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CONFLICTS BETWEEN ZONING ORDINANCES AND RESTRICTIVE COVENANTS: A PROBLEM IN LAND USE POLICY

Lawrence Berger*

It is a commonplace to note that with an ever-increasing birth rate and decreasing death rate, as well as concomitant increases in demand for food, fiber, mineral resources, and space, effective land use control is a most important problem in our society. The problem is exacerbated by accompanying shifts in population concentrations—first from rural to urban and then from urban to suburban communities. Under our system these problems are handled at least partly (but not wholly) by resort to legal devices. The law has developed three categories of such devices for land use control: (1) those arrived at by consensual arrangements of the landowners, the covenant and the related equitable servitude;¹ (2) those arising from common law doctrines of private liability, the nuisance; and (3) those arising from direct governmental regulatory controls over land use, the zoning and allied laws.²

The rules of law relating to the first two categories are the result of the evolution of hundreds of years of case controversy and decision. Zoning and allied laws are a more recent development and in a short amount of time have become an almost universally utilized vehicle for handling municipal land use problems.³

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¹ "[R]estrictions under deeds and contracts and those under zoning ordinances do not have common purposes. The former have private ends in view, and although they may in some instances be directed to secure the public welfare or the good of a residential or other property development, they are, nevertheless, privately conceived, controlled and directed." Premium Point Park Ass'n v. Polar Bear, Inc., 121 N.Y.S.2d 596, 601 (Sup. Ct. 1953), rev'd, 282 App. Div. 735, 122 N.Y.S.2d 425 (2d Dep't 1953), modified, 306 N.Y. 507, 119 N.E.2d 360 (1954). See also 8 McQuillin, MUNICIPAL CORPORATIONS § 25.09 (3d ed. 1957).

² Other direct controls which are sometimes categorized as zoning and sometimes separately categorized are subdivision controls, building codes and inspection, sanitary codes, tenement house codes and set-back ordinances. See METZENBAUM, ZONING ch. 1 (2d ed. 1955).

³ See HAAR, LAND USE PLANNING ch. 3 (1959).

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Occasionally over the years there have been collisions between the different devices. In such cases, there are obviously involved clashes between private land use arrangements and the public will as expressed by the city or state. Such collisions pose most serious problems in constitutional and statutory interpretation and judge-made law formulation. Should there be a rule superimposing public will over private arrangement? What factors should the court consider in determining which device and under what limitations that device shall prevail? In this article, an endeavor will be made to explore one highly litigated set of these conflicts—that between restrictive covenants and zoning ordinances. First, the present governing law will be examined. Then an attempt will be made to formulate some general principles which should govern adjudications in the area.

THE PRESENT LAW ON ZONING VS. COVENANTS

It is a simple matter to state what the vast and overwhelming mass of cases have held when there has been found to be a conflict between a restrictive covenant and a zoning ordinance. These cases almost invariably involve a suit to enjoin acts constituting a violation of a restrictive covenant, which acts a subsequent zoning ordinance purports to make a proper use. The courts have generally stated that in such case the restrictive covenant cannot be abrogated by the ordinance. Most have just announced the rule with little or no statement of reasons or analysis of the problem. The following language is typical: “A valid restriction on the use of realty is

4 In general on this subject, see 2 Rathkopf, ZONING AND PLANNING ch. 74 (3d ed. 1962); 2 Metzenbaum, ZONING ch. Xd (2d ed. 1955); 8 McQuillen, MUNICIPAL CORPORATIONS § 25.09 (3d ed. 1957); Van Hecke, Zoning Ordinances and Restrictions in Deeds, 37 YALE L.J. 407 (1928); Comment, 48 MICH. L. REV. 103 (1949).

neither nullified nor superseded by the adoption of a zoning ordinance, nor is the validity of the restriction thereby affected."\(^7\)

Some of the earlier cases rested the rule on vaguely stated constitutional grounds.\(^7\) For example, in *Ludgate v. Somerville*\(^8\) the court said in holding the ordinance ineffective:\(^9\)

An act which so deprives a citizen of his property rights cannot be sustained under the police power unless the public health, comfort, or welfare demands such enactment. It cannot well be argued that the purpose to enjoy that which we are pleased to call home and to protect it against the encroachment of commercial interests is inimical to public welfare.

