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COMMENT

NECESSITY FOR COMPENSATION FOR VIOLATION OF A RESTRICTIVE COVENANT IN AN EMINENT DOMAIN PROCEEDING

In eminent domain proceedings where the state or a repository of state power seeks to use land within a restricted residence area for a purpose not consistent with the restrictive covenants, recovery of compensation by adjacent owners in the subdivision for this violation seems dependent upon whether the interest created by the covenants in the adjacent owners is a "property right". If it is a property right it can not under most state and the federal constitutions be taken by eminent domain unless compensation is made.[1] On the other hand, if the interest be not "property"

[1]Amendment V, Federal Constitution: ". . . nor shall private property be taken for public use without just compensation." Under the Washington Constitution the issue discussed in this article might not be raised. Art. I, § 16, amendment 9 says "No private property shall be taken or

no compensation need be made for its removal or violation.[2]

Surely there must be some right which the other owners have with regard to the restricted property, for a right is a thing protected in the courts, and this type of restriction has been enforced by injunction with more or less uniformity since *Tulk v. Moxhay* in 1848.[3] At the time of *Tulk v. Moxhay* it was traditional that a court of equity would only grant relief if there were a contract or property right involved. The case did not indicate which was the basis of the decision but was decided on the theory of unjust enrichment.

A reconciliation of the concept that restrictive covenants merely create contract rights with the rules of enforcement of these agreements in a court of equity against strangers to the contract was offered by Mr. Ames, who suggested that in such cases the owner of the land involved was the *persona designita* in the contract much like the bearer of a note, and by taking the land with notice of the agreement assents to the rights and liabilities thereunder.[4]

A minority of these eminent domain cases in the United States support the concept of the covenant creating a contract right.[5] Because no compensation was allowed in the case of *Herr v. Board of Education*[6] that case is sometimes referred to as supporting the contract theory. However, that case was decided on the basis that the commissioners in an eminent domain proceeding evaluated the *res* and need not join all the owners of the equitable interests, if such there be. It was the problem of the owners to establish their respective rights to the property involved among themselves.

The leading case supporting the contract theory is *U. S. v. Certain Lands*[7] which is based squarely on policy. The court reasoned that if the restrictive covenant were taken to create a property right it would have to be compensated for, and this would restrict the exercise of the right of eminent domain. The court therefore found the interest to be one of contract, which was enforceable as against individuals but not against the state because if the

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damaged without just compensation." Arguably when a restrictive covenant is interfered with there is a damage to the benefited land irrespective of whether any interest of the benefited owner is taken or not. In none of the jurisdictions examined was a constitution with similar wording involved.

[2]U. S. v. Certain Lands, 112 Fed. 622 (1899); Wharton v. U. S., 153 Fed. 876 (1907); Moses v. Hazen, 69 F. (2d) 842 (1934). Dicta from this last case: "As against the sovereign in the discharge of a governmental function, rights such as these (restrictive covenants) are not enforceable to restrict or burden the exercise of eminent domain . . . These are not truly property rights but are contractual rights which the government in the exercise of its sovereign power may take without compensation."

[3]Tulk v. Moxhay, 2 Phil. 774 (1848) (Eng.).

[4]17 HARV. L. REV. 174.

[5]U. S. v. Certain Lands, 112 Fed. 622 (1899); Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930); Sackett v. Los Angeles City School, 118 Cal. App. 254, 5 P. (2d) 23 (1931). These cases held that this interest is a contract right and thus need not be compensated for. Dicta in the cases of Moses v. Hazen, 69 F. (2d) 842 (1934) and Wharton v. U. S., 153 Fed. 876 (1907) follows this line of reasoning.

[6]82 N. J. L. 610, 83 Atl. 173 (1912).

[7]112 Fed. 622 (1899).

contract were enforced it also would burden the exercise of eminent domain. Assuming the primary premise that this is not a property right, the eminent domain provision of the Constitution is avoided. Some other courts have doubted that public policy was sufficiently cogent to support this primary premise. The Connecticut court in *Town of Stamford v. Vuono*[8] criticizes this policy argument:

> "The fallacy of the argument lies in the assumption of the minor premise that the requirement that the state compensate the owner of the dominant tenement for the taking of an interest in the servient tenement actually interferes with the exercise of a governmental function. . . . The public use can not be enjoined, but if it amounts to the taking of private property there must be compensation made."

