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ZONING ORDINANCES AND RESTRICTIONS IN DEEDS

M. T. VAN HECKE

Five recent cases from Illinois,[1] Massachusetts,[2] New York,[3] and Oregon[4] suggest a study of the relative merits of zoning ordinances and restrictions in deeds as aids in the control of community growth. The discussion may perhaps best proceed by way of a comparison of (a) the uses to which each may be put, (b) their administrative methods, and (c) the effect of one upon the other. The decisions just referred to are mainly concerned with this last topic. A few preliminary matters should first be noticed.

Each device is a negative and supplementary control, serving mainly to keep the stream of individual initiative in the use of property to pre-determined channels. Modern city planning, however, involves much more than either or both of these restrictive devices could be made to accomplish. Affirmative compulsion and condemnation proceedings must frequently be resorted to if constructive effects are to be obtained. Especially is this so in respect to the development of a system of parks, playgrounds, waterfronts, boulevards and streets; the placement of institutions; and the location of transportation lines and terminals.

The servitude imposed by contract is older than that created by legislation. The covenant sued upon in the basic case of *Whatman v. Gibson*[5] was executed in 1799, and its draftsmanship indicates that the conveyancers in England had done this

[1] Gordon v. Caldwell, 235 Ill. App. 170 (1924); Minkus v. Pond, 158 N. E. 121 (Ill. 1927).

[2] Vorenberg v. Bunnell, 153 N. E. 884 (Mass. 1926).

[3] Forstmann v. Joray Holding Co., 244 N. Y. 22, 154 N. E. 652 (1926).

[4] Ludgate v. Somerville, 256 Pac. 1043 (Or. 1927).

[5] 9 Simons 196 (1838).

sort of thing before. Although it has been said that Massachusetts enacted a "use" zoning law in 1692,[6] and that European zoning goes back to an 1810 decree of Napoleon while acting as Protector of the Confederation of the Rhine,[7] it is clear that the zoning ordinance as we know it today first came into general use in Germany about 1894 and was introduced in England and the United States about 1909.[8]

Because critical examinations of the decision in *Tulk v. Moxhay* [9] have given prominence to an effort to preserve a breathing place in the city of London, we have been apt to assume that the restrictive covenant is exclusively an urban mechanism. The zoning ordinance is peculiarly that. It was the chaotic results of the growth of large cities during the last quarter of the nineteenth century that prompted the enactment of such measures. And the territorial limitations upon municipal legislative capacity prevent their operation in the country, except where extended by a regional planning enabling act to include the fringe for a mile or so beyond the city limits or the space between the corporate units of a great metropolitan district. On the other hand, the fact that the restrictive covenant depends for its vitality, not upon legislation but upon contract, means that its field of operation is much more extensive than that of the zoning ordinance. Thus the covenant dealt with in *Whatman v. Gibson* was part of a scheme for the development of a cliff-site at a sea-side resort. Much of the litigation over restrictions in deeds has been concerned with the surroundings of country estates. And it is not uncommon for a contract to restrain the use to be made of a chattel.[10]

THE USES TO WHICH EACH MAY BE PUT

Restrictive covenants function best when they are comprehensively worked out in connection with the intelligent planning either of large subdivisions, such as Roland Park in Baltimore or the Country Club District in Kansas City, or of proprietary town-sites such as Longview, Washington. It is sometimes thought that they can be effectively used only in such virgin areas. The problem in sections that are already built up and established is not so much a legal as a practical one. In the

[6] HARTMAN, BULL. NO. 21, MASS. FED. PLANNING BOARDS (June, 1927) 7. The statute referred to is Mass. Prov. Laws 1692, c. 23, now Mass. Gen. Laws (1921) c. 111, § 143.

[7] WILLIAMS, THE LAW OF CITY PLANNING AND ZONING (1922) 210, n. 1.

[8] WILLIAMS, *op. cit. supra* note 7, at 218, 265-267; Wells, *The Law of Zoning in Missouri* (1926) UNIV. OF MO. BULL., 34 LAW SERIES 5-6.

[9] 2 Phillips 774 (1848).

[10] See Note (1919) 32 HARV. L. REV. 278; (1922) 36 HARV. L. REV. 107; (1926) 39 HARV. L. REV. 655.

present degree of mobility of urban population, it is frequently difficult to locate and effect an agreement among all the owners of property in a given city neighborhood. The task is easier when the particular district was once a subdivision whose developers are still in business and will take the lead. Attorneys often think, however, that the imposition of new or additional restrictions in a built-up section requires a conveyance of the lots to a common grantee and the writing into the return deeds of the desired covenants. Unless the local recording act forbids or is inapplicable, could not this be accomplished as well through a blanket written contract, descriptive of the lots involved and the ends in view, containing appropriate mutual undertakings and signed by all of the owners concerned? Surely a non-resident owner would suffer less compunction about this transaction than over parting even momentarily with his title. The substantive law governing the creation of the servitude would be satisfied,[11] and effective recording would be a matter of detail. At best, however, this process would be a patch-work enterprise, responding only to neighborhood initiative and leaving inevitable gaps here and there through which undesirable inroads could be made.

