equity also have application. It is 'elementary'[21] that he who seeks equity must do equity.[22] But although any inequitable conduct on the part of the plaintiff may justify the withholding or conditioning of equitable relief, a court of equity may not utilize this maxim to re-write a plaintiffs legal rights.[23]

14 *Supra* p. 225.
15 (1877) 7 Ch.D. 271. *Supra* p. 211.
16 Casner, *American Law of Property* (1952), ii. s. 9.14.
17 *Rogers v. State Roads Commission* (1962), 177 A.2d. 850 (Md.).
18 (1946) 196 S.W. 2d. 780, 785. See also, *Hogue v. Dreeszen* (1955) 73 N.W.2d. 159, and *Bullock v. Steinmil Realty Inc.* (1955) 145 N.Y.Supp.2d. 331, in both of which cases a mandatory injunction was granted.
19 *Murphy v. Gray* (1958) 327 P.2d. 751 (Ariz.); *Grange v. Korff* (1956) 79 N.W. 2d. 743 (Iowa); *Thodos v. Shirk* (1956) 79 N.W.2d. 733 (Iowa); *Rogers v. State Roads Commission* (1962) 177 A.2d. 850 (Md.).
20 *Loud v. Prendergast* (1910) 92 N.E. 40.
21 *Rogers v. State Roads Commission* (1962) 177 A.2d. 850 (Md.).
22 *Welshire, Inc. v. Harbison* (1952) 88 A.2d., 121 aff'd. (1952) 91 A.2d. 404.
23 *Welitoff v. Kohn* (1929) 66 A.L.R. 1317.

(ii) *Relief is discretionary*

A court of equity will not do 'an inequitable thing'.[24] Nor will equity aid doubtful rights.[25] It is a general rule that the granting or withholding of equitable relief involves the exercise of *judicial* discretion.[26] Although relief in a court of equity is given as a matter of grace, some rather well defined guides have been enunciated by the courts to indicate when and under what conditions actions will be entertained;[28] change of neighbourhood is merely one circumstance which a court may consider in the exercise of its discretion. It follows, that a plaintiff's right to injunctive relief is not absolute.[29] This was so stated in *Fairchild v. Raines*,[30] where it was pointed out that sound judicial philosophy demands that a measure of discretion be permitted a court. Indeed, as the Californian Court continued, to hold otherwise would result in ignoring principles of equity which are fundamental. Accordingly, ever since the *Columbia College Case*,[31] injunctive relief has been withheld where, under the circumstances, it would be inequitable to grant an injunction.

(iii) *Balancing of the equities*

Generally, what is involved is a balancing of the equities.[32] How does the benefit which would accrue to the plaintiff, should the covenant be enforced, measure up against the detriment which would thereby fall on the defendant? As was said by Osborne J. in *Van Meter v. Manion*:

> Cases of this nature are determined by the courts by weighing the equities of the parties, as they arise under contractual obligations and as they are affected by changing conditions and circumstances either inside or outside of the restricted area.[33]

[24] *Welshire, Inc. v. Harbison* (1952) 88 A.2d., 121 aff'd. (1952) 91 A.2d. 404.
[25] *McClure v. Leaycraft* (1905) 75 N.E. 961, 962, *per* Vann J. Also, *Swain v. Maxwell* (1946) 196 S.W.2d. 780.
[26] *Forstmann v. Joray Holding Co.* (1926) 154 N.E. 652.
[27] *Fairchild v. Raines* (1944) 151 P.2d. 260.
[28] *Thodos v. Shirk* (1956) 79 N.W.2d. 733 (Iowa).
[29] *Grange v. Korff* (1956) 79 N.W.2d. 743 (Iowa).
[30] (1944) 151 P.2d. 260.
[31] *Trustees of Columbia College v. Thacher* (1882) 41 Am.Rep. 365; (1882) 87 N.Y. 311, 317, *per* Danforth J.: 'It certainly is not the doctrine of courts of equity, to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable.'
[32] *Welshire, Inc. v. Harbison* (1952) 88 A.2d. 121, aff'd. (1952) 91 A.2d. 404; *Schwartz v. Hubbard*, 198 Okla. 194, (1947) 177 P.2d. 117; *Williamson v. Needles* (1942) 133 P.2d. 211; *Southwest Petroleum Co. v. Logan* (1937) 71 P.2d. 759; *Cowling v. Colligan* (1958) 312 S.W.2d. 943 (Tex.).
[33] (1934) 38 P.2d. 557, 559. Also, *Rowland v. Miller* (1893) 34 N.E. 765, 768, *per* Earl J.: 'The question to be determined in the exercise of such discretion depends largely upon the facts, and mainly whether the enforcement of the agreement would greatly harm the defendant, without any substantial benefit to the plaintiff, so as to make the enforcement inequitable.'

This reasoning has no application, however, where such inequality as may exist has been brought about by the defendant against the wishes and efforts of the plaintiff.[34]

(iv) *Distinction from nuisance cases*

The same general considerations apply as in an action for specific performance of contracts.[35] Therefore, as pointed out in *Porter v. Johnson,* the court's discretion to refuse relief is not as wide as it is where an injunction is sought under the general law:

> Where the rights of parties seeking injunctive relief are based not on the *general law,* but, rather, on *contractual* agreements, as in this case, injunctive relief will be granted as a matter of right if the contract relied on was made complete, fair, and untainted with fraud (as this was, so far as the evidence here presented shows). The field of judicial discretion, in such case, is much more narrow when the equitable relief prayed is bottomed on private contract, because 'certain it is the law will not permit a man to repudiate his solemn restrictive covenants, fairly entered into, merely because changed conditions render it more inconvenient for him to perform than for his adversary to suffer a breach. If the performance of contracts depended on the convenience of the parties, there would be little need of having them'. *Rombauer v. Christian Church, supra,* 382 Mo. 1, *loc. cit.* 21, 40 S.W.2d. 545, 554.[36]

It is in this way that a nuisance suit differs. Further, in a nuisance action, as in an action for a declaratory judgment,[37] the burden of proof lies upon the plaintiff. He has the onus of proving the facts which he alleges constitute a nuisance. In a suit to enforce observance of a restrictive covenant, change of neighbourhood may be pleaded, but 'clearly'[38] it operates as an *affirmative defence.* The onus lies upon the *defendant* to prove, *inter alia,* the change of conditions upon which he relies.[39]

34 *Williamson v. Needles* (1942) 133 P.2d. 211.

35 *Windemere-Grand Improvement & Protective Ass'n. v. American State Bank of Highland Park* (1919) 172 N.W. 29, 32, *per* Steere J.: 'The right and duty of a chancery court to enforce restrictions under its equitable jurisdiction is not absolute. In the exercise of such jurisdiction the same general equitable considerations and rules are recognized as move the court in passing upon applications to compel specific performance of contracts.' Also see, *Ludgate v. Somerville* (1927) 54 A.L.R. 837; *Johnson v. Poteet* (1925) 279 S.W. 902 (Tex.Civ.App.); *Robinson v. Edgell* (1905) 49 S.E. 1027.

36 (1938) 115 S.W.2d. 529, 534-535, *per* Sperry Commissioner.

37 *Martin v. Cantrell* (1954) 81 S.E.2d. 37.

38 *Thodos v. Shirk* (1956) 79 N.W.2d. 733, 742, *per* Larson J.: 'This then is clearly an equitable defense and it is defendants' burden to show that the conditions are such that equity in good conscience would not compel compliance with the restrictive covenants.'

39 *Porter v. Johnson* (1938) 115 S.W.2d. 529; *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545. Also, *Bogan v. Saunders* (1947) 71 F. Supp. 587, 591, *per* Keech A.J.: 'In each of these situations it is incumbent upon the person seeking the change to show such changed conditions as to render the existing restriction unreasonable. No such showing was made by the defendants in this case.'

(v) *The size of the tract*

In *Bogan v. Saunders*[40] it was contended, *inter alia*, that the doctrine had no application where the size of the restricted addition, rather than an area of several squares, was relatively small. This contention was unhesitantly rejected by the Court, which stigmatized it as 'unimportant'.[41] In that case the agreement encompassed an area embracing only sixty-nine properties on both sides of a long block, and the District Court of the United States for the District of Columbia pointed out that restrictive agreements of the type there in issue had been sustained by the Court of Appeals when the number of properties were less. In *Corrigan v. Buckley*[42] thirty owners of twenty-five parcels of land were parties to the covenant there upheld, and a covenant covering thirty-four properties, seventeen on each side of a block was similarly upheld in *Cornish v. O'Donoghue*.[43]

Surely this is correct. At the most, the size of the restricted addition may be a factor for consideration by a court, but, without more, it seems utterly without critical significance. The concern of a court is to determine whether to grant or to withhold injunctive relief. What difference should it *necessarily* make if the subject matter of the proceedings is one plot only out of a large subdivision, or if the covenant was entered into by adjoining land owners and is, therefore, the only property burdened by the restriction? In both situations the plaintiff is seeking judicial assistance to retain the benefits which, he alleges, accrue to him by compliance with the covenant, and in both circumstances what is involved is a balancing of the equities.

(vi) *Annexation of a covenant*

A general neighbourhood plan is not required to make a restrictive covenant enforceable. It is enough if the covenant is imposed by a grantor on a single tract conveyed by him, the covenant being for the benefit of adjacent property retained by him.[44] But if proof of such a plan is necessary to the enforcement of a restriction, the fact that not *all* the lots in a tract are subject to restrictions, or are not subject to identical restrictions, does not necessarily matter. The absence of restrictive covenants on some of the lots may be evidence of an intention not to create a neighbourhood scheme.[45] This is, however, but one factor from many which may fall for a court's consideration.[46] Thus in *Fairchild v. Raines*,[47] at the time of the original subdivision, ap-

40 (1947) 71 F. Supp. 587 (D.C. Cir.).
41 *Ibid.* 592, *per* Keech A.J.
42 (1924) 299 F. 899, Id. (D.C. Cir.).
43 (1929) 30 F.2d. 983 (D.C. Cir.).
44 *Rogers v. State Roads Commission* (1962) 177 A.2d. 850 (Md.).
45 *Munson v. Berdon* (1951) 51 So.2d. 157 (La.App.).
46 *Weinstein v. Swartz* (1949) 68 A.2d. 865.
47 (1944) 151 P.2d. 260. Also, *Grange v. Korff* (1956) 79 N.W.2d. 743 (Iowa); *Thodos v. Shirk* (1956) 79 N.W.2d. 733 (Iowa).

parently no restrictions of the kind there in issue had been placed on any of the properties in the tract. In 1927, however, owners representing thirty-five (possibly only thirty-three) of the sixty-nine lots therein, entered into such restrictions. Discussing this, Schauer J. said:

> The fact that all the lots in the tract are not subject to the covenant is not conclusive of the issue. Even if restrictions are not enforceable as to every lot in an area originally covered by an agreement they may be upheld as to a part of that area if such part is of sufficient extent and so located that the original purpose of the restrictions can be accomplished. (*Downs v. Kroeger* (1927), *supra,* 200 Cal. 743, 254 P. 1101).[48]

So too in *Martin v. Cantrell,*[49] covenants were held enforceable where, out of a subdivision comprising forty-one lots twenty-nine had substantially similar restrictions prohibiting their use for purposes other than residences, while the other twelve were free therefrom. So too in *Frey v. Poynor,*[50] where two hundred and fifty-four lots of a two hundred and eighty lot addition contained restrictive provisions, the remaining twenty-six lots being free of restriction. So too in *Gomory v. Cantor-Shaw Co.,*[51] where all but eight out of more than five hundred and fifty lots were restricted to residence purposes, and the eight, which were set aside for business purposes, were specially restricted as to the buildings to be erected. The same result followed in *Franklin v. Moats,*[52] where seventeen out of nineteen lots on a street were covered by building restrictions, the remaining fifty lots on other streets bearing the burden of certain other restrictions. The Court there stated that it was not necessary that every lot in a subdivision, regardless of the prominence of the street upon which it faces, must bear the same restrictions as all other lots therein.

It may, however, be noted that a neighbourhood scheme is usually excluded where the common grantor reserves to himself a power to sell other lots without restriction.[53]

5. Circumstances which Determine whether Injunctive Relief should be Granted

Each application to enjoin the breach of a restriction is 'usually determined from the facts and circumstances of the individual case.'[54]

[48] *Fairchild v. Raines* (1944) 151 P.2d. 260, 265.

[49] (1954) 81 S.E.2d. 37. Also, *Pitts v. Brown* (1949) 54 S.E.2d. 538, 543, *per* Fishburne J.: 'This is not the situation here. Fifty two of the fifty eight lots into which the tract was subdivided contain restrictions; forty-four contain exactly the same restrictions, and only six contain no restrictions at all. It cannot reasonably be said that the omissions were extensive or that the variations were more than negligible. They do not destroy the general plan which appears to us to be self evident.'