Johnstone v. Detroit G. H. & M Ry. Co.:[9]

> "Nor is there anything in our laws, system of government, or spirit of our institutions which curtails the genius of a citizen in creating or enhancing values in his property in any lawful way, by physical improvement, psychological inducement or otherwise. His obligation to recognize the power of eminent domain and the possibility of its exercise in no way restricts his right to a legitimate profit . . . He may order his affairs in the assurance that, if the state takes his property it will pay him the value of what it takes."

In effect, the policy argument is weak because enforcing a restrictive covenant does not interfere with the exercise of eminent domain except that it may increase the expense. The existence of a restrictive covenant would not stop eminent domain, for the state could breach the covenant and pay damages, provided it permitted itself to be sued. There could be no injunction because the governmental function of the state is here involved. If the covenant created property rights eminent domain could still be exercised, although admittedly there might be more parties involved and compensation would have to be made. It seems not a valid reason to declare that policy demands that these covenants be considered contract rights not enforceable against the state simply because they increase expense and the number of parties. On that reasoning, should *A* erect an office building on his land he has burdened the exercise of eminent domain in that he has increased the value of the property, and should he sell or lease suites of offices in the building the exercise of eminent domain would be still further burdened because of the added number of parties involved. Yet who would say that the erection of such a building and the sale of floor space was against public policy simply because the state was attempting to take the lot on which the building was erected? It would seem that *U. S. v. Certain Lands* simply indicates there is a policy in the federal court to aid the state in the exercise of eminent domain with the least possible cost, and for that reason construction will be against recog-

[8] 108 Conn. 359, 143 Atl. 245 (1928).
[9] 245 Mich. 65, 222 N. W. 325 (1928).

nizing new compensable interests.

There are other cases in which no compensation has been given owners of lots within the subdivision for violations of the restrictions by the state. However, these cases do not necessarily stand for either doctrine of contract or property interest. The usual case is where the state seeks to erect a school house or fire-house within a district restricted to "residences only". The courts by at times resorting to rather violent construction interpret the restrictions not to include school houses or other public buildings,[10] or where the federal government seeks to erect a fortification the court rigidly construes the covenants as speaking to individuals only and not intended to limit the state in the exercise of its governmental function.[11] *Ward v. Cleveland Ry. Co.*[12] was a case in which land was restricted for residences only, and a railroad was building its line on some of the lots. The court said that it was faced with the alternative of construing the contract as not preventing use of the property for a public purpose, thus no violation, or if it were against the public use it would restrict the exercise of eminent domain and be therefore void. The final holding was that restrictive covenants can not be construed as binding on the state or any of its agencies vested with the power of eminent domain, and further, as against them such restrictions would be illegal and void if so construed. *Frieson v. City of Glendale*[13] is a case where the court did not think that a restriction for "residence purposes only" necessarily precluded the city from running streets through the subdivision.

Where the court finds there is no violation of the restrictive covenant there is no need to determine what interest is created, thus these cases which interpret the covenant as not phrased against the state are no authority for either doctrine.

A majority of the cases holds that restrictive covenants create "a property interest in the nature of an easement", and whenever in the exercise of eminent domain the state or one of its agencies takes land subject to restrictive covenants compensation must be made for the interest of the owners of the "dominant tenements" as their property right has been taken.[14]

[10]Moses v. Hazen, 69 F. (2d) 842 (1934).

[11]Wharton v. U. S., 153 Fed. 876 (1907).

[12]Ward v. Cleveland Ry. Co., 92 Ohio St. 471, 112 N. E. 507 (1915), affirms Doan v. Cleveland Short Line, 92 Ohio St. 461, 112 N. E. 505 (1915).

[13]209 Cal. 524, 288 Pac. 1080 (1930).

[14]Michigan: Leading case is Allen v. Detroit, 167 Mich. 464, 133 N. W. 317, 26 L. R. A. (N. S.) 890 (1911). Missouri: Leading case is Peters v. Buchner, 288 Mo. 618, 232 S. W. 1024 (1921), and for a recent case from the same jurisdiction see State ex rel. Britton v. Mulloy, 332 Mo. 1107, 61 S. W. (2d) 741 (1933). Connecticut: Town of Stamford v. Vuono, 108 Conn. 359, 143 Atl. 245 (1928). New York: Flynn v. N. Y. W. & B. R. R. Co., 218 N. Y. 140, 112 N. E. 913 (1916). Massachusetts: Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N. E. 244 (1917). New Jersey: Hayes v. Waverly and P. Ry. Co., 51 N. J. Eq. 345, 27 Atl. 648 (1893). California: Dicta in Martin v. Holm, 197 Cal. 732, 242 Pac. 718 (1925) cites Allen v. Detroit as the well settled law, and City of Beverly Hills v. Anger, 127 Cal. App. 223, 15 P. (2d) 867 (1932) cites Peters v. Buchner as the settled law, but in the case of Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930) the language of the court casts doubt on whether the law is settled on this point in California.

In the injunction case of *Sanborn v. McLean*[15] where a restrictive covenant was sought to be enforced between individuals, the Michigan court asserted the doctrine of reciprocal negative easements. Drawing an analogy from the common law rules and following the natural tendency of trying to slip this new relationship to property into a time-worn category, the court labeled it an easement. From here: Easements were traditionally considered property rights; this is an easement, therefore this is a property right. No definite reason has been laid down for considering this interest as property except that the court feels this is a reasonable and natural expansion of the common law doctrine of easements.[16] Calling this an easement and then reasoning that it is therefore a property right is simply begging the question. A reading of the cases leads one to suspect that much of the result in the majority of cases comes from a habitual use of the words "easement", "dominant" and "servient" tenements, plus the natural tendency when once named to accept all the incidents of the normal concept of easement. This mode of thinking has not led the courts to indulge in any intensive analysis of what this interest really is.

What has happened is that we have a new incident in the interrelation of land owners—a concept new to the law (1848) and arising because of the increasing density of population. This underlying reason for the development is suggested by the fact that the Michigan court in considering how Detroit residence districts fell before the encroachment of factories, was very willing to find restrictive negative covenants and enforce them even against the state.

> "Restrictive covenants for residence purposes, if clearly established by proper instruments, are favored by definite public policy . . . Of late, the executive and legislative branches of government have declared the necessity for such restrictions through the enactment of zoning laws, an important purpose of which is to preserve the home, home advantages, privacy and atmosphere . . . A total of forty-three states have authorized cities to zone. (This case written in 1928) . . . In December of 1926 there were 456 zoned cities with a population of 30,000,000 people—more than one-half of the urban population of the country. In the construction of a contract whose purpose has such a definite approval of the state, the reading of illegality into them would not be justifiable."[17]

On the other hand, the California court, where when the law developed there was an absence of any general congested industrial condition, is hesitant to find a restrictive covenant, interprets them strictly,[18] and as against the state feels that there is no necessity for recognizing an incident never known to the common law which will burden the exercise of a governmental function.

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[15]233 Mich. 227, 206 N. W. 496 (1925).

[16]Johnstone v. Detroit G. H. & M. Ry. Co., 245 Mich. 65, 222 N. W. 325 (1928).

[17]*Supra* note 16.

[18]Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919); Sackett v. Los Angeles City School, 118 Cal. App. 254, 5 P. (2d) 23 (1931).

The court states this interest "does not rise to the dignity of an estate in land".[19]

For the purpose of aiding the citizenry in adjusting rights on the basis of some settled rules, the attempt by the court to put this new incident into the category of easements is laudatory. However, the result has not been especially to clarify, since the attempt to reconcile this new incident to old concepts has failed to produce any clear, logical principles, but rather confusion.

It is not difficult to see the policy behind enforcing restrictive covenants as between individuals. The free land in the United States is no more, and if a man in metropolitan districts would protect his property from the acts of his neighbors; if he would insure that the one big investment of his life—his home, be located so that his family might enjoy the advantages of a beautiful, healthful and moral environment, he must do so by restrictive covenants or by zoning laws. We do find a large number of decisions where injunction prevents a breach of restrictive covenants in suits between persons. However, where the state is involved in the exercise of a governmental function, a new policy arises: that of facilitating the economical exercise of eminent domain, which policy militates against recognizing new compensable interests in land. The cases do not satisfactorily reconcile this conflict of policy, but follow one or the other.[20]

For the purpose of certainty and for the better reconciliation of these conflicting policies, the interest created by restrictive covenants should if possible be placed on a basis not inconsistent with our present established rules of property whereby they are enforceable as between individuals and at the same time do not burden the exercise of eminent domain.

