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Real Property - Compensation for Abrogation of a Restrictive Covenant by Public Authority

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REAL PROPERTY — COMPENSATION FOR ABROGATION OF A RESTRICTIVE COVENANT BY PUBLIC AUTHORITY—Probably the two most effective legal devices for controlling the use of land, at least for the purpose of establishing an area which may be developed only with single family dwellings, are the restrictive covenant and the zoning ordinance. One, the restrictive covenant, depends upon the volition of private individuals. Since the historic case of *Tulk v. Moxhay*,[1] holding that a negative restrictive covenant might be enforced against a successor of the covenantor who took with notice of the restriction, it has been used extensively to effectuate the creation of restricted residential areas. The other method, the zoning ordinance, is imposed by organized society acting through appropriate governmental channels. The use of this device has become extremely common during the past thirty years, the most noteworthy growth coming after the Supreme Court upheld the general constitutionality of a comprehensive zoning ordinance.[2]

It is the purpose of this comment to examine the legal consequences produced when the tranquillity of the residential district is disturbed by governmental action. Sometimes the disturbance arises when a governmental unit simply amends a zoning ordinance to permit a less restricted use; sometimes the power of eminent domain is exercised and the land thus acquired is used for a purpose which does not conform to the previously existing restrictions. In either case, there frequently are persons who, having relied upon the restrictions, are subjected to the loss of values which they anticipated from the restricted character of the neighborhood. This loss can be the result of four possible variations arising from these two methods of governmental interference. First, there is the effect of condemnation of land which

[1] 2 Ph. 774, 41 Eng. Rep. 1143 (1848).
[2] Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926).

is subject to a restrictive covenant and subsequent use of that land in a manner which deprived the covenantee of any benefit from the restrictive covenant. In this area we are particularly concerned with compensation to the beneficiaries of the restrictive covenant. The major portion of the comment will be devoted to this phase. Second, there is the effect of condemnation of land followed by a non-conforming public use which does not coincide with the restrictions already imposed by a zoning ordinance. This area gives little difficulty.[3] Third, there is the effect of amendment of a zoning ordinance upon restrictions previously imposed by the zoning ordinance. Here again the law is relatively well settled. Fourth, there is the effect of amendment of a zoning ordinance on private restrictive covenants. The ramifications of this area are worthy of consideration at some length.

Since the Constitution of the United States requires the government to compensate for any property it takes, it is very important to determine whether or not the damage done to those who suffer economic loss is to be classified as a taking of "property" within the constitutional definition. Although there is little disagreement that a piece of land is "property," there is room for reasonable difference of opinion when the item in question is the benefit from a restrictive covenant. In such a fringe area a proper decision can be made only by looking beyond a preconceived categorization of private interests involving land. Moreover, once a certain fringe interest is found to constitute "property," the concept of stare decisis should be applied only when a previous decision deals with an interest that is strikingly similar to the one at hand. It might be well if decisions in this area were to rest on the underlying policy considerations that originally were used in deciding that land was "property." However, courts usually follow the rather unrealistic approach of trying to fit their holdings into traditional definitions of property, and their decisions must be discussed with this in mind.

I. *The Effect of Condemnation upon Restrictive Covenants*

A. *Restrictive Covenants as Property.* Whereas the enforcement of a written covenant was a bold step in *Tulk v. Moxhay,* it is not now unusual for courts of equity to infer the equivalent of a restrictive

[3] There is little difficulty in deciding that the condemning authority need not compensate for disappointing those who relied on the zoning ordinance as it stood. There may be some difficulty in determining the applicability of zoning ordinances to other governmental agencies, however.

covenant in certain situations.[4] A written restrictive covenant, being generally enforceable in courts of law, has often been denominated a "property right."[5] There is, however, at least one situation in which such a covenant is not universally found to be "property": when land is condemned while subject to a restrictive covenant in favor of adjacent land. This situation is presented in its most common form when a residential subdivision is planned and each lot is sold with an express covenant that the lot may be used "for residential purposes only."[6] Some years later the city condemns several of the lots for a public project, and the neighboring home owners sue for compensation for the loss of the benefit of the covenant. The crucial question is whether, because of constitutional mandate, the covenantee should be compensated for the financial injury he sustains. There are competing policy considerations which make the choice far from easy. On the one hand is the fact that something of value has been taken from the covenantee. On the other hand is the fact that any damage done is only incidental to the furtherance of public purposes.