A few courts, though following the general rule, admit evidence of the zoning ordinance in order to show that there has been a neighborhood change.\(^10\) This in turn constitutes grounds for refusal to enforce the covenant.

In at least three cases the courts have said that the more restrictive of the two land use controls governs.\(^11\) One court limited its holding that the covenant controls to a situation where there is a prior covenant followed by an inconsistent zoning ordinance.\(^12\) And, the New Jersey courts have ruled that when the municipality itself is the covenantee, it can pass an ordinance inconsistent with the covenant thereby waiving the benefit of the covenant owned by the city.\(^13\)

One difficulty with formulating rules for this area lies in the fact that the courts have been faced primarily, if not exclusively, with the problem of a prior covenant restricting the property to

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\(^8\) Id. at 643, 647, 256 Pac. 1043, 1045 (1927).

\(^9\) Id. at 647, 256 Pac. at 1045.


residence uses and a subsequent zoning ordinance allowing business uses. It would seem that with the growth of new techniques in zoning such as noncumulative\footnote{See note 56 \textit{infra}.} and multi-use zoning,\footnote{See note 60 \textit{infra}.} the courts are going to be faced with problems calling for more ingenuity and imagination to reach sound results.

But the great hurdle in handling these problems is the fact that courts have usually failed to give reasons for their rule that, in general, ordinances cannot abrogate covenants. If the rule has basis in law, it must rest on either the unconstitutionality of the ordinance or the lack of municipal power to so regulate land use. Conceivably, then, there are four possible bases: first, that the ordinance has no reasonable relation to the public health, safety, and welfare and therefore is a denial of substantive due process; second, that the ordinance unconstitutionally impairs the obligation of contract; third, that the ordinance constitutes a governmental taking of property without just compensation; and fourth, that the municipality is by ordinance attempting to alter private rights and liabilities, something which it has no power to do. Before dealing with the other policy questions raised by conflicts between ordinances and covenants, these constitutional and ultra vires questions will be considered.

\textbf{SUBSTANTIVE DUE PROCESS AND OBLIGATION OF CONTRACT}

The substantive due process issue may be quickly settled. Even ignoring the judicial disrepute in which the doctrine now reposes federally,\footnote{Ferguson v. Skrupa, 372 U.S. 726 (1963) seems to have rejected once and for all substantive due process as a federal ground for invalidating economic regulation.} substantive due process could threaten only individual ordinances as applied to individual covenants. It could not be applicable to all ordinances having the purported effect of abrogating covenants.\footnote{Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. City-of Cambridge, 277 U.S. 183 (1928). For the state cases, see 8 McQuillin, \textit{Municipal Corporations} § 25.60 n.61 (1957) and cases therein cited.} The question in each case rather would be whether this particular ordinance which negates this particular covenant bears a reasonable relationship to the public health, welfare and safety. Substantive due process then could not be a justification
for a blanket rule holding all such ordinances void but would occasionally be grounds for voiding an ordinance in a proper case.

There is only slightly more difficulty in disposing of the obligation of contracts issue. Although at one time the so-called contract clause\(^\text{18}\) was of substantial importance and was responsible for the voiding of much state action, the period since the 1930's has seen a marked decline in its significance, especially since the *Home Bldg. & Loan Ass'n v. Blaisdell*\(^\text{19}\) case. *Blaisdell* involved a 1933 Minnesota statute which provided that mortgage foreclosures and execution sales might be postponed for a reasonable time but not beyond May 1, 1935. In holding that this was not an unconstitutional impairment of the obligation of contract, Mr. Chief Justice Hughes justified his decision on two theories: (1) that the legislation was temporary and for emergency purposes only; and (2) that all contracts are subject to a subsequent governmental exercise of the police power. Later cases have relied on the second of these as the exclusive ground for decision,\(^\text{20}\) so that as a matter of federal constitutional law it may be said that prior obligations of contract may be impaired by an otherwise valid exercise of the police power. It would seem there is little if anything left of the constitutional provision that is not already encompassed in substantive due process.\(^\text{21}\) Similar developments may be noted in the cases involving analogous provisions of the state constitutions.\(^\text{22}\) Proper exercise of the police power is a justification for governmental impairment of contracts. There would thus be little argument under present law that zoning, which is traditionally justified as a police power measure, could not abrogate a prior covenant.