Distinction Between "Real Property Right" and "Contract Right"

The term "real property" may have either of two meanings. First, it may be employed to designate an interest which one has with respect to a given tract of land, the interest consisting of the rights, privileges, powers, immunities and their correlatives which the person has against other members of the community with respect to the given tract. When, by process of conveyancing or otherwise, one obtains sufficient number of these rights, privileges, powers and immunities he is said to own the land; or to put it another way, when, by process of conveyancing or otherwise he is recognized as the owner of the land as of a certain estate, he obtains certain of these rights, privileges, powers, immunities and their correlatives. In another sense "real property" is used to refer to the land itself, a tangible "thing", as to which one may have certain rights, powers, privileges and immunities.

If "property" means a thing of value capable of ownership there is no difference between "property right" and "contract right" for there is no valid distinction in the ownership of a

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[19]Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930).

[20]Justice Harlan F. Stone in 19 Col. L. Rev. 177 pointed out the difficulty of reconciling a contract theory to the accepted rules of equitable enforcement of restrictive covenants.

right against third persons whether it arises by reason of titles to land or by a contract, as far as restrictive covenants are concerned. The only basis of distinction would be subject matter. Those rights governing the conduct of individuals in relation to land would be termed "real property" while those governing the conduct of individuals in other respects would be termed "contract rights". However, if the word "property" means rights of value against individuals, the eminent domain provisions of the Constitution should require compensation for all such rights violated. On this theory the majority of the cases in holding that compensation must be made when a restrictive covenant is violated by the state were well decided.

There is evidence in the cases indicating that the constitutional requirement for compensation in eminent domain proceedings referred to the *land itself* when it said "property". (See *Herr v. Board of Education*[21] where evaluation of the *res* was held to satisfy the constitutional requirement.) On this theory the Constitution in this connection would read "No *land* shall be taken without just compensation." The question for the courts to determine would be what is just compensation. It would seem clear that all those valuable rights which arise by virtue of legal title to the land should be compensated for. Perhaps the distinction relied upon by the minority of the courts is between traditional rights regarding land as against those which find their existence for the first time by reason of a contract.

Assuming that the requirement of compensation depends on whether the right involved be one that traditionally attached to land, the issue is narrowed accordingly, and a split of opinion here can be explained also.

It has long been noticed that when the law recognizes title to land in a person, an innumerable array of "rights" arise in his favor by virtue of his "ownership". One of those rights is to build on his land as he sees fit, or more properly a "privilege" to so build. When he agrees that he will not exercise that privilege he substitutes a duty on his part enforceable by the covenantee that he will not so build. If that right always existed but is now simply transferred it may still retain its characteristic as a right that arose by operation of law by reason of legal title and is therefore a "real property right" which must be compensated for when removed. On the other hand, if this be not a transfer but an agreement imposing a new duty on the owner of the restricted land and creating a co-relative *new* right in the covenantee, then it is not a traditional "real property right" although it has relation to land, but is more properly a "contract right".

Before a restriction is imposed, the covenanter *A* has the privilege of building or not building on his land. The covenantee *B* merely has the duty not to interfere. After a restrictive covenant *A* no longer has the privilege of building, but now is charged with the duty of not building. *B* on the other hand does not have a right to build on *A's* land (at least it does not seem to be the

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[21] *Supra* note 6.

intention of the parties that *B* have such an inchoate and useless right), but he does have a right not to have *A* build. On analysis this agreement does not look very much like a transfer. Rather it looks like the creation of a new set of relationships, not arising formerly by operation of law by reason of ownership and now transferred, but wholly created by agreement. Since these "rights" are not those traditionally arising by operation of law, or not traditionally considered as property rights such as easements, they are not such rights as must be compensated for when the *res* is taken under eminent domain. Granted that they are rights relative to the ownership of land and if valuable are perhaps "property" rights, they are still not those "real property" rights which were traditionally enforced by reason of ownership of the *res*, hence since the government takes only the *res* it need not compensate for those rights not thereto normally incident. Since no traditional property right is involved the state is not limited by the contract unless it chooses, as the state may breach a contract and insulate itself from liability. This view harmonizes policies in that the restrictive covenant would be enforceable between individuals but not against the state. Thus the state is relieved of the compulsion to recognize new compensable interests in eminent domain proceedings.

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