The courts are about equally divided on this question of compensation for depriving the covenantee of the benefit of the restrictive covenant.[7] Michigan is a strong advocate of the "property" view,[8] as shown by the leading case of *Allen v. Detroit*.[9] In its opinion the court held that restrictive covenants are easements at law, and that the plaintiff's interest must be purchased or condemned with full compensation. The court used the following language:

> "Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and are a property right of value, which cannot be taken for public use

[4] See Walsh, "Equitable Easements and Restrictions," 2 ROCKY MT. L. REV. 234 (1930), for a discussion of the evolution of the restrictive covenant.

[5] Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N.E. 244 (1917); Ladd v. Boston, 151 Mass. 585, 24 N.E. 858 (1890).

[6] Walsh, "Equitable Easements and Restrictions," 2 ROCKY MT. L. REV. 234 at 237 (1930).

[7] Cases illustrative of the view that restrictive covenants give rise to property interests which must be compensated in condemnation proceedings include: Meagher v. Appalachian Elec. Power Co., 195 Va. 138, 77 S.E. (2d) 461 (1953); Alfortish v. Wagner, 200 La. 198, 7 S. (2d) 708 (1942); Stamford v. Vuono, 108 Conn. 359, 143 A. 245 (1928); Peters v. Buckner, 288 Mo. 618, 232 S.W. 1024 (1921); Flynn v. New York, W. & B. Ry. Co., 218 N.Y. 140, 112 N.E. 913 (1916). Cases declaring that restrictive covenants constitute only equitable rights include: Friesen v. Glendale, 209 Cal. 524, 288 P. 1080 (1930); Doan v. The Cleveland Short Line Ry. Co., 92 Ohio St. 461, 112 N.E. 505 (1915); Moses v. Hazen, (D.C. Cir. 1934) 69 F. (2d) 842; Ward v. The Cleveland Ry. Co., 92 Ohio St. 471, 112 N.E. 507 (1915).

[8] Johnstone v. Detroit, G.H. & M. Ry. Co., 245 Mich. 65, 222 N.W. 325 (1928); Allen v. Detroit, 167 Mich. 464, 133 N.W. 317 (1911) are the leading Michigan cases.

[9] 167 Mich. 464, 133 N.W. 317 (1911).

> without due process of law and compensation therefor; the validity of such restriction not being affected by the character of the parties in interest."[10]

It can be forcefully argued that the loss of the residential character of a neighborhood is a very real one, and that the condemning authority must pay for the loss of "property" through reduced value just as it paid the fair value of the lots actually taken.[11] It is this rule that the English courts have followed,[12] and this writer believes it to be the better view. It gives effect to the strong policy argument that the benefit of an agreement made by private initiative, as distinguished from a right created by government action, should not be abrogated without compensation. It seems only proper that public authority should not be able to deprive landowners of rights created by private individuals as easily as "rights" created by that very public authority.

B. *Restrictive Covenants as Equitable Interests.* Many jurisdictions do not accept the above analysis, but declare that a restrictive covenant is only an equitable right, and the covenantee is not entitled to any compensation when the covenantor's land is condemned. Perhaps the leading case supporting this view is *United States v. Certain Lands.*[13] The United States Government sought to condemn residential lands near the Pacific Ocean for defense purposes. Owners of nearby properties objected, claiming that the United States would violate their restrictive covenants by its prospective actions. The decision in favor of the government was based on two grounds: the restrictive language was not violated, and restrictive covenants are not true easements. The court was also concerned with the possible future effect on eminent domain proceedings, and said:

> "If such a right can exist against the state or nation, and can be considered property, then only a mere device of conveyancing is necessary to defeat entirely the rule that depreciation of property incidental to a public use does not constitute a 'taking'; for private deeds may then provide in express terms against such uses as may be necessary in case the government exercises the right of eminent domain."[14]

[10] Allen v. Detroit, 167 Mich. 464 at 473, 133 N.W. 317 (1911).

[11] For the argument that the cost of a condemnation should be absorbed by the citizens in general rather than by just a few, see Aigler, "Measure of Compensation for Extinguishment of Easement by Condemnation," 1945 WIS. L. REV. 5 at 34.