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\(^{18}\) "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. 1, § 10.

\(^{19}\) 290 U.S. 398 (1933).


A third justification for the rule subordinating ordinances to covenants might be that under the federal and state constitutions, private property may not be taken for public use without payment of just compensation. The argument would be that the owner of the dominant tenement of a restrictive covenant has a valuable property right which cannot be taken away from him by a zoning ordinance without provision for compensation.

Certainly this argument could not be applied where the ordinance was on the books prior to the creation of the covenant. Such an agreement would be subject to existing law. But it would seem to have some force where the ordinance purports to destroy a previously created covenant. Indeed, there is a great deal of case authority which states that where the state condemns property for its own use it must compensate owners of tenements dominant to the condemned property if the restrictive covenant owned by the dominant tenant is breached by the condemnation.

The argument against requiring payment of compensation is simply that zoning is traditionally viewed as an exercise of the police power for which no payment of compensation is necessary. Let us examine this premise. The hazy line between the police power and eminent domain has been oft discussed. With relation to this question it has been said:

Under the police power rights of property are impaired not because they become useful or necessary to the public, or because
Some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful.

Many cases make essentially the same theoretical distinction. But though this distinction may be well established and theoretically sound, it can surely be said that many of the zoning cases have not followed it in substance or indeed even in form. The decisions future public purchase, but it is within constitutional power to compel an owner to leave a portion of his land vacant where building would be harmful to the use and enjoyment of other land (e.g., set-back lines). It is unconstitutional to compel an owner to commit his land to park use in order to meet the public desire for a park, but an owner may be compelled to furnish a portion of his land for a park where the need for a park results primarily from activity on other land of the owner. It is unconstitutional to compel him to use his land as a parking lot in order to obtain a parking lot for the community, but it is within constitutional power to compel an owner to provide a parking lot for the parking needs of activities on his own land. It is improper to compel a railroad to install grade-crossings for highways in order to promote the convenience of highway users, but it is permissible to compel the railroad to install grade-crossings so as to eliminate danger and hazards from the railroad's use of its own property. It is not permissible to compel an owner to hold land in reserve for industrial purposes by restricting his use to industrial purposes only, but it is permissible to exclude industrial development from districts where such development will harm other uses in the district. It is beyond state power to compel an owner without compensation to set aside or give land to the public for a street or highway, but it is within that power to compel him to do so where the need for the streets is related to the traffic generated by the owner's use of his other land. Likewise the state may compel an owner to furnish other community facilities such as water and sewer lines at his own expense where the need for such facilities results in part at least from activities on his other land."


See cases at notes 29 and 30 infra.

See cases at notes 32 and 33 infra.
upholding five acre\textsuperscript{29} and aesthetic zoning\textsuperscript{30} are in point. It is difficult to delineate the detriment or harm to the public interest that is averted through a requirement that each lot in a residential area must be a minimum of five acres or that the owner who plans to build must get approval of exterior appearance from an architectural review board. Yet, such ordinances have been upheld as a proper exercise of the police power.\textsuperscript{31} The standard that is often applied relates to the extent of the regulation of the owner's use. One court has stated the test to be whether the ordinance "permanently so restricts the use of property that it cannot be used for any reasonable purpose."\textsuperscript{32} If it does then it is viewed as a taking which must be compensated for.\textsuperscript{33}

While the "no reasonable purpose" test looks to the extent of the limitation upon the landowner's rights of use, the "detriment"


\textsuperscript{30} State ex rel. Saveland Park Holding Co. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955); Hayes v. Smith, 167 A.2d 546 (R.I. 1961). It is true that most courts still say that zoning solely for aesthetic purposes is unconstitutional, but it is clear that this is a standard stated but not really followed because the courts can usually find another valid purpose for the ordinance. See Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 LAW & CONTEMP. PROB. 218 (1955); Pooley, PLANNING AND ZONING IN THE UNITED STATES 84-90 (1961); CHAPIN, URBAN LAND USE PLANNING 53-56 (1957); 1 Rathkopf, ZONING AND PLANNING ch. 11 (1962). See also Berman v. Parker, 348 U.S. 26 (1954).