The zoning device went through its experimental stages in countries without the American doctrine of judicial review of legislative validity, and came to us without a definite juristic basis. It is especially interesting, therefore, that Professor Ernst Freund should say:

"The legal principle of zoning is the idea that there is such a thing as unfair, illegitimate non-conformity. . . . The truth often does not lie along the most obvious lines, and yet practically if you have to deal with the courts, you have to approach them on the somewhat obvious lines of thinking to which they are accustomed. Thus, it was the path of least resistance to link up the whole matter of zoning with what is called the police power. . . . But does it define the police power to refer to the public or the general welfare?" [12]

As a result of the adoption of the "police power" concept, it was at first necessary for zoning ordinances in the United States,

[11] There is a split of authority as to whether restrictions upon the use of land even have to be in writing. Compare BROWNE, THE STATUTE OF FRAUDS (5th ed. 1895) § 269 and Giddings, *Restrictions Upon the Use of Land* (1892) 5 HARV. L. REV. 274, 278. Perhaps the latest decision upholding an oral agreement of this character is Thornton v. Schobe, 243 Pac. 617 (Colo. 1925), commented upon in (1926) 24 MICH. L. REV. 854. See also (1924) 3 TEX. L. REV. 101; Note (1925) 38 HARV. L. REV. 967.

[12] PLANNING PROBLEMS OF TOWN, CITY AND REGION, BEING THE PROCEEDINGS OF THE NATIONAL CONFERENCE ON CITY PLANNING (1926) 73. Professor Freund's discussion is one of the very few critical examinations of zoning principles and operations.

if they would safely run the gauntlet of our due process clauses, to be tied up pretty definitely, in terms at least, with the furtherance of conventional notions of health and safety.[13] No doubt these are among the most important objectives of zoning. City planners proceed on the assumption, however, that it is equally desirable that certain purely economic and aesthetic considerations in city life should be systematically promoted. And these last two purposes always predominate in every lay discussion of zoning schemes. Today there is an increasing willingness upon the part of the courts to recognize, as the Kansas court said [14] in upholding an ordinance against bill-boards, that "there is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations" by statute. In the *Euclid Village* case,[15] the Supreme Court exhibited a psychiatrist's comprehension of the effect of city life upon the temperament of the urban dweller. And a federal District Court has recently, although reluctantly, upheld as a police measure, a zoning ordinance designed to prevent the further encroachments of industry upon the environment of a state university campus.[16]

No one seriously contends, however, that zoning legislation would either be enacted or upheld if it attempted to prescribe requirements as to the minimum cost or architectural design [17] of buildings, or the shape and landscaping of lots. These factors can be handled only by private contracts.

Racial discriminations in the use and occupation of land cannot be accomplished through zoning ordinances.[18] The Fifth and Fourteenth Amendments bar the way. Some think [19] that

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[13] See the interesting articles by Larremore, *Public Aesthetics* (1906) 20 HARV. L. REV. 35, 44; and Baker, *Municipal Aesthetics and the Law* (1926) 20 ILL. L. REV. 546.

[14] Ware v. City of Wichita, 113 Kan. 153, 157, 214 Pac. 99 (1923). On restrictive covenants against bill-boards, see 41 A. L. R. 756, 760 (1926) annotation; 2 B. R. C. 425, 434 (1912) annotation. Billboard ordinances are now widely sustained when couched in terms of safety and fire prevention. Note (1927) 13 VA. L. REV. 581.

[15] Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114 (1926).

[16] Am. Wood Products Co. v. Minneapolis, 21 F. (2d) 440 (D. Minn. 1927).

[17] Bostock v. Sams, 95 Md. 400, 52 Atl. 665 (1902).

[18] Buchanan v. Warley, 245 U. S. 60, 38 Sup. Ct. 16 (1917), commented upon in Note (1917) 16 MICH. L. REV. 109 and Note (1918) 31 HARV. L. REV. 475; Tyler v. Harmon, 158 La. 439, 104 So. 200 (1925); s. c. 160 La. 943, 107 So. 704 (1926), *rev'd* 273 U. S. 668, 47 Sup Ct. 471 (1927); Land Development Co. v. New Orleans, 13 F. (2d) 898 (E. D. La. 1926), *rev'd* 17 F. (2d) 1016 (C. C. A. 5th, 1927). For the diversity of opinion in the state courts, see Hott, *Constitutionality of Municipal Zoning and Segregation Ordinances* (1927) 33 W. VA. L. Q. 332, 341, and Comment (1926) 36 YALE LAW JOURNAL 274.

[19] Bruce, *Racial Zoning by Private Contract in the Light of the Constitu-*

the Supreme Court, in *Corrigan v. Buckley*,[20] upheld the use of restrictive covenants which had that purpose. The restrictions there presented recited that the lots involved were never to be used or occupied by, or sold, leased or given to persons of the negro race. An attempted sale to a negro was enjoined below. The Supreme Court of the United States dismissed an appeal for want of jurisdiction. Obviously, neither the Fifth, Thirteenth nor Fourteenth Amendments prohibits racially discriminatory private contracts. Whether these violated some public policy found in the general or common law of the District of Columbia or were of such a character that a court of equity ought not to lend itself to their enforcement involved no statutory or constitutional question sufficient of itself to confer jurisdiction. And the contention that the decree of the court below enforcing the restrictions amounted to a governmental deprivation of property within the purview of the Fifth or Fourteenth Amendments, although not properly raised, was dismissed as "likewise lacking in substance." The court said:

"The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation. Mere error of a court, if any there be, in a judgment entered after full hearing, does not constitute a denial of due process." [21]

It might be urged that a common law rule, when sanctioned by a state court, may be just as offensive to constitutional prohibitions as a similarly designed statute.[22] The answer is that the making of the discriminatory restrictions was not required by any rule or policy of the District of Columbia. The restraints of the Fifth and Fourteenth Amendments are directed to coercive policies formulated by the government, whether judge-made or legislated, and not to voluntary undertakings. Nor does it suffice to say that the private act of discrimination would be ineffective without the court's aid, unless, perhaps, in enforcing the covenant, the court overrides a locally established general policy or rule to the contrary and thus gives color to the claim that it is motivated by race prejudice.[23] If it be conceded that an appeal dismissed for want of jurisdiction

tions and the Rule Against Restraints on Alienation (1927) 21 ILL. L. REV. 704, 711.

[20] 271 U. S. 323, 46 Sup. Ct. 521 (1926).

[21] *Ibid.* 331, 46 Sup. Ct. 524.

[22] Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 416, 417, 31 Sup. Ct. 59, 62 (1910); Dodd, *Impairment of Obligation of Contracts by State Judicial Decision* (1909) 4 ILL. L. REV. 155, 327.

[23] (1926) 35 YALE LAW JOURNAL 755.

strictly decides nothing, the demonstrated attitude of the court at least serves to indicate what its reaction is likely to be when the question is properly raised. The present tendency of the state courts on the constitutional issues is overwhelmingly in favor of validity.[24] None of the opinions, however, seem to have adequately considered the effect of the decree as a possible denial of due process.

Nor do the state courts appear to doubt the reasonableness of racial segregation as a privately initiated policy, when motivated by the more commonly felt racial antipathies. While the New Jersey court in a dictum has said that it would refuse to enforce a restriction against ownership or occupation by persons of the Jewish faith,[25] covenants drafted clearly against use or occupation by negroes, Chinese or Japanese, and limited in duration to say twenty-five years, would probably be upheld everywhere. The time limit itself is perhaps not significant but it does become important on the issue of reasonableness when the case is presented to the court. If the covenant goes further, however, and seeks to prohibit the sale, lease or gift to similar classes, it may be endangered by the policy or rule against restraints upon alienation. Upon that question the courts are divided.[26] The excellent discussions of this aspect of the problem in the periodicals listed in the above note make additional comment unnecessary. It is doubtful, however, if any court will follow the Virginia decision in *People's Pleasure Park v. Rohleder*,[27] which found no violation of a restriction against transfer to negroes in a sale to a corporation composed of negroes, even though it was formed to operate an amusement park for colored people upon the land in question. The refusal of the federal District Court in California to allow violators of the alien land law of that state to hide behind a corporate entity [28] seems more sensible. Much can be accomplished in these fields through indirection. For example, in connection with the management of co-operative apartments, provisions are common reserving to the promotors or an association of owners, the "first refusal" [29] in case of a proposed sale.

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[24] See the materials referred to *infra* note 26.

[25] Miller v. Jersey Coast Resorts Corp., 130 Atl. 824, 828 (N. J. Eq. 1925).

[26] Bruce, *loc. cit. supra* note 19; (1926) 35 YALE LAW JOURNAL 755; Note (1926) 24 MICH. L. REV. 840; (1926) 20 ILL. L. REV. 723; (1926) 21 ILL. L. REV. 78; (1926) 14 CALIF. L. REV. 503; (1927) 12 CORN. L. Q. 400; 42 A. L. R. 1273 (1926) annotation.

[27] 109 Va. 439, 61 S. E. 794 (1908).

[28] Frick v. Webb, 281 Fed. 407 (N. D. Cal. 1922); *cf.* Willmott v. London Road Car Co. [1910] 2 Ch. 525.

[29] Care should be taken that this privilege is definitely related to an ascertainable price. See Manchester Ship Canal Co. v. Manchester Racecourse Co. [1901] 2 Ch. 37; 1 WILLISTON, CONTRACTS (1920) §§ 43, 61;

On the uses to which zoning ordinances and restrictions in deeds may be put, it may perhaps be concluded that subject to the practical difficulties already mentioned and others to be discussed in the next section, the scope of the restrictive covenant's potential operation is broad enought to permit its use for every purpose attainable by a zoning ordinance. That is to say, it may serve to regulate matters of height, area and bulk, courts and yards, set-backs, and use. In addition, it may be resorted to for the protection of such subjects as cost and beautification, and to a certain extent, race prejudice.

THEIR ADMINISTRATIVE METHODS

A number of interesting and apparently significant comparisons can be made of the administrative methods peculiar to each of the devices under consideration. One must, however, keep two or three inherent distinctions constantly in mind.

Most of the nearly six hundred American cities now subject to zoning legislation [30] have adopted their ordinances within the last decade. Zoning is still in its infancy and most persons concerned therewith are largely feeling their way. The public has been converted to the general principle of zoning, and critical reactions are just beginning as to its detailed aspects. This means that confusion abounds in what is really a period of adjustment. There is as yet no settled administrative technique or procedure. On the other hand, after more than a century of litigation in the private restriction field, courts know pretty well how to handle the enforcement of the covenant.

Except where tentative or preliminary zoning is applied in spots pending the completion of the whole plan, zoning is city-wide. Restrictions in deeds are always sectional. Most subdivisions have been laid out with little thought of their relation to the community at large. In many instances there has been not even an adequate coupling of the layout of streets, alleys and utility services with that of the city. The developers have been actuated by a desire to sell the lots as quickly and at as large a profit as possible, going only so far with restrictions as will not impair these objectives. Only a few have exhibited the degree of foresight and civic consciousness felt by the designers

Fogg v. Price, 145 Mass. 513, 14 N. E. 741 (1888); Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73 (1894); Monroe v. Crabtree, 178 Iowa 546, 159 N. W. 979 (1916).

