

## Controlling construction

By : RAFAEL HERNANDEZ COLON

Volume: 36 | No: 5

Page : 27

Issued : 02/07/2008

The controversy over Paseo Caribe has put on the table the issue of controls over construction in Puerto Rico. Paseo Caribe presents the issue as to the adequacy of governmental control inasmuch as the building permits issued in that case flagrantly violated applicable regulations. I have written a number of columns on this issue so I will not belabor the point at this time.

There is another tool for placing controls on construction, which has also come to the attention of the public during these days when litigation seems to occupy so much space in the printed press. It is a private legal instrument called the *servidumbre en equidad*, or restrictive covenant.

In a recent column published in a local daily, attorney Awilda López Palau addresses a recent decision of the Puerto Rico Supreme Court in the case of Asociación de Vecinos de Villa Caparra Sur v. Asociación de Fomento Educativo, 2007 JTS 208. She mistakenly claims the concurrent opinion issued by three justices of the Supreme Court supposedly threatens the effective use of the injunction through which building controls such as the *servidumbres en equidad* can be enforced. I disagree.

*Servidumbres en equidad* are established by developers of urbanizations by means of the deeds of sale. They are contractual obligations recognized in the Property Registry and thereby made public vis-à-vis third parties. Butterworth's English / Spanish Legal Dictionary defines it as a covenant that results from the existence of a prior common property over real estate, which is later divided into various lots belonging to different owners particularly as to buildings. These contractual obligations impose limitations on the uses that may be given to structures built on the resultant lots, the height of the structures, the distances that must be observed between the structures, the street and the adjoining lots, the building of fences, etc.

In the case analyzed by attorney López Palau, the limitation at issue consists of a requirement that the residences in Villa Caparra Sur may be only single-dwelling homes. The contention of some residents is that only those who are related by blood or marriage may live in Villa Caparra Sur. Any others, they further contend, do not constitute a "family" and may be forcefully excluded from the neighborhood. This case has had extensive coverage in the local press since it began a few years ago.

The contention of some Villa Caparra Sur residents is that a home that is being rebuilt for eight women who have lived there since the 1980s and who belong to the Catholic organization Opus Dei should be demolished, simply because the women are not related by blood or marriage. Essentially, they want to stop these women from continuing to live in Villa Caparra Sur.

The case has not been tried on the merits. Construction was already in progress when the residents of Villa Caparra Sur requested a preliminary injunction to restrain the contractor from completing the building of the residence. A preliminary injunction is an order from the court to cease and desist from building until the case is tried on its merits. The lower court issued the preliminary injunction without affording the defendants an evidentiary hearing in which they could have presented witnesses. Furthermore, the court did not require the residents of Villa Caparra Sur to post bail to provide a guarantee for the compensation of the damages that would be caused to the defendants by the restraint of construction until the case was tried on the merits.

The defendants appealed. While the case was on appeal they discovered the judge who issued the preliminary injunction had had contacts in the past with Opus Dei and was embittered against the organization. Upon that evidence, they asked the judge to recuse himself from further action in the case. The judge disqualified himself. The matter was reported in the local press.

The Court of Appeals reversed the order granting the preliminary injunction. The residents of Villa Caparra Sur requested the Supreme Court of Puerto Rico issue a writ of certiorari to review the decision of the Court of Appeals. The Supreme Court denied the writ. On a motion for reconsideration filed by the residents, the justices issued three opinions. A concurring opinion of three of them upheld the Court of Appeals. Two opinions with the concurrence in one of them of a third justice would have reconsidered the decision and issued the writ. When the court is divided this way, the opinion of the Court of Appeals prevails.

What troubles attorney López Palau is that the concurring opinion of the three justices holds that there must be an evidentiary hearing, and bail must be posted to issue a preliminary injunction to halt construction, presumably violating a restrictive covenant. This, she claims, reduces the effectiveness of our legal processes as to the control of such constructions.

As already stated, I disagree. The concurring opinion of the three justices who would uphold the Court of Appeals does not establish new law. It merely states the law as it is and the way it has been applied by our Supreme Court and by the federal courts including the U.S. Supreme Court. With regard to injunctions, our local rule and the federal rule are essentially the same. They both require an evidentiary hearing before issuing a preliminary injunction. And they both require the plaintiff to post bail.

This does not make the injunction ineffective for enforcing restrictive covenants. On the contrary, the doctrine regarding *servidumbres en equidad* has been developed by our Supreme Court mostly through cases of injunctions where the provisions of our rule on injunctions have been duly observed.

Under the case law set out by the Supreme Court of Puerto Rico, injunctions to enforce *servidumbres en equidad* are privileged because the plaintiffs do not have to establish that they will suffer irreparable damages in order to prevail. In all other injunctions, plaintiffs must prove irreparable damages. But since the issuance of a preliminary injunction to restrain the defendant from building until the case is heard on

its merits can cause the defendant serious damages, the judge must afford the defendant to present his or her witnesses, and plaintiffs must post bail under the law. The issuance of such an extraordinary remedy requires no less.

The concurrent opinion in *Asociación de Vecinos de Villa Caparra Sur v. Asociación de Fomento Educativo* poses no danger to the effectiveness of the injunction as an instrument to enforce the *servidumbres en equidad*. What does pose a danger to these *servidumbres* is pretending to use them to prevent eight women from residing in an urbanization because they are not related by blood or marriage. The use of the *servidumbres en equidad* as a means of discriminating as to who may reside in an urbanization is an abuse of the legal instrument which can make it suspect and blunt its effectiveness for more appropriate uses.

If this use is accompanied by signs that say “Opus Dei No” going up in an urbanization, such as we have seen in the press, then we face a problem foreign to the values of our community, and to the rightful use of the *servidumbres en equidad*. It then requires strict judicial scrutiny of these restrictive covenants so they never become instruments of intolerance, hatred or injustice.