[12] The outstanding English case is The Long Eaton Recreation Grounds Co. v. The Midland Ry. Co., [1902] 2 K.B. 574.

[13] (1st Cir. 1899) 112 F. 622.

[14] Id. at 629. The argument of the court may be answered by saying that "mere conveyancing" often makes compensation necessary, notably in the instance of condemnation of land which is subject to an easement of way.

It is of interest to note the observation made by one eminent writer,[15] who points out that the portion of *United States v. Certain Lands* upon which many courts rely as precedent is really nothing more than dictum.[16] There can be no doubt that he is correct. The only basis necessary for the decision was that the government project would not violate the restrictive covenant, for this alone shows that the government was not liable. The additional reason, that no compensation would be necessary even if the covenant were to be violated at some indefinite time in the future, seems superfluous, as it does in many other restrictive covenant cases using the same technique.

Perhaps the major concern of the non-compensating courts is the possibility of a multiplicity of claims.[17] They fear that in order to block a specific governmental project all the property owners in the vicinity will ask for compensation, causing a prohibitive expense. Actually there is little to fear, because only those home owners living near the condemned area will sustain real damage, and the courts are well qualified to differentiate between real and feigned injury. It is often possible that a substantial gain will result to those on the fringe of the area concerned. For example, if a small bus waiting station were built on a condemned lot, the value of real estate in the immediate area might drop, but the value of land a block away would probably rise, for bus service would now be available as an added convenience. Of course, the introduction of a railroad terminal would increase the perimeter of claimants, but the courts will still be able to make the proper evaluation of claims.[18]

The courts which refuse compensation adhere to the idea that the public good is supreme, even when privately created rights are abrogated. They say, in effect, that the government may disturb the tranquillity of the residential district whether that condition was brought about by public or private action, paying only for the land actually taken.

C. *Avoidance by Interpretation.* Numerous courts have avoided the crucial question or given their decision additional support by inter-

[15] Aigler, "Measure of Compensation for Extinguishment of Easement by Condemnation," 1945 WIS. L. REV. 5.

[16] An examination of the court's exact language would be helpful. See United States v. Certain Lands, (1st Cir. 1899) 112 F. 622 at 626.

[17] This argument is analyzed in 38 MICH. L. REV. 357 (1940); and Aigler, "Measure of Compensation for Extinguishment of Easement by Condemnation," 1945 WIS. L. REV. 5 at 32.

[18] Perhaps no group is as well qualified to deal with the uncertain as are the courts, for they must do so every day.

preting the restrictive covenants as not prohibiting the use in question,[19] or as not applying to public authorities.[20] Too often the interpretations have been rather strained in order to achieve the desired result—denial of a right to compensation. A good example is *Moses v. Hazen*,[21] where the language, "shall be built and used for residence purposes exclusively,"[22] was construed to allow a school building. This court, as have many others, twisted the meaning of words to avoid the basic question. This course is even less commendable than merely labeling a restrictive covenant as "a right only in equity." It avoids the contradictions that occur when a jurisdiction holds that a restrictive covenant does not create property rights when there is a condemnation of the servient tenement, but creates contradictions in other instances.[23]

Whatever the method used, the underlying policy question, whether the individual should suffer the loss or the public should pay, remains hidden beneath a covering of legal terminology.

II. *Effect of Amendment of Zoning Ordinances on Restrictive Covenants*

A situation somewhat similar to the deprivation of benefit of a restrictive covenant by condemnation of the servient tenement arises when a city zones a district for residential use and later amends the ordinance to allow industrial or business use, thereby causing a drop in value of residential properties in the area.[24] The law is well settled when the amendment of a zoning ordinance merely abrogates "rights" acquired from the previous zoning law. Courts will protect the residential owner to this extent: they require that the exercise of police power conform to the same standard as that exercised in the passage of the original ordinance,[25] that is, the amendment must be reasonably necessary to the public health, safety, morals, general welfare, or other exercise of the police power.[26] Suppose, however, that the area is not

[19] Friesen v. Glendale, 209 Cal. 524, 288 P. 1080 (1930); Moses v. Hazen, (D.C. Cir. 1934) 69 F. (2d) 842; Wharton v. United States, (1st Cir. 1907) 153 F. 876.

[20] United States v. Certain Lands, (1st Cir. 1899) 112 F. 622.

