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Eminent Domain - Restrictive Covenants - Compensability of Equitable Servitudes

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EMINENT DOMAIN—RESTRICTIVE COVENANTS—COMPENSABILITY OF EQUITABLE SERVITUDES—During appellee sanitation district's negotiations for the purchase of a tract of land owned by one Peterson, the eighteen appellants and thirty-seven other owners of land in the vicinity of Peterson's tract executed with Peterson and each other reciprocal covenants whereby each party agreed that his land should be restricted to certain uses, the use contemplated by appellee for Peterson's land being specifically excluded. When appellee and Peterson failed to reach an agreement in their negotiations and appellee filed a petition for condemnation of the land, appellants presented a cross-petition to the trial court, requesting that they be allowed to intervene in the action as parties respondent and demanding that they be awarded damages because appellee's proposed use of the condemned land would violate their restrictive agreements with Peterson. On appeal from a judgment denying the cross-petition, *held*, affirmed. Agreements between private parties could not restrict the exercise of the power of eminent domain by an agency of the state. Such agreements could only create contract rights, not property rights compensable in a condemnation proceeding. Also, to require compensation for the taking of such rights would contravene public policy in placing a large and restrictive burden upon the condemning authority. *Smith v. Clifton Sanitation District*, (Colo. 1956) 300 P. (2d) 548.

The question of whether or not the equitable rights arising under the doctrine of *Tulk v. Moxhay*,¹ variously designated "equitable servitudes," "equitable easements," and "negative easements," should be condemned,

¹ 18 L.J. (n.s.) (Ch.) 83 (1848).

and their owners correspondingly compensated, by public authority which takes servient land for purposes inconsistent with them is a problem which has divided the courts for some sixty years.² The cases which have held that compensation must be rendered have done so on the grounds that restrictive covenants of this nature create property rights analogous to legal easements, and that therefore any violation of such restrictions by a public body is subject to the federal and state constitutional provisions that private property shall not be taken without just compensation.³ The courts deciding against compensation have generally based their position upon one or more of the three arguments utilized by the court in the principal case.⁴ In view of the fact that the first of these is not in point,⁵ the second both question-begging⁶ and contrary to the weight of authority developed in related areas,⁷ and the third highly unrealistic,⁸ the position that condem-

² *Ladd v. Boston*, 151 Mass. 585, 24 N.E. 858 (1890), is apparently the first case to deal with the problem, though there the issue was somewhat obscured by the fact that legal easements of light and air were also involved. In *United States v. Certain Lands in the Town of Jamestown*, (C.C. R.I. 1899) 112 F. 622, affd. sub nom. *Wharton v. United States*, (1st Cir. 1907) 153 F. 876 (1907), the question was squarely presented, and an answer opposite to that of the *Ladd* case given.

³ The courts have used two different approaches in assessing the compensation to be rendered to the owner of a legal easement on condemned servient land. One approach is to set the upper limit of the liability of the condemning authority at the total value of the unencumbered fee interest of the land condemned, and then to determine the portion of this amount to be allocated to the easement owner by subtracting the present value of the encumbered land from the total sum. *United States v. Certain Lands*, note 2 supra. The other approach is to ascertain the easement owner's damages entirely apart from the value of the servient land, either by determining the difference in the value of the *dominant* land with and without the easement, if the easement is appurtenant, or by calculating the present value of the easement itself, if it is in gross. *United States v. Welch*, 217 U.S. 333 (1910). The latter would appear to be the better view (see Aigler, "Measure of Compensation for Extinguishment of Easement by Condemnation," 1945 Wis. L. Rev. 5). Nonetheless, either method can be extended to the case of equitable servitudes; and if the former is utilized, the third argument of the court in the principal case disappears.

⁴ Other arguments are occasionally advanced, such as the contention that, since every person must be charged with the knowledge that all property is subject to the sovereign's power of eminent domain, the parties must be held not to have intended the restrictive covenant to apply to public use of the land. *Board of Public Instruction of Dade County v. Town of Bay Harbor Islands*, (Fla. 1955) 81 S. (2d) 637. But like this contention, most of these arguments amount merely to highly artificial justifications of a predetermined result.

⁵ The question is not whether private persons can *prevent* the state's exercise of its power of eminent domain by covenants among themselves; it is rather whether such persons should be *compensated* when the state in the use of its admitted power proceeds contrary to these covenants.

⁶ Whether a given legal interest is denominated a "property right" or a "contract right" depends upon how it is treated by the courts when a specific problem arises; the legal *treatment* of the interest determines its *classification*, rather than vice versa. Thus, in the present situation, until the basic question of whether owners of condemned equitable servitudes must be compensated has been decided, the subsidiary question of whether or not equitable servitudes will be termed "property" for the instant purposes cannot be decided.

⁷ Where the problem of the status of equitable servitudes has arisen in other contexts, the modern courts have almost uniformly held such interests to be property rights. E.g., *Pratte v. Balatsos*, 99 N.H. 430, 113 A. (2d) 492 (1955); *Houston Petroleum Co. v. Automotive Products Credit Assn.*, 11 N.J. Super. 357, 78 A. (2d) 310 (1951); *Seeger's Estate*

nation and compensation are generally necessary in these situations would seem clearly to be the better view. The majority of the jurisdictions that have faced the problem have taken this approach.⁹ Therefore, in basing its holding upon the position that equitable servitudes are ipso facto not compensable in a condemnation proceeding, the principal case is supported by a minority of the existing authorities, as well as the weaker legal and policy reasoning. Because the case contains a wholly new element, however, not present in any of the prior cases on the point, its result is surely justified. Here the circumstances were such as to render it obvious that the restrictive covenants were executed in a conscious, intentional, and single-purposed endeavor to obtain compensation from the government.¹⁰ Public policy clearly does not favor this kind of private opportunism at the expense of the government. A sounder basis for denial of compensation in such a case—one which would not also preclude compensation in the ordinary case, where

v. Puckett, 115 Colo. 185, 171 P. (2d) 415 (1946). See also Aigler, "Measure of Compensation for Extinguishment of Easement by Condemnation," 1945 WIS. L. REV. 5 at 16; Pound, "Progress of the Law 1918-1919: Equitable Servitudes," 33 HARV. L. REV. 813 (1920); Clark, "Equitable Servitudes," 16 MICH. L. REV. 90 (1917); 4 POMEROY, EQUITY JURISPRUDENCE, 4th ed., §1295 (1919); 5 id. [1 EQUITABLE REMEDIES, 2d ed., §1693 (§272)]. Even Tiffany, who criticizes the view, admits that restrictive covenants are treated as property rights by all of the later English cases and by "most American courts." 3 TIFFANY, LAW OF REAL PROPERTY, 3d ed., §861 (1939).

⁸ Although a large number of landowners distributed over a considerable area might hold restrictive covenants on the land being condemned, in order for each to recover in the eminent domain proceedings he would have to show that the proposed public use would damage him by decreasing the value of his own land. This requirement would generally restrict recovery to owners of land within the immediate vicinity of the condemned land, and would in most instances limit the amount of recovery to minimal sums. Also, in the case of many kinds of public uses, such as the construction of highways, there would be special benefits to proximate land which in most jurisdictions would be calculated as offsets to detriments.

⁹ In the following jurisdictions the rule is for compensation: *England*, Long Eaton Recreation Grounds Co. v. Midland Ry. Co., [1902] 2 K.B. 574; *Connecticut*, Town of Stamford v. Vuono, 108 Conn. 359, 143 A. 245 (1928); *Massachusetts*, Ladd v. Boston, note 2 supra; *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N.E. 244 (1917); *Michigan*, Allen v. Detroit, 167 Mich. 464, 133 N.W. 317 (1911); *Minnesota*, Burger v. St. Paul, 241 Minn. 285, 64 N.W. (2d) 73 (1954); *Missouri*, Peters v. Buckner, 288 Mo. 618, 232 S.W. 1024 (1921); *North Carolina*, Raleigh v. Edwards, 235 N.C. 671, 71 S.E. (2d) 396 (1952); *New Jersey*, Hayes v. Waverley & Passaic R. Co., 51 N.J. Eq. 345, 27 A. 648 (1893); *New York*, Flynn v. New York W. & B. R. Co., 218 N.Y. 140, 112 N.E. 913 (1916); *Pennsylvania*, In re Erie Airport, 25 Erie 31 (1942); *Virginia*, Meagher v. Appalachian Electric Power Co., 195 Va. 138, 77 S.E. (2d) 461 (1953); *Wisconsin*, Fuller v. Town Board of Madison, 193 Wis. 549, 214 N.W. 324 (1927). These jurisdictions are *contra*: *United States*, United States v. Certain Lands, note 2 supra; *California*, Friesen v. Glendale, 209 Cal. 524, 288 P. 1080 (1930); *Florida*, Board of Public Instruction of Dade County v. Town of Bay Harbor Islands, note 4 supra; *Georgia*, Anderson v. Lynch, 188 Ga. 154, 3 S.E. (2d) 85 (1939); *Ohio*, Doan v. Cleveland Short Line R. Co., 92 Ohio St. 461, 112 N.E. 505 (1915); *Texas*, Houston v. Wynne, (Tex. Civ. App. 1926) 279 S.W. 916.

The *contra* authority has been criticized as consisting largely of dicta. See Aigler, "Measure of Compensation for Extinguishment of Easement by Condemnation," 1945 WIS. L. REV. 5.

¹⁰ Principal case at 549.

the imposition of the restrictions is in good faith—would seem to be found in the equitable doctrine of clean hands.¹¹

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¹¹ Although in general it has been held that eminent domain proceedings are in the nature of common law, rather than equitable actions [2 LEWIS, EMINENT DOMAIN, 3d ed., §512 (1909)], if the interests for which compensation is being sought are equitable in nature a court being called upon to recognize them would certainly be justified in examining the equities of the entire situation before doing so.