Michigan Law Review

Volume 38 | Issue 3

1940

EMINENT DOMAIN - COVENANTS - VIOLATION OF BUILDING RESTRICTIONS BY EXERCISE OF PUBLIC AUTHORITY - NECESSITY FOR COMPENSATION

Edmund R. Blaske
University of Michigan Law School

COMMENTS

EMINENT DOMAIN — COVENANTS — VIOLATION OF BUILDING RESTRICTIONS BY EXERCISE OF PUBLIC AUTHORITY — NECESSITY FOR COMPENSATION — When a public agency such as the state, a municipality, a school district, or a railroad[1] buys or condemns a lot in a restricted district, must it compensate other owners in the subdivision? Courts have given different answers to this question. Not one has enjoined a public agency from taking property in a restricted area or putting it to uses inconsistent with the restrictive covenants,[2] but on the

[1] The term "public agency" as used throughout this comment includes not only the state and its subdivisions but also private corporations clothed with eminent domain powers. See section 3 of the discussion above.

[2] See Wallace v. Clifton Land Co., 92 Ohio 349, 110 N. E. 940 (1915).

question of compensation for such interferences the courts are divided.[3] Some have defined the interests of the covenantees as mere contract rights not binding upon a public agency.[4] Others have seen in these interests sufficient elements of property[5] to require compensation under the federal and most state constitutions.[6] A third group has avoided a direct answer to the problem by construing the covenants not to prohibit acts of public agencies.[7] Of the latter approach there is little more to be said, except that it cannot be resorted to when the language expressly prohibits public acts in violation of the covenants.[8]

It is the purpose of this comment to examine the contract and the property theories of restrictive covenants; and to suggest other possible grounds upon which to decide whether or not a public agency should compensate owners in the subdivision for interference with their restrictive covenants.

I.

Courts which adopt the contract theory argue that restrictive covenants embody only an agreement not to use the land in a particular manner, and are not intended to convey an interest in property.[9] On

[3] For example, in Town of Stamford v. Vuono, 108 Conn. 359, 143 A. 245 (1928), the court compelled compensation, but in Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85, compensation was denied.

[4] Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85; Sackett v. Los Angeles City School District, 118 Cal. App. 254, 5 P. (2d) 23 (1931); Friesen v. Glendale, 209 Cal. 524, 288 P. 1080 (1930); Doan v. Cleveland Short L. R. R., 92 Ohio St. 461, 112 N. E. 505 (1915); 17 A. L. R. 554 (1922); 67 A. L. R. 385 (1930); 98 A. L. R. 390 (1935). See also Bristol v. Woodward, 251 N. Y. 275, 167 N. E. 441 (1929).

[5] Town of Stamford v. Vuono, 108 Conn. 359, 143 A. 245 (1928); Johnstone v. Detroit, G. H. & M. Ry., 245 Mich. 65, 222 N. W. 325 (1928); Allen v. Detroit, 167 Mich. 464, 133 N. W. 317 (1911); Britton v. School District, 328 Mo. 1185, 44 S. W. (2d) 33 (1931); Peters v. Buckner, 288 Mo. 618, 232 S. W. 1024, (1921); Flynn v. New York, W. & B. R. R., 218 N. Y. 140, 112 N. E. 913, Ann. Cas. 1918B 588 at 591 (1916).

[6] U. S. Constitution, Amendment V, "nor shall private property be taken for public use, without just compensation." It has been suggested that the question of compensation for the violation of restrictive covenants by a public agency would not arise in a state having the more modern constitutional provision: "no private property shall be taken or *damaged* without just compensation." 14 WASH. L. REV. 137, note 1 (1939). Strangely enough such a case has recently gone to the Georgia Supreme Court and no point seems to have been made of the "or damaged" clause in the Georgia Constitution. Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85.

[7] Moses v. Hazen, 63 App. D. C. 104, 69 F. (2d) 842 (1934); United States v. Certain Lands, (C. C. R. I. 1899) 112 F. 622.

[8] Nevertheless, courts have gone very far in attempting to construe restrictive covenants as not prohibiting acts by public agencies. Thus a restriction "for residence purposes exclusively" was held not to prohibit use for a public school. Moses v. Hazen, 63 App. D. C. 104, 69 F. (2d) 842 (1934).

[9] Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85; City of Houston v. Wynne, (Tex. Civ. App. 1925) 279 S. W. 916, affd. 115 Tex. 255, 281 S. W. 544 (1926);

this basis no property is "taken" or "damaged" by the public use, even though the interests of the covenantees are defeated.[10] While such an approach avoids the condemnation clauses and possibly the due process clauses of the constitutions, it does not dispose of the contracts clause of the Federal Constitution.[11]

One way of avoiding difficulty with the contracts clause is to say, as some courts have, that covenants restricting uses of land by a public agency are against public policy and therefore void.[12] But such an argument goes too far. In the first place restrictive covenants are for most purposes looked upon with favor by the courts.[13] Nor does there seem to be any public policy against securing the value of property by means of contract. Indeed, as one court has pointed out, the increase in the popularity of zoning ordinances is indicative of quite the contrary public policy.[14]

Perhaps a better way to meet the contracts clause is to recognize that this provision of the constitution prohibits only arbitrary and unreasonable impairments of the obligation of contract,[15] and to argue that it is neither arbitrary nor unreasonable to exempt a public agency from liability for interfering with restrictive covenants. It is now settled that private persons contract "subject to the reserved power of the state to modify or even to destroy the rights based on their contract so far as necessary to protect the public health, morals, or safety."[16] On this ground a statute authorizing a lower riparian owner to build a dam across a stream in violation of his agreement with an upper riparian owner has been held valid.[17] Changes in public utility rates are

Hall v. Solomon, 61 Conn. 476, 23 A. 876 (1892). See also 14 WASH. L. REV. 137 at 141 (1939).

[10] Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85; City of Houston v. Wynne, (Tex. Civ. App. 1925) 279 S. W. 916, affd. 115 Tex. 255, 281 S. W. 544 (1926); Hall v. Solomon, 61 Conn. 476, 23 A. 876 (1892). See also 14 WASH. L. REV. 137 at 141 (1939).

[11] U. S. Constitution, art. I, § 10: "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ." It has been suggested that "Whatever impairs the obligation of a contract will also be a violation of the due process clause." 32 MICH. L. REV. 71 at 73 (1933).

[12] This view is expressed in: Doan v. Cleveland Short L. R. R., 92 Ohio St. 461, 112 N. E. 505 (1915); Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85; Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080 (1930); United States v. Certain Lands, (C. C. R. I. 1899) 112 F. 622.

[13] See 2 TIFFANY, REAL PROPERTY, 2d ed., 1427 (1920).

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

[15] See Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231 (1934); 32 MICH. L. REV. 71 at 72 and note 7 (1934).

[16] ROTTSCHAEFER, CONSTITUTIONAL LAW 575 (1939).

[17] Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127 (1905); ROTTSCHAEFER, CONSTITUTIONAL LAW 575 (1939).

binding on consumers despite their inconsistency with the consumers' prior contracts with the utility company.[18]

In *Home Bldg. & Loan Assn. v. Blaisdell*[19] the Supreme Court held in effect that in cases of public necessity the legislature might impair the obligation of contracts, "provided the impairment is no more than reasonably necessary. To that extent police power is supreme."[20]

But can it be reasonably said that public necessity requires a public agency to impair the interests of restrictive covenantees? The proponents of the rule requiring compensation must argue that it does not, since these interests may be condemned and paid for like the land which is physically appropriated.[21] This does not seem unreasonable until we look at the facts. In a comparatively recent case[22] the Texas court pointed out that if the condemnor, a county acquiring land for highway purposes, were required to serve process on ten thousand or even one thousand other lot owners in the district, the exercise of eminent domain, although existing in theory, would be practically impossible because of the procedural difficulties.[23] It might be argued that these procedural burdens are largely imaginary and that only those covenantees would protest whose damages were substantial. But the fact is that the covenantees under a contract theory would be entitled to at least nominal damages,[24] and the nuisance value of these rights would in many instances be sufficiently great to defeat the proposed public undertaking. It might even be necessary for the covenantees to protest against acts of a public agency in order not to be precluded from subsequently enforcing the covenants against private persons.[25]

Besides having to shoulder a tremendous procedural burden, a public agency would often have to pay a prohibitive price for taking land in a restricted district. In a recent case[26] where a county wanted to take

[18] Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, 39 S. Ct. 117 (1919); 9 A. L. R. 1423 (1920).

[19] 290 U. S. 398, 54 S. Ct. 231 (1934).

[20] Blaisdell v. Home Bldg. & Loan Assn., 189 Minn. 422 at 432-433, 249 N. W. 334 (1933), affirmed 290 U. S. 398, 54 S. Ct. 231 (1934). It might be argued that the reason the moratorium statute in the Blaisdell case was upheld is that it only postponed enforcement of the contract but took no rights away from the promisee, and thus affected only the remedy. But as pointed out in 32 MICH. L. REV. 71 at 73-74 (1934), this distinction is more apparent than real, since "the remedy and the right shade into each other and are a part of the same thing, i.e., the contract. . . ."

[21] Town of Stamford v. Vuono, 108 Conn. 359, 143 A. 245 (1928); 4 TEX. L. REV. 531 (1926); 14 WASH. L. REV. 137 at 145 (1939).

[22] City of Houston v. Wynne, (Tex. Civ. App. 1925) 279 S. W. 916, affd. 115 Tex. 255, 281 S. W. 544 (1926).

[23] See also Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080 (1930), noted 19 CAL. L. REV. 58 (1930).

[24] 5 WILLISTON, CONTRACTS, rev. ed., 3766 (1936).

[25] 2 TIFFANY, REAL PROPERTY, 2d ed., 1453 (1920).

[26] Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85.

a lot for highway purposes, five covenantees claimed aggregate damages in the sum of $17,500. A further estimate revealed that the aggregate claims of other owners in the district would run into several hundred thousand dollars. In *Town of Stamford v. Vuono*[27] one owner recovered $10,000 in eminent domain proceedings for the violation of his restrictive covenant. Unless these cases are quite exceptional, an impairment of the obligations of covenants is necessary in order that public opportunity to use be preserved in full and effective form. Since covenants would remain in force as among private persons, their impairment would be "no more than is reasonably necessary," and, we might conclude: "To that extent police power is supreme."

2.

Courts which adopt the property theory cónstrue a restrictive covenant as granting a negative easement in the land of the covenantor.[28] Since a negative easement is property, there must be compensation when it is taken or impaired by a public agency.[29]

A practical argument in favor of compensation might be made to the effect that a contrary rule would discourage the development of, and the investment in, high-class residential property. But there is no indication that such has been the reaction in jurisdictions denying compensation. This may be due to the gaming spirit in human nature, and to the infrequency of occasions upon which it is necessary for public agencies to take or use property in a restricted area.[30] Furthermore, in many instances property values are affected not adversely but favorably by the public or quasi-public act. A new street or boulevard facilitates traffic. A public school is a civic center, and makes for greater safety and convenience of school children. A fire station means greater protection to the community. Although such benefits are not usually taken into consideration in setting compensation under eminent domain,[31] they ought not to be ignored in considering the reasonableness of public acts and their normal effect on property values.[32]

Another argument in favor of allowing compensation is that a con-

[27] 108 Conn. 359, 143 A. 245 (1928).

[28] Town of Stamford v. Vuono, 108 Conn. 359, 143 A. 245 (1928); Johnstone v. Detroit, G. H. & M. Ry., 245 Mich. 65, 222 N. W. 325 (1928); Allen v. Detroit, 167 Mich. 464, 133 N. W. 317 (1911); Britton v. School District, 328 Mo. 1185; 44 S. W. (2d) 33 (1931); Peters v. Buckner, 288 Mo. 618, 232 S. W. 1024 (1921); Flynn v. New York, W. & B. R. R., 218 N. Y. 140, 112 N. E. 913 (1916). Also, 2 TIFFANY, REAL PROPERTY, 2d ed., 1436 (1920).

[29] See note 6, supra. To the effect that zoning restrictions do not create property rights, see De Palma v. Town of Greenwich, 123 Conn. 257, 193 A. 868 (1937).

[30] The litigated cases are comparatively few.

[31] Missionary Society of St. Paul v. New York El. R. R., 12 Misc. 359, 33 N. Y. S. 648 (1895), cited in 2 LEWIS, EMINENT DOMAIN, 3d ed., 1300 (1909).

[32] See 19 CAL. L. REV. 58 at 59 (1930).

trary holding would establish a bad precedent as regards other property interests.[33]

> "it would enable the State to destroy a common-law negative easement of light, air, and prospect without compensation. By analogy, it would deny payment for destruction of an easement of way, an unexpired rental term, increased values due to attractive leases or uses, and, if pursued to its conclusion, injury to a residue of a freehold when part is taken."[34]

A sufficient answer to this suggestion is that this result has not followed in those jurisdictions which have denied compensation.

The arguments against making a public agency pay for its interference with restrictive covenants are about the same under the property theory as under the contract theory. The burden on the use by the public agency will be the same whether damages are awarded on the basis of violation of contract rights or on the basis of "taking" of property.[35]

Under normal circumstances a public agency cannot take, damage, destroy or encroach upon private property without compensating the owner. But in times of emergency or public necessity,[36] a public agency may destroy private property[37] or deprive it of its normal legal incidents.[38] While it is generally for the legislature to say what relationships shall or shall not enjoy legal protection as property,[39] the courts must, in proper cases, decide such questions.[40] When a case involving

[33] 14 WASH. L. REV. 137 at 139 (1939).

[34] Johnstone v. Detroit, G. H. & M. Ry., 245 Mich. 65 at 73-74, 222 N. W. 325 (1928). And see 4 TEX. L. REV. 531 (1926).

[35] Under the property theory it is possible that each time public use of property in a restricted area is extended (for example, if a street is widened, or an addition built on a fire station or a school house), it will be necessary to repeat the whole process of condemning the interests of restrictive covenantees.

[36] That is, in interest of public health, safety, and morals.

[37] American Print Works v. Lawrence, 23 N. J. L. 590 (1851); Small v. Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19 (1908).

[38] Samuels v. McCurdy, 267 U. S. 188, 45 S. Ct. 264 (1924); Barbour v. Georgia, 249 U. S. 454, 39 S. Ct. 316 (1918); Crane v. Campbell, 245 U. S. 304, 38 S. Ct. 98 (1917) (liquors); Miller v. McLaughlin, 281 U. S. 261, 50 S. Ct. 296 (1930) (fish nets). People v. Camperlingo, 69 Cal. App. 466, 231 P. 601 (1924); People v. McCloskey, 76 Cal. App. 227, 244 P. 930 (1926) (gambling devices).

[39] In jurisdictions where the courts are committed to the property theory of restrictive covenants, it is properly up to the legislatures to change the rule, if a change is thought desirable.

[40] "Under certain circumstances, when the interest of the public conflicts with individual or private interests in property, the common law accords a privilege to any member of the public as well as to official representatives thereof to invade the individual interests of one citizen on behalf of the general community." HARPER, TORTS 134 (1933).

the liability of a public agency for interference with restrictive covenants is one of the first impression in a particular jurisdiction, the court, and not the legislature, is called upon to classify the interests of restrictive covenantees and to define their scope. After classification and definition of these interests certain legal consequences seem to follow almost as a matter of course.[41]

Suppose that the court decides that the relationships created by restrictive covenants are of such "character, number, and scope"[42] that it will be most convenient to speak of them as property. It is still possible, if public necessity requires, for the court to say that these relationships are property only as among private persons, losing such character when interfered with by a public agency. The apparent absurdity of calling these relationships property for some purposes and not for others is only due to a "hangover" of notions of absolute rights. The law is full of instances in which property rights are good as against some persons and not as against others. For example, an adverse possessor in favor of whom the statute of limitations has not yet run has "property rights" against everyone but the real owner.[43] As one writer has said "right of property is . . . not a single indivisible concept, but a collection or bundle of rights, of legally protected interests."[44] Even if the scope of restrictive covenants were to be cut down by making them unenforceable against public agencies, the rights remaining would not necessarily be deprived of their character of property.[45] On the contrary, it would seem that even under a "property theory" of restrictive covenants, compensation for interference by a public agency is not a foregone conclusion.

3.

Up to this point we have not attempted to distinguish between public agencies, nor between the uses to which they might put restricted property. If public necessity is to be the test of liability for interference with restrictive covenants, then we may need to distinguish between different agencies and their different uses. Whether the public agency is a quasi-public corporation[46] or a governmental body,[47] and whether

[41] See for example 14 WASH. L. REV. 137 et seq. (1939).

[42] ROTTSCHAEFER, CONSTITUTIONAL LAW 516 (1939).

[43] Illinois & St. Louis R. R. & Coal Co. v. Cobb, 94 Ill. 55 (1879).

[44] BROWN, PERSONAL PROPERTY 6 (1936).

[45] For example, it is one of the rights of property to refuse to surrender title to others, but this right does not avail against the state or its agency in eminent domain proceedings. It is one of the rights of property to be compensated for destruction of property by others, but when the state destroys property in time of emergency no such right to compensation exists.

[46] That is, a public utility like a railroad, or a power company.

[47] The state or any subdivision thereof—county, municipality, or school district.

the restricted property is to be used for the bed of a street railway, or a school site might be important.[48]

Let us first consider cases where the public necessity argument is least strong. Since quasi-public corporations are organized and operated for profit, it might be argued that they ought to compensate covenantee-owners of other property in the subdivision. But while it is true that private persons are not allowed to profit by violating restrictive covenants, it cannot be overlooked that quasi-public corporations are engaged in direct public service.[49] If there is a public necessity for such service and if the proposed use of the restricted property will have the effect of appreciably extending or materially improving that service, it might be sound policy to deny compensation to other covenantees.[50] On the other hand, if the service were not affected with great public interest,[51] or the proposed use of restricted property would not appreciably extend or materially improve the service, then there would be no public necessity requiring or justifying interference with the interests of covenantees without compensation.[52]

Suppose that the restricted property is to be used to build and operate a water works or a light plant. Even if the public agency is the state or a subdivision thereof, it would seem that since such use is proprietary, the same factors would determine its liability or non-liability for interference with restrictive covenants as would determine the liability of a quasi-public corporation under similar circumstances.[53] But if we can

[48] The cases are not distinguishable on this basis. In Johnstone v. Detroit, G. H. & M. Ry., 245 Mich. 65, 222 N. W. 325 (1928), the public agency was a railroad corporation requiring property for a right of way. In Allen v. Detroit, 167 Mich. 464, 133 N. W. 317 (1911), the city wanted property for a fire station. In both cases compensation was required. However, most of the cases denying compensation involved the activity of a governmental body. Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85; Sackett v. Los Angeles City School District, 118 Cal. App. 254, 5 P. (2d) 23 (1931); Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080 (1930); Moses v. Hazen, 63 App. D. C. 104, 69 F. (2d) 842 (1934); United States v. Certain Lands, (C. C. R. I. 1899) 112 F. 622; City of Houston v. Wynne, (Tex. Civ. App. 1925) 279 S. W. 916, affd. 115 Tex. 255, 281 S. W. 544 (1926); 19 CAL. L. REV. 58 (1930).

[49] A further fact reducing the emphasis on the profit element is that utility rates are subject to governmental control.

[50] Doan v. Cleveland Short L. R. R., 92 Ohio St. 461, 112 N. E. 505 (1915).

[51] It cannot be denied that "public interest" or "public necessity" are difficult of ascertainment, but it is submitted that a legislative body would have less difficulty with this question than a court of law would have in determining the rights and amount in which several hundred covenantees were damaged.

[52] For example, it might be that the extension of a street railway track into or through a restricted area would greatly improve public service, but the construction of car barns in the same district might not have that effect.

[53] A municipality engaged in a water business has the same rights and liabilities as a private corporation engaged in that business. Keever v. City of Mankato, 113 Minn.

assume that the objective of governmentally operated utilities is not profit, but rather public service, then we have a distinction. While the profit motive is said not to give character to a proprietary function of a governmental body, its absence does make such a function look somewhat more like a governmental act.[54] If governmental acts should be exempt from the burdens of restrictive covenants, then it is possible to argue that non-profit proprietary acts of a governmental body should also be exempt.[55]

Although most courts ignore the distinction between a quasi-public corporation and a governmental body when dealing with the problem of a public agency's liability for interference with restrictive covenants,[56] the rule requiring compensation has been most vigorously denounced in cases involving the exercise of governmental functions.[57] It would be a superfluity to argue the public necessity for streets, schools, fire stations, or military fortifications. If the effect of the rule requiring compensation is to deny the state or any of its subdivisions the governmental power to protect public morals, health, life and property, and to challenge the state's institutional rights of self-preservation, then the application of that rule should be denied on the dual ground that it conflicts with the public interest and with the fundamental concept of sovereignty.[58]

In conclusion no more need be suggested than that it should not be very important whether we characterize the interests created by restrictive covenants as contract rights, property or quasi-property rights, or just restrictive covenant rights.[59] Whenever the question of the binding

55, 129 N. W. 158, 775 (1910); Lockwood v. City of Dover, 73 N. H. 209, 61 A. 32 (1905); 19 R. C. L. 764, 1130 (1917).

[54] Keever v. City of Mankato, 113 Minn. 55, 129 N. W. 158, 775 (1910); Lockwood v. City of Dover, 73 N. H. 209, 61 A. 32 (1905).

[55] On principle it would seem that a proper water supply is just as necessary to the "public health, safety, morals, and welfare" of a densely populated community as adequate fire and police protection. See Trenton v. New Jersey, 262 U. S. 182, 43 S. Ct. 534 (1922).

[56] But see Doan v. Cleveland Short L. R. R., 92 Ohio St. 461, 112 N. E. 505 (1915).

[57] Anderson v. Lynch, (Ga. 1939) 3 S. E. (2d) 85; Sackett v. Los Angeles City Schools, 118 Cal. App. 254, 5 P. (2d) 23 (1931); Friesen v. Glendale, 209 Cal. 524, 288 P. 1080 (1930); Moses v. Hazen, 63 App. D. C. 104, 69 F. (2d) 842 (1934); United States v. Certain Lands, (C. C. R. I. 1899) 112 F. 622; City of Houston v. Wynne, (Tex. Civ. App. 1925) 279 S. W. 916, aff'd. 115 Tex. 255, 279 S. W. 916 (1926); 19 CAL. L. REV. 58 (1930).

[58] Harmon v. Chicago, 110 Ill. 400 (1884); Taylor v. Nashville & C. R. R., 46 Tenn. 646 (1869); In re License Cases, 5 How. (46 U. S.) 504 at 583 (1847); Munn v. Illinois, 94 U. S. 113 (1876).

[59] The courts seem to talk contract when it suits their purposes and property when when this suits them better. Pound, "The Progress of the Law, 1918-1919—Equity,"

effect of restrictive covenants upon a public agency is raised, the primary consideration ought to be: Are these interests to be allowed, as a matter of policy, to hinder, or even prohibit, improvements in the interest of public health, safety, and morals? This is probably a question to which a single and all inclusive answer is impossible, but it does seem important that the problem be envisaged as such and that it be not obscured by the application of irrelevant labels.

Edmund R. Blaske

---

33 HARV. L. REV. 813 (1920). When it makes no difference in their conclusion, courts may admit the interest of the covenantee to be strictly neither. Peck v. Conway, 119 Mass. 546 (1876); Ames, "Specific Performance for and Against Strangers to the Contract," 17 HARV. L. REV. 174 at 181-182 (1904), reprinted in AMES, LECTURES ON LEGAL HISTORY 389 (1913).