[21] (D.C. Cir. 1934) 69 F. (2d) 842.

[22] Id. at 843.

[23] Compare Miller v. Babb, (Tex. Comm. App. 1924) 263 S.W. 253, with Houston v. Wynne, (Tex. Civ. App. 1925) 279 S.W. 916; and Martin v. Holm, 197 Cal. 733, 242 P. 718 (1925), with Friesen v. Glendale, 209 Cal. 524, 288 P. 1080 (1930).

[24] For amplification of the legal aspects of such a situation, see 25 IOWA L. REV. 830 (1940); 41 HARV. L. REV. 667 (1928); 8 UNIV. PITT. L. REV. 69 (1941).

[25] Clifton Hills Realty Co. v. Cincinnati, 60 Ohio App. 443, 21 N.E. (2d) 993 (1938); Trust Co. of Chicago v. Chicago, 408 Ill. 91, 96 N.E. (2d) 499 (1951).

[26] Hasbrouck Heights Hospital Assn. v. Hasbrouck Heights, 27 N.J. Super. 476, 99 A. (2d) 591 (1953); Rodgers v. Tarrytown, 302 N.Y. 115, 96 N.E. (2d) 731 (1951).

only zoned for a particular use, but that there are also private restrictive covenants which limit the use. Suppose further that the zoning law is now amended so as to impose further restrictions. The applicable law changes slightly. An unreasonable amendment will still be declared invalid, and one which is reasonable will be allowed to place a greater restriction on an area than was the case under a set of private negative restrictive covenants already in existence. Thus, while the applicable covenants would allow residences and apartments, an area may nevertheless be effectively zoned for residential use only. It seems logical that the exercise of police power should be able to limit further the use to which land is put when there is already a restrictive covenant attached, just as it can limit the use of land that is completely free of prior restrictions. The restrictive covenant is in no way violated, for the restrictions it prescribes are still in force.

A more difficult question arises when the uses permitted by an amendment are less restrictive than a pre-existing private covenant. The courts have almost invariably held that an amendment of a zoning ordinance which lifts governmentally imposed restrictions does not indicate legislative intent to nullify a more stringent private covenant. Most of these cases say that an amendment to a zoning ordinance *cannot* abrogate a more restrictive private covenant.[27] There is, however, one recent case in which the court reached a contrary conclusion.[28] This decision assumes considerable importance, in view of the fact that most of the cases in which it is said that an amendment to the ordinance cannot abrogate more restrictive private covenants are explainable on the ground that the amendment did not purport to do so. If an amendment evidences a plain intention to override the applicable private covenants, the courts could deviate from their present position and still maintain logical consistency. However, it seems doubtful that they would do so, for the language used by the courts, though technically dictum as applied to this situation, is certainly broad enough to cover it.[29]

In deciding zoning questions the courts seem to realize that they are actually dealing with a compromise between collective and individual rights. The decisions rest on basic considerations rather than upon definitions and are consistent with the principle of allowing a

[27] Abrams v. Shuger, 336 Mich. 59, 57 N.W. (2d) 445 (1953); Olberding v. Smith, (Ohio App. 1934) 34 N.E. (2d) 296; Vorenberg v. Bunnell, 257 Mass. 399, 153 N.E. 884 (1926); Marshall v. Salt Lake City, 105 Utah 111, 141 P. (2d) 704 (1943).

[28] Taylor v. Hackensack, 137 N.J.L. 139, 58 A. (2d) 788 (1948).

[29] For a favorable discussion of Taylor v. Hackensack and the possibilities it suggests, see 48 MICH. L. REV. 103 (1949).

government extensive freedom in withdrawing "rights" which it had earlier conferred on individuals.

III. *The Minnesota Zoning System*

Thus far, we have been concerned with the compensable status of rights created either exclusively by private action or exclusively by governmental action. A unique system obtains in Minnesota, where rights are created by the combined action of individuals and the governmental unit concerned. Instead of having zones planned exclusively by a commission, zoning laws are passed by a two-thirds vote of the city council, upon petition of fifty percent of the property owners in the district.[30] After the council has passed the suggested measure, an eminent domain proceeding is conducted to establish the district.[31] Awards are made for damages to those put in a less favorable position, and assessments are levied on those who benefit. Under the statute the removal of restrictions is made in the same manner.[32] In the very significant case of *Burger v. City of St. Paul*,[33] the plaintiff and defendant were both property owners in a restricted residential district, established by condemnation under the original 1915 zoning law.[34] Defendant secured a permit to remodel his house into a fourplex pursuant to a 1943 amendment to the original act.[35] Plaintiff requested that the building permit be declared void, and that the remodeling be enjoined. The district court held for the plaintiff. On appeal to the Supreme Court of Minnesota it was held that an interest which constitutes "property"—the court called it an "easement"[36]—had been created by the

[30] Compare the Ohio law. "The planning commission . . . may frame and adopt a plan for dividing the municipal corporation or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare, for the limitations and regulation of the height, bulk, and location, including percentage of lot occupancy, set back building lines, and area and dimension of yards, courts, and other open spaces, and uses of buildings and other structures and of premises in such zones or districts." Ohio Rev. Code (Baldwin, 1953) §713.06. "The legislative authority of such municipal corporation may amend or change the number, shape, area, or regulations of or within any district. . . ." Id., §713.10.

[31] "The council shall first, after causing the probable costs of the proceedings, if abandoned, to be deposited or secured by the petitioners, designate the restricted residence district and shall have power to acquire by eminent domain the right to exercise the power granted by sections 462.12 to 462.17 by proceedings hereinafter defined, and when such proceedings shall have been completed, the right to exercise such powers shall be vested in the city." Minn. Stat. Ann. (1947) §462.13.

[32] Minn. Stat. Ann. (1947) §462.12.

[33] (Minn. 1954) 64 N.W. (2d) 73.

[34] Minn. Laws (1915) c. 128.

[35] Minn. Laws (1943) c. 246.

[36] Frequent use by courts of the word "easement" in this situation is illustrative of the desire to give a well-recognized name to a newer type of interest.

original condemnation, and hence it could not be taken without just compensation. The court's reasoning is illustrated by the following:

> "It seems to us that the situation created in the restricted use area here under condemnation proceedings is similar to the situation where a common grantor opens up a tract of land to be sold in lots and blocks and, before any lots are sold, inaugurates a general plan for such entire subdivision intending thereby to increase the value of each lot and then sells each lot subject to such plan of improvement. As a result there is thereby created and annexed to the entire tract restrictive covenants. . . ."[37]

The Minnesota court has extended the idea of "property" to a restrictive covenant which it implies from the fact that the plaintiff's property was zoned as residential under the original 1915 law. The result of carrying this theory to its logical extreme would be that when the legislature passes a zoning statute upon which people rely, there is no power to change that statute. This result would conflict with the general and extensive power of a legislature to amend its laws.

This writer believes that the Minnesota court could have found better justification for its decision. If the court had applied the usual requirement that an amendment to a zoning law must be based upon the furtherance of the public health, safety, morals, and general welfare, the amendment could have been declared invalid, since the court seemed to feel that defendant's actions did nothing to further the public good.[38] The case also fits well into the "privately created rights" pattern. Under the Minnesota law the neighboring property owners initiate zoning restrictions by a petition signed by fifty percent of the property owners in the district. Without individual action there could be no zoning restrictions in the first place. Governmental action alone is not sufficient, so the Minnesota law is more than an ordinary zoning law, which operates solely through public authority. Since the original "zoning" restrictions are in this sense privately created, it is not illogical to hold that the government must compensate affected property owners for any changes it makes in the status quo. In addition, according to the Minnesota law the property owners in the area concerned had to pay for their benefits under the original zoning ordinance.[39] A subsequent deprivation of such benefits without compensation would hardly be in accord with ordinary concepts of justice.

[37] Burger v. City of St. Paul, (Minn. 1954) 64 N.W. (2d) 73 at 81.
[38] Id. at 82.
[39] Minn. Laws (1915) c. 128.

Earlier in the comment it was mentioned that an amendment to a zoning ordinance is valid only if it furthers the public health, safety, morals or general welfare, but that if it does so, property owners generally have no claim for the depreciation in their property values.[40] The deciding factor is the public interest; when exercised reasonably, the rights of adjacent landowners must bow to it.[41] It appears that even under the Minnesota law a restrictive covenant implied because of a condemnation proceeding might fall without compensation if the public good really demanded it.[42] The court in the *Burger* case is very careful to point out that zoning procedure in Minnesota is not the exercise of police power only, but that because of the statute the proceeding is of a mixed nature—one of both police power and eminent domain.[43] However, one gets the impression that if the public need were really great, it could override the theory of implied restrictive covenants and compensation would not be required.[44] It is only fitting that an overwhelming public need should supersede these benefits even though they were partially the result of individual action.