\textsuperscript{31} See cases at notes 29 and 30 supra.


\textsuperscript{33} A variation of the same approach states that an ordinance is not unconstitutional merely because the property may not be put to its most profitable use. Guacides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (App. Div. 1951); Zweifel Mfg. Corp. v. City of Peoria, 11 Ill. 2d 489, 144 N.E.2d 593 (1957); Scholneck v. City of Bloomfield Hills, 350 Mich. 187, 86 N.W.2d 324 (1957). See 1 Rathkopf, ZONING AND PLANNING 6-6 nn.7 and 7a (1962) and 1 NICHOLS, EMINENT DOMAIN § 1.42[10] (1950). In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), Mr. Justice Holmes said: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized,
test looks to the purpose or policy behind the ordinance and makes a value judgment of the social utility of the proscribed use. Whether the one test or the other should be applied to zoning is a most challenging question which is for the most part academic, for American courts have clearly made the choice. To retrace steps now and provide for compensation in any case where a zoning ordinance does not avoid a "detriment" to the public would mean the practical end of much zoning in this country, unless the word "detriment" were most loosely interpreted. With such a loose interpretation, the result of applying the test would verge upon that already reached by the courts using the "no reasonable purpose" approach. This latter formula, it is submitted, is a practical compromise within the requirements of a workable zoning program.

How would this rule apply to the covenant abrogated by an ordinance? It is obvious that such an ordinance may permanently "restrict" the property right involved (represented by the covenant) beyond any "reasonable purpose." In fact, where the ordinance purports, for example, to allow industrial construction on property covenanted residential only, it "restricts" the right out of existence. Thus, it is suggested that if a city purports to completely abrogate a covenant it must compensate the dominant tenant. This rule would be in consonance with the cases holding that the dominant tenant of a restrictive covenant must be compensated when the government condemns the servient tenement. Indeed, it is an anomaly that the rule should be different merely because in one case the government condemns a servient interest and in the other it does not.

The limits upon and the extent to which the eminent domain device should be utilized in this area will be examined later in the article.\textsuperscript{84}

**THE ULTRA VIRES PROBLEM**

Lastly, court holdings that covenants prevail over ordinances may rest upon the theory that the municipality has no power to regulate in such a way as to affect private rights and private law—
matters traditionally for state legislatures and courts. There is surprisingly scant case authority upon the question, but in isolated instances such exercises of power have been upheld with little or no discussion of the real issue. The problem is of especial difficulty where the municipality has the so-called power of home rule. In such instances, the municipality has at the least primary authority and in some states plenary authority over "local" or "municipal" matters. In some jurisdictions the municipality even has power to legislate on "state" matters where the legislature has not occupied the field, though in other states, such municipalities have no power to regulate matters of state concern, whether the legislature has entered the area or not. The courts have not laid down a clear differentiation as to what matters are local and what are state in character but seem to make the determination on a case to case basis. For example, it has been held in some states that regulation

35 On the broad question see Fordham, Local Government Law 112 (1949); Freund, Legislative Regulation § 7 (1932); 6 McQuillin, Municipal Corporations § 22.01 (1949); Antieau, Municipal Corporation Law § 3.06 (1963); Comment, The Power of Ohio Municipalities to Enact Private Law, 9 Ohio St. L.J. 152 (1948).


38 City of Portland v. Welch, 154 Ore. 286, 59 P.2d 228 (1936); 2 McQuillin, Municipal Corporations § 4.83 n.76 (1949) and cases therein cited.


40 Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643 (1922); Ex parte Galusha, 184, Cal. 597, 195 Pac. 436 (1921).