[30] The Division of Building and Housing of the U. S. Department of Commerce publishes excellent source-materials for the study of zoning. See particularly, A CITY PLANNING PRIMER (Feb., 1927); ZONING PROGRESS IN THE UNITED STATES (July, 1927); A STANDARD STATE ZONING ENABLING ACT (1926); and A STANDARD CITY PLANNING ENABLING ACT (Feb., 1927). Consult, also, the materials referred to *supra* notes 7 and 12.

of such tracts as Roland Park (Baltimore), the Country Club District (Kansas City) and Mariemont (Cincinnati). Indeed, in some of these latter areas, the covenants accomplish for the contemplated community a program similar in some respects to that usually aimed at by zoning ordinances: creating districts for business, parks, playgrounds, schools, libraries and residences, and dedicating streets and alleys.

Zoning by ordinance is undertaken, ostensibly, only in the interest of the city as a whole. Whether this is in fact true depends entirely upon the way in which the work is done. Its excellence inevitably varies with the standards of the local government generally and with the personnel, industry and courage of the bodies directly in charge. Charges are heard now and then that in given localities the zoning device has been or is likely to be used as an artificial stimulus for the inflation in value of a tract controlled by an influential group. More often the charge is that it is resorted to for the protection of already established institutions or investments. In other words, the political situation is an important factor here. It seldom is so in connection with private restrictions.

The chancellor, of course, is never a party to the creation of the contract he is asked to enforce. In zoning, the city is the creator [31] of the restrictions. The principal zoning administrators, the building commissioner and board of zoning appeals, follow in the wake of the city planning commission which laid out the scheme and the city council which enacted it into law. The survey which preceded the plan is in their hands, as are the ordinances, maps, data and detail. On the other hand, the chancellor gets his knowledge of the purport, background and effects of the covenant from evidence introduced in court in the time-honored fashion. As a board, the board of zoning appeals is a specialized agency. The court is charged with a thousand other and unrelated matters. The occasional request for an injunction to prevent the disruption of a restrictive covenant is just one case on the docket. But the court is, presumably, a qualified expert in judicial administration. The building commissioner has many other duties not related to zoning. And the city officials and citizens on the board of appeals or plan commission are, as to this function, amateurs. As heads of city departments, or as bankers, lawyers and merchants, their main interests are far afield.

The canons of construction require the court to read the deed restrictions strictly against their proponent and in favor of the

[31] Where "excess condemnation" is permitted, the city imposes deed restrictions upon land surrounding public improvements. See article by Dodd and Britton in ILL. CONST. CONV. BULL. (1920) 491-493.

free use of land.[32] The building commissioner, in applying the zoning ordinance in the first instance, is without discretion. The commission or board of appeals, however, looks to the underlying spirit as governing literal interpretation of the legislation. This body has a discretionary power to modify or vary the requirements of the ordinance to prevent unnecessary hardship upon the owners of unstandardized properties. Its function is the adjustment of the plan of the ordinance to specific situations where a literal enforcement would involve practical difficulties or inequitable consequences. Ordinances without such a "safety valve" have sometimes been held unconstitutional as providing no guaranty of reasonableness in application. No adequate study has been made of these administrative agencies. A recently published [33] series of reports shows the following illustrative results of the work of a few boards of appeal in their first years of activity.

During the first three years in Pittsburgh, 4,034 applications for a variance went to the board of appeals after negative action by the building permit office. Of these, 1,061 were granted outright, and 1,842 granted conditionally. In a similar period in Kansas City, out of 600 appeals filed, 350 were granted, many upon conditions. In Providence, during substantially the same time, 70% out of 213 appeals were sustained. The Boston board upheld less than 50% of 300 appeals during two and a half years. The Denver board reversed the permit office in 123 out of 182 cases during the first year's work. The officials claim that this does not mean that the law is being evaded, nor that it was badly drawn, but that when a zoning ordinance is applied to an already established community, a literal enforcement would produce in many instances a hardship not resulting in corresponding benefit to the community. For example, the topography in Pittsburgh was probably responsible for 2,986 appeals relating almost exclusively to the requirements as to area per family and regulations as to yards. Only one city boasted of the practice of the board not to attach conditions to the privilege of variation. Most boards felt proud of their conditional actions as tending to make permitted non-conforming uses as innocuous as possible. Thus, in one instance, a bakery, previously established, desired to complete its unit by an addition in a section zoned for dwellings. A permit was granted on condition that certain windows be closed, noiseless bread conveyors and modern ventilating systems installed, and shade trees planted in the yard.

The results of the strict construction attitude of the courts

[32] Peterson v. Gales, 210 N. W. 407 (Wis. 1926); Miller v. Jersey Coast Resorts Corp., *supra* note 25.

[33] *The Board of Appeals in Zoning, A Symposium*, in 3 CITY PLANNING (1927) 63-72. BAKER, THE LEGAL ASPECTS OF ZONING (1927), 76-112 is excellent. Received after press-time.

toward covenants are not quite the same as those arising from the administrative attitude toward the restrictions imposed by ordinance. Under the deed, the owner of the servient estate is free to use the land except as prohibited by clearly expressed language in the deed. Under the zoning plan, the owner may sometimes use the land for a purpose definitely prohibited by the ordinance because of the supposed "equities" of his situation. In other words the zoning mechanism, including as it does the provision for variances by the board of appeals, expressly arranges for a greater flexibility in the permitted use of land. The courts have not attempted, in the absence of statutes,[34] to modify or vary the effect of restrictive covenants. When, in view of changed conditions,[35] the chancellor has thought that enforcement would not secure to the plaintiff the benefit originally contemplated, he has virtually cancelled the restrictions by a denial of relief. Similarly, he has sometimes pronounced them to be at an end through an application of the so-called "balance of injury" doctrine, when it has appeared that enforcement would do more harm to the defendant than good to the plaintiff.[36] And in at least two cases,[37] he has conditioned the decree forbidding a violation of a covenant against the probable requirements of a fast approaching change in the neighborhood.

Many complainants have been refused injunctions against palpable violations of private restrictions because of the effect of delay and inattention thought to be tantamount to acquiescence or estoppel.[38] It appears to be fatal for a dweller in a privately restricted neighborhood not to take prompt and diligent action whenever he sees construction in progress near his home. One zoning enthusiast has reported that restrictions in deeds are easily breakable and that zoning ordinances are sometimes necessary to prevent a conspiracy of several lot-owners to acquiesce in a deliberately planned breach and thus render the major part of a restricted area available for more profitable use.[39] Under the best modern covenants, provisions are inserted to prevent

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[34] See *infra* notes 64-66.

[35] See Cowan v. Ferguson, 48 Dom. L. R. (Ont. 1919) 616, and the cases discussed in the following Notes: (1918) 31 HARV. L. REV. 876; (1926) 74 U. PA. L. REV. 312; (1927) 12 CORN. L. Q. 518. In Waggoner v. Floral Hts. Baptist Church, 288 S. W. 129 (Tex. Comm. App. 1926), the restrictions had lapsed.

[36] Forstmann v. Joray Holding Co., *supra* note 3, commented upon in Note (1927) 12 CORN. L. Q. 518. And see Note (1922) 36 HARV. L. REV. 211, 213.

[37] Gordon v. Caldwell, *supra* note 1; Ward v. Prospect Manor Corp., 188 Wis. 534, 206 N. W. 856 (1926).

[38] The best collection of these cases is the annotation in 46 A. L. R. 372 (1927).

[39] See PROCEEDINGS referred to *supra* note 12, at 65.

these consequences, in this manner: Enforcement is to be the joint responsibility of the individual lot-owner and of the corporation which originally developed the tract or an association of owners acting through a trustee.[39a] Failure to object upon the part of either is not to bar the other, as to the same, prior or subsequent infractions. Perhaps these clauses will be held to waive antecedently any defense normally derivable from delay, acquiescence or estoppel.

The administration of zoning does not face these weaknesses of individual enforcement. We have long been used to the necessity for building permits before construction or alteration is begun, and to their refusal if the specifications have not complied with sanitary and fire regulations, to mention only two. Zoning begins here, and today the permit is refused if sought for a nonconforming use or if the proposed structure violates requirements as to bulk, area or size of yards. If work goes ahead without a permit, the city may resort to various sanctions. Civil penalties and fines may be recovered or the offender put in jail. Many laws and ordinances authorize the issuance of an injunction. Even though that procedure has not been provided by statute, and in the face of the objection that equity was departing from its policy of not enforcing the criminal law, the use of the injunction to prevent violations of the zoning scheme has been sustained by handling the project as a public nuisance.[40] This presents the interesting picture of the chancellor enforcing both the private and the legislative restrictions with the same process. The withholding of the building permit, for a structure of large size, is usually effective upon public opinion and upon materialmen and contractors.

In a constantly increasing number of cities, there is provision for an appeal to a group functioning as a board of zoning appeals. Where none is available, and the courts are approached through mandamus or bill in equity, the questions raised relate to compliance with the state enabling act,[41] and the constitutionality of that statute and of the ordinance. The *Euclid Village* case [42] established the judicial attitude toward the general scope of municipal zoning. And the recent federal District Court decision in *American Wood Products Co. v. Minneapolis*,[43] per San-

[39a] Parsons v. Duryea, 158 N. E. 761 (Mass. 1927).

[40] City of New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798 (1924), 40 A. L. R. 1136, 1145 (1926) annotation; Holzbauer v. Ritter, 184 Wis. 35, 198 N. W. 852 (1924). *Contra:* Coley v. Campbell, 126 Misc. 869, 215 N. Y. Supp. 679 (Sup. Ct. 1926). See (1928) 37 YALE LAW JOURNAL 387.

[41] Dart v. City of Gulfport, 113 So. 441 (Miss. 1927).

[42] *Supra* note 15.

[43] *Supra* note 16. See, on judicial review of an amendment by the city council to cover a specific application, Gorieb v. Fox, 273 U. S. 687, 47 Sup. Ct. 675 (1927).

born, J., perhaps goes as far toward a similar view of specific applications:

"It is evident, however, that zoning ordinances which, in theory at any rate, are carefully prepared by planning commissions and adopted after careful study by city councils, will not be benefited by having the judges of the federal courts substitute their judgment for that of the legislative bodies and attempt to revise them with respect to individual cases." [44]

This followed a vigorous criticism by Judge Sanborn of the policy of the ordinance, under which additions to established factories were prohibited, as lacking in good sense, common decency, justice and morals, because it did not provide for compensation.

Speed, informality and publicity characterize the work of the board of zoning adjustment. One city reports the average time elapsing between the filing of the appeal and the decision as from five to ten days. A personal inspection is commonly made, either by board members or representatives, in advance of the hearing.[45] A sign on the property or notices in the newspapers afford the neighbors an opportunity to attend and to be heard. Sometimes the demonstrated opposition of a considerable number of citizens has been enough to cause the withdrawal of the appeal. There are no pleadings, and rules of evidence seem unthought of. The board gets information from those interested upon which to balance the petitioner's need against the requirements of the ordinance and the desires of those most immediately to be affected.

Judicial review of the decisions of boards of zoning appeals seems to be limited mainly to a test of the fairness of the exercise of administrative discretion.[46] It does not extend to a trial de novo upon the facts. Questions of compliance with state enabling acts and of constitutionality arise here also. The appellate review of lower court action in the restrictive covenant cases differs only as to the nature of the issues upon which the discretionary function of the chancellor has to work.

Except where the property involved was originally developed by a company still in business, there is more practical difficulty in the way of getting restrictions imposed by contract amended to meet new conditions, than in the creation of new restrictions in an already established section. In the situation excepted, the contracts sometimes provide for revision and amendment, at stated intervals, by coöperation between the original developers

[44] *Supra* note 16, at 444.

[45] For an instance of personal inspection of an alleged change in the surroundings of privately restricted land, see Downs v. Kroeger, 254 Pac. 1101 (Cal. 1927).

[46] Minkus v. Pond, *supra* note 1.

or the maintenance association and a majority of the owners of lots. In one large city a subdivider is said to have called back an enormous number of conveyances for the purpose of adding restrictions thought necessary to block the expected effect of a proposed zoning ordinance upon that locality. The Texas court has denied that "amendments" to restrictions can go to the extent of wiping them out entirely.[47]

The zoning ordinance can, of course, be amended and revised from time to time by the city legislative body. Some zoning workers favor the notion that amendments should be initiated, or at least approved, by the city planning commission or board of zoning appeals. Others argue for restraints in the form of three-fourths vote in the city council or the expressed concurrence of a certain percentage of adjacent property owners. Professor Freund is somewhat pessimistic:

"I receive every week the Bulletin of the Chicago City Council, with its output of legislation; and there is not a number where I do not find one or two or three amendments of the zoning ordinance. In other words, when you cannot get a thing through your Board of Appeals, you get it through your alderman, and he gets an amendment to suit the particular need or desire of his constituent. That seems to me a grave infraction of the entire principle because it isn't done systematically, but is done entirely through political influence. I understand that in some states there is a rule that amendments of the zoning ordinance can be made only upon recommendation of the Board of Appeals, but the rule is not absolute because ordinarily there is a provision that if the Board does not consent, then an increased majority can amend. This, however, is a very slight safeguard, as votes in a city council go, and in most cases a four-fifths majority is as easily obtainable as a bare majority." [48]

It seems clear, therefore, that from the standpoint of the respective merits of the two devices as aids in the control of community growth, the administrative aspects of zoning on the whole possess more advantages than those incident to restrictions in deeds; namely, protection for the community as a whole, systematic control, greater flexibility, and official as against individual enforcement.

THE EFFECT OF ONE UPON THE OTHER

Zoning programs are frequently influenced by restrictions in deeds.[49] Where a very substantial area has been set aside for a

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[47] Couch v. So. Meth. University, 290 S. W. 256, 260 (Tex. Civ. App. 1926).

[48] *Supra* note 12.

[49] The present writer desires at this point to acknowledge the help received from letters sent in answer to his inquiries by Mr. Gordon Whitnall, Director of the Los Angeles Board of City Planning Commissioners; Mr. Jacob L. Crane, a town planning engineer of Chicago; Mr. Harland

high type use through the medium of deed restrictions, and that area is sufficiently large and geographically distinctive, zoning officials ordinarily recognize the character of the development and classify that section accordingly, so that the objectives of the statutory and deed restrictions are the same. Otherwise, zoning classifications are predicated upon a consistent city-wide policy and are established, for the most part, independently of existing restrictions imposed by contract.

Zoning affects restrictions in deeds in five or six ways. The fear of manipulation of the zoning device for selfish ends has on occasion caused new or revised restrictive covenants to be entered into respecting the use of land in a given neighborhood. Sometimes the selfishness has been more apparent on the part of the covenantors, who by their agreement have sought to block the expected effects of a really beneficent ordinance, either in advance of or after its enactment. In the first situation, the covenant is apt to be more restrictive than the ordinance. The contrary is the more likely in the second. Some zoning enabling laws contain a provision to the effect that "the powers by this act conferred shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted." The Department of Commerce advises,[50] however, that "while the almost universal practice is to make zoning ordinances non-retroactive, it is recognized that there may arise local conditions of a peculiar character that make it necessary and desirable to deal with some isolated case by means of a retroactive provision affecting that case only. For this reason, it does not seem wise to debar the local legislative body from dealing with such a situation." There is no reason in the nature of things why a need for such legislation may not be presented by a restrictive covenant as well as by a traditional type of affirmative use. The saving clauses of many ordinances provide that the zoning ordinance is not intended to abrogate or supplant restrictions privately imposed, except that where the legislation lays down the more restrictive requirements, those regulations shall control. These provisions were once more common than they are today. There is no reason why a zoning ordinance cannot be so referred to in a deed as to be incorporated therein with the effect of an express covenant. Litigation has arisen as to whether the purport of an ordinance may not operate as an implied covenant in a deed executed prior to

Bartholomew, Engineer for the City Plan of St. Louis; Mr. Frank R. Grant, of the J. C. Nichols Investment Co., of Kansas City; Mr. Robert Whitten, City Planning Consultant, of New York City; and Mr. E. M. Bassett, Counsel for the New York Zoning Committee.

[50] A STANDARD STATE ZONING ENABLING ACT (1926) 2.

the ordinance's repeal.[51] Finally, subdivision control by city planning agencies under the authority of state enabling acts will go far to insure consistency between contractual and municipal use regulations, as well as street and utility layouts, in the future. Approval of plats and restrictions as a condition to recording and transfer will affect new restrictive covenants within the city and, where regional planning is permitted, for a distance of several miles beyond.[52]

Where the scope of the zoning regulations is more restrictive than those of the deeds, no problem is presented different from that raised by the application of the ordinance generally. That is, the deeds may say that there shall be nothing but one-family houses, duplexes and small apartments. The ordinance says there shall be nothing in that section but one-family homes. The lot-owner who desires to erect an apartment sees a conflict. The beneficiaries of the restrictive covenant do not object however, unless by connivance they are also interested in the overthrow of the ordinance, for the ordinance goes farther toward protecting them than did the covenant. Presumably the locality is still largely residential. The deed restriction is not being violated by the proposed use, even if the ordinance were not present. The owner's privilege that is cut off by the zoning ordinance was not derived from the covenant but from ownership generally.

If the reverse is true, and the covenant is more severe than the ordinance in its restrictions upon private initiative, then an important and a difficult problem, unique in several aspects, is presented as to the effect of the zoning legislation upon the enforceability of the restrictions in the deeds. For the owner of the restricted lot is not objecting to the ordinance here; rather he is relying upon it as freeing him from the control of his neighbors. It is the beneficiary of the restriction who charges confiscation pro tanto of his rights if the ordinance is effective to enlarge the privilege of the lot-owner. It may be, of course, that no question will arise until the force of the covenant has been spent, either by lapse according to its terms (restrictions have usually been imposed for a period of years) or because of a change in the neighborhood, perhaps brought about by the effects of the zoning scheme itself. If the question arises sooner, no opportunity is afforded for a variance or modification to be al-

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[51] See Note, *Zoning Ordinance as Implied Covenant in Deeds* (1926) 10 MARQ. L. REV. 165.

[52] See A STANDARD CITY PLANNING ENABLING ACT (1927) tit. 2; Anderson, *The Extra-Territorial Powers of Cities* (1926) 10 MINN. L. REV. 475, 564, 572, reprinted in (1927) 61 AM. L. REV. 641, 680; Root, *Regulation of Land Subdivision*, and Whitten, *Combined Zoning and Planning Control of Unsubdivided Areas*, with discussion of both papers, in PROCEEDINGS, NATIONAL CONFERENCE ON CITY PLANNING (1926) 49-66.

lowed by a board of zoning appeals, for it is not the ordinance that forbids the proposed use but the covenant. The deeds may confine the use to a single-family house while the ordinance says that there shall be nothing in this area but one-family homes and small apartments. Or, the covenant may restrict to business uses only and provide for a reversion in the event of any other use, whereas the ordinance prohibits any use other than residential.[53] Again, the ordinance may proceed on the basis of a taking for a public use with compensation.

Five recent cases from Illinois, Massachusetts, New York and Oregon agree that the ordinance is to have no effect upon the deed restrictions where the covenant prescribes residences and the section is zoned for business or apartments. The ordinance is construed in these cases to mean that only those otherwise free may use their properties for the purposes contemplated by the zoning scheme.[54] If it purports to abrogate existing private restrictions, the courts seem to assume that the ordinance is unconstitutional,[55] probably because of the due process or impairment of contracts clauses. There is no apparent judicial inclination to view the zoning ordinance either as expressing a countervailing public policy or as accelerating the normal growth and change of conditions in the locality in question. On the contrary, when the plaintiffs have built homes in reliance upon the restricted character of the neighborhood, and they have not waived or abandoned their rights, the courts find every ingredient in the "public convenience and welfare" calling for a decree that will maintain their surroundings as originally contemplated. This is strikingly illustrated in one of the Illinois cases and in the New York case. In the former,[56] it appeared that the plaintiff had bought land restricted by covenant for residences and had erected an expensive break-water, in preparation for an apartment structure, in reliance upon the zoning commission's recommendation to the city council that the area be zoned for apartments. The council rejected this and zoned the lots for residences only, in accordance with the deed restrictions, although this section was the only spot on a long stretch of Chicago's north shore that had not been developed and subsequently zoned for apartments. The court sustained the board of zoning appeals in its refusal to permit a variance. In the New York case,[57] a beneficiary of a deed restriction for residences sought

[53] Such a problem was reported from Los Angeles. It has not reached the litigation stage, apparently.

[54] Gordon v. Caldwell, *supra* note 1, at 174; Vorenberg v. Bunnell, *supra* note 2; Ludgate v. Somerville, *supra* note 4.

[55] Cases *supra* note 54, particularly Ludgate v. Somerville. Compare Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127 (1905).

[56] Minkus v. Pond, *supra* note 1.

[57] Forstmann v. Joray Holding Co., *supra* note 3.

to force the removal of a business block erected in violation of the covenants. The immediate neighborhood had completely changed to a business section and had been zoned for commercial purposes. The plaintiff had negligently delayed in bringing suit and the restrictions in the deeds had but three years to run. Relief was refused. In other words, as the Massachusetts court said,[58] "The question, whether equity will specifically enforce such restrictions, is (as before the passage of that statute) a matter for the exercise of sound equitable discretion in the light of all attendant circumstances." The zoning ordinance with its provision for a broader use than that permitted by the restrictive covenant is not treated as one of the circumstances. Cases will arise, however, where the conditions that brought forth that ordinance, as well as those likely to result from its effects, will constitute important factors.