[50] (1962) 369 P.2d. 168 (Okla.).

[51] (1928) 91 N.E.2d. 298.

[52] (1954) 273 (Ky.) S.W.2d. 812.

[53] *Stewart v. Valenta* (1962) 361 S.W.2d. 910 (Tex.Civ.App.).

[54] *Commercial Realty Co. v. Pope* (1935) 43 P.2d. 62, 64, *per* Welch J. Also, *Southwest Petroleum Co. v. Logan* (1937) 71 P.2d. 759, 764, *per* Hurst J.: 'The

Likewise, what is meant by the term neighbourhood must also be determined in relation to the particular facts before the court.[55]

There is a vast number of authorities where the development alleged has occurred entirely on land outside the tract.[56] To review and to distinguish them at length would be a useless and endless task.[57] For, as pointed out by Goff J. in *Iselin v. Flynn,* although the principle of law applicable may be stated with some confidence, its application to the facts of any particular case cannot be so easily predicted:

> While the cases are uniform in maintaining the doctrine, they vary in application in accordance with the differing facts which arise from character, time, location, change, or conditions, and diligent search has failed to disclose a case so exactly in point as to facts that a controlling precedent can be relied upon. It follows that neither discussion nor citation of cases will be profitable, and that guidance must be sought in principle.[58]

It is indeed not easy to reconcile some of the decisions.[59] But some discussion may, however, be profitable.

A. *Restrictions enforced*

In both of the great cases of *Trustees of Columbia College v. Thacher* and *Jackson v. Stevenson,* the defendant, as noted earlier,[60] successfully resisted the plaintiff's injunctive suit. This may perhaps have induced the view that a plaintiff's task was inordinately burdensome, and that such actions could be relatively easily contended. But if any such attitude existed, it was soon dispelled by the New York decision of *Rowland v. Miller.*[61] There, lots in a residential district

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law regarding change of condition of surrounding neighbourhood as a defence to such actions appears fairly well settled, but each case must be decided on the equities of each particular situation as it is presented.' Also, *Thodos v. Shirk* (1956) 79 N.W.2d. 733 (Iowa); *Vorenberg v. Bunnell* (1926) 153 N.E.884; *Kustarz v. Janesick* 347 Mich. 223, (1956), 79 N.W.2d. 613; *Boston-Edison Protective Ass'n. v. Goodlove* (1929) 227 N.W. 772; *Normus Realty Corp. v. Gargano* (1963) 237 N.Y.S.2d. 648; *Ludgate v. Somerville* (1927) 256 P. 1043.

55 *Daniels v. Notor* (1957) 133 A.2d. 520; *Price v. Anderson* (1948) 2 A.L.R.2d. 593.

56 Generally, see annotations (1928) 54 A.L.R. 812, (1949) 4 A.L.R.2d. 1111, (1960) A.L.R.2d. Supplement Service 319, (1962) A.L.R.2d. Supplement Service 74, (1963) A.L.R.2d. Supplement Service 43.

57 *Ludgate v. Somerville* (1927) 54 A.L.R. 837. Also, *Reeves v. Comfort* (1931) 157 S.E. 629; *Porter v. Johnson* (1938) 115 S.W.2d. 529.

58 (1915) 154 N.Y.Supp. 133, 134. See also: *Windemere-Grand Improvement & Protective Ass'n. v. American State Bank of Highland Park* (1919) 172 N.W. 29; *Shuford v. Asheville Oil Company* (1956) 91 S.E.2d. 903. But see, *Commercial Realty Co. v. Pope* (1935) 43 P.2d. 62, 64, *per* Welch J.: 'We are impressed, however, with the fact that the evidence in both cases is so nearly identical as to lead to the conclusion that, had the trial court in the instant case decided the case in favour of the defendants, it would have been necessary to reverse the same upon the authority of the *Manion Case, supra.*'

59 *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314, 317, *per* Buchanan J.: 'The cases, of course, deal with different facts and it is not possible to reconcile many of the holdings on similar facts.'

60 *Supra* p. 215. 61 (1893) 34 N.E. 765.

were sold subject to restrictions prohibiting their use for trade or business. The plaintiff occupied her lot as a residence and sought to restrain the defendant from carrying on upon the lot of which he was lessee the business of an undertaker. The defendant alleged that the character of the neighbourhood had changed, that most of the lots in the block were no longer occupied as residences but were devoted to business purposes, and prayed in aid the *Columbia College Case*. Earl J. found no difficulty in distinguishing this case and explaining the ambit of its operation:

> The principles of that case are not applicable to the facts of this. There it appeared that the contract which the plaintiff sought to enforce was no longer of any value to it, and that its enforcement would result in great damage to the defendant, without any benefit to any one. Here the plaintiff has the right to occupy her house as a residence, and in such occupation to have the protection of the restriction agreement. She has never violated the agreement herself, or consented to, or authorized or encouraged, its violation by others.[62]

In *Holt v. Fleischman,*[63] the 'exact situation' occurred and a covenant dealing with building restrictions was accordingly sustained.

It is now apparent that once a plaintiff has proved the existence of a restriction and its actual or threatened breach, a court requires some real and convincing reason for not acceding to the plaintiff's claim. As was said by O'Brien J. in *Bullock v. Steinmil Realty, Inc.*, protection, by the granting of an injunction, is the ordinary rule:

> Ordinarily where the protected area, itself, has not deteriorated, such covenant is enforceable in equity despite a change in the surrounding area. *Zipp v. Barker,* 40 App.Div. 1, 57 N.Y.S. 569, affirmed 166 N.Y. 621, 59 N.E. 1133; *Pagenstecher v. Carlson,* 146 App.Div. 738, 131 N.Y.S. 413.[64]

Thus it has been said that a court is not commissioned to hunt out a way to defeat a restrictive covenant.[65] Such covenants constitute 'valid and solemn'[66] contracts, and their enforcement will not lightly be denied.[67] Indeed, it has even been said that, providing the restrictions are not unlawful, it is immaterial that they seriously retard the improvement of a city.[68]

62 (1893) 34 N.E. 765, 767.

63 (1902) 78 N.Y.Supp. 647, 651.

64 (1955) 145 N.Y.Supp.2d. 331, 334. Adopted in *Cummins v. Colgate Properties Corp.* (1956) 153 N.Y.Supp.2d. 321, aff'd. (1956) 153 N.Y.Supp.2d. 608 *app. den.* (1956) 154 N.Y.Supp.2d. 845. Also, *Cooper v. Kovan* (1957) 84 N.W.2d. 859.

65 *Proetz v. Central Dist. of Christian & Missionary Alliance* (1945) 191 S.W.2d. 273, 276 (Mo.App.).

66 *Grady v. Garland* (1937) 89 F.2d. 817 (D.C. Cir.), (*cert. den.* (1937) 302 U.S. 694, 82 L.Ed. 536, 58 S.Ct. 13).

67 *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545; *O'Neil v. Vose* (1944) 145 P.2d. 411. Also, *Martin v. Cantrell* (1954) 81 S.E.2d. 37, 39, where Greneker A.A.J. spoke of ' . . . the sanctity of the written provisions of the deeds under which they held'

68 *Landell v. Hamilton* (1896) 34 Atl. 663, 666.

The fact that adjacent property is eventually used in a manner prohibited by restrictions is not, by itself, sufficient, for the effect of covenants is clearly limited to the restricted territory, and their precise purpose is to avert changes therein, and not in the surrounding neighbourhood.[69] Nor is a plaintiff arbitrary and unreasonable in insisting upon adherence to a covenant where further encroachment is prohibited by a zoning ordinance, so that, thereafter he would have the protection not only of the covenant, but also of the ordinance as well.[70] For zoning is administered by public bodies authorized to change classifications, so that, even if a zoning ordinance and a private covenant do substantially tend to achieve the same purpose, a property owner would not have the same protection as may be afforded by a deed.[71]

If the restricted area still retains its essential character, it is not enough that the changed conditions render the covenant of less value than it once was.[72] What is required is such a change that the restriction becomes valueless to the property of the plaintiff and onerous to the property of the defendant.[73] Furthermore the plaintiff need not show that the breach complained of amounts to a nuisance. If this were so, a person entitled to the benefit of a restriction would be in no better position than a stranger to the covenant.[74]

An injunction may be granted though serious injury may result to the servient estate.[75] Or even though another portion of the restricted addition may be injured or its value reduced.[76] So too will a covenant be upheld where the change in the condition of the surrounding property does not render its performance more injurious to the defendant's interest than was the case before the change occurred.[77] So too where the court finds that the development alleged must have been within the reasonable contemplation of the parties to the covenant.[78] Indeed, in such event the change of conditions might have made a restriction more valuable to the owner of the land bene-

69 *Fairchild v. Raines* (1944) 151 P.2d. 260.
70 *Lefferts Manor Association, Inc. v. Fass* (1960) Misc. 211 N.Y.Supp.2d. 18.
71 *Murphey v. Gray* (1958) 327 P.2d. 751 (Ariz.). Also, *Hirsch v. Hancock* (1959) 343 P.2d. 959.
72 *Proetz v. Central Dist. of Christian & Missionary Alliance* (1945) 191 S.W.2d. 273 (Mo.App.).
73 *Cummins v. Colgate Properties Corp.* (1956) 153 N.Y.Supp.2d. 321, aff'd. (1956) 153 N.Y.Supp.2d. 608, *app. den.* (1956) 154 N.Y.Supp.2d. 845. Also, *Todd v. North Ave. Holding Corp.* (1923) 201 N.Y.Supp. 31, 35, aff'd. (1924) 204 N.Y. Supp. 953; *Metropolitan Investment Company v. Sine* (1962) 376 P.2d. 940.
74 *Hunter v. Wood* (1923) 120 Atl. 781. Also see, *Phillips v. Donaldson* (1920) 112 Atl. 236.
75 *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545.
76 *Hawkins v. Whayne* (1947) 179 P.2d. 138.
77 *Star Brewery Co. v. Primas* (1896) 45 N.E. 145.
78 *Bogan v. Saunders* (1947) 71 F.Supp. 587 (D.C. Cir.); *Frick v. Foley* (1928) 141 Atl. 172 aff'd *on op.* below *Frick v. Northern Trust Co.* (1929) 146 Atl. 914; *Benbow v. Boney* (1951) 240 S.W.2d. 438 (Tex.Civ.App.).

fited thereby.[79] Also, where the restrictions still perform their intended function of repelling the invasion of business.[80]

Some aspects of the problems here considered may be particularized.

(i) *Economic considerations*

For reasons that are not entirely clear, it seems that economic considerations are not material.

(a) *As to the owner of the land benefited*

Should the plaintiff have an interest to protect, should the restriction notwithstanding the change of neighbourhood still be of 'substantial value' to the property protected—and this is the 'controlling question'[81]—the defendant may be enjoined.[82] In *Daniels v. Notor,* however, the Supreme Court of Pennsylvania, in deciding not to preclude the operation of a motel on the defendant's land, said:

> However, the measure of alleged harm thus far advanced (and apparently adopted by the chancellor when he stated that 'The erection of a motel unquestionably causes adjoining residences to lose value') is patently irrelevant. As noted by Justice (later Chief Justice) Stern in *Price v. Anderson, supra,* 'The value referred to in the authorities is the benefit to the owner of the dominant tenement in the "physical use or enjoyment of the land possessed by him". Rest. Property, s.537. "It (the restrictive covenant) must in some way make the use or enjoyment more satisfactory to his physical senses".'[83]

But should pecuniary benefit be regarded as an irrelevant consideration? The comment from the Restatement was stated in a discussion of the rules relating to the *running of the burden* of a covenant, and continues by giving as an example of a covenant, the burden of which will not run, a covenant against competition with a business.[84] This

[79] *Metropolitan Investment Company v. Sine,* 14 Utah 2d. 36 (1962) 376 P.2d. 940.

[80] *Speidel v. Weiner* (1941) 19 A.2d. 875. Also, *Weinstein v. Swartz* (1949) 68 A.2d. 865; *O'Neil v. Vose* (1944) 145 P.2d. 411; *Southwest Petroleum Co. v. Logan,* 180 Okla. 477, (1937) 71 P.2d. 759.

[81] *Pierce v. St. Louis Union Trust Co.* (1925) 278 S.W. 398, 409.

[82] *Taylor Avenue Improvement Ass'n. v. Detroit Trust Co.* (1938) 278 N.W. 75; *Stahl v. Dyer* (1926) 209 N.W. 107; *Proetz v. Central Dist. of Christian & Missionary Alliance* (1945) 191 S.W.2d. 273 (Mo.App.); *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545; *Reed v. Williamson* (1957) 82 N.W.2d. 18; *Chuba v. Glasgow* (1956) 299 P.2d. 774; *Alamogordo Improvement Co. v. Prendergast* (1940) 109 P.2d. 254; *Bullock v. Steinmil Realty, Inc.* (1955) 145 N.Y.Supp.2d. 331; *Rice v. Brehm* (1935) 287 N.Y.Supp. 648; *Szilvasy v. Saviers* (1942) 44 N.E.2d. 732; *Brown v. Huber* (1909) 88 N.E. 322; *Southwest Petroleum Co. v. Logan* (1937) 71 P.2d. 759; *Van Meter v. Manion* (1934) 38 P.2d. 557; *Snyder v. Plankenhorn* (1960) 159 A.2d. 209; *Daniels v. Notor* (1957) 133 A.2d. 520; *La Rue v. Weiser* (1954) 106 A.2d. 447; *Katzman v. Anderson* (1948) 59 A.2d. 85; *Price v. Anderson* (1948) 2 A.L.R.2d. 593; *Hunter v. Wood* (1923) 120 Atl. 781; *Landell v. Hamilton* (1896) 34 Atl. 663.

[83] (1957) 133 A.2d. 520, 525 *per* Jones C.J.

[84] v. Rest. Property s.537(f): 'It (the restrictive covenant) must in some way make the use or enjoyment more satisfactory to his physical senses. It is not enough that the income from it is increased by virtue of it. Thus a promise that land of the promisor will not be so used as to compete with a business carried on upon the land of the promisee does not so affect the land of the promisor that it can

is quite a different context from the issue of whether a court should give relief against a claim for an injunction, an issue which does not arise unless it has first been decided that the burden of a covenant has run with the land. It is considered that having reached the stage of determining whether or not to grant or withhold injunctive relief, the mere fact of the substantial benefit to the plaintiff's land as a pecuniary benefit only ought not to be determinative.

In accord with this view is the recent decision of *Metropolitan Investment Company v. Sine*.[85] There an action was brought to quiet title against a covenant providing that the plaintiff's property should not be used for the erection of a motel thereon. At first instance judgment was entered in favour of the plaintiff, and the defendants now appealed. The Supreme Court of Utah, reversing the decision of the court below, held that the covenant was not subject to be set aside, and that indeed the increased business construction and activity had made its purpose more valuable to the defendants. That the benefit to the plaintiff's land was pecuniary in no way deterred the Court, and of interest is the detailed manner in which this issue was reviewed:

> Plaintiff's contention that defendants would not derive a substantial benefit from preservation of the restriction is based primarily on defendant Jerry Sine's testimony that six motel units would not materially damage his motel business. On the other hand, Jerry Sine further testified in substance that an impressive motel front could not be built on North Temple Street without this property, and this fact would have a substantial effect upon his motel business. The defendants at least considered this fact important to them. Mr. and Mrs. Sine advertise by numerous road signs for the purpose of attracting guests originating from regions outside of Salt Lake Valley. If a large motel was erected, in part, on the subject property, defendants feared that the business of Se Rancho and Scotty's Romney would be adversely affected. Guests, especially those travelling . . . [into] North Temple Street, would be diverted into such motel, to the detriment of Se Rancho and Scotty's Romney situated to the west thereof.
>
> To prevent an imposing motel on North Temple Street as far as possible in order to protect their motel business was the main reason defendants purchased the property from Fendrelakis in the first place, and they carried out this purpose in requiring the restriction as a condition of sale to Mr. Neilson, who was known to them to be interested in a large motel in Salt Lake City. Even so, the restriction was required and the sale completed only after Mr. Sine was informed that Mr. Neilson wanted the property for 'other purposes'.
>
> When the restrictive covenant was entered into the purchaser, A. P. Neilson, as well as Jerry Sine, the seller, were well acquainted with the locality, the property in question, its relationship to the surrounding

be made to run with it.' Is this comment applicable to the facts of *Daniels v. Notor*. See also, *Rogers v. State Roads Commission* (1962) 177 A.2d. 850 (Md.). 1962).

[85] (1962) 376 P.2d. 940.

property, and had equal knowledge as to the purpose and effect of the restriction. It follows therefore that the parties to the covenant knew at the time it was agreed to that the restriction on the Sine property would interfere with an imposing front on North Temple or the architectural design of any motel that might be constructed. The purpose of the restriction when imposed still exists as does the benefit to the defendant, and therefore the purpose of the covenant has not ceased or become useless.[86]

(b) *As to the owner of the land burdened*

In *Ockenga v. Alken*,[87] the Appellate Court of Illinois rejected as insufficient a plea that there had been changes in the general economic conditions and in the real estate market since the creation of the restrictions there in issue, and accordingly upheld a decree dismissing proceedings for their modification or cancellation. In *Wilshire, Inc. v. Harbison*,[88] a restricted residential development was commenced in 1937, at which time restrictions were adopted which, having regard to the then economic conditions, were appropriate to such a development. Economic changes wrought by the war had resulted in greatly increased building costs which, argued the plaintiff, had rendered it impracticable to proceed to sell and develop the remaining lots under the restrictions as initially adopted; that their enforcement would thus balk the primary purpose of developing the entire tract as a residential district; and that accordingly he was entitled to change or to abrogate the restrictions to the extent necessary to make continued development practicable. This contention was rejected by the Supreme Court of Delaware, which said:

> But this consideration apart, it is obvious that plaintiff's argument reduces to the proposition that if a developer has fastened upon a residential development conditions which subsequently become so burdensome as effectively to deter the further development of the area, he is entitled to change or abrogate the restrictions to the extent necessary to make continued development practicable. Plaintiff cites to us no decision so holding, and in our opinion it is not the law. As above stated, changed economic conditions that impose upon a developer greater burdens than expected do not supply a reason for applying the rule invoked here by the plaintiff.[89]

In both these cases *affirmative* relief was sought. There seems, however, no reason to doubt that the same results would have been reached had the remedy sought been an injunction. That changed conditions impose upon a defendant greater burdens than were expected is clearly not material. But if it is established that the enforcement of restrictions would balk the primary purpose for which

86 (1962) 376 P.2d. 940, 944, *per* Cowley District J.
87 (1942) 41 N.E.2d. 548. Also, *Osius v. Barton* (1933) 88 A.L.R. 394. And see, *Allen v. Avondale Co.* (1938) 185 So. 137.
88 (1952) 88 A.2d. 121, *aff'd.* (1953) 91 A.2d. 404.
89 (1953) 91 A.2d. 404, 407, *per* Southerland C.J.

they were imposed, the merit of denying relief simply because the changed conditions are economic, is not easy to discern.

(ii) *No radical change in the tract*

A covenant will be enforced where the court finds that there is no change in the tract or its vicinity so radical as to defeat the object and purposes of the covenant.[90] This is a question of fact.[91] Exactly when it occurs is not easy to say, for no hard and fast rule can be laid down.[92] It is, however, clear that such a change may be constituted by any number of factors. By way of caution, however, it may be noted that the enactment of a zoning ordinance,[93] a change of zoning[94] (which is admissible in evidence,[95] though it does not operate

90 *Oler v. Gibbons* (1952) 200 F.2d. 135 (D.C. Cir.); *Miles v. Clark* (1919) 187 Pac. 167; (*reh. den.* by Supreme Court in (1920) 187 Pac. 172; *Wilshire, Inc. v. Harbison* (1952) 88 A.2d. 121, *aff'd.* (1953) 91 A.2d. 404; *Dolan v. Brown* (1930) 170 N.E. 425; *Hartman v. Wells* (1912) 100 N.E. 500; *Evans v. Foss* (1907) 80 N.E. 587; *Stahl v. Dyer* (1926) 209 N.W. 107; *Benzing v. Harmon* (1922) 189 N.W. 69; *McQuade v. Wilcox* (1921) 16 A.L.R. 997; *Moore v. Curry* (1913) 142 N.W. 839; *Hickey v. Greengard* (1944) 176 S.W.2d. 661 (Mo.App.); *Pierce v. St. Louis Union Trust Co.* (1925) 278 S.W. 398; *Milligan v. Balson* (1924) 264 S.W. 73; *Scillia v. Szalai* (1948) 59 A.2d. 435; *Friedman v. Cicoria* (1947) 54 A.2d. 922; *Speidel v. Weiner* (1941) 19 A.2d. 875; *Humphreys v. Ibach* (1932) 85 A.L.R. 980; *Chuba v. Glasgow* (1956) 299 P.2d. 774; *Cummins v. Colgate Properties Corp.* (1956) 153 N.Y.Supp.2d. 321, *aff'd.* (1956) 153 N.Y. Supp.2d. 608, *app.den.* (1957) 154 N.Y.Supp.2d. 845; *Brown v. Fred J. Hovey, Inc.* (1954) 136 N.Y.Supp.2d. 263; *Rice v. Brehm* (1935) 287 N.Y.Supp. 648; *Hart v. Little* (1918) 171 N.Y.Supp. 6; *Szilvasy v. Saviers* (1942) 44 N.E.2d. 732; *Gomory v. Cantor-Shaw Co.* (1928) 91 N.E.2d. 298; *Brown v. Huber* (1909) 88 N.E. 322; *Van Meter v. Manion* (1934) 38 P.2d. 557; *Heitkemper v. Schmeer* (1934) 29 P.2d. 540, (*reh. den.*) (1934) 30 P.2d. 1119; *Martin v. Cantrell* (1954) 81 S.E.2d. 37; *Hackett v. Steele* (1956) 297 S.W.2d. 63 (Tenn.); *Ridley v. Haiman* (1932) 47 S.W.2d. 750; *Ward v. Prospect Manor Corp.* (1926) 46 A.L.R. 364, *Infra* p.

91 *Wilshire, Inc. v. Harbison* (1952) 88 A.2d. 121, *aff'd.* (1953) 91 A.2d. 404.

92 *Proetz v. Central Dist. of Christian & Missionary Alliance* (1945) 191 S.W.2d. 273 (Mo.App.); *Hickey v. Greengard* (1944) 176 S.W.2d. 661 (Mo.App.); *Hall v. Koehler* (1941) 148 S.W.2d. 489; *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545; *Pitts v. Brown* (1949) 54 S.E.2d. 537; *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314.

93 *Dolan v. Brown* (1930) 170 N.E. 425; *Franklin v. Moats* (1954) 273 S.W.2d. 812 (Ky.); *Shuford v. Asheville Oil Company* (1956) 91 S.E.2d. 903; *Hayslett v. Shell Petroleum Corporation* (1930) 175 N.E. 888; *Ludgate v. Somerville* (1927) 54 A.L.R. 837; *Hackett v. Steele* (1956) 297 S.W.2d. 63 (Tenn.).

94 *Bard v. Rose* (1962) 21 Cal.Reptr. 382; *Osborne v. Hewitt* (1960) 335 S.W.2d. 921 (Ky.); *Cooper v. Kovan* (1957) 84 N.W.2d. 859; *Frey v. Poynor* (1962) 369 P.2d. 168 (Okla.); *Stewart v. Valenta* (1962) 361 S.W.2d. 910 (Tex.Civ.App.); *Hodgkins v. Pickett* (1961) 344 S.W.2d. 461 (Tex.Civ.App.); *Murphy v. Davis* (1957) 305 S.W.2d. 218 (Tex.Civ.App); *Schwarzschild v. Welborne* (1947) 45 S.E.2d. 152.

95 *Bard v. Rose* (1962) 21 Cal.Reptr. 382, 384, *per* Shepard J. (referring to *Strong v. Hancock* (1927) 258 P. 60): 'As was suggested in the *Strong* case, referring to zoning changes. "It may be that the adoption of such ordinances by the municipality affecting property subjected to residential restrictions would shed some light upon the question as to whether, in the course of civic growth, changed conditions have arisen in the neighbourhood of such property which would render the application of such zoning provisions advisable, and hence render the admission in evidence of such ordinances proper in a litigation between strictly private parties involving their contractual rights and obligations".' Also, *Wahrendorff v. Moore* (1957) 93 So.2d. 720 (Fla.).

to shift the burden of proof),[96] an increase in traffic,[97] the widening of a street and the establishment of street car tracks,[98] the presence of street railway tracks,[99] the erection of a filling station directly across the street on unrestricted property,[1] the construction of an oil station,[2] the erection of a large factory on property abutting a restricted subdivision,[3] an actively producing oil field in the immediate neighbourhood,[4] an increase in population[5] and (before the Supreme Court determined that restrictive covenants as to ownership or occupancy of property based on race or colour could not be enforced by injunction)[6] an increase of Negro occupancy,[7] while being circumstances to be considered by the court in the exercise of its discretion, have been held to be factors that are not of themselves *necessarily* sufficient to show that the original plan or purpose of the covenant can no longer be established. Their presence has, in some cases, caused or contributed to injunctive relief being denied.[8] For example, recently the New York Court cancelled a covenant which restricted the use of property by prohibiting erection of a building other than a private

96 *Wahrendorff v. Moore* (1957) 93 So.2d. 720 (Fla.).

97 *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314, 318, *per* Buchanan J.: 'Because there is more traffic on the street is no sufficient reason for lifting the restrictions to permit more business houses among the residences.' Also, *Continental Oil Co. v. Fennemore* (1931) 299 Pac. 132; *Thodos v. Shirk* (1956) 79 N.W.2d. 733 (Iowa); *Osborne v. Hewitt* (1960) 335 S.W.2d. 922 (Ky.); *Humphreys v. Ibach* (1932) 85 A.L.R. 980; *O'Neil v. Vose* (1944) 145 P.2d. 411; *Van Meter v. Manion* (1934) 38 P.2d. 557; *Ludgate v. Somerville* (1927) 54 A.L.R. 837; *Hodgkins v. Pickett* (1961) 344 S.W.2d. 461 (Tex.Civ.App.); *Morton v. Sayles* (1957) 304 S.W.2d. 759 (Tex.Civ.App.); *Hemphill v. Cayce* (1946) 197 S.W.2d. 137 (Tex.Civ.App.); *Scaling v. Sutton* (1942) 167 S.W.2d. 275 (Tex.Civ.App.).

98 *Bingham v. Locklin* (1936) 267 N.W. 564. Also, *Martin v. Cantrell* (1954) 81 S.E.2d. 37.

99 *Noel v. Hill* (1911) 138 S.W. 364; *Spahr v. Cape* (1909) 122 S.W. 379, 383.

1 *Bethea v. Lockhart* (1939) 127 S.W.2d. 1029 (Tex.Civ.App.). Also see, *Kustarz v. Janesick* (1956) 79 N.W.2d. 613.

2 *Burgess v. Magarian* (1932) 243 N.W. 356.

3 *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314.

4 *Southwest Petroleum Co. v. Logan* (1937) 71 P.2d. 759. Also *Smith Oil Co. v. Logan* (1937) 71 P.2d. 766.

5 *Chuba v. Glasgow* (1956) 299 P.2d. 774; *Alamogordo Improvement Co. v. Prendergast* (1940) 109 P.2d. 254.

6 *Sheeley v. Kraemer* (1948) 3 A.L.R.2d. 441.

7 *Bogan v. Saunders* (1947) 71 F.Supp. 587 (D.C. Cir.); *Mays v. Burgess* (1945) 162 A.L.R. 168 (D.C. Cir. 1945), (*cert. den.*) (1945) 65 S.Ct. 1406, which has *reh. den.* (1945) 65 S.Ct. 1567; *Grady v. Garland* (1937) 89 F.2d. 817 (D.C. Cir.), (*cert. den.*) (1937) 58 S.Ct. 13 *Meade v. Dennistone* (1938) 114 A.L.R. 1227; *Swain v. Maxwell* (1946) 196 S.W.2d. 780; *Porter v. Pryor* (1942) 164 S.W.2d. 353 (Mo.); *Porter v. Johnson* (1938) 115 S.W.2d. 529; *Eakers v. Clopton* (1947) 173 A.L.R. 309 (Okla.); *Hawkins v. Whayne* (1947) 179 P.2d. 138; *Schwartz v. Hubbard* (1947) 177 P.2d. 117; *Shipman v. Medlock* (1947) 184 P.2d. 764 (Okla.).

8 *Hundley v. Gorewitz* (1942) 132 F.2d. 23 (D.C. Cir.); *Wolff v. Fallon* (1955) 284 P.2d. 802; *Fairchild v. Raines* (1944) 151 P.2d. 260; *Goodwin Bros. v. Combs Lumber Co.* (1938) 120 S.W.2d. 1024; *Muilenburg v. Blevins* (1955) 87 S.E.2d. 493.

single-family dwelling, where such property was located on land zoned and taxed for apartment house use.[9]

(iii) *Increase of value*

The mere fact that the defendant's property would sell for more without the restriction is not in itself sufficient reason to preclude the defendant from being enjoined.[10] Indeed, the very purpose of a restriction is to prevent property from being converted to a prohibited use, should it become more valuable therefor.[11] To this extent, accordingly, there is a similarity between proceedings for an injunction and an application for a change in zoning, where there is evidence to the effect that prices would be enhanced by a change from residential to commercial use.[12] Nor does it matter that as a consequence of the use of surrounding land for business purposes the defendant's property has become more desirable or valuable for a like user, for economic considerations are not necessarily the controlling factor; the courts may act to protect a home. These sentiments were well expressed by Kerrigan J. in *Miles v. Clark,* when he said:

> The fact that apart from and surrounding the tract some business has grown up, and that the land has become more valuable in consequence, in no manner entitles defendants to be relieved of the restrictions they have created. This condition is but the natural result of the improvement of the various tracts, and the fact that the property may have become more valuable thereby for business purposes is immaterial . . . Courts in such cases are not controlled exclusively by money value, but may protect a home.[13]

9 *Normus Realty Corp. v. Gargano* (1963) 237 N.Y.S.2d. 648, 652, *per* Lyman J.: 'Accordingly, continued enforcement of the restrictive covenant would result for plaintiff in the insistence on private residential use for property located on land zoned and taxed for apartment house use.'

10 *Moore v. Curry* (1913) 142 N.W. 839, 842, *per* Steere C.J.: 'The only equitable consideration for refusing this relief, under present conditions, is that the lots on Woodward Avenue would sell for more with the restrictions removed. This is not sufficient.' See also, *Swain v. Maxwell* (1946) 196 S.W.2d. 780, 785, *per* Douglas J.: 'In this state the courts have consistently refused, and correctly so, to nullify a restriction merely because an increment in the value of the property would result thereby.' Also, *Bogan v. Saunders* (1947) 71 F.Supp. 587 (D.C. Cir.); *Murphey v. Gray* (1958) 327 P.2d. 751 (Ariz.); *Continental Oil Co. v. Fennemore* (1931) 299 Pac. 132; *Fairchild v. Raines* (1944) 151 P.2d. 260; *Osborne v. Hewitt* (1960) 335 S.W.2d. 922 (Ky.); *Monroe v. Menke* (1946) 22 N.W.2d. 369; *Wineman Realty Co. v. Pelavin* (1934) 255 N.W. 393; *Benzing v. Harmon* (1922) 189 N.W. 69; *McQuade v. Wilcox* (1921) 16 A.L.R. 997; *Cowherd Development Co. v. Littick* (1951) 238 S.W.2d. 346; *Proetz v. Central Dist. of Christian & Missionary Alliance* (1945) 191 S.W.2d. 273 (Mo.App.); *Hall v. Koehler* (1941) 148 S.W.2d. 489; *Porter v. Johnson* (1938) 115 S.W.2d. 529; *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545; *Pierce v. St. Louis Union Trust Co.* (1925) 278 S.W. 398; *Frey v. Poynor* (1962) 369 P.2d. 168 (Okla.); *Martin v. Cantrell* (1954) 81 S.E.2d. 37; *Hackett v. Steele* (1956) 297 S.W.2d. 63 (Tenn.); *Hodgkins v. Pickett* (1961) 344 S.W.2d. 461 (Tex.Civ.App.).

11 *Bickell v. Moraio* (1933) 167 Atl. 722; *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314.

12 *Bogan v. Saunders* (1947) 71 F.Supp. 587 (D.C. Cir.).

13 (1919) 187 Pac. 167, 172 (*reh. den.*) (1920) 187 Pac. 172. And see, *Ludgate v.*

Such circumstances do not, by themselves, signify that the purpose of the restrictions has been defeated.[14] It does not necessarily follow that the defendant's property is thereby made unsuitable for a residence.[15] But if this is so, if such property is essentially business property, the situation being such that it is 'absolutely useless' for residential purposes and to enforce the covenant would be to deprive the property of any use whatsoever, thereby irreparably damaging the defendant, an injunction will be refused.[16] The mere fact, however, that property can be 'profitably utilized' in breach of the restriction, is not enough.[17]

(iv) *Business encroachment*

One problem which has caused the court some concern arises where business or commerce has begun to encroach upon a restricted residential subdivision—or the aggravating circumstance presented by an increase of business thereon.[18] If the changed conditions have affected *all* the lots in the tract, and have rendered the enforcement of the restriction inequitable in relation to any one lot, no difficulty arises in denying injunctive relief, for the covenant has spent its force. Whether this same result will follow if, in a large tract, one or two lots only remain unaffected by the changed conditions, is not easy to say. The question may be whether a 'sufficient part' of the tract has been materially affected.[19]

Somerville (1927) 256 P. 1043, 1046, *per* Belt J.: 'It is true that it might be more valuable for business purposes, but there are some things in this strenuous age of commercialism that count more than cash. It is her home.' See too, *Downs v. Kroeger* (1927) 254 Pac. 1101; *Reeves v. Comfort* (1931) 157 S.E. 629; *Swan v. Mitshkun* (1919) 173 N.W. 529; *Noel v. Hill* (1911) 138 S.W. 364; *Iselin v. Flynn* (1915) 154 N.Y. Supp. 133; *Van Meter v. Manion* (1934) 38 P.2d. 557.

14 *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545; *Pierce v. St. Louis Union Trust Co.* (1925) 278 S.W. 398.

15 *Spahr v. Cape* (1909) 122 S.W. 379, 383-384, *per* Reynolds P.J.: 'All that the evidence tends to show is that the property adjoining this loop, as do the lots here involved, is more valuable for business than for residential purposes. It does not convince us that it has become unsuitable for residence purposes, and so does not come within the three cases cited. The mere fact that it is more valuable or suitable for the one purpose than the other is not enough to justify a court in overturning and nullifying the solemn covenants in the deeds.' Also, *Thompson v. Langan* (1913) 154 S.W. 808; *Noel v. Hill* (1911) 138 S.W. 364; *Brown v. Huber* (1909) 88 N.E. 322.

16 *Downs v. Kroeger* (1927) 254 Pac. 1101; *Windemere-Grand Improvement & Protective Ass'n. v. American State Bank of Highland Park* (1919) 172 N.W. 29; *Hayslett v. Shell Petroleum Corporation* (1930) 175 N.E. 888.

17 *Brown v. Huber* (1909) 88 N.E. 322, 328, *per* Crew C.J.: '. . . a court of equity will not deny to plaintiff the relief she asks merely because the property of defendants can now be profitably utilized only in the manner contemplated by the proposed improvement.'

18 *Todd v. North Ave. Holding Corp.* (1923) 201 N.Y.Supp. 31, 36.

19 *Southwest Petroleum Co. v. Logan* (1937) 71 P.2d. 759, 764, *per* Hurst J.: 'Defendants introduced testimony to the effect that the lots on the outside of the addition, bordering on adjacent oil fields, would sustain no more damage by drilling within the addition than has already been sustained. The language in *Trustees of Columbia College v. Thacher, supra,* supports the contention that it is not necessary for the change in condition to extend to every lot in the addition. But the question is still whether a sufficient part of the addition has been affected

The more common situation which seems to occur is where the changed situation has reacted only upon the plots on the periphery of the subdivision (that is those fronting onto the line to which business has thus far advanced) and the owners thereof wish to depart from residential user and commence business operations. Should the court consider only the particular lot or lots claimed to have been so affected; or should consideration be given to the effect upon the entire restricted tract of the alleged business encroachments in the adjoining unrestricted areas?

Such a situation has often arisen before the Michigan courts.[20] These courts have held that business encroachment is not in itself sufficient to bar injunctive relief, provided that the tract has retained its residential quality, for it is the policy of the courts of that state to protect property owners who have not themselves violated restrictions in the enjoyment of their homes.[21] Such owners are entitled to protection, and this is so 'regardless of how close business may crowd around them on unrestricted property'.[22] The question suggested by these cases may be not whether, having regard to the change, anyone would purchase a vacant lot in the tract for a residential site, but rather whether the plaintiff should be entitled to enjoy his home, erected in reliance on the restrictions,[23] free from the disturbances a business use would necessarily produce.[24] Sharpe J. in *Bohm v. Silberstein* spoke in general terms:

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so as to defeat the restrictions, and, even though the lots on the edge or threshhold of the restricted area must bear the brunt of the outside commercial expansion, yet if the restrictions are still a substantial value to those within, they will be enforced. The very purpose of the restrictions is to protect the property in the restricted area from such invasion.'

20 *Cooper v. Kovan* (1957) 84 N.W.2d. 859; *Redfern Lawns Civic Ass'n. v. Currie Pontiac Co.* (1950) 44 N.W.2d. 8; *Monroe v. Menke* (1946) 22 N.W.2d. 369; *Bigham v. Locklin* (1936) 267 N.W. 564; *Wineman Realty Co. v. Pelavin* (1934) 255 N.W. 393; *Boston-Edison Protective Ass'n. v. Goodlove* (1929) 227 N.W. 772; *Sanders v. Campbell* (1925) 204 N.W. 767; *Sherrard v. Fine* (1923) 192 N.W. 564; *Bohm v. Silberstein* (1922) 189 N.W. 899, *Swan v. Mitshkun* (1919) 173 N.W. 529.

21 *Swan v. Mitshkun* (1919) 173 N.W. 529, 531, *per* Steere J.: 'The case falls well within that class where it is the policy of the courts of this state to protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings, free from inroads by those who attempt to invade restricted residential districts and exploit them under some specious claim that others have violated the restrictions, or business necessities nullified them.' Also, *Continental Oil Co. v. Fennemore* (1931) 299 Pac. 132; *Murphy v. Davis* (1957) 305 S.W.2d. 218 (Tex.Civ.App.); *Bethea v. Lockhart* (1939) 127 S.W.2d. 1029 (Tex.Civ.App.).

22 *Swan v. Mitshkun* (1919) 173 N.W. 529, 531, *per* Steere J.. Also, *Moreton v. Louis G. Palmer & Co.* (1925) 203 N.W. 116; *Martin v. Cantrell* (1954) 81 S.E.2d. 37.

23 *Monroe v. Menke* (1946) 22 N.W.2d. 369; *Bigham v. Locklin* (1936) 267 N.W. 564; *Moreton v. Louis G. Palmer & Co.* (1925) 203 N.W. 116; *Cowherd Development Co. v. Littick* (1951) 238 S.W.2d. 346; *Martin v. Cantrell* (1954) 81 S.E.2d. 37; *Hodgkins v. Pickett* (1961) 344 S.W.2d. 461 (Tex.Civ.App.); *Cowling v. Colligan* (1958) 312 S.W.2d. 943 (Tex.).

24 *Taylor Avenue Improvement Ass'n. v. Detroit Trust Co.* (1938) 278 N.W. 75;

The fact that adjoining or surrounding property is now used for business purposes does not alter the character of the subdivision itself, and the owners of property therein are entitled to have it preserved for the purpose for which it must be assumed they purchased it.[25]

A similar result has been achieved in a series of Missouri cases,[26] and, with a few exceptions,[27] this appears to be the generally prevailing view.[28]

In *Continental Oil Co. v. Fennemore*,[29] this passage from *Bohm v. Silberstein* was cited by the Supreme Court of Arizona, which

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Bohm v. Silberstein (1922) 189 N.W. 899; *Reed v. Williamson* (1957) 82 N.W.2d. 18; *Southwest Petroleum Co. v. Logan* (1937) 71 P.2d. 759; *Ludgate v. Somerville* (1927) 54 A.L.R. 837; *Booker v. Old Dominion Land Co.* (1948) 49, S.E.2d. 314.

25 (1922) 189 N.W. 899, 901. *Windemere-Grand Improvement & Protective Ass'n. v. American State Bank of Highland Park* (1919) 172 N.W. 29, where an injunction was refused, seems almost to be regarded as an embarrassment, and subsequent courts have been at pains to virtually confine that case to its own particular facts. In *Boston-Edison Protective Ass'n. v. Goodlove* (1929) 227 N.W. 772, for example, North C.J., at pp. 773-774, said: 'He refers to the case of *Windemere, etc., Association v. American State Bank*, 205 Mich. 539, 172 N.W. 29. In this case, it was held that the restriction forbidding the use of the property for business purposes was no longer of any force. It was shown that the three lots in the subdivision immediately north of the lot in question had been freed from the restriction and that it was inequitable to hold that defendant's lot was bound by a restriction when the adjoining property had been so released. In that case also the plaintiff association conceded that there had been such a change in conditions as to render the enforcement of the restrictions inequitable and the association had been active in lifting the restrictions on other properties. Plaintiff in that case opposed the nearness of the building lines to the street on Windemere avenue. We have no such situation in the case under consideration.'

26 *Cowherd Development Co. v. Littick* (1951) 238 S.W.2d. 346; *Proetz v. Central Dist. of Christian & Missionary Alliance* (1945) 191 S.W.2d. 273 (Mo.App.); *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545; *Pierce v. St. Louis Union Trust Co.* (1925) 278 S.W. 398; *Thompson v. Langan* (1913) 154 S.W. 808; *Noel v. Hill* (1911) 138 S.W. 364; *Spahr v. Cape* (1909) 122 S.W. 379. *Supra* p. 292.

27 *Hirsch v. Hancock* (1959) 343 P.2d. 959; *Wolff v. Fallon* (1955) 284 P.2d. 802; *Downs v. Kroeger* (1927) 254 Pac. 1101; but see, *Miles v. Clark* (1919) 187 Pac. 167 (*reh. den.* by Supreme Court in (1920) 187 Pac. 172; *Shuford v. Asheville Oil Company* (1956) 91 S.E.2d. 903; *Muilenburg v. Blevins* (1955) 87 S.E.2d. 493; *Bass v. Hunter* (1939) 5 S.E.2d. 558; *Elrod v. Phillips* (1938) 199 S.E. 722; but see, *Logan v. Sprinkle* (1961) 123 S.E.2d. 209 (N.C.); *Tull v. Doctors Building, Inc.* (1961) 120 S.E.2d. 817; *Brenizer v. Stephens* (1941) 17 S.E.2d. 471; *Franklin v. Elizabeth Realty Co.* (1932) 162 S.E. 199; *McLeskey v. Heinlein* (1931) 156 S.E. 489. See also, *Daniels v. Notor* (1957) 133 A.2d. 520.

28 *Bickell v. Moraio* (1933) 167 Atl. 722; *Fortney v. Gulf Refining Company* (1958) 316 S.W.2d. 65 (Ky.); *Hardesty v. Silver* (1956) 302 S.W.2d. 578 (Ky.); *Franklin v. Moats* (1954) 273 S.W.2d. 812 (Ky. 1954); but see, *Osborne v. Hewitt* (1960) 335 S.W.2d. 922 (Ky. 1960); *Bewley v. Stieff* (1954) 273 S.W.2d. 833 (Ky.); *Hogue v. Dreeszen* (1955) 73 N.W.2d. 159; *Reed v. Williamson* (1957) 82 N.W.2d. 18; *Weinstein v. Swartz* (1949) 68 A.2d. 865; *Humphreys v. Ibach* (1932) 85 A.L.R. 980; *Frick v. Foley* (1928) 141 Atl. 172, *aff'd. on op.*, below *Frick v. Northern Trust Co.* (1929) 146 Atl. 914; *Lefferts Manor Association, Inc. v. Fass* (1960) Misc., 211 N.Y.Supp.2d. 18; *Pagenstecher v. Carlson* (1911) 131 N.Y.Supp. 413; *Holling v. Margiotta* (1957) 100 S.E.2d. 397; *Martin v. Cantrell* (1954) 81 S.E.2d. 37; *Hackett v. Steele* (1956) 297 S.W.2d. 63 (Tenn.); *Metropolitan Investment Company v. Sine* (1962) 376 P.2d. 940; *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314.

29 (1931) 299 Pac. 132. Also, *Murphey v. Gray* (1958) 327 P.2d. 751 (Ariz.).

observed that practically all the modern authorities supported that view. The argument that the plaintiff's lot should be considered separate and apart from its relation to the entire restricted area was there expressly rejected by Fickett S.J., who said:

> We adhere to the doctrine that the lot of appellant cannot be considered separate and apart from its relation to the entire restricted addition. Though there may be a fringe of property all around the borders of a restricted addition which would be more valuable for business than for residential purposes, this fact alone is not sufficient to warrant the breach of the restrictions by these owners.[30].

Continental Oil Co. v. Fennemore found favour in *Van Meter v. Manion*, the forerunner of a series of Oklahoma cases.[31] And what was said in the Arizona case was considered 'quite appropriate' by the Supreme Court of Texas in *Bethea v. Lockhart*.[32]

There is a difficulty in denying injunctive relief, a difficulty which though perhaps implicit in the early cases, first seems to have found clear expression in the *Continental Oil Case*.[33] Jurisdictions where the majority view prevails have without doubt been considerably influenced by the argument that if injunctive relief is denied, the process of encroachment would continue further and further into the tract as the frontier should shift.[34] Other lots would fall 'like tenpins',[35] until finally the residential character of the entire subdivision becomes obliterated. Further, such a disastrous result can occur even if a court declares the restrictions enforceable against all other lots, for such a judgment is *res judicata* only of present, and not of future, conditions.[36] A good statement is found in the judgment of the United States Court of Appeal, District of Columbia Circuit, in *St. Lo Construction Co., Inc. v. Koenigsberger*.

30 *Continental Oil Co. v. Fennemore* (1931) 299 Pac. 132, 135.

31 (1934) 38 P.2d. 557. Also, *Frey v. Poynor* (1962) 369 P.2d. 168 (Okla.); *Kytle v. Peck* (1958) 330 P.2d. 189 (Okla.); *Tower v. Mudd Realty Company* (1957) 317 P.2d. 753 (Okla.); *Hawkins v. Whayne* (1947) 179 P.2d. 138; *O'Neil v. Vose* (1944) 145 P.2d. 411; *Williamson v. Needles* (1942) 133 P.2d. 211; *Southwest Petroleum Co. v. Logan* (1937) 71 P.2d. 759; *Commercial Realty Co. v. Pope* (1935) 43 P.2d. 62.

32 (1939) 127 S.W.2d. 1029 (Tex.Civ.App.). And see, *Hodgkins v. Pickett* (1961) 344 S.W.2d. 461 (Tex.Civ.App.); *Murphy v. Davis* (1957) 305 S.W.2d. 218 (Tex.Civ.App.); *Benbow v. Boney* (1951) 240 S.W.2d. 438 (Tex.Civ.App.).

33 *Continental Oil Co. v. Fennemore* (1931) 299 Pac. 132, 135: 'It is also a matter of common knowledge and accepted human experience that, if the restrictive bars were let down for appellant in this case, the business encroachment on the remainder of the addition would be a matter of gradual yet steady development against which the home owners would be helpless, and the benefits and protection of the restrictive covenants would eventually be lost to all the co-owners therein.'

34 *Continental Oil Co. v. Fennemore* (1931) 299 Pac. 132; *Redfern Lawns Civic Ass'n. v. Currie Pontiac Co.* (1950) 44 N.W.2d. 8: *Tull v. Doctors Building, Inc.* (1961) 120 S.E.2d. 817; *Cowling v. Colligan* (1958) 312 S.W.2d. 943 (Tex.); *Scaling v. Sutton* (1942) 167 S.W.2d. 275 (Tex.Civ.App.).

35 *Cowling v. Colligan* (1958) 312 S.W.2d. 943, 946, *per* Calvert J.

36 *Cowling v. Colligan* (1958) 312 S.W.2d. 943.

> Owners of restricted property adjoining, or across the street from, an unrestricted area can almost always present an equitable and reasonable case for lifting the restriction on their property. As between two pieces of property, side by side or across the street from each other, there is frequently little reason for different treatment. But restrictions, whether by covenant or by zoning regulation, necessarily fall within fixed lines. One side of the line is commercial and the other side non-commercial. Oftentimes that rule yields harsh results . . . But if intangible considerations require the line to be extended to include him, his neighbour takes the place next to the commercial area. The problem is not thereby solved; it is merely shifted. So the existence of the commercial area across the Avenue may make the restrictive covenant in this case very harsh. But if the restriction be lifted from this particular property, the next adjoining residential property would then be the recipient of the same harsh treatment. The line as now fixed falls where it was placed by contract before this appellant bought the property.[37]

Recently, however, the California Court in *Atlas Terminals, Inc. v. Sokol*[38] has denied that this process of encroachment must necessarily continue. In 1938 the perimeter of a restricted tract was adjudged to be no longer bound by restrictions confining use to first-class family residences. The plaintiffs owned lots in the perimeter and also adjoining lots in the second tier. The plaintiff company planned to erect a twenty-seven storey office building on the perimeter lots with a two-storey garage therefor on the lots in the second tier. The plaintiffs brought the present action for declaratory relief and quiet title. At first instance the Court found that the plaintiffs' second tier lots were not, at the date of the hearing, desirable for first-class family residential use and were suitable and desirable only for business and commercial uses as an adjunct to the perimeter property. The Court also found, however, that the continued maintenance of the restrictions was of material and continuing benefit to the remaining properties in the tract, and that, therefore, it was both just and equitable that the restrictions should be maintained and enforced. This judgment was affirmed on appeal. It was there pointed out that there were over four hundred lots within the tract which did not abut upon perimeter lots and which were protected by the enforcement of the restrictions. Further, that the findings of the Court below blended into a 'harmonious whole' and reflected a carefully considered and well-balanced judicial conclusion. Of interest is the Court's observation:

> There is, as will be shown, no hard and fast rule that clearing boulevard frontage of restrictions connotes a further right to do that with respect to a second tier of lots and then a third and so on until a whole tract is freed merely because the frontage on a given street is no

[37] (1948) 174 F.2d. 25, 28, *per* Pettyman Circuit J. (*cert. den.* (1948) 338 U.S. 821).

[38] (1962) 21 Cal.Rptr. 293.

longer suitable for the continuance of the use prescribed by the restrictions.[39]

This approach seems to go quite a way to resolving the difference between the Californian cases and the cases in most other jurisdictions,[40] and surely it is correct.

Perhaps a relaxation of the majority view, together with the acceptance of the principle of the *Atlas Terminals Case,* is a combination best designed to reach an equitable solution. Though generalizations are not easy to make, it may be that to adopt a rigid attitude of disregarding business encroachment is undesirable. No doubt a court should move very slowly before denying injunctive relief. But, depending of course upon the facts, it may be that perimeter lots, from their very nature, suffer a disproportionate amount of harm through the unanticipated approach of commerce and, therefore, to enforce a covenant would be to work an injustice. Equally so, however, it could be that lots in a second tier, though not desirable for residential purposes, do have a use therefor, and, even if a business use was carried on upon the perimeter lots, the second tier lots would not suffer harm of the magnitude equal to that which would be suffered by the perimeter lots should they be denied a business user.

(v) *Covenant taken for a limited duration only*

A covenant may be taken for a limited duration only. If so, it will clearly expire by effluxion of time at the termination of the period for the continuance of which it was so limited. An injunction may, however, be sought to restrain the breach of such a covenant before this occurs. The question which is thereby raised is, what effect, if any, should be conceded to the limited nature of the restriction?

Several solutions seem possible. It could be contended that a restriction will not be enforced if a substantial part of its duration has expired, it being for the court, on the facts before it, to determine whether this is so. Alternatively, there may be an argument that the length of time which a restriction has still to run, however short this may be, is of no concern in determining whether or not to enjoin a breach, for a plaintiff is entitled to the enforcement of a covenant for howsoever long it is limited to endure.[41] Neither of these views commend themselves, and both lack any substantial degree of judicial support.

An injunction is granted or withheld at the discretion of a court, the concern of equity being to achieve a just solution to the problem before it.[42] In the exercise of this discretion all material facts require

39 (1962) 21 Cal.Rptr. 293, 295, *per* Ashburn J.
40 *Supra* p. 297.
41 *Porter v. Pryor* (1942) 164 S.W.2d. 353 (Mo.).
42 *Supra* p. 285.

consideration,[43] and the period of a restriction remaining unexpired is surely one such factor. It is one of the 'elements which should control the disposition' of a case.[44] On this basis, it has been held that such a period is an issue which, if supported by competent evidence, ought to be found by a court.[45] For it gives 'added force' to the defence of change of neighbourhood.[46] Its effects are variable. For example, the fact that the time which has elapsed since the execution of the agreement is but short, may be relevant in that it may indicate that the purpose of the agreement is as existent at the time of the proceedings as it was at the time of its making.[47] Conversely, the fact that a restriction has nearly expired may dissuade a court from granting a mandatory injunction.[48]

In quite a few cases this issue has not received judicial consideration either in the granting[49] or in the withholding[50] of injunctive relief. The earliest case where a discussion is found is *Page v. Murray*.[51] There a covenant precluded, *inter alia,* for a term of twenty years, the erection of a building costing less than $3,000. The defendant commenced to build a house which, when finished, would cost about $2,000, and the plaintiff sought an injunction. The covenant had only three years remaining unexpired and, in refusing injunctive relief, the Court said:

> It is true that to some extent the future character of Valley Street north of Murray's land was foreshadowed at the time of the agreement between the complainant and Gerbert & Ward, but it was not then so pronounced as at present, and then the agreement had twenty years to run—a time apparently sufficient to ensure a change in that character over the portion of the land affected by the agreement; but now, after 17 years have expired, and no buildings of the value contemplated have been built on the land affected by the agreement, while upon adjacent land cheaper buildings have multiplied, it appears to be too late for the covenant to secure the desired end.[52]

So too in *McClure v. Leaycraft*,[53] breach of a covenant against the erection of an apartment house was not enjoined by the New York Court of Appeals. The covenant, initially for a period of twenty-five years, had run nineteen years, and the Court held that its purpose had been defeated by the unexpected action of others in erecting stores and apartment houses in the immediate vicinity. *McClure v.*

43 *Supra* p. 285.
44 *Forstmann v. Joray Holding Co.* (1926) 154 N.E. 652.
45 *Fairchild v. Raines* (1944) 151 P.2d. 260.
46 *Loud v. Prendergast* (1910) 92 N.E. 40, 41, *per* Rugg J.
47 *Bogan v. Saunders* (1947) 71 F.Supp. 587 (D.C. Cir.).
48 *Forstmann v. Joray Holding Co.* (1926) 154 N.E. 652; *Holling v. Margiotta* (1957) 100 S.E.2d. 397.
49 See annotation (1949) 4 A.L.R.2d. 1184-1185.
50 *Ibid.* 1187. 51 (1890) 19 Atl. 11.
52 (1890) 19 Atl. 11, 13, *per* McGill Ch. 53 (1905) 75 N.E. 961.

Leaycraft was referred to in *Norris v. Williams*.[54] There, a covenant initially created for a period of fifty years, restricted the use of property to residential purposes only. In proceedings for its enforcement, the Court of Appeals of Maryland said:

> Thus more than 30 years of the life of the covenant have elapsed. We now hold that, even though the duration of a restrictive covenant is expressly limited, equity will not enforce the covenant where a considerable part of the life of the covenant has elapsed and where, owing to a change in the character of the neighbourhood, not resulting from a breach of the covenant, the reason for enforcement of the covenant no longer exists, and such enforcement would merely encumber the land and injure or harass the covenator without benefiting the covenantee.[55]

If, however, a covenant is to continue until the date limited for its expiration, an injunction of unlimited duration should not be granted, but only one limited, expressly or otherwise,[56] to the period of the continuance of the restriction.[57]

B. *Restrictions not enforced*

Once restrictions have been declared invalid, an injunction forbidding any attempt to enforce them will not be issued, at least in the absence of any reason to anticipate such conduct.[58] This apart, it is a 'familiar rule' that when conditions have so changed as to render it unconscionable to enforce a restriction, injunctive relief will be refused.[59] Such will also be the case where it would be unjust, oppressive and inequitable to enforce a covenant.[60] But such circumstances form 'equitable exceptions',[61] and it is not easy to determine when they occur.

Injunctive relief will be refused where no benefit will accrue to the plaintiff by the enforcement of the covenant.[62] For to violate a restriction without harming anyone in so doing, creates no cause of action in equity, whose objective, in this context, is not to protect a mere preference.[63] Particularly is this so where the result of enforcement would be that the burdened land would remain idle for eleven years.[64] So too will an injunction be refused where the benefit has so largely

54 (1947) 54 A.2d. 331.
55 (1947) 54 A.2d. 331, 334, *per* Delaplaine J.
56 *Holling v. Margiotta* (1957) 100 S.E.2d. 397.
57 *Reed v. Williamson* (1957) 82 N.W.2d. 18.
58 *Forman v. Hancock* (1934) 39 P.2d. 249 (1934).
59 *Friesen v. City of Glendale* (1930) 288 P. 1080, 1082.
60 *Fairchild v. Raines* (1944) 151 P.2d. 260; *Hess v. Country Club Park* (1931) 2 P.2d. 782; *Downs v. Kroeger* (1927) 254 Pac. 1101; *Stewart v. Valenta* (1962) 361 S.W.2d. 910 (Tex.Civ.App.); *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314.
61 *Cooper v. Kovan* (1957) 84 N.W.2d. 859, 864, *per* Edwards J.
62 *De Gray v. Monmouth Beach Club House Co.* (1892) 24 Atl. 388; *Deeves v. Constable* (1903) 84 N.Y.Supp. 592. See also, *Hunter v. Wood* (1923) 120 Atl. 781; *Landell v. Hamilton* (1896) 34 Atl. 663, 666.
63 *Forstmann v. Joray Holding Co.* (1926) 154 N.E. 652.
64 *Hayslett v. Shell Petroleum Corporation* (1930) 175 N.E. 888.

ceased to exist that it would be inequitable to enforce the restriction.[65] Or where there has been such a substantial change in the character of a neighbourhood that the restricted area is no longer reasonably useful for the limited purposes permitted by the covenant.[66] So too where the change is such that the usefulness of the covenant has been destroyed and it is no longer applicable to the existing state of things.[67] Or where by virtue of such a change the purpose of the covenant cannot be carried out, and the result of enforcing it would be to depreciate rather than to enhance the value of the property concerned.[68] So too where the changes are so radical as to frustrate the original purposes and intention of the parties, with the result that they can no longer be carried out: *lex non cogit ad impossibilia*.[69] The same result will follow when the enforcement of the restrictions would impose a hardship rather than a benefit upon those who were parties to its terms.[70] So too where by an unanticipated development the property becomes of no use or value for the purpose to which it is restricted.[71] Likewise, the intervention of a court should be denied if changed conditions have made performance by the defendant so onerous that the enforcement of a restriction will impose great hardship upon him and cause little or no benefit to the plaintiff.[72]

If it is clear that the plaintiff has, because of the changed conditions, no substantial benefit in equity to be protected, but that, in fact, the application is part of an attempt to levy and collect the increased value which, but for the changed conditions, would otherwise have been conferred upon the restricted property by non-compliance with the covenant, the defendant will not be enjoined.[73] So too if the situation is such that the rigid enforcement of the covenants would not restore a locality to its intended character, or would not promote

65 *Welitoff v. Kohn* (1929) 66 A.L.R. 1317.
66 *Heller v. Seltzer* (1947) 67 N.Y.Supp.2d. 456.
67 *Normus Realty Corp. v. Gargano* (1963) 237 N.Y.S.2d. 648.
68 *Hundley v. Gorewitz* (1942) 132 F.2d. 23 (D.C. Cir. 1942); *Mays v. Burgess* (1945) 147 F.2d. 869 (D.C. Cir.), (*cert. den.* (1945) 65 S.Ct. 1406, which has *reh. den.* (1945) 65 S.Ct. 1567).
69 *Chuba v. Glasgow* (1956) 299 P.2d. 774.
70 *Bogan v. Saunders* (1947) 71 F.Supp. 587 (D.C. Cir.); *Mays v. Burgess* (1945) 162 A.R.L. 168 (D.C. Cir. 1945), (*cert. den.* (1945) 65 S.Ct. 1406, which has *reh.den* (1945) 65 S.Ct. 1567); *Jameson v. Brown* (1939) 109 F.2d. 830 (D.C. Cir.).
71 *Windemere-Grand Improvement & Protective Ass'n. v. American State Bank of Highland Park* (1919) 172 N.W. 29. Also, *Downs v. Kroeger* (1927) 254 Pac. 1101.
72 *Trustees of Columbia College v. Thacher* (1882) 41 Am.Rep. 365. Also, *Fairchild v. Raines* (1944) 151 P.2d. 260; *Downs v. Kroeger* (1927) 254 Pac. 1101; *Osius v. Barton* (1933) 88 A.L.R. 394; *Esso Standard Oil Co. v. Mullen* (1952) 90 A.2d. 192; *Norris v. Williams* (1947) 4 A.L.R.2d. 1106; *Lefferts Manor Association, Inc. v. Fass* Misc. (1960) 211 N.Y.Supp.2d. 18; *Forstmann v. Joray Holding Co.* (1926) 154 N.E. 652; *La Rue v. Weiser* (1954) 106 A.2d. 447.
73 *Welitoff v. Kohn* (1929) 66 A.L.R. 1317.

the better improvement or permanent value of the property, but would only prejudice other lot owners.[74] Or where the changed conditions have removed the reason for the restrictions, so that there is 'no robust vestige' of the original idea left.[75] For example, a covenant precluding row houses was held no longer effective when the entire neighbourhood had become a row house community,[76] as was a restriction limiting the use of property to residential purposes where the grantors had sold adjoining lots with no such restriction and a garage had been built thereon, thereby materially injuring, if not rendering valueless, the restricted property as residential land.[77] Or where the change alleged is so radical as clearly to neutralize the benefit of the covenants to the point of defeating their object and purpose.[78] So too where the change is such as to make it impossible any longer to secure in a substantial degree the benefits sought to be realized through the performance of the restrictive covenants.[79] Also when, having regard to the changed conditions, it would be inequitable to deprive the defendant of the privilege of conforming the user of his property to that of the surrounding land.[80] All the more so will this result follow where the development proposed would actually *increase* the value of the plaintiff's premises, while to enforce the covenant would benefit no-one, but would cause great damage to the defendant.[81]

C. *Compromise solution*

Occasionally a court, though not willing to enforce a covenant as

[74] *Jackson v. Stevenson* (1892) 31 N.E. 691; *Trustees of Columbia College v. Thacher* (1882) 41 Am.Rep. 365. Also, *Loud v. Prendergast* (1910) 92 N.E. 40; *Heitkemper v. Schmeer* (1934) 29 P.2d. 540, (*reh. den.* (1934) 30 P.2d. 1119); *Johnson v. Poteet* (1925) 279 S.W. 209 (Tex.Civ.App.).