42 See 2 McQuillin, Municipal Corporations § 4.85 (1949): "Decisions of courts of last resort relating to this subject are more or less conflicting, and even in the decisions of the same state there is this lack of harmony, so that it is frequently difficult, and sometimes impossible, to determine just where the power of the legislature to interfere stops and the right of the city to be let alone begins." In Van Gilder v. City of Madison, 222 Wis. 58, 67, 267 N.W. 25, 28 (1936), the court said: "When is an enactment of the Legislature of state-wide concern? We find no answer to this question in any decision of any court in this country."
of city streets is a matter of local concern\textsuperscript{43} while in others it is deemed a state matter.\textsuperscript{44} There are cases saying that control of municipal fire departments is of local\textsuperscript{45} and others saying it is of state concern.\textsuperscript{46} The cases are split on the power of municipal taxation\textsuperscript{47} and in many other areas as well.\textsuperscript{48}

The difficult question, then, is whether a state which allows home rule cities to legislate in certain instances on matters of state concern would permit property legislation which affects or changes private law relationships. If it is held there is no such power, it would be inconsistent with the above basic rule, assuming that property law is a matter of state concern. And, a fortiori, if we assume that it is a matter of local concern, where home rule cities have exclusive jurisdiction. It would seem that when authorities, court and text, state the rules about municipal power over law-making they are excepting, unconsciously, matters which are related to traditional private law.

Professor Ernst Freund concluded this in his book, \textit{Legislative Regulation}.\textsuperscript{49} There he made the distinction between government-legislation and law-legislation, the former relating to the police power, revenue, organization of government, and the public services, and the latter including private law, criminal law, and procedure. With respect to law-legislation it is universally assumed that the municipality shall not have power,\textsuperscript{50} and it is submitted that this

\textsuperscript{43} Massa v. City of Cincinnati, 51 Ohio Op. 101, 110 N.E.2d 726 (1953), appeal dismissed, 160 Ohio St. 254, 115 N.E.2d 689 (1953); Salsbury v. City of Lincoln, 117 Neb. 465, 220 N.W. 827 (1928); Civic Center Ass'n v. Railroad Comm'n, 175 Cal. 441, 166 Pac. 351 (1917).

\textsuperscript{44} Pipoly v. Benson, 20 Cal. 2d 366, 125 P.2d 482 (1942).


\textsuperscript{46} Luhrs v. City of Phoenix, 52 Ariz. 483, 83 P.2d 283 (1938); Axberg v. City of Lincoln, 141 Neb. 65, 2 N.W.2d 613 (1942).

\textsuperscript{47} Local concern: West Coast Advertising Co. v. City & County of San Francisco, 14 Cal. 2d 518, 95 P.2d 138 (1939); City of Ardmore v. Excise Bd. of Carter County, 155 Okla. 126, 8 P.2d 2 (1932). State concern: Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946).

\textsuperscript{48} See 2 \textit{McQuillin, Municipal Corporations} §§ 4.89-.113 (3d ed. 1949).

\textsuperscript{49} Freund, \textit{Legislative Regulation} §§ 6-7 (1932).

\textsuperscript{50} "The enumeration [of powers] which is customary in charters or city acts does not attempt systematic classification; but an analysis will show that the subjects covered are always confined to police, revenue, organization, and public services or undertakings. There is never any thought of including matter of private law . . . ." Freund, \textit{Legislative Regulation} § 7 (1932).
tradition is one based in sound policy. Uniformity of private law within a state certainly is a desideratum. Should the law of contracts vary from city to city within a state? Should a contract be enforcible in New York and not in Albany? These questions seem to answer themselves, at least with respect to those contracts to which the city is not a party or in which the city does not have a police power interest. Our federal system has shown the myriad difficulties of having fifty separate private law making authorities. To compound this to thousands would seem to be ridiculous.

Likewise, it seems clear that cities within a state should not have different rules with respect to the formal requisites of passing title to realty. Cities are not given home rule to handle matters of this kind. In the final analysis, they are given local self-government because theoretically they can run certain categories of their affairs more efficiently and in a manner more responsive to local will than can the state legislature.

If there is a possible dispute as to whether the handling of fire departments and city streets is an appropriate matter for municipal concern, surely there can be no doubt that a municipality has no distinctly local interest in the law governing civil disputes between private parties. So that even in a state in which the municipality does have concurrent but subordinate jurisdiction over matters of state concern, courts should strike down municipal attempts to change private law. If this is so, is a municipal ordinance forbidding a land use which is permitted by a covenant or permitting a land use which is forbