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Right to Compensation in Eminent Domain for Abrogation of Restrictive Covenants

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by John C. Vance, formerly TRB Counsel for Legal Research, principl investigator, serving under the Special Technical Activities Division of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving right-of-way acquisition and control, as well as highway law in general. This report deals with legal questions surrounding restrictive covenants in eminent domain.

This paper is included in a three-volume text entitled, "Selected Studies in Highway Law." Volumes 1 and 2 were published by the Transportation Research Board in 1976 and Volume 3 in 1978. Together they include 45 papers and more than 2,000 pages. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

CONTENTS

TRANSPORTATION RESEARCH BOARD
NATIONAL RESEARCH COUNCIL

Right to Compensation in Eminent Domain for Abrogation of Restrictive Covenants

By John C. Vance

Counsel for Legal Research
Transportation Research Board
National Research Council

INTRODUCTION

For at least 75 years a common feature of the development of residential areas in both cities and suburbs in the United States has been the incorporation into all deeds conveying land in the developed area of "common plan or scheme" covenants designed to preserve the residential character of the neighborhood. These take many forms, including, for example, the prohibition of manufacturing, business, trade, and other named activities deemed inimicable to the enjoyment of residential property and conducive to the depreciation of the investment in such property. But whatever the varied language of such covenants, the same almost invariably contain a restriction so worded as specifically to prohibit the use of the land conveyed for other than residential purposes. It is with this latter type of restriction that this paper is concerned. Although this form of covenant has long been in use, it appears today in conveyancing with increasing frequency due to the emergence of the "developer" as a key figure in the financing and construction of new homes throughout the country.

The legal effect of building restrictions of this nature, known as negative easements or equitable servitudes, has received a chequered treatment at the hands of the courts. This derives at least in part from the fact that incorporeal hereditaments of this kind were unknown to the common law. The early English cases did not extend the doctrine of negative easements beyond those for air, light, lateral and subjacent support, and the flow of an artificial stream.[1] It was not in fact until 1848 that in the famous case of *Tulk v. Moxhay,* 2 Phil. 774, 41 Eng. Rep. 1143, the principle was laid down by the English courts that where an owner of land contracts to abstain from using his property in a particular manner, equity will enforce the agreement against a purchaser with notice irrespective of whether the promise creates a covenant running with the land.[2] This case served as the basis for the later recognition and development of the doctrine of negative easements and equitable servitudes in the American courts.

Although such doctrine eventually received wide acceptance in American courts, a division of opinion appeared as to the nature of the

[1] GALE ON EASEMENTS, pps. 23–24, 36–37 (14th ed., Sweet & Maxwell, London, 1972).

[2] See AMERICAN LAW OF PROPERTY, Vol. II, § 924 (Little, Brown and Company, Boston 1974).

interest created by the promise to abstain from using land in a certain manner. One line of authority held to the view that the interest created by the promise was contractual only; whereas the other line of authority took the position that the promise created an equitable property interest in the burdened land. This division of opinion obtains today and is partly responsible for the fact that diametrically opposite treatment has been accorded such interests when the same are extinguished by a taking in condemnation of the servient tenement free and clear of the obligation.

The ordinary situation in which the extinguishment of such incorporeal interest takes place is in the condemnation of property located in a subdivision. The typical case involves condemnation of certain of the lots in the addition for highway, street, school, public utility, etc., purposes, and the owners of the dominant tenements seek to intervene (not ordinarily being named as parties defendant), or bring an inverse action to recover damages for the destruction of their alleged interest in the servient tenement.

The results in the cases are split. The decided weight of authority holds to the view that the right created by a covenant restricting land to residential use is a covenant running with the land and constitutes an interest in real property. The majority rule points to the fact that the conveyance of a negative easement is within the Statute of Frauds; it notes that the doctrine is universally accepted that as between private persons the right to enforce a restrictive covenant is a valid right and is enforceable in equity; it posits that the state in the exercise of the sovereign power of eminent domain should not be placed in a different position than private persons with respect to the exercise of such valuable right; and reasoning from the premise that restrictive covenants unarguably enhance the value of land, it concludes that the extinguishment of the right to enforce such covenants constitutes the unlawful taking of private property for public use without payment of compensation.

The minority rule concedes that the value of land is enhanced by restrictive covenants and that such covenants constitute a valuable right. Despite this admission, recovery has been denied in the cases on the grounds that: (a) A covenant restricting land to residential use is a contractual right, and although binding on the parties and enforceable in equity against purchasers with notice, such contractual interest is not binding on the state; private parties cannot create between themselves an incorporeal interest of a kind and nature not known to the common law and impose the burden thereof on the sovereign which is a stranger to their agreement; and because such right cannot be enforced against the state, the instrument creating the right must be construed as having been intended to apply only as between private parties. (b) It is against public policy to enforce a restrictive covenant as against the state. To permit otherwise would be to allow private persons to so embarass and encumber the eminent domain process as to make it an unworkable legal mechanism.

The practical considerations that have led some courts to hold that it is contrary to sound public policy to allow recovery against the state for breach of restrictive covenants are well illustrated in a Texas case involving a subdivision with restrictive covenants in deeds to approximately 1,500 different lot owners.[3] The Court dwelt on the labyrinthian practical difficulties that would be attended upon a ruling by it that all 1,500 such lot owners had a property interest in the 2 lots that were taken in condemnation. In ruling adversely to the plaintiffs' claim, the Court speculated on the nightmarish problems that would be presented if the number of potential claimants were increased from 1,500 to 10,000.

Putting hyperbole aside, it must be conceded that even in a subdivision without a multiplicity of lot owners that if the area were one devoted exclusively to high cost residences, the amount of damage from certain types of public improvements could easily exceed the value of the property taken for the improvement. It is not too difficult to understand that faced with such result some courts are persuaded to deny recovery for breach of restrictive covenants on grounds of policy.

It is thus patent that the problem presented by the violation of restrictive covenants is one of importance from several standpoints. These include, but are not limited to, the following: (a) The difficult theoretical problem of doing justice to both public and private interests; (b) the serious economic problem of avoiding escalation of the costs of condemnation; (c) the intractable administrative problem of handling the negotiations for and purchase of land for public use where compensation must be paid to a large number of persons outside the chain of title to the real estate sought to be acquired.

The problem, as stated, would today be one of first impression in the majority of jurisdictions. In the light of the importance of the question, the cases that have passed on the issue (at the time of this writing) are considered on an individual basis, in jurisdictional order, and grouped according to whether they represent the majority rule (allowing recovery), or the minority rule (denying recovery).

MAJORITY VIEW

In the following cases recovery was allowed for violation of covenants restricting the use of land.

California

Prior to the decision in *Southern California Edison Co. v. Bourgerie,* 107 Cal. Rptr. 76, 507 P.2d 964, rendered in 1973, California jurisprudence had adhered to the view that the state is not liable for the violation of restrictive covenants in the taking of private property for a public use. This rule was laid down by the Supreme Court of California in *Friesen v. City of Glendale,* 209 Cal. 524, 288 P. 1080 (1930), involving breach of a covenant restricting land "for residential purposes only;"

[3] City of Houston v. Wynne, 279 S.W. 916 (Tex. Civ. App. 1925).

wherein the Court held that such restriction "is not binding upon the sovereign unless it appear expressly or by necessary implication that the sovereign consented to be so bound." The Supreme Court reexamined its holding in *Friesen* in *Southern California Edison Company v. Bourgerie,* and squarely overturned the same. Because of the importance of the California Court's action in *Bourgerie,* the case merits consideration in some detail. The facts were as follows:

Defendants purchased a tract of land in Santa Barbara from the Bank of America. The Bank retained a tract of adjoining land, and the deed of conveyance specifically provided that neither the land conveyed nor the Bank's adjoining land could be used for the purpose of erecting an electric transmission station. Plaintiff, Southern California Edison Company, a public utility invested with the power of eminent domain, instituted a condemnation action against the Bank to acquire the adjoining tract for the express purpose of erecting an electric transmission station. In the complaint against the Bank Edison joined defendants, alleging that they "owned or claimed" some "right, title, or interest" in the land of the Bank. Defendants answered asserting that the land proceeded against was burdened with a restriction in their favor the violation of which would cause them substantial damage. Subsequently the Bank and Edison entered into a stipulation for judgment in which it was agreed that Edison could acquire the land for a stated sum. The matter proceeded to trial on the issue of the propriety of the condemnation action, and in holding that the property sought to be condemned would be put to uses duly authorized by law, the trial court also ruled (on the basis of *Friesen*) that the defendants were not vested with any compensable property interest in the burdened land.

In reversing and remanding the Supreme Court of California stated:

> In *Friesen,* a case we have not reexamined in over four decades, the court held: a building restriction is not a property right but merely a negative easement or an equitable servitude; such an interest is, in essence, a contractual right cognizable in equity as between the contracting parties but not binding upon the sovereign.
>
> A majority of jurisdictions which have considered the matter hold that building restrictions constitute property rights for purposes of eminent domain proceedings and that a condemner must compensate a landowner who is damaged by violation of the restriction. . . . The Restatement of Property also adopts this view. . . . *Friesen* and other cases adhering to the minority view have been sharply criticized.
>
> We need not contemplate in depth the somewhat esoteric dialogue on the appropriate characterization of a building restriction. One writer has perceptively declared that the "no-property-interest" argument is less the motivation for denial of compensation than it is a rationalization of a result desired for other reasons." . . . An objective analysis reveals the real basis for the decisions which deny compensation for the violation of building restrictions by a condemner relates to pragmatic considerations of public policy rather than abstract doctrines of property law, and it is upon these issues of policy that jurisdictions choose between the minority and majority views.

Denial of compensation has been justified upon the ground that the cost of constructing public projects will be substantially increased if compensation must be paid by a condemner for the violation of a restriction. In addition, it is asserted that a condemner might be required to join a large number of landowners as defendants in cases where the benefit of the restriction runs to numerous lots, and that this could result in inhibiting the condemner's ability to acquire essential property. Finally, it has been suggested that the landowners might "pluck valuable causes of action from the thin air" by entering into agreements imposing restrictions whenever condemnation proceedings are on the horizon.

We find these reasons for denying compensation to be unpersuasive. . . . [T]he speculative possibility that some unduly acquisitive landowners might in bad faith enter into restrictive covenants solely for the purpose of collecting compensation would not justify the denial of compensation to all property owners, including those acting in good faith. If bad faith or sharp practices were established, a court could properly refuse to allow compensation.

Under the minority view, compensation is denied to those persons whose property may have been damaged as a result of the violation of a valid deed restriction, thereby placing a disproportionate share of the cost of public improvements upon a few individuals. Neither the constitutional guarantee of just compensation, nor public policy permit such a burdensome result. The United States Supreme Court has recently declared, "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness—as it does from technical concepts of property laws."—Our conclusion to harmonize California law with the majority rule is in conformity with this salutary principle.

Connecticut

The Court in *Southern California Edison Co. v. Bourgerie, supra,* relied on and quoted extensively from the opinion in *Town of Stamford v. Vuono,* 108 Conn. 359, 143 A. 245 (1928), describing the decision as "the most frequently cited case for the majority position." The facts in this case were as follows:

Plaintiff, the Town of Stamford, brought suit to condemn three lots for the purpose of erecting a high school thereon. Both the lands proceeded against and defendant's adjoining lands were subject to covenants restricting use to residential purposes. The issue for decision was whether the abrogation of the restrictive covenants by the condemnation of the lots for school purposes constituted the taking of a compensable property interest vested in the defendant. The Supreme Court of Errors of Connecticut said in respect thereto:

The plaintiff also contends that these restrictions, in so far as they prohibit the erection of a high school or other municipal building upon the restricted property are void as against public policy. The argument in support of this contention is that no contractual agreement between the owners of property should be permitted to prevent the use of that property by an agency of the state when its use is required in the

exercise of a governmental function, that to require the state to make compensation for the right taken would interfere with this governmental function, and therefore should not be permitted. The fallacy of the argument lies in the assumption of its minor premise that the requirement that the state compensate the owner of the dominant tenement for the taking of his interest in the servient tenement actually interferes with the exercise of any governmental function. There is, of course, a clear distinction between the rights of the private owner of land which is subject to a restrictive easement and those of a governmental agency which requires for public purposes the use of the land in violation of the restriction. The private owner may not violate the restriction; if he attempts to do so, he may be restrained by injunction. The governmental agency may not be restrained from making such use of the property as the public purpose for which it is acquired may require, but, if that involves the taking of private property, it must make compensation for the same. When, therefore, property subject to a restrictive easement is taken for a public use . . . the owner of the property for whose benefit the restriction is imposed is entitled to compensation.

The just compensation to which the property owner is entitled when his land is taken is ordinarily measured by the market value of the land taken. When an easement appurtenant to land is taken, the measure of damages is the depreciation in the market value of the dominant tenement. This is shown by the difference in the fair market value of the property before and after the taking.

Massachusetts

Ladd v. City of Boston, 151 Mass. 585, 24 N.E. 858 (1890) was an early case in which it appeared that the owners of 64 neighboring lots in the City of Boston had mutually covenanted not to build beyond a certain line nor above a certain height. The City of Boston acquired certain of the lots for the purpose of constructing a courthouse thereon, in violation of such restrictions. One of the lot owners filed a petition seeking damages for the abrogation of the restrictive rights by the City. In sustaining the action of the trial court in refusing the City's motion to dismiss the petition, the Supreme Judicial Court of Massachusetts, speaking through Mr. Justice Holmes, held that the restrictive covenants created a valid easement in favor of the owners of the dominant lots which could not be extinguished by the City of Boston without payment of compensation.

Michigan

In *Allen v. Murfin,* 159 Mich. 612, 124 N.W. 581 (1910) the owner of lots in the City of Detroit sold the same subject to covenants designed to restrict the use thereof to residence purposes. Certain of the lots owners sought to enjoin the City of Detroit from erecting a fire engine house on some of the lots, in violation of the building restrictions contained in the deeds. On the question of whether such building restrictions could be enforced against the City of Detroit, the Supreme Court of Michigan said:

> We are satisfied that a valid building restriction may be binding upon a city as well as an individual, and, before it can use a lot charged with such restriction for a purpose prohibited by the restriction, it must obtain, by purchase or condemnation, the title of all owners of any interest therein, and, when it has not done so, equity may properly intervene to preserve the status quo until such interests are acquired.

The holding in *Allen v. Murfin, supra,* was reaffirmed in *Allen v. City of Detroit,* 167 Mich. 464, 133 N.W. 317 (1911), (involving substantially the same fact situation), wherein the Court stated:

> The contention that the city under its general police power may ignore the building restriction and erect its fire engine house within the restricted district because it is necessary for the public good and to protect the lives and property of citizens in that locality, is not tenable. When such action deprives the individual of a vested right in property it goes beyond regulation under police power, and becomes an act of eminent domain governed by the appropriate condemnation laws.

The Court went on to say that in a condemnation proceeding "necessary parties" would include "owners of property in the same subdivision mutually burdened with the same restrictions."

The same Court held in *Johnstone v. Detroit, G.H.&M. Ry. Co.,* 245 Mich. 65, 222 N.W. 325 (1928), that owners of lots in a subdivision, property in which was restricted under a general plan to residences of stated minimum costs with setback requirements, were entitled to compensation on a taking of part of the subdivision for railroad purposes. The Court stated that "aside from nominal damages for destruction of the easement, the compensation is measured by the actual diminution in value of the premises of such owner as a result of the use to which the property taken is put."

And in *In Re Dillman,* 263 Mich. 542, 248 N.W. 894 (1933), the owners of lots in certain subdivisions restricted to residential use and the construction of dwelling houses of prescribed minimum cost were held entitled to compensation upon the taking of certain of said lots for the relocation of a railroad right-of-way and the widening of a highway. Describing the restrictive covenants as being "reciprocal and in the nature of easements" the Court ruled that the same constituted protected property interests which "are appurtenant to and run with the land."

Missouri

In *Peters v. Buckner,* 288 Mo. 618, 232 S.W. 1024 (1921), a condemnation proceeding was brought by a school district of Kansas City, Missouri, to acquire a site for school purposes, the lands proceeded against being part of an addition created by a development company. The developer and common source of title, Meadow Land Company, caused to be inserted in every deed conveying lots in the addition covenants restricting the land to residential use, prescribing minimum costs for the erection of dwellings, providing setback and other restrictive use requirements. One of the defendants in the condemnation proceeding (plaintiff-at-bar in the instant case) sought damages for the violation of the restrictive covenants in the acquisition of the land for school purposes. The question for decision was stated by the Court as follows:

> The material and controlling proposition in the condemnation case therefore is substantially this: May the Peterses who own a 50 foot lot across the street from the proposed schoolhouse site, and which fronts the proposed site, recover in the condemnation proceeding the amount that their lot is depreciated in value and damaged by reason of the fact that the condemnation and use of the site for schoolhouse purposes violates the restrictive covenants and terminates the easement which their residence lot as a dominant estate has in each and every lot in the servient estate?

Answering in the affirmative the Supreme Court of Missouri said:

> The covenants and agreements in the deeds from the Meadow Land Company and its grantees, who are owners of lots in addition mentioned outside of the proposed schoolhouse site, create and vest in each of them as owners a legal right of property, an easement in and to each and every lot within the schoolhouse site. . . . there can be no doubt but what the rights . . . are property rights, and under the Constitution of the United States . . . and that of the State of Missouri . . . such property cannot be taken or damaged without just compensation first be paid. . . . While these restrictions are not binding upon . . . the school board acting under the state's authority . . . yet if such restrictions add value to all the lots of the addition . . . then when the school board undertakes to deprive the owners of those lots of those values, by condemnation proceedings, it should be required to pay for the same, as for all other values it takes from the property owners of the addition by such proceedings.

Reaching the same result the Supreme Court of Missouri stated in *State ex rel. Britton v. Mulloy,* 332 Mo. 1107, 61 S.W.2d 741 (1933) that:

> It is the settled law of this jurisdiction that where the deeds of conveyance impose valid restrictions on the lots within a given area, then each lot and the owner of same has an easement in each and all the other lots affected by the restrictions. . . . The easement in plaintiff's favor in the land which defendant seeks to use for school purposes is within the protection of the constitutional provisions which provide that "private property shall not be taken or damaged for public use without just compensation."

Nebraska

The sole question before the Court in *Horst v. Housing Auth. of County of Scotts Bluffs,* 184 Neb. 215, 166 N.W.2d 119 (1969), was whether restrictive covenants constitute a constitutionally protected property right. The facts were as follows: Appellee, the Housing

Authority of the County of Scotts Bluffs, instituted a condemnation proceeding to acquire 24 lots in an addition for the purpose of erecting multiple unit dwellings thereon. The appellants, being 40 in number, were joined as defendants because of their interest in covenants affecting all lots in the addition, which covenants, among other things, restricted each lot in the addition to single-family residential use. Each of the 40 appellants received an award of damages in the condemnation proceeding. On appeal to the District Court, the Housing Authority filed a motion for summary judgment on the ground that appellants did not own any interest in the lots being acquired by the Housing Authority, and hence were not entitled to compensation. The District Court sustained the motion, entered judgment for the Housing Authority, and directed that the damages awarded be returned. In reversing and remanding the Supreme Court of Nebraska said:

> The Housing Authority contends that restrictive covenants are not enforceable against the government; that such covenants are made subject to the powers of government, including the power of eminent domain; and are, therefore, void as against the government and not compensable. . . . This argument, in effect, is that people should not be allowed to increase the value of their property by these covenants. . . . [W]e cannot accept the premise that the government should be permitted to inflict damage without liability simply because it is the government. . . . Whether the interests involved here be treated as negative easements, equitable servitudes, or contractual covenants running with the land, they constitute property in the constitutional sense and must be compensated for it if their extinguishment results in damage to the owners. We therefore hold that lawful covenants restricting the use of land and binding upon successors in title constitute an interest in the land, and property in the constitutional sense. Where the taking of the land by eminent domain permits a use violative of the restrictions and extinguishes such interest, there is a taking of the property of the owners of the land for whose benefit the restrictions were imposed, and such an owner is entitled to compensation for the damage, if any, to his property.

Nevada

It was held in *Meredith v. Washoe Co. School Dist.*, 435 P.2d 750 (Nev. 1968), that the beneficiaries of covenants restricting the use of lots in a subdivision to residential purposes were entitled to damages for the extinguishment of such restrictions in the taking of certain lots in the subdivision for school purposes, the Supreme Court of Nevada stating with respect thereto:

> This case is unique and one of first impression in our state. We note a clear division of authority among the jurisdictions that have considered the problem. . . . The procedural view essentially supposes that the subdivision will be a large tract with many lots and each lot owner would necessarily have to be served and that a trial on the issue of damages for each lot owner would serve to practically prohibit the public authority from condemning any land so situated. . . . We do not agree that because a number of persons may be affected by the proceedings it is best to hold the appellants have no right that the law should protect against the sovereign and deny them the right to offer proof of damage. Procedural considerations should not determine the substantive question of whether there is a compensable property interest. Furthermore, our existing civil practice procedures and statutes are sufficient to bring before the courts all persons claiming a compensable interest. Since all landowners within a subdivision can be readily ascertained from public records, they may be made a party either by personal service or publication. The burden then falls on the claimants to appear and establish their loss.

New Jersey

Holding that common covenants in subdivision deeds restricting the use of lots for residential purposes were operative to prohibit the construction of a public walkway, the Court in *Duke v. Tracy*, 105 N.J. Super. 442, 252 A.2d 749 (1969), ruled that the township desirous of constructing such public way for the common good must either purchase a release of the property rights vested by the covenants in the lot owners, or in the alternative extinguish the same by a proceeding in eminent domain with compensation paid for the property rights so taken.

New York

Lots were sold, in *Flynn v. New York, W.&B. Ry. Co.*, 218 N.Y. 140, 112 N.E. 913 (1916), pursuant to a common plan designed to preserve the addition as residential in character. The restrictive covenants appearing in all deeds provided, *inter alia*, that no "building or structure for any business purpose whatsoever shall be erected on said premises." Defendant railway company acquired a number of lots in the addition, subject to the terms of the restrictive covenants, and caused a railroad to be constructed thereon. In holding that plaintiffs, neighboring lot owners, were entitled to damages for violation of the restrictive covenants on the part of defendant railway company, the New York Court of Appeals said:

> Restrictive building covenants have been consistently recognized as valid and enforceable in law and equity, and it has been held that all the lots covered thereby are subject to an incumbrance requiring occupation in accordance with the plan, which is binding upon each subsequent purchaser having notice of the plan, even though his legal title is unrestricted. The public service corporation, exercising the right of eminent domain, has the advantage over the private person or corporation, in that it cannot be kept off the premises entirely, but may enter the restricted district and destroy its exclusive character upon making just compensation for property rights thus taken. . . . The appellant has violated the restrictive agreement by "erecting a building

or other structure for business purposes." . . . The right of the property owner is measured by the depreciation in value which his land sustains, including such depreciation as will be sustained by reason of the use to which the railroad puts its property, the difference in value between his land with and without the railroad in operation.

North Carolina

The restrictive covenants under review in *City of Raleigh v. Edwards,* 235 N.C. 671, 71 S.E.2d 396 (1952), prohibited the erection of any buildings or structures in the subdivision for other than residence purposes and costing less than $7,000. The City of Raleigh instituted a proceeding to condemn certain of the lots as a site for the erection of an elevated water tank. Intervenors, lot owners in whose favor the restrictive covenants ran, sought damages for the proposed abrogation of the covenants by the condemning authority. In addressing the question of the nature of the right created by the restrictive covenants the Court said:

> This precise question does not seem to have been presented heretofore to this Court for determination, and the decisions from other jurisdictions reflect a contrariety of opinion.
>
> However, the decided weight of authority in other jurisdictions supports the proposition that such a restriction, being in the nature of an equitable servitude, is an interest in land and must be paid for when taken. The theory is that restrictions impose negative easements on the land restricted in favor of and appendant to the rest of the land in the restricted area, and when a particular parcel thereof is appropriated for a public use that will violate the restrictions, such appropriation amounts in a constitutional sense to a taking or damaging of property of the other landowners for whose benefit the restrictions are imposed. . . .
>
> [T]his Court has adhered unvaryingly to the principle that a negative easement of this kind is a vested interest in land. . . . Thus, holding as we do that these negative easements are vested property rights, it follows by force of natural logic and simple justice that for the taking of such property just compensation must be paid as in the case of the taking of any other type of property, and the lack of contractual privity between the owners and the condemnor is in no sense a determinative factor.

South Carolina

Noting that an irreconcilable conflict existed in the decisions from other jurisdictions on the question whether restrictive covenants create such property rights as are compensable in condemnation, the Supreme Court of South Carolina, in *School District No. 3 v. Country Club of Charleston,* 241 S.C. 215, 127 S.E.2d 625 (1962), opted for the view expressed in what it described as "the better reasoned cases" that "a right to enforce such restrictions constitutes property in the constitutional sense for which compensation must be paid if taken."

Tennessee

A bill for declaratory judgment was filed in *City of Shelbyville v. Kilpatrick,* 204 Tenn. 484, 322 S.W.2d 203 (1959), for the purpose of procuring an adjudication as to whether in the taking of a lot by the City of Shelbyville in a subdivision for the erection of a water tower, the City was liable in damages to lot owners protected by covenants restricting the use of property in the subdivision "to residential purposes only." After noting that the decisions in other jurisdictions took "dramatically opposite views" the Supreme Court of Tennessee concluded:

> The reasoning of the cases holding that compensation must be made where the taking of property under eminent domain violates building restrictions placed thereon for the benefit of every other lot owner in the sub-division is, in the opinion of this Court, more consistent with the realities of the situation. Each of the respective owners of the respective lots entered into this restrictive agreement because each regarded it as something which added to the value of his or her own lot. . . . Certainly it is not within the spirit of our eminent domain law that such interest created by the deed may be taken away from its owner without compensation, if that owner is damaged. Not being within the spirit of the law, it ought not to be so held, unless required by the letter of the law. This Court finds nothing in the letter of our eminent domain law forbidding compensation to the owner under such circumstances.

Virginia

Plaintiffs, lot owners in a subdivision restricted to residential use only, brought suit in *Meagher v. Appalachian Electric Power Co.,* 195 Va. 138, 77 S.E.2d 461 (1953), to restrain defendant public service company from erecting high voltage transmission towers on a certain lot in the subdivision in violation of the restrictive covenants, or alternatively, to compel it to exercise its right of eminent domain with respect to the property rights created by such covenants. In handing down its ruling on the alternative plea the Supreme Court of Appeals of Virginia said:

> It is argued that such restrictions cannot be invoked against a public service corporation clothed under the laws of the State with the power of eminent domain, because public necessity may require the taking of property in such an area despite such restrictions. The answer is, that "Public necessity may justify the taking, but cannot justify the taking without compensation." . . . We are of the opinion, then, that the acts of the defendant are a breach of the covenants and restrictions binding on its lands in these subdivisions, and constitute a taking or damaging of property rights for which compensation must be paid.

Federal

United States v. Certain Land in the City of Augusta, Maine, 220 F.Supp. 696 (S.D. Me. 1963), involved federal condemnation of land in a subdivision subject to covenants prohibiting the use thereof for com-

mercial or industrial purposes. The question for decision was whether the extinguishment of such covenants by the United States Government entitled mutual covenantors owning property in said subdivision to compensation. The District Court ruled that Maine law was not binding under principles either of res judicata or collateral estoppel, and turned for instruction to other cases involving condemnation by the Federal Government. In holding that compensation was required to be paid for the extinguishment of the restrictive covenants, the Court stated that "it now seems clear that equitable servitudes created by restrictive covenants are recognized as property rights under federal law."

MINORITY VIEW

In the following cases recovery was not allowed for the violation of covenants restricting the use of land.

Alabama

Burma Hills Development Co. v. Marr, 285 Ala. 141, 229 So.2d 776 (1969) involved lots in a subdivision burdened with mutual covenants providing that: "No lot shall be used except for residential purposes." The City of Mobile instituted condemnation proceedings to acquire one of said lots for road purposes. Plaintiff, the adjoining lot owner, brought suit to enjoin the construction of the public way and also sought a declaratory judgment with respect to the question phrased by the Court as follows:

> Does a restrictive covenant or the right to enforce a restrictive covenant constitute a property right, the taking of which necessitates condemnation and the payment of compensation or damages to those persons entitled to enforce the restrictive covenant where the restricted land is taken or used for public purposes?

Noting the division of authority in the various jurisdictions that had passed on the question, the Court considered the problem under the labels of "Majority View" and "Minority View," and came down on the side of the latter, summing up its conclusions in the language as follows:

> These authorities [minority view] are persuasive to our conclusion that the question presented herein for decision should be answered in the negative. We hold that a restrictive covenant or the right to enforce a restrictive covenant *does not* constitute such a property right, title and interest as requires the payment of compensation or damages to those persons entitled to enforce the restrictions of said covenants where the restricted land is taken for and devoted to public purposes. (Emphasis by the Court.)

Arkansas

Suit was brought in *Arkansas State Highway Comm'n v. McNeill,* 238 Ark. 244, 381 S.W.2d 425 (1964), by a lot owner in an addition restricted to residential use to enjoin the Arkansas Highway Commission from constructing a highway on eleven lots acquired by it in said addition, without first posting a bond to secure plaintiff against loss occasioned by the abrogation of the restrictive covenants. Expert testimony was introduced to the effect that plaintiffs' adjacent residential property would be damaged in the amount of $10,000 by the construction of the proposed highway. In reversing the trial court's ruling in favor of the plaintiff, the Supreme Court of Arkansas bottomed its holding chiefly on the ground that breach of the covenants would not be the proximate cause of plaintiff's loss. After reviewing the case law in other jurisdictions, the Court said:

> We need not, however, adopt the somewhat dubious reasons that have been given for the denial of compensation. We think the problem is simply one in causation.
>
> It seems almost too plain for argument that the reduction in the value of the McNeills' property is attributable not to the breach of the restriction but rather to the fact that a highway is about to pass through a residential district. Suppose, for example, that this addition . . . had been developed in exactly the same way that it was actually developed, as a residential district, but without any such restriction. . . . If the interchange had then been constructed the McNeills' damage . . . would have been the same to the penny as if the restriction had existed. Yet it would not have been compensable. Thus, it is illogical to permit a recovery upon the theory that the breach of the covenant is the proximate cause of the injury. . . .
>
> We do not deny the existence of a property right in the appellees. It may be that the restrictive covenant gave added value to their land when they bought it. But it is not the breach of the covenant alone that is causing their damage. . . . Even without the restriction their injury would still have occurred. We cannot permit an irrelevant clause . . . to create a fictitious cause of action.

The Supreme Court of Arkansas subsequently declined, in *Arkansas State Highway Comm'n v. Kesner,* 239 Ark. 270, 388 S.W.2d 905 (1965), to reconsider its holding in *Arkansas State Highway Comm'n v. McNeill, supra,* and reaffirmed the same with the comment that the "decision is entirely sound."

Colorado

During the period that a sanitation district was negotiating with a landowner for the acquisition of a 21-acre tract to be used for the construction of a sanitary disposal system, said property owner entered into an instrument termed a "Restrictive Use Agreement" with other landholders owning thousands of acres within an 11 square mile area, by the terms of which it was jointly covenanted that none of the lands covered by the agreement would be used for, among other purposes, a sanitary disposal system. Such restrictive agreement was recorded approximately one month prior to the institution by the sanitation district of a condemnation action against the owner of the 21-acre tract.

In holding that no property interests in the condemned land were created by the Restrictive Use Agreement, the Supreme Court of Colorado, in *Smith v. Clifton Sanitation District,* 134 Colo. 116, 300 P.2d 548 (1956), said that "such a scheme as the one before us is contrary to sound public policy," adding that "the right of eminent domain could be defeated if the condemning authority had to respond in damages for each interest in a large subdivision . . . subject to . . . restrictive covenants." The Court concluded that: "Parties may not by contract between themselves restrict the exercise of the power of eminent domain. . . . To hold otherwise would place a premium on property owners of adjacent property to attempt to thwart a public improvement by the execution of restrictive covenants and subject the public agency seeking to acquire lands for proper purposes to the payment of speculative and unwarranted damages."

Florida

Holding that covenants restricting property to residential use create contractual rights that cannot be enforced against a public body seeking to acquire property for school purposes, the Court in *Board of Public Instruction v. Town of Bay Harbor Islands,* 81 So.2d 637 (Fla. 1955), said:

> [T]he restrictions with which we are concerned in this case do not fall within the category of true easements, such as the right of passage, use, or rights of light, air and view. Easements such as these fall into a separate category from easements such as those we are dealing with in this case. These latter easements have been defined, and we think correctly, as negative easements or equitable servitudes. Such so-called easements are basically not easements in the strict sense of the word but are more properly classified as rights arising out of contract. . . . Were we to recognize a right of compensation in such instances, it would place upon the public an intolerable burden wholly out of proportion to any conceivable benefits to those who might be entitled to compensation.

Georgia

The violation of covenants restricting all lots in a subdivision to residential purposes by the construction of a highway on one of said lots was before the Court in *Anderson v. Lynch,* 188 Ga. 154, 3 S.E.2d 85 (1939). The petition sought to enjoin the proposed sale of land for highway purposes, or in the alternative, to compel condemnation thereof and the joinder of plaintiff lot owners as parties defendant in such action. The petition further asked that the suit be treated as a class action and that some 200 other lot owners similarly situated in the subdivision be allowed to intervene, the court noting with respect to such prayer that "it is apparent from the petition that owners of other lots in the subdivision might assert claims in the aggregate of several hundred thousand dollars."

In its opinion the Court took note of the division of authority in other jurisdictions on the question presented, and premised its holding denying the relief sought on a threefold basis: (1) that the restrictive covenants did not create an interest in property; (2) that the covenants should not be construed to appertain to a public body taking property for a public use; and (3) that if construed to apply to a public body the covenants would be void as contrary to public policy.

The Court said:

> As important as the question is, and with all deference to the eminent courts which have held to the contrary, we cannot escape the conclusion that the plaintiffs have no property interest in the lot. . . . The most that can be said is that the restrictive covenants on which they rely are enforceable as between the parties thereto and their successors with notice. They do not convey an interest in land.
>
> Furthermore, it is our opinion that these covenants, if construed as intended to burden the free right of the county to acquire and use the property . . . for the purpose of establishing a new public road, would be contrary to public policy and void. . . . [W]e are of the opinion that the restrictions should be construed as not intended to apply so as to prevent the county authorities from acquiring and using any of the lots for the purpose of a public road.

New Jersey

A judgment in a condemnation proceeding to acquire land for school purposes, wherein the owner of the dominant tenement benefited by covenants restricting the use of the servient tenement was allowed to prove damages by reason of violation of the restrictive covenants, was reversed, in *Herr v. Board of Education,* 82 N.J. L. 610, 83 A. 173 (1912), on the ground that damage to the tract not taken could not be shown in the condemnation action.

See, however, *Duke v. Tracy,* 105 N.J. Super. 442, 252 A.2d 749 (1969), *supra,* reaching a contrary result.

Ohio

A railway company acquired certain lots in a subdivision, in *Doan v. Cleveland Short Line Ry. Co.,* 92 Ohio St. 461, 112 N.E. 505 (1915), and proceeded to construct thereon a line of railroad in violation of a common covenant in deeds to property in the subdivision reading that: "As part of the consideration for this deed it is hereby agreed that the said land shall be used exclusively for residence purposes." Plaintiff lot owner brought suit for damages alleging injury to her nearby property by reason of violation of such covenant by defendant railway company. In denying recovery the Supreme Court of Ohio said:

> No convenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to prevent the state, or any body politic or corporate having the authority to exercise the right of eminent domain, from devoting such property to a public use. The

> right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of the right is clearly against public policy, and is therefore illegal and void. . . . We are restrained to the conclusion that restrictive covenants in deeds or a general plan for the improvement of an allotment cannot be construed to prevent the use of the lots for public purposes, and as against the state or any of its agencies which are vested with the right of eminent domain are illegal and void, confer no property right and cannot be the basis of a claim for damages.

See also *Norfolk & W. Ry. Co. v. Gale,* 119 Ohio St. 110, 162 N.E. 385 (1928), wherein the same result was reached on the authority of *Doan v. Cleveland Short Line Ry. Co., supra.*

Texas

City of Houston v. Wynne, 279 S.W. 916 (Tex. Civ. App. 1925) involved a large residential addition wherein approximately 1,500 individuals owned lots. The restrictive covenants appearing in the deeds to all lots in the addition prohibited use for other than residential purposes. The City of Houston condemned two lots for the purpose of erecting thereon a fire engine house. Suit for injunctive relief was brought by a group of lot owners alleging, *inter alia,* that the condemnation proceeding was defective in that they were not joined as parties defendant having a property interest in the condemned lots.

The decision of the Civil Court of Appeals in favor of the City of Houston was made to rest on three grounds: (1) Because all owners of private property are charged with knowledge that private property may be taken for a public use, the covenants could not be construed as having been intended to apply to the state or its political subdivisions; (2) the rights created by the restrictive covenants were negative rights or easements and did not constitute "affirmative rights" or property interests in the land taken; (3) insofar as the restrictive covenants sought to inhibit the exercise of the sovereign power of eminent domain they were "contrary to public policy and void."

West Virginia

The holdings in *Doan v. Cleveland Short Line Ry. Co., supra.,* and *City of Houston v. Wynne, supra,* were relied on by the Supreme Court of Appeals of West Virginia in ruling in *State v. City of Dunbar,* 142 W.Va. 332, 95 S.E.2d 457 (1956) that covenants restricting use of land to residential purposes are inoperative as against the exercise of the power of eminent domain. In holding that the owner of the dominant tenement benefited by such covenant could not recover in damages against a municipal corporation which instituted condemnation proceedings against the adjacent servient tenement to acquire the same for the construction of a toll bridge, the Court said:

> We find ourselves in accord with the view that covenants of the nature of those here involved should not be so construed or applied as to require the government, or one of its agencies, in the taking or acquiring of private property for a governmental use, to respond in damages either on the theory of a taking of a vested right, or for breach of such a covenant. To hold otherwise would enable those having title to real estate often to greatly inconvenience and, perhaps, defeat the proper exercise by the government of the right of eminent domain, guaranteed to it by the Constitution, and absolutely necessary to the operation of the government in a manner best for the interests of all its citizens. No few citizens should be permitted to so contract as to destroy, or make prohibitive to the government, the right to acquire property for necessary governmental purposes. As pointed out in the cited cases, those who enter into such covenants do so with the knowledge that the government has the absolute right to acquire lands for governmental purposes, and they cannot be presumed to have intended an interference with such right.

Federal

Moses v. Hazen, 63 App. D.C. 104, 69 F.2d 842 (1934), was an appeal in a condemnation proceeding instituted in the Supreme Court of the District of Columbia by Commissioners of the District to acquire a certain subdivision lot for school purposes. Appellants' claim for damages was based on breach of covenants contained in all deeds to lots in the subdivision restricting the use thereof to residential purposes only. In denying recovery, the Court of Appeals for the District of Columbia ruled that the interests created by the restrictive covenants were contractual rights only, and as such, not binding on the District Government in the taking of property for a public use. It stated:

> [A]s against the sovereign in discharge of a governmental function, rights such as here claimed are not enforceable to restrict or burden the exercise of eminent domain; for the claims of these appellants are not for damage to what are sometimes called true easements, as right of passage or rights to light and air, which are land and subject to condemnation as other interests in land, but the restrictions on which appellants rely are not truly property rights, but contractual rights, which the government in the exercise of its sovereign power may take without payment of compensation. . . . [T]he restrictive covenants on which appellants' case is built are no more than negative easements, or rights analogous to negative easements, and while these contractual rights are binding as between the parties and ordinarily enforceable by specific performance between the parties, or others who purchase with notice, they are not binding as against the District of Columbia in the taking of property for a purely governmental use.

United States v. Certain Lands, 112 F. 622 (D.R.I. 1890), involved the condemnation of certain lands by the United States Government for the construction of fortifications for coastal defense. The lands so taken were subject to restrictive covenants prohibiting use for other than residential purposes. Claimants, neighboring landowners in whose

favor the covenants ran, sought compensation for the destruction of the alleged "property interests" created by the restrictive covenants. Compensation was denied on policy grounds, the Court stating:

> Can it be possible that these owners, by mutual agreements or covenants that they or their successors in title will not do things which may be necessary for national defense, and by agreeing that these things are noxious and offensive to them, compel the United States to pay them for the right to do, upon lands taken, what is necessary for the protection of the nation? . . . While the owners may so contract as to control private business, and thereby increase the values of their estates, they are not entitled so to contract as to control the action of the government.

In affirming judgment, *sub nomine Wharton v. United States,* 153 F. 876 (1907), the Court of Appeals for the Second Circuit said that whatever the nature of the plaintiffs' interest created by the restrictive covenants, the same did not constitute "a true easement as known to the common law."

See, however, *United States v. Certain Land in the City of Augusta, Maine,* 220 F.Supp. 696 (D. Me. 1963), *supra,* in which case the Court reviewed the holdings in *Moses v. Hazen,* 63 App. D.C. 104, 69 F.2d 842 (1934), *supra, United States v. Certain Lands,* 112 F. 662 (D. R.I. 1890), *supra,* and *Wharton v. United States,* 153 F. 876 (2d Cir. 1907), *supra,* and declined to follow the same, stating that "it now seems clear that equitable servitudes created by restrictive covenants are recognized as property rights under federal law."

Conclusion

It has been seen that the cases under consideration herein reach diametrically opposite results in the resolution of the question whether or not restrictive covenants create constitutionally protected property rights. It can properly be said that the conflict in the cases is irreconcilable, because the weighty arguments on both sides were fully considered in the decisions, and there is no middle ground.

In the eight jurisdictions where it has been decided that recovery cannot be had against the state for violation of restrictive covenants, no problem is presented to a condemning agency. However, in those jurisdictions where a contrary result has been reached serious problems are presented; and the same could fairly be said for the remaining jurisdictions (being the numerical majority) where the question has yet to be decided and could go either way.

It has been seen that the measure of damages, in those jurisdictions wherein recovery has been allowed, is the difference in value of the affected property before and after the abrogation of the restrictive covenants and the construction of the injury-producing public facility. And it has further been seen that in situations where there are many affected lot owners, or the value of the impacted property is high, that the condemnor can incur substantial damages. The cost of condemnation is, in effect, sharply increased beyond the value of the land taken.

It would seem to follow that in jurisdictions treating restrictive covenants as property rights, and perhaps equally in jurisdictions where the nature of such interests has yet to be passed on and the result cannot be predicted, that the safest planning course is to adopt what might be characterized as a "4(f)" [4] approach to highway corridor selection in restricted land areas. That is to say, acquisition of land so burdened should be avoided "unless there is no feasible and prudent alternative to the use of such land." [5] The quoted statutory language (although directed to a different purpose) seems entirely pertinent to the problem under consideration because the majority rule makes clear that to invade property protected by restrictive covenants invites the prospect of placing an additional and unnecessary burden on the expenditure of public funds for land acquisition. The better part of caution, hence, would appear to be to avoid the taking of such lands except where there appears to be no "feasible and prudent alternative" thereto.

In any event, a contrary course should be entered into, in jurisdictions where the question has yet to be passed on, with full awareness of the risks involved; and not the least of these may be that, in the case of a federal-aid highway project, the state would find itself without federal assistance in meeting the increase in the project cost. (Consider, for example, the federal position with respect to a successful inverse action brought *after* the project is fully completed.) Because such unforeseen increment in cost could be substantial, the language of 4(f) should be deemed the enunciation of a salutary principle to be closely observed in addressing the question whether or not to proceed against lands protected and enhanced in value by restrictive covenants.

[4] Section 4(f) of the Department of Transportation Act, 80 Stat. 931, Pub. L. No. 89-670.

[5] Department of Transportation Act, 49 U.S.C. § 1653(f); Federal-Aid Highway Act of 1968, 23 U.S.C. § 138.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, and those responsible for land acquisition. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in condemnation cases.