[75] *Snyder v. Plankenhorn* (1960) 159 A.2d. 209, 211, *per* Bok J.

[76] *Talles v. Rifman* (1947) 189 Md. 10, 53 A.2d. 396.

[77] *Johnson v. Poteet* (1925) 279 S.W. 902 (Tex.Civ.App.).

[78] *Bogan v. Saunders* (1947) 71 F.Supp. 587 (D.C. Cir.); *Grady v. Garland* (1937) 89 F.2d. 817, (*cert. den.* (1937) 58 S.Ct. 13); *Murphey v. Gray* (1958) 327 P.2d. 751 (Ariz.); *Continental Oil Co. v. Fennemore* (1931) 299 Pac. 132; *Bickell v. Moraio* (1933) 167 Atl. 722; *Franklin v. Moats* (1954) 273 S.W.2d. 812; *Proetz v. Central Dist. of Christian & Missionary Alliance* (1945) 191 S.W.2d. 273 (Mo. App.); *Rombauer v. Compton Heights Christian Church* (1931) 40 S.W.2d. 545; *Duhamel v. Prescott* (1957) 134 A.2d. 703 (N.H.); *Scillia v. Szalai* (1948) 59 A.2d. 435; *Humphreys v. Ibach* (1932) 85 A.L.R. 980; *Sandusky v. Allsopp* (1926) 131 Atl. 633; *Chuba v. Glasgow* (1956) 299 P.2d. 774; *Alamogordo Improvement Co. v. Prendergast* (1940) 109 P.2d. 254; *Ludgate v. Somerville* (1927) 54 A.L.R. 837; *Daniels v. Notor* (1957) 133 A.2d. 520; *Katzman v. Anderson* (1948) 59 A.2d. 85; *Pitts v. Brown* (1949) 54 S.E.2d. 538; *Metropolitan Investment Company v. Sine* (1962) 376 P.2d. 940; *Booker v. Old Dominion Land Co.* (1948) 49 S.E.2d. 314.

[79] *Grange v. Korff* (1956) 79 N.W.2d. 743 (Iowa); *Thodos v. Shirk* (1956) 79 N.W.2d. 733 (Iowa); *Osborne v. Hewitt* (1960) 335 S.W.2d. 922 (Ky.); *Stewart v. Valenta* (1962) 361 S.W.2d. 910 (Tex.Civ.App.); *Cowling v. Colligan* (1958) 312 S.W.2d. 943 (Tex.).

[80] *Page v. Murray* (1890) 19 Atl. 11; *Schwarz v. Duhne* (1907) 103 N.Y.Supp. 14; *Trustees of Columbia College v. Thacher* (1882) 41 Am.Rep. 365.

[81] *McClure v. Leaycraft* (1905) 75 N.E. 961. Also, *Hundley v. Gorewitz* (1942) 132 F.2d. 23 (D.C. Cir.).

written, has also not been prepared to allow it to be totally disregarded. A middle course has been adopted, that of modifying the restriction and then enforcing the covenant as modified. This procedure, however, is not common, and will only occur where, by reason of the change of neighbourhood, the modification will not damage the other lot owners. It is part of the court's quest for an equitable solution to the problem before it.[82]

But it appears that this approach cannot be carried too far. In *Cooper v. Kovan,*[83] the Court was asked to enforce certain residential restrictions. Apparently seeking a compromise between two hostile forces, a limited injunction was issued at first instance, restraining the defendants from using the easternmost one hundred and thirty feet of their land for anything other than residence or 'green belt' purposes, and the next easternmost one hundred feet thereof for anything other than parking, the balance being left free of any injunction. On appeal, the Supreme Court of Michigan stated:

> The obvious purpose, of course, was to provide a buffer strip or green belt of residences or lawn between plaintiffs and the proposed shopping centre, in accordance with present day city planning principles. Desirable as such a plan may be in general city planning terms, we must answer the question here as to whether the circuit judge sitting in equity had power to effect such a compromise in the face of and at the expense of existing and valid residential restrictions, or whether such planning must be left to planning boards and private developers.[84]

In the result, the Court was unable to find that this power lay in judicial hands. Upon the present state of the authorities, no doubt this is so. But it does not follow that such a jurisdiction cannot be judicially evolved if its existence is deemed desirable.

In *Cooper v. Kovan* neither party was satisfied with the judgment of the court below. But it might, however, be eminently desirable that, for the protection of other lot owners, restrictions be enforced on a given portion of a defendant's property, but, having regard to changed conditions, inequitable to enforce them on the remainder. Or it might be that while adjacent land owners need some protection, it would be harsh and unconscionable to enforce restrictions without some modification. These kinds of situations tend to produce an injustice, whether an injunction is granted or denied. No doubt planning is a specialized discipline and requires the skill and experience of experts. But a court is quite used to receiving expert evidence in zoning, as well as in many other matters. The enquiry of a court, the purpose of its proceedings, is to strike a balance between the parties.

[82] *Taylor Avenue Improvement Ass'n. v. Detroit Trust Co.* (1938) 278 N.W. 75. Also, *Walker v. Haslett* (1919) 186 P. 622.
[83] (1957) 84 N.W.2d. 859.
[84] (1957) 84 N.W.2d. 859, 864, *per* Edwards J.

Surely it is in accordance with this policy to permit a court to tailor its relief to accommodate the equities of the case before it. There may be a consideration that militates in favour of this sort of judicial activity—that the predominant objective in judicial proceedings is an endeavour to do justice between the parties, and not necessarily to produce the most technically desirable use of land.

6. ZONING ORDINANCES

Zoning ordinances, it has been said, are of 'ancient origin'.[85] No doubt this is so, although the constitutional validity of zoning as a method of land use control was not finally decided until 1926 in *Village of Euclid v. Ambler Realty Co.*[86]

A zoning ordinance, like a restrictive covenant, is subject to review in the light of changing conditions.[87] Further, restrictive covenants and zoning ordinances are not essentially dissimilar in their objectives, for they both 'segregate conflicting purposes and so promote their greater satisfaction'.[88] This they each do in the same way, that is by regulating the use of land. When the desires of a private developer and a public authority coincide, no difficulty arises. But this does not always occur, and it is, therefore, not surprising that at times there may be a lack of consistency between the use each system of control designates.

Interplay between restrictive covenants and zoning ordinances may arise in two different ways. As has been mentioned, if it is sought to restrain a breach of covenant by injunction, the mere fact that the use proposed by the defendant is consistent with the terms of a zoning ordinance is not, in itself, sufficient to constitute a radical change in the character of a neighbourhood.[89] Moreover, there is no need for a plaintiff in an injunction suit to first appeal an ordinance to the appropriate zoning authority, for the powers of such body are confined to the subject of zoning and are conferred by statute.[90] There is a more drastic aspect. When there is a conflict between the use prescribed by a restrictive covenant and that prescribed by a zoning ordinance, proceedings may be taken to strike the one or the other down on the basis of this very inconsistency. The way in which such conflicts are resolved may perhaps be mentioned.

A. *Cases of false conflict*

What is here discussed as a case of real conflict would arise where a restrictive covenant and a zoning ordinance are so completely in-

85 *Burgess v. Magarian* (1932) 243 N.W. 356, 358, *per* Albert J. See also, *Respublica v. Philip Urbin Duquet* (1799) 2 Yeates 493 (Pa.).
86 (1926) 272 U.S. 365. Generally, Haar, *Land-Use Planning* (1959), Ch. 3..
87 Metzenbaum, *The Law of Zoning* (2nd ed. 1955), vol. ii, Ch. X-d-(2). Also, *Supra* p. 288.
88 *Jameson v. Brown* (1939) 109 F.2d. 830, 831, *per* Edgerton A.J.
89 *Supra* p. 288. 90 *Dolan v. Brown* (1930) 170 N.E. 425.

compatible that compliance with the one *necessarily* entails breach of the other. Where they are, in other words, incapable of concurrent application. The courts have not frequently been presented with such a conflict. The situation which has usually arisen is where public provisions *permit* the use of of land, restricted by private agreement to residential use only, for business purposes.

One of the early cases is *Ludgate v. Somerville.*[91] There covenants were imposed in 1909, the purpose of which was to establish a strictly residential district. The defendant wished to construct a modern gasoline station on his lot. A zoning ordinance initiated in 1924, *inter alia,* permitted this use of the defendant's land. The plaintiff obtained an injunction, and from this decree the defendant appealed. The Supreme Court of Oregon, after pointing out that the only justification for the exercise of the police power is that it has some rational relation to public health, morals, safety or general welfare, and that the general scheme there considered certainly promoted the general welfare, stated:

> The contractual obligation imposed upon all lot owners is not contrary to public policy. An act which so deprives a citizen of his property rights cannot be sustained under the police power unless the public health, comfort, or welfare demands such enactment. It cannot well be argued that the purpose to enjoy that which we are pleased to call home and to protect it against the encroachment of commercial interests is inimical to public welfare.[92]

So too in *Strauss v. Ginzberg,*[93] the defendant was entitled to three lots under a contract for sale and wished to hold religious services thereon, a use held to be inconsistent with covenants which, with few exceptions, were imposed upon the tract. A building ordinance, adopted after many of the restrictive covenants were in effect, permitted, *inter alia,* the use or alteration of such property for religious purposes. The defendant contended that under the zoning ordinance he might use the property for religious purposes and also alter it to make it more suitable for such use. And that, therefore, the restrictions were inoperative. The Supreme Court of Minnesota rejected this contention and upheld the covenant on the grounds that the zoning ordinance could not impair contractual obligations and, if less stringent, did not diminish the legal effect of private restrictions. The reasoning in *Ludgate v. Somerville,* and the logic of the rule there announced, impressed the Court of Appeals of Ohio in *Szilvasy v. Saviers,*[94] which accordingly reached the same conclusions. There is authority to the like effect in many jurisdictions.[95]

[91] (1927) 256 P. 1043. Also, *Heitkemper v. Schmeer* (1934) 29 .P.2d 540 (*reh. den.* (1934) 30 P.2d. 1119). [92] (1927) 256 P. 1043, 1045, *per* Belt J.
[93] (1944) 155 A.L.R. 1000. [94] (1942) 44 N.E.2d. 732.
[95] *Shuford v. Asheville Oil Company* (1956) 91 S.E.2d. 903, 912, *per* Denny J.: 'A valid restriction upon the use of property is not superseded or nullified by the

A case of real conflict is much more likely to arise if, unlike in the above situation, an ordinance is mandatory in its operation. The existence of such an ordinance, however, does not necessarily involve this type of conflict, for the use required by the ordinance may overlap with that prescribed by the covenant. Thus in *City of Richlawn v. McMakin*,[96] restrictions provided that unimproved land should be used for residences and certain particularized business purposes only. Subsequently the property was zoned for residential use only. The plaintiffs were trustees for a realty company which wished to use the land for commercial purposes and, an application for re-zoning being denied, instituted the present proceedings, *inter alia*, to enjoin the municipality from enforcing the ordinance. At first instance the plaintiffs succeeded, and the defendants appealed to the Court of Appeals of Kentucky. One contention of the plaintiffs was that they had vested rights to use the land as commercial property. The Court was unable to see how the restriction imposed upon the property could give a right to commercial development which could not be further restricted by zoning laws, and accordingly reversed the judgment of the court below. Helm J. said:

> This is not a case where a commercial use is already in operation, or where any construction has been begun for commercial purposes. The general theory of zoning laws would necessarily fail if courts were to determine that a property owner has a vested right to construct commercial buildings on property subsequently zoned for residences, only because the owner had a plan to make a commercial development permitted under such a declaration of restrictions.[97]

The same result would seem to follow if an ordinance is phrased in negative terms. For example, if the ordinance in the *City of Richlawn Case* had precluded the use of the land for apartment houses.