IV. *A Suggested Change in Approach*

It has been pointed out that there is a definite split among the courts on the matter of required compensation to a restrictive covenantee when the government uses the condemned property in a manner which deprives the covenantee of the benefit of the covenant. The better view is that there should be compensation. Other cases declare

[40] A leading case so holding is Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N.W. (2d) 84 (1941).

[41] Chayt v. Maryland Jockey Club, 179 Md. 390, 18 A. (2d) 856 (1941); Page v. Portland, 178 Ore. 632, 165 P. (2d) 280 (1946). For a discussion of what constitutes public good today, see 8 MCQUILLAN, MUNICIPAL CORPORATIONS, 3d ed., §25 (1950).

[42] The court seems dissatisfied with the profit element in the case, as shown by the following quotation: "Who suggested converting the property at 669 Summit avenue into a fourplex property? The evidence in this case does not disclose a public request. What justification is there for the exercise of the police power to assist a single individual's venture for profit?" Burger v. City of St. Paul, (Minn. 1954) 64 N.W. (2d) 73 at 82.

[43] "If a governmental subdivision were exercising the police power, without more, the case would be one of uncompensated duty of submission. The statute governing this procedure requires compensation to all who suffer damages. Therefore, it is of no consequence that there may be an element of police power activity in the proceeding for invoked also are the powers of taxation and eminent domain." Burger v. City of St. Paul, (Minn. 1954) 64 N.W. (2d) 73 at 77.

[44] The following excerpt seems to show the attitude of the court: "No further authorities need be cited to establish that under the circumstances before us any act which deprives a citizen of his property rights cannot be sustained under the police power unless the public health, morals, comfort, or welfare demands that such power be exercised or that such laws or ordinances be enacted." Burger v. City of St. Paul, (Minn. 1954) 64 N.W. (2d) 73 at 82.

that restrictive covenants are merely rights cognizable in equity; hence the covenantee is not given compensation. A third group of cases depends upon intellectual gymnastics of interpretation to avoid the whole issue. It is the consensus that a zoning ordinance may make an area more selective than the already applicable private covenants, but that mere enactment of a zoning ordinance cannot make an area less restricted. The sway of a reasonable zoning amendment is unlimited when there are no restrictive covenants applicable. It is also true that the government need not compensate surrounding owners when it condemns property for a use not sanctioned by the zoning ordinance.

The conflict in decisions giving and refusing compensation to a restrictive covenantee who is deprived of the benefit of the covenant may be avoided by the use of a "privately created rights" test. The test is derived from the law in the other three situations mentioned. It may be stated as follows: the government should be compelled to compensate for its deprivation of any benefits which arise from individual, as opposed to governmental, action. The test is illustrated by the wealth of decisions holding that the government should not be able to abrogate a restrictive covenant by enacting or amending the applicable zoning laws, but that it should be able to increase the degree of restriction over that privately imposed. It is further illustrated by holdings that mere amendment of an existing zoning ordinance does not require that compensation be given to those injured thereby, and that the government can use land obtained through eminent domain without regard to the zoning ordinance. No restrictions created by individual action are violated in either case. This same theory leads to the conclusion that the beneficiary of a restrictive covenant should receive compensation when the government exercises its unquestioned right to use the covenantor's land in a way not sanctioned by the covenant. The theory justifies the decisions of courts following the "property" view.

Throughout this comment two theories have been advanced. First, the decisions in the four classes of cases mentioned in the introduction can be reconciled on the theory that public authority may deprive people of the benefits of "rights" that are created by the government with greater ease than rights are created by private initiative. Only when there is an *overwhelming* public interest should the government be allowed to abrogate privately created rights without compensation. Second, that whatever the view of a court may be on the first theory, its decision should be based upon underlying policy reasons rather than upon a process of molding the elements of a case to fit the definition that will give the desired result. Since the basic consideration in cases

allowing a deprivation of the benefit of a restrictive covenant without compensation is in reality the supremacy of *ordinary* public interest over individual "rights," the courts should say so.

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