

**ORTIGAS & CO., LIMITED PARTNERSHIP,
PLAINTIFF-APPELLANT, VS. FEATI BANK AND TRUST CO.,
DEFENDANT-APPELLEE.**

G.R. No. L-24670. December 14, 1979

Ponente: SANTOS, J.

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SANTOS, J.:

An appeal interposed on June 23, 1965 by plaintiff-appellant, Ortigas & Co., Limited Partnership, from the decision of the Court of First Instance of Rizal, Branch VI, at Pasig, Hon. Andres Reyes presiding, which dismissed its complaint in Civil Case No. 7706, entitled, "Ortigas & Company, Limited Partnership, plaintiff, v. Feati Bank and Trust Company, defendant", for lack of merit.

The following facts – a reproduction of the lower court's findings, which, in turn, are based on a stipulation of facts entered into by the parties – are not disputed. Plaintiff (formerly known as "Ortigas, Madrigal y Cia") is a limited partnership and defendant Feati Bank and Trust Co., is a corporation duly organized and existing in accordance with the laws of the Philippines. Plaintiff is engaged in real estate business, developing and selling lots to the public, particularly the Highway Hills Subdivision along Epifanio de los Santos Avenue, Mandaluyong, Rizal.[1]

On March 4, 1952, plaintiff, as vendor, and Augusto Padilla y Angeles and Natividad Angeles, as vendees, entered into separate agreements of sale on installments over two parcels of land, known as Lots Nos. 5 and 6, Block 31, of the Highway Hills Subdivision, situated at Mandaluyong, Rizal. On July 19, 1962, the said vendees transferred their rights and interests over the aforesaid lots in favor of one Emma Chavez. Upon completion of payment of the purchase price, the plaintiff executed the corresponding deeds of sale in favor of Emma Chavez. Both the agreements (of sale on installment) and the deeds of sale contained the stipulations or restrictions that:

"1. The parcel of land subject of this deed of sale shall be used by the Buyer exclusively for residential purposes, and she shall not be entitled to take or remove soil, stones or gravel from it or any other lots belonging to the Seller.

2. All buildings and other improvements (except the fence) which may be constructed at any time in said lot must be, (a) of strong materials and properly painted, (b) provided with modern sanitary installations connected either to the public sewer or to an approved septic tank, and (c) shall not be at a distance of less than two (2) meters from its boundary lines."[2]

The above restrictions were later annotated in TCT Nos. 101509 and 101511 of the Register of Deeds of Rizal, covering the said lots and issued in the name of Emma Chavez.[3]

Eventually, defendant-appellee acquired Lots Nos. 5 and 6, with TCT Nos. 101613 and 106092 issued in its name, respectively, and the building restrictions were also annotated therein.[4] Defendant-appellee bought Lot No. 5 directly from Emma Chavez, "free from all liens and encumbrances as stated in Annex 'D',"[5] while Lot No. 6 was acquired from Republic Flour Mills through a "Deed of Exchange", Annex "E".[6] TCT No. 101719 in the

name of Republic Flour Mills likewise contained the same restrictions, although defendant-appellee claims that Republic Flour Mills purchased the said Lot No. 6 "in good faith, free from all liens and encumbrances," as stated in the Deed of Sale, Annex "F"[7] between it and Emma Chavez.

Plaintiff-appellant claims that the restrictions annotated on TCT Nos. 101509, 101511, 101719, 101613, and 106092 were imposed as part of its general building scheme designed for the beautification and development of the Highway Hills Subdivision which forms part of the big landed estate of plaintiff-appellant where commercial and industrial sites are also designated or established.[8]