Conclusions

The two situations above discussed differ in that in the *Ludgate v. Somerville* line of cases the zoning ordinances were more generous in the use they prescribed than were the private covenants; whereas in the *City of Richlawn Case* the ordinance was the more restrictive of the two. As a consequence, in the former circumstance it was usually the person entitled to the benefit of a covenant who sought an in-

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enactment of a zoning ordinance.' Also, *Murphey v. Gray* (1958) 327 P.2d. 751 (Ariz. 1958); *Allen v. Avondale Co.* (1938) 185 So. 137; *Dolan v. Brown* (1930) 170 N.E. 425; *Burgess v. Magarian* (1932) 243 N.W. 356; *Osborne v. Hewitt* (1960) 335 S.W.2d. 922 (Ky.); *Vorenberg v. Bunnell* (1926) 48 A.L.R. 1431; *Cooper v. Kovan* (1957) 84 N.W.2d. 859; *Scillia v. Szalai* (1948) 59 A.2d. 435; *Chuba v. Glasgow* (1956) 299 P.2d. 774; *Lefferts Manor Association, Inc. v. Fass* Misc. (1960) 211 N.Y.Supp.2d. 18; *Hayslett v. Shell Petroleum Corporation* (1930) 175 N.E. 888; *Hodgkins v. Pickett* (1961) 344 S.W.2d. 461 (Tex.Civ. App.); *Morton v. Sayles* (1957) 304 S.W.2d. 759 (Tex. Civ.App.).

[96] (1950) 230 S.W.2d. 902.

[97] (1950) 230 S.W.2d. 902, 906.

junction restraining conduct which would comply with the ordinance, but not with the covenant; whereas in the latter, it was the owner of the land burdened by the covenant who sought an injunction against the City restraining them from enforcing their ordinance.

But this apart, the difference seems without critical significance. Of more importance appears to be a characteristic common to the two situations. This is that they display no real conflict between the systems of public and private land use control. They both raise only a false conflict, for in each circumstance the private restrictions and the zoning ordinance could clearly co-exist. Thus in the *Ludgate v. Somerville* situation, compliance with the restrictions would not have involved violation of the ordinance, for a business user was not thereby *required.* The unanimous rejection by the courts of the contention that restrictive covenants should be abrogated by a zoning ordinance of this sort is not, therefore, surprising. Similarly, in the *City of Richlawn Case,* compliance with the ordinance could have been effected without working a breach of covenant, and the reasons for upholding the validity of the ordinance can perhaps be no better expressed than in the judgment in that case.

B. *Cases of real conflict*

An ordinance and a covenant may be totally antagonistic. Thus an ordinance may require that land, limited to business use only by a restrictive covenant, be used exclusively for residential purposes. To satisfy both forms of control is impossible, for any use to which the land is put would invariably result in either non-compliance with the ordinance or in a breach of the restriction. When this happens, three possibilities are suggested by the cases.

(i) *Both the covenant and the ordinance should operate*

This obviously is a most unsatisfactory solution, but it was the result reached by the Supreme Court of Western Australia in *Perth Construction Pty. Ltd. v. Mount Lawley Pty. Ltd.*[98] There land was subject to a restriction that it should not be used for any other purpose than the erection thereon of a private dwellinghouse with its usual conveniences. An amended zoning by-law, which came into force only a few days before the proceedings were commenced, restricted the property to business purposes only, and prohibited its use for residential purposes. The plaintiffs made application under s.129C of the Transfer of Land Act 1893-1950 (W.A.), for the discharge of the covenant.[99] On their behalf it was contended, *inter alia,* that the

[98] (1956) 57 W.A.L.R. 41.

[99] S. 129C. (1) Where land under this Act is subject to any restriction arising under covenant or otherwise as to the user thereof or the right of building thereon, the Court or a Judge may from time to time on the application of any person in-

retention of the covenant would have the effect of preventing the land being used for any purpose whatsoever. At first instance this application was dismissed, and the plaintiffs appealed. In dismissing the appeal, Virtue J., with whom Dwyer C.J. and Wolff J. agreed, said:

> Alternatively, the appellant's Counsel relies on the reference in the sub-section to other circumstances which the Court may deem material. He says that another circumstance of which this Court should take account is that owing to the promulgation of the amended zoning by-law, use of the land in accordance with the terms of the covenant is illegal and, consequently, unless the covenant is removed, the land cannot be used for any purpose at all. It would be impossible to deny that the existence of such a legal bar to the use of the land consistently with the covenant is a circumstance which should be deemed material, but the sub-section requires the matter to be taken further, for it must be shown that as the result of such circumstances, the restriction ought to have been deemed to have been abandoned or to be obsolete which it clearly is not, or that its continued existence would impede the reasonable user of the land without securing practical benefits to other persons.[1]

It may be that this case should be restricted to its particular facts.[2] In any event, it seems clear that so far as American jurisdictions are concerned, constitutional considerations would seem to preclude such a conclusion.[3]

(ii) *Ordinance prevails*

It is quite usual for private control by way of a restrictive covenant to precede the public action of a zoning ordinance. In this way, a conflict between the two may perhaps be explained. For conditions, appropriate to a covenant at the time it was taken, may have changed by the time an ordinance is enacted. If such change is of a sufficient

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terested in the land by order wholly or partially discharge or modify the restriction upon being satisfied—

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court or a Judge may deem material the restriction ought to be deemed to have been abandoned or to be obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or . . .

(c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction.

1 *Perth Construction Pty. Ltd. v. Mount Lawler Pty. Ltd.* (1956) 57 W.A.C.R. 41, 46.

2 *Ibid.* p. 48, *per* Virtue J.: 'It would be difficult to imagine a more unmeritorious application under the section than this one by an applicant which entered into a binding legal obligation without the slightest intention of abiding by it, which appears to have used public authorities vested with powers in such matters for its own ends in order to manoeuvre itself into a position where it might have some shadow of pretext for making the application, and which in addition, has been guilty of a serious non-disclosure in bringing the application before the Court.'

3 *Arverne Bay Construction Co. v. Thatcher* (1938) 15 N.E.2d. 587. Also, *Vernon Park Realty, Inc. v. City of Mount Vernon* (1954) 121 N.E.2d. 517. Generally, Haar, *Land-Use Planning* (1959) Ch. 3. *Infra* p. 312.

magnitude, it may be possible to obtain judicial extinguishment or cancellation of the covenant. In this event, whatever may be the nature of the proceedings in which the issue arises, the ordinance should prevail. Not because it has *directly* superseded the covenant, but because for reasons quite disconnected therewith the restriction has been abolished, and that accordingly nothing remains with which the ordinance has to compete.

This is illustrated by *Peoples-Pittsburgh Trust Co. v. McKinley-Gregg Automobile Co.*[4] There the question before the Court was the marketability of title to property sold by the plaintiffs to the defendants. This property was subject to a restriction requiring buildings to be erected a certain distance from the street, a restriction which would prohibit the use of the land under the then existing building ordinances. The Court stated that the purpose of the restriction was to create a residential district, in which all houses erected on the plot would be set back a uniform distance from the street. In affirming the conclusion of the court below that the restriction was not then effective or enforceable, and that the deed tendered to the defendants conveyed a good and marketable title, Maxey, C.J. said:

> Since this restriction was created there has been a change in the use of property in the area under consideration. The land on the northerly side of Center Avenue is now zoned as 'commercial' and the property on the southerly side of the street is zoned 'light industrial'. A number of buildings used for commercial purposes have been erected on the northern side of Center Avenue, without conforming to the dotted line on the 'plan' and without objection from any person owning property on the lots included in the plan. The court below said: 'It would be unjust and inequitable to hold that this building restriction is still effective, particularly since the same is of no practical utility today *and would prohibit the use of the land under the present building ordinances. Henry v. Eves et al.*, 306 Pa. 250, 159 A. 857'.[5]

It may be noted that if the change is sufficient only to preclude injunctive relief, this would not be enough, for the obligation at common law would still subsist.[6]

(iii) *Covenant prevails*

Situations may however arise in which the altered state of things is not radical enough to obtain affirmative judicial relief. Further, there may be another reason for the conflict. It may be that a private developer and a municipal authority have differed in their views as to the way in which a particular locality shall develop. This was the situation in *Weber v. City of Cheyenne.*[7] There the plaintiff agreed to purchase certain land. The contract provided, *inter alia,* that the

4 (1945) 44 A.2d. 295.
5 (1945) 44 A.2d. 295, 296. Italics supplied.
6 *Supra* p. 281.
7 (1940) 97 P.2d. 667.

land was sold for business purposes only. Subsequently it was zoned as residential property only, and the plaintiff sought to restrain the City of Cheyenne from enforcing this part of their zoning ordinance. At first instance the Court found for the defendants, and the plaintiff appealed to the Supreme Court of Wyoming. It was held that the plaintiff, as a contracting purchaser, could maintain the action. It was further held that the judgment of the court below should be reversed and that court directed to issue its order restraining the City from enforcing its zoning ordinance as to the plaintiff's property for residence purposes only, and directing that such property should be permitted to be used for business purposes. Riner C.J. said:

> It appears from the record, and it is strongly argued for appellant, that the net result of the action of the City in this matter when taken in conjunction with the contract which the appellant holds with the Paul H. Moore Realty Company containing the covenant for the use of lots 13 and 14 for 'business purposes only', is to deprive Weber of the use of the property for any practical purpose. There seems to be no reason or contention advanced here why the Realty Company could not before the lots in question were taken into the City and the restrictive zoning applied, make the restriction it did in its contract with Weber. Indeed, if, as seems to be the fact, it was in accord with the Realty Company's scheme of handling its property for the benefit of nearby residence property, there would be much reason for approving such an arrangement. At any rate, since it would seem that Weber will in fact be deprived of any really beneficial use of his property, and that being so, the following cases afford guides in directing us to what disposition shall be made of the cause now before us.[8]

It seems clear from *Arverne Bay Construction Co. v. Thatcher*[9] that a zoning ordinance which so restricts the use of property that it cannot profitably or reasonably be used without violation of the ordinance will not, for constitutional reasons, be upheld.[10] It is also clear that in the *City of Cheyenne Case* the combined operation of the restrictions and of the zoning ordinance did result in the land being deprived of any really beneficial use. But should the zoning ordinance have there been denied effect?

In the *City of Cheyenne Case* the Court, without question, considered the impact of the ordinance, not upon the plaintiff's land as such, but upon this land as encumbered by the restrictions, an approach in no way derived from the cases cited by the Court.[11] Surely, in cases of a real conflict, this formulation of the issue is to resolve the question before it is asked. For if the problem is posed in

[8] (1940) 97 P.2d. 667, 672.
[9] (1938) 15 N.E.2d. 587. Also, *Rockhill v. Chesterfield Township* (1956) 128 A.2d. 473.
[10] *Supra* p. 310.
[11] *Inter alia, Bull Moose Holding Corporation v. Fergus Realty Corporation* (1934) 269 N.Y.S. 285; *Eaton v. Sweeny, Commissioner of Public Safety* (1931) 177 N.E. 412.

this way, would it not always follow that to comply with the ordinance would be to preclude the land from being profitably or reasonably used? Would not, therefore, an ordinance always be held invalid? If this is so, it is not easy to see how land subject to a pre-existing restrictive covenant differs materially from the general concept of a non-conforming use, though to so conclude would drastically enlarge this category to include not only uses existing at the date of the enactment of an ordinance, but also to cover a *potential* use prescribed by private restrictions, but not yet undertaken. In *Ludgate v. Somerville*,[12] in upholding covenants which restricted the use of land to residential purposes, it was said that it could not well be argued that to protect a home against the encroachment of commercial interests is inimical to public welfare. This may be so, but such reasoning can hardly be invoked in aid of a covenant where, as in the *City of Cheyenne Case*, this very function is fulfilled by a zoning ordinance. In any event, why should private developers by prior action be permitted always to frustrate the desires of a municipality. In such a situation as this, surely the argument of the Court in the *City of Richlawn Case* that the general theory of zoning laws would necessarily fail, is applicable *a fortiori* in this context. For ought not the public interest to be regarded at least on an equal footing with private desires?

The proper enquiry, it is considered, requires a consideration of the plaintiff's land *without regard* to the provisions of any covenant to which it may be subject. This does not mean that a zoning ordinance should invariably prevail. It may not. For no doubt the *conditions* which produced private restrictions are, *inter alia*, factors which require consideration by a court. But what is here asserted is that the mere presence of such restrictions, of themselves, should not mechanically determine the question of reasonableness.

[12] (1927) 54 A.L.R. 837. *Supra* p. 307.