Then take the situation where the lot in question was conveyed upon the condition that it be used only for a purpose now prohibited by the zoning law, with provision in the deed for a reversion to the grantor if the use originally contemplated ceases. Much will depend upon the exact language of the instrument, the precise lay of the land in the immediate vicinity and the extent to which the court sympathizes with the need for the zoning classification of that locality. If the plot, at the time of the ordinance's enactment, was already being actively used as required by the deed, and that does not amount to a nuisance, the ordinance would probably be without effect. If, on the other hand, the use specified in the conveyance had not begun, and this fact of itself would not work a forfeiture, the lot-owner's predicament might be ground for a variance by the board of appeals. For, unless the conception of hardship, which induced the New York court[59] to refuse a vendor specific performance against a vendee after a supervening zoning ordinance had made illegal the purpose for which the latter agreed to buy the land, would operate here as a basis for recovery of the purchase price, and that is unlikely, the ordinance confiscates his investment. But the community is not interested in who owns the lot, so long as the zoning classification is adhered to. The grantee got just what he paid for, a defeasible fee. Ordinarily, the ordinance could not be construed as cutting off the grantor's privilege of reversion. If so intended, there is authority for the view that

[58] Vorenberg v. Bunnell, *supra* note 2, at 887. Compare Note (1918) 31 HARV. L. REV. 876.

[59] Anderson v. Steinway & Sons, 178 App. Div. 507, 165 N. Y. Supp. 608 (1st Dept. 1917), *aff'd* 221 N. Y. 639, 117 N. E. 575 (1917). See Notes (1918) 18 COL. L. REV. 162 and (1923) 23 COL. L. REV. 660. Compare 3 WILLISTON, *op. cit. supra* note 29, § 1938; WOODWARD, QUASI-CONTRACT (1913) § 124, and Williams v. Eldred Ref. Co., 224 N. Y. Supp. 349 (Sup. Ct. 1927).

the zoning law would be invalid as impairing the obligation of a contract.[60] On the surface, there is no conflict between the deed restrictions and the zoning scheme; yet, practically, the ordinance precipitates either a deprivation of the lot-owner's property or a destruction of the reversion.

The fairest way to deal with such a problem, and with all restrictions found to be obstructive of a zoning plan, is through the exercise of the power of eminent domain. The court should cut off the conflicting interests upon payment of compensation. The condemnation of land for a public building,[61] or other traditional sort of "public use," may frequently involve such a procedure. Courts of equity which, after a "balancing of injuries," or because of the effects of changes in surroundings, award substantial damages in lieu of an injunction, actually do what "amounts to a condemnation of the servitude without legislative authority and for a private rather than a public use." [62] A statutory authorization, however, for just such a process was held unconstitutional in Massachusetts [63] on the grounds just quoted. England and Ontario,[64] on the other hand, have recently gone far with legislation granting to a court [65] or an arbitration committee [66] a discretionary power to modify or discharge obstructive restrictions in deeds, upon the payment by the applicant of any net damage resulting. Decisions in Minnesota [67] and Missouri [68] perhaps point toward a sufficiently enlightened concept of what makes for a "public use" in this day and age to warrant the validity of such a program in this country, at least to the extent that the modification or discharge is definitely tied up with the objectives of an otherwise proper

[60] Board of Education v. Littrell, 173 Ky. 78, 190 S. W. 465 (1917). Compare State v. New Orleans, 154 La. 271, 97 So. 440 (1923); Dart v. City of Gulfport, *supra* note 41.

[61] Peters v. Buckner, 288 Mo. 618, 232 S. W. 1024 (1921); 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917) § 121, n. 52.

[62] Note (1918) 31 HARV. L. REV. 876, 878.

[63] Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917), commented upon in Note (1918) 31 HARV. L. REV. 876.

[64] See Note (1927) 5 CAN. B. REV. 427; Ontario Stat. 1922, c. 53.

[65] HOUSING, TOWN PLANNING ACT, 1919, § 27, 20 CHITTY'S STATUTES (6th ed. 1921) 197; Johnston v. Maconochie [1921] 1 K. B. 239.

[66] LAW OF PROPERTY ACT, 1925, § 84, 23 CHITTY'S STATUTES (6th ed. 1925) 288. The administrative regulations and rules are printed in (1926) 70 SOL. JOUR. 1183, 1203. The Act is construed liberally in Feilden v. Byrne [1926] Ch. 620.

[67] State v. Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159 (1920), approved (by reference to the statute without mention of the case) in American Wood Prod. Co. v. Minneapolis, *supra* note 16.

[68] Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404 (1923).

zoning plan,[69] and the compensation is payable from assessments levied upon the district most directly benefited.

Perhaps enough has been said to indicate that the problems arising from the relations between zoning ordinances and restrictions in deeds will never be solved by the adoption of the attitude voiced by the counsel for the New York zoning committee:

"No private restrictions need ever refer to zoning, nor need any zoning ordinance ever refer to private restrictions. They are entirely separate and apart. Courts will not usually listen to the private restrictions in trying a zoning case, nor to the zoning regulations in trying a private restrictions case. They go hand and hand with each other and never conflict." [70]

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[69] The author of the comment upon the Riverbank case, *supra* note 63, probably had this in mind when he said, at 879: "Moreover, if the tract in question was needed for business purposes for the proper development of the city and the restrictions resulted in the tract remaining vacant and useless, a statute permitting registration of title free of the restrictions upon compensation in order to permit the only practicable use of the land and thus make it available for the general good might be sustained." Citing Clark v. Nash, 198 U. S. 361 (1905); Strickley v. Mining Co., 200 U. S. 527 (1906); but see Salisbury Land Co. v. Commonwealth, 215 Mass. 371, 379, 102 N. E. 619 (1913).

[70] Discussion by Bassett in PROCEEDINGS, NATIONAL CONFERENCE ON CITY PLANNING (1926) 71.