Defendant-appellee, upon the other hand, maintains that the area along the western part of Epifanio de los Santos Avenue (EDSA) from Shaw Boulevard to Pasig River, has been declared a commercial and industrial zone, per Resolution No. 27, dated February 4, 1960 of the Municipal Council of Mandaluyong, Rizal.[9] It alleges that plaintiff-appellant "completely sold and transferred to third persons all lots in said subdivision facing Epifanio de los Santos Avenue"[10] and the subject lots thereunder were acquired by it "only on July 23, 1962 or more than two (2) years after the area x x x had been declared a commercial and industrial zone x x x." [11]

On or about May 5, 1963, defendant-appellee began laying the foundation and commenced the construction of a building on Lots Nos. 5 and 6, to be devoted to banking purposes, but which defendant-appellee claims could also be devoted to, and used exclusively for, residential purposes. The following day, plaintiff-appellant demanded in writing that defendant-appellee stop the construction of the commercial building on the said lots. The latter refused to comply with the demand, contending that the building was being constructed in accordance with the zoning regulations, defendant-appellee having filed building and planning permit applications with the Municipality of Mandaluyong, and it had accordingly obtained building and planning permits to proceed with the construction.[12]

On the basis of the foregoing facts, Civil Case No. 7706, supra, was submitted in the lower court for decision. The complaint sought, among other things, the issuance of "a writ of preliminary injunction x x x restraining and enjoining defendant, its agents, assigns, and those acting on its or their behalf, from continuing or completing the construction of a commercial bank building in the premises x x x involved, with the view to commanding the defendant to observe and comply with the building restrictions annotated in the defendant's transfer certificate of title."

In deciding the said case, the trial court considered, as the fundamental issue, whether or not the resolution of the Municipal Council of Mandaluyong declaring Lots Nos. 5 and 6, among others, as part of the commercial and industrial zone of the municipality, prevailed over the building restrictions imposed by plaintiff-appellant on the lots in question.[13] The records do not show that a writ of preliminary injunction was issued.

The trial court upheld the defendant-appellee and dismissed the complaint, holding that the subject restrictions were subordinate to Municipal Resolution No. 27, supra. It predicated its conclusion on the exercise of police power of the said municipality, and stressed that private interest should "bow down to general interest and welfare". In short, it upheld the classification by the Municipal Council of the area along Epifanio de los Santos Avenue as a commercial and industrial zone, and held that the same rendered "ineffective and unenforceable" the restrictions in question as against defendant-appellee.[14] The trial court decision further emphasized that it "assumes said resolution to be valid, considering that there is no issue raised by either of the parties as to whether the same is null and void." [15]

On March 2, 1965, plaintiff-appellant filed a motion for reconsideration of the above decision,[16] which motion was opposed by defendant-appellee on March 17, 1965.[17] It averred, among others, in the motion for reconsideration that defendant-appellee "was duty bound to comply with the conditions of the contract of sale in

its favor, which conditions were duly annotated in the Transfer Certificates of Title issued in her (Emma Chavez') favor." It also invited the trial court's attention to its claim that ". . . the Municipal Council had (no) power to nullify the contractual obligations assumed by the defendant corporation."^[18]

The trial court denied the motion for reconsideration in its order of March 26, 1965.^[19]

On April 2, 1965 plaintiff-appellant filed its notice of appeal from the decision dismissing the complaint and from the order of March 26, 1965 denying the motion for reconsideration, its record on appeal, and a cash appeal bond.^[20] On April 14, the appeal was given due course^[21] and the records of the case were elevated directly to this Court, since only questions of law are raised.^[22]

Plaintiff-appellant alleges in its brief that the trial court erred –

I. When it sustained the view that Resolution No. 27, series of 1960, of the Municipal Council of Mandaluyong, Rizal declaring Lots Nos. 5 and 6, among others, as part of the commercial and industrial zone, is valid because it did so in the exercise of its police power; and

II. When it failed to consider whether or not the Municipal Council had the power to nullify the contractual obligations assumed by defendant-appellee and when it did not make a finding that the building was erected along the property line, when it should have been erected two meters away from said property line.^[23]

The defendant-appellee submitted its counter-assignment of errors. In this connection, We already had occasion to hold in *Relativo v. Castro*^[24] that "(I)t is not incumbent on the appellee, who occupies a purely defensive position, and is seeking no affirmative relief, to make assignments of error."

The only issues to be resolved, therefore, are: (1) whether Resolution No. 27 s-1960 is a valid exercise of police power; and (2) whether the said Resolution can nullify or supersede the contractual obligations assumed by defendant-appellee.

1. The contention that the trial court erred in sustaining the validity of Resolution No. 27 as an exercise of police power is without merit. In the first place, the validity of the said resolution was never questioned before it. The rule is that the question of law or of fact which may be included in the appellant's assignment of errors must be those which have been raised in the court below, and are within the issues framed by the parties.^[25] The object of requiring the parties to present all questions and issues to the lower court before they can be presented to the appellate court is to enable the lower court to pass thereon, so that the appellate court upon appeal may determine whether or not such ruling was erroneous. The requirement is in furtherance of justice in that the other party may not be taken by surprise.^[26] The rule against the practice of blowing "hot and cold" by assuming one position in the trial court and another on appeal will, in the words of Elliot, prevent deception.^[27] For it is well-settled that issues or defenses not raised^[28] or properly litigated^[29] or pleaded^[30] in the Court below cannot be raised or entertained on appeal.

In this particular case, the validity of the resolution was admitted, at least impliedly, in the stipulation of facts below, when plaintiff-appellant did not dispute the same. The only controversy then as stated by the trial court was ". . . whether or not the resolution of the Municipal Council of Mandaluyong x x x which declared Lots Nos. 4 and 5 among others, as a part of the commercial and industrial zone of the municipality, prevails over the restrictions constituting as encumbrances on the lots in question."^[31] Having admitted the validity of the subject resolution below, even if impliedly, plaintiff-appellant cannot now change its position on appeal.

But, assuming *arguendo* that it is not yet too late in the day for plaintiff-appellant to raise the issue of the invalidity of the municipal resolution in question, We are of the opinion that its posture is unsustainable. Section 3 of R.A. No. 2264, otherwise known as the Local Autonomy Act,^[32] empowers a Municipal Council "to adopt

zoning and subdivision ordinances or regulations"[33] for the municipality. Clearly, the law does not restrict the exercise of the power through an ordinance. Therefore, granting that Resolution No. 27 is not an ordinance, it certainly is a regulatory measure within the intendment or ambit of the word "regulation" under the provision. As a matter of fact the same section declares that the power exists "(A)ny provision of law to the contrary notwithstanding x x x."

An examination of Section 12 of the same law[34] which prescribes the rules for its interpretation likewise reveals that the implied power of a municipality should be "liberally construed in its favor" and that "(A)ny fair and reasonable doubt as to the existence of the power should be interpreted in favor of the local government and it shall be presumed to exist." The same section further mandates that the general welfare clause be liberally interpreted in case of doubt, so as to give more power to local governments in promoting the economic conditions, social welfare and material progress of the people in the community. The only exceptions under Section 12 are existing vested rights arising out of a contract between a "a province, city or municipality on one hand and a third party on the other," in which case the original terms and provisions of the contract should govern. The exceptions, clearly, do not apply in the case at bar.

2. With regard to the contention that said resolution cannot nullify the contractual obligations assumed by the defendant-appellee – referring to the restrictions incorporated in the deeds of sale and later in the corresponding Transfer Certificates of Title issued to defendant-appellee – it should be stressed, that while non-impairment of contracts is constitutionally guaranteed, the rule is not absolute, since it has to be reconciled with the legitimate exercise of police power, i.e., "the power to prescribe regulations to promote the health, morals, peace, education, good order or safety and general welfare of the people." [35] Invariably described as "the most essential, insistent, and illimitable of powers" [36] and "in a sense, the greatest and most powerful attribute of government," [37] the exercise of the power may be judicially inquired into and corrected only if it is capricious, whimsical, unjust or unreasonable, there having been a denial of due process or a violation of any other applicable constitutional guarantee. [38] As this Court held through Justice Jose P. Bengzon in *Philippine Long Distance Company vs. City of Davao, et al.* [39] police power "is elastic and must be responsive to various social conditions; it is not confined within narrow circumscriptions of precedents resting on past conditions; it must follow the legal progress of a democratic way of life." We were even more emphatic in *Vda. de Genuino vs. The Court of Agrarian Relations, et al.*, [40] when We declared: "We do not see why public welfare when clashing with the individual right to property should not be made to prevail through the state's exercise of its police power."

Resolution No. 27, s-1960 declaring the western part of Highway 54, now E. de los Santos Avenue (EDSA, for short) from Shaw Boulevard to the Pasig River as an industrial and commercial zone, was obviously passed by the Municipal Council of Mandaluyong, Rizal in the exercise of police power to safeguard or promote the health, safety, peace, good order and general welfare of the people in the locality. Judicial notice may be taken of the conditions prevailing in the area, especially where Lots Nos. 5 and 6 are located. The lots themselves not only front the highway; industrial and commercial complexes have flourished about the place. EDSA, a main traffic artery which runs through several cities and municipalities in the Metro Manila area, supports an endless stream of traffic and the resulting activity, noise and pollution are hardly conducive to the health, safety or welfare of the residents in its route. Having been expressly granted the power to adopt zoning and subdivision ordinances or regulations, the municipality of Mandaluyong, through its Municipal Council, was reasonably, if not perfectly, justified under the circumstances, in passing the subject resolution.

The scope of police power keeps expanding as civilization advances, stressed this Court, speaking thru Justice Laurel in the leading case of *Calalang v. Williams, et al.* [41] Thus –

"As was said in the case of *Dobbins v. Los Angeles* (195 US 223, 238 49 L. ed. 169), 'the right to exercise the

police power is a continuing one, and a business lawful today may in the future, because of changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good.' And in *People v. Pomar* (46 Phil. 440), it was observed that 'advancing civilization is bringing within the scope of police power of the state today things which were not thought of as being within such power yesterday. The development of civilization, the rapidly increasing population, the growth of public opinion, with an increasing desire on the part of the masses and of the government to look after and care for the interests of the individuals of the state, have brought within the police power many questions for regulation which formerly were not so considered.'"[42] (Emphasis, supplied.)

Thus, the state, in order to promote the general welfare, may interfere with personal liberty, with property, and with business and occupations. Persons may be subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state[43] and to this fundamental aim of our Government, the rights of the individual are subordinated.[44]

The need for reconciling the non-impairment clause of the Constitution and the valid exercise of police power may also be gleaned from *Helvering v. Davis*[45] wherein Mr. Justice Cardozo, speaking for the Court, resolved the conflict "between one welfare and another, between particular and general," thus –

"Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times".[46]

The motives behind the passage of the questioned resolution being reasonable, and it being a "legitimate response to a felt public need,"[47] not whimsical or oppressive, the non-impairment of contracts clause of the Constitution will not bar the municipality's proper exercise of the power. Now Chief Justice Fernando puts it aptly when he declared: "Police power legislation then is not likely to succumb to the challenge that thereby contractual rights are rendered nugatory."[48]

Furthermore, We restated in *Philippine American Life Ins. Co. v. Auditor General*[49] that laws and reservation of essential attributes of sovereign power are read into contracts agreed upon by the parties. Thus –

"Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairments presupposes the maintenance of a government by virtue of which contractual relations are worthwhile - a government which retains adequate authority to secure the peace and good order of society."

Again, We held in *Liberation Steamship Co., Inc. v. Court of Industrial Relations*,[50] through Justice J.B.L. Reyes, that "x x x the law forms part of, and is read into, every contract, unless clearly excluded therefrom in those cases where such exclusion is allowed." The decision in *Maritime Company of the Philippines v. Reparations Commission*,[51] written for the Court by Justice Fernando, now Chief Justice, restates the rule.

One last observation. Appellant has placed unqualified reliance on American jurisprudence and authorities[52] to bolster its theory that the municipal resolution in question cannot nullify or supersede the agreement of the parties embodied in the sales contract, as that, it claims, would impair the obligation of contracts in violation of the Constitution. Such reliance is misplaced.

In the first place, the views set forth in American decisions and authorities are not per se controlling in the Philippines, the laws of which must necessarily be construed in accordance with the intention of its own lawmakers and such intent may be deduced from the language of each law and the context of other local legislation related thereto.[53] In the second place, *Dolan, et al. v. Brown*[54] and *Burgess, et al. v. Magarian, et al.*,[55] two of the cases cited by plaintiff-appellant, lend support to the conclusion reached by the trial court, i.e.

that the municipal resolution supersedes/supervenes over the contractual undertaking between the parties. *Dolan v. Brown*, states that "Equity will not, as a rule, enforce a restriction upon the use of property by injunction where the property has so changed in character and environment as to make it unfit or unprofitable for use should the restriction be enforced, but will, in such a case, leave the complainant to whatever remedy he may have at law." [56] (Emphasis supplied.) Hence, the remedy of injunction in *Dolan vs. Brown* was denied on the specific holding that "A grantor may lawfully insert in his deed conditions or restrictions which are not against public policy and do not materially impair the beneficial enjoyment of the estate." [57] Applying the principle just stated to the present controversy, We can say that since it is now unprofitable, nay a hazard to the health and comfort, to use Lots Nos. 5 and 6 for strictly residential purposes, defendant-appellees should be permitted, on the strength of the resolution promulgated under the police power of the municipality, to use the same for commercial purposes. In *Burgess v. Magarian, et al.* it was held that "restrictive covenants running with the land are binding on all subsequent purchasers x x x." However, Section 23 of the zoning ordinance involved therein contained a proviso expressly declaring that the ordinance was not intended "to interfere with or abrogate or annul any easements, covenants or other agreement between parties." [58] In the case at bar, no such proviso is found in the subject resolution.

It is, therefore, clear that even if the subject building restrictions were assumed by the defendant-appellee as vendee of Lots Nos. 5 and 6, in the corresponding deeds of sale, and later, in Transfer Certificates of Title Nos. 101613 and 106092, the contractual obligations so assumed cannot prevail over Resolution No. 27, of the Municipality of Mandaluyong, which has validly exercised its police power through the said resolution. Accordingly, the building restrictions, which declare Lots Nos. 5 and 6 as residential, cannot be enforced.

IN VIEW OF THE FOREGOING, the decision appealed from, dismissing the complaint, is hereby **AFFIRMED**. Without pronouncement as to costs.

SO ORDERED.

Makasiar, Antonio, Concepcion, Jr., Fernandez, Guerrero, De Castro, and Melencio-Herrera, JJ., concur.

Fernando, C.J., see concurring opinion.

Teehankee and Aquino, JJ., took no part.

Barredo, J., concurs. He holds it is a matter of public knowledge that the place in question is commercial. It would be worse if the same were to be left as residential and all around are already commercial.

Abad Santos, J., dissents in a separate opinion.

[1] Record on Appeal, p. 110.

[2] *Id.*, pp. 4-5. Emphasis supplied.

[3] *Id.*, pp. 111-112.

[4] *Id.*, p. 112.

[5] *Id.*, p. 80.

[6] *Id.*, p. 86.

[7] *Id.*, p. 94.

[8] *Id.*, pp. 112-113.

[9] *Id.*, pp. 60 and 113.

- [10] Brief for Defendant-Appellee, p. 2.
- [11] *Id.*, p. 3.
- [12] Record on Appeal, pp. 113-114.
- [13] *Id.*, p. 114.
- [14] *Id.*, pp. 114-115.
- [15] *Id.*, p. 114.
- [16] *Id.*, p. 116.
- [17] *Id.*, p. 118.
- [18] *Id.*, p. 117.
- [19] *Id.*, p. 127.
- [20] *Id.*, pp. 127-129.
- [21] *Id.*, p. 130.
- [22] *Ibid.*
- [23] See Brief for Defendant-Appellee, pp. 30-31.
- [24] 76 Phil. 563, 567 (1946).
- [25] Sec. 18, Rule 46, Revised Rules of Court; *Tan Machan v. De la Trinidad*, 3 Phil. 684, (1946).
- [26] Francisco, *The Revised Rules of Court*, Vol. III, 1968 Ed., p. 648, citing *Jones v. Seymour*, 95 Art. 593, 597, 130 S.W. 560.
- [27] *Id.*, pp. 648-649, cit. *Elliot on Appellate Procedure*, 416-417.
- [28] *Sumerariz, et al. vs. Development Bank of the Philippines, et al.*, L-23764, Dec. 26, 1967, 21 SCRA 1374; *San Miguel Brewery, et al. vs. Vda. de Joves, et al.*, L-24258, June 26, 1968, 23 SCRA 1093, 1097. See also *Tuason vs. Hon. Arca, et al.*, L-24346, June 29, 1968, 23 SCRA 1308, 1312.
- [29] *Plaridel Surety and Ins. Co. vs. Commissioner of Internal Revenue*, L-21520, Dec. 11, 1967, 21 SCRA 1187.
- [30] *Manila Port Service, et al. vs. Court of Appeals, et al.*, L21890, March 29, 1968, 22 SCRA 1364.
- [31] Record on Appeal, p. 114.
- [32] Sec. 3 reads:
- Sec. 3. Additional powers of provincial boards, municipal boards or city councils and municipal and regularly organized municipal district councils.

x x x

Power to adopt zoning and planning ordinances. - Any provision of law to the contrary notwithstanding Municipal Boards or City Councils in cities, and Municipal Councils in municipalities are hereby authorized to adopt zoning and subdivision ordinances or regulations for their respective cities and municipalities subject to the approval of the City Mayor or Municipal Mayor, as the case may be. Cities and municipalities may, however, consult the

National Planning Commission on matters pertaining to planning and zoning. (Emphasis supplied.)

[33] Emphasis supplied.

[34] The full text of Section 12 follows:

"SEC. 12. Rules for the Interpretation of the Local Autonomy Act.

1. Implied power of a province, a city or municipality shall be liberally construed in its favor. Any fair and reasonable doubt as to the existence of the power should be interpreted in favor of the local government and it shall be presumed to exist.

2. The general welfare clause be liberally interpreted in case of local governments in promoting the economic condition, social welfare and material progress of the people in the community.

3. Vested rights existing at the time of the promulgation of this arising out of a contract between a province, city or municipality on one hand and third party on the other, should be governed by the original terms and provisions of the same, and in no case would this act infringe existing right."

[35] *Primicias vs. Fugoso*, 80 Phil. 77 (1948).

[36] *Smith Bell & Co. v. Natividad*, 40 Phil. 136 (1919), citing earlier authorities, Justice Malcolm ponente.

[37] *Edu v. Ericta*, L-3206, Oct. 24, 1970, 35 SCRA 487, Justice Fernando, now Chief Justice, speaking for the court.

[38] See *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila*, L-24693, July 31, 1967, 20 SCRA 849, Justice Fernando, now Chief Justice, also wrote the decision for the Court.

[39] L-23080, Oct. 20, 1965, 15 SCRA 244, 247-248.

[40] L-25035, Feb. 26, 1968, 22 SCRA 792, 797.

[41] 70 Phil. 726 (1940).

[42] *Id.*, p. 734; Emphasis supplied.

[43] *Id.*, p. 733, citing *U.S. v. Gomez Jesus*, 31 Phil. 218 (1915).

[44] *Id.*, p. 733.

[45] 301 U.S. 619 (1937).

[46] Emphasis supplied.

[47] *Edu v. Ericta*, *supra*, p. 489.

[48] Fernando on the Philippine Constitution, 1974 ed., p. 558.

[49] L-19255, January 18, 1968, 22 SCRA 135, citing *Home Building and Loan Association v. Blaisdell*, 78 L. ed., 413, 428.

[50] L-25389-90, June 27, 1968, 28 SCRA 1115, citing *Manresa*, Comm. Vol. 8, part 2 (5th Ed.) p. 535.

[51] L-29203, July 26, 1971, 40 SCRA 75.

[52] Brief for Plaintiff-Appellant, pp. 9-17.

[53] Proctor & Gamble Philippine Manufacturing Corporation vs. Commissioner of Customs, L-24173, May 23, 1968, 23 SCRA 691.

[54] 170 NE 425, 428 Illinois (1930).

[55] 243 NW 356, 358-359 Iowa (1932).

[56] Op. Cit. at p. 427.

[57] Id., id.

[58] Op. Cit. at p. 358.

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DISSENTING OPINION

ABAD SANTOS, J.:

I dissent. Although Resolution No. 27, series of 1960, of the Municipal Council of Mandaluyong, Rizal, is valid until otherwise declared, I do not believe that its enactment was by virtue of the police power of that municipality. I do not here dispute the concept of police power as stated in *Primicias vs. Fugoso*, 80 Phil. 77 (1948) for as a matter of fact I accept it. And I agree also that it is elastic and must be responsive to various social conditions, etc. as ruled in *PLDT vs. City of Davao*, L-23080, Oct. 26, 1965, 15 SCRA 244. But Resolution No. 27, cannot be described as promotive of the health, morals, peace, education, good order or safety and general welfare of the people of Mandaluyong. On the contrary, its effect is the opposite. For the serenity, peace and quiet of a residential section would by the resolution be replaced by the chaos, turmoil and frenzy of commerce and industry. Where there would be no industrial and noise pollution these bane of so-called progress would now pervade and suffocate the environment to the detriment of the ecology. To characterize the ordinance as an exercise of police power would be retrogressive. It will set back all the efforts of the Ministry of Human Settlements to improve the quality of life especially in Metro Manila. It will make Metro Manila, not the city of man as envisioned by its Governor but a city of commerce and industry.

Considering, therefore, that Resolution No. 27 was not enacted in the legitimate exercise of police power, it cannot impair the restrictive covenants which go with the lands that were sold by the plaintiff-appellant. I vote for the reversal of the appealed decision.

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CONCURRING OPINION

FERNANDO, C.J.:

The exhaustive and lucid opinion of the Court penned by Justice Guillermo S. Santos commends itself for approval. I feel no hesitancy, therefore, in yielding concurrence. The observation, however, in the dissent of Justice Vicente Abad Santos relative to restrictive covenants calls, to my mind, for further reflection as to the respect to which they are entitled whenever police power legislation, whether on the national or local level, is assailed. Before doing so, however, it may not be amiss to consider further the effect of such all-embracing attribute on existing contracts.

1. Reference was made in the opinion of the Court to Philippine American Life Insurance Company v. Auditor General.[1] The ponente in that case was Justice Sanchez. A concurrence came from me. It contained this qualification: "It cannot be said, without rendering nugatory the constitutional guarantee of non-impairment, and for that matter both the equal protection and due process clauses which equally serve to protect property rights, that at the mere invocation of the police power, the objection on non-impairment grounds automatically loses force. Here, as in other cases where governmental authority may trench upon property rights, the process of balancing, adjustment or harmonization is called for." [2] After referring to three leading United States Supreme Court decisions, Home Building and Loan Association v. Blaisdell,[3] Nebbia v. New York,[4] and Norman v. Baltimore and Ohio Railroad Co.,[5] I stated: "All of the above decisions reflect the view that an enactment of a police power measure does not per se call for the overruling of objections based on either due process or non-impairment grounds. There must be that balancing, or adjustment, or harmonization of the conflicting claims posed by an exercise of state regulatory power on the one hand and assertion of rights to property, whether of natural or of juridical persons, on the other. That is the only way by which the constitutional guarantees may serve the high ends that call for their inclusion in the Constitution and thus effectively preclude any abusive exercise of governmental authority." [6] Nor did my concurrence stop there: "In the opinion of the Blaisdell case, penned by the then Chief Justice Hughes, there was this understandable stress on balancing or harmonizing, which is called for in litigations of this character: 'The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile – a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.' Also to the same effect: 'Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserve power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community.' Further on, Chief Justice Hughes likewise stated: 'It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.'" [7] This is the concluding paragraph of my concurrence in the Philippine American Life Insurance Co. case: "If emphasis be therefore laid, as this concurring opinion does, on the pressing and inescapable need for such an approach whenever a possible collision between state authority and an assertion of constitutional right to property may exist, it is not to depart from what sound constitutional orthodoxy dictates. It is rather to abide by what is compels. In litigations of this character then, perhaps much more so than in other disputes, where there is a reliance on a constitutional provision, the judiciary cannot escape what Holmes fitly

referred to as the sovereign prerogative of choice, the exercise of which might possibly be impugned if there be no attempt, however slight, at such an effort of adjusting or reconciling the respective claims of state regulatory power and constitutionally protected rights."^[8]

I adhere to such a view. This is not to say that there is a departure therefrom in the able and scholarly opinion of Justice Santos. It is merely to stress what to my mind is a fundamental postulate of our Constitution. The only point I would wish to add is that in the process of such balancing and adjustment, the present Constitution, the Philippine American Life Insurance Co. decision having been promulgated under the 1935 Charter, leaves no doubt that the claim to property rights based on the non-impairment clause has a lesser weight. For as explicitly provided by our present fundamental law: "The State shall promote social justice to ensure the dignity, welfare, and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment, and disposition of private property, and equitably diffuse property ownership and profits."^[9]

2. Now as to restrictive covenants, accurately included by Hart and Sacks under the category of "private directive arrangements."^[10] Through them people are enabled to agree on how to order their affairs. They could be utilized to govern their future conduct. It is a well-known fact that the common law relies to a great extent on such private directive arrangements to attain a desirable social condition. More specifically, such covenants are an important means of ordering one aspect of property relationships. Through them, there could be delimitation of land use rights. It is quite understandable why the law should ordinarily accord them deference. It does so, it has been said, both on grounds of morality and utility. Nonetheless, there are limits to the literal enforcement of their terms. To the extent that they ignore technological or economic progress, they are not automatically entitled to judicial protection. Clearly, they must "speak from one point of time to another."^[11] The parties, like all mortals, do not have the power of predicting the future with unfailing certainty. In cases therefore where societal welfare calls for police power legislation, the parties adversely affected should realize that arrangements dealing with property rights are not impressed with sanctity. That approach, in my view, was the guiding principle of the opinion of the Court. Hence my full and entire concurrence.

[1] L-19255, January 18, 1968, 22 SCRA 135.

[2] Ibid., 148.

[3] 290 US 398 (1934).

[4] 291 US 502 (1934).

[5] 294 US 240 (1935).

[6] Ibid., 151-152.

[7] Ibid., 152-153.

[8] Ibid., 155.

[9] Article II, Section 6 of the Constitution.

[10] H. Hart and A. Sacks, *The Legal Process*, 124.

[11] Ibid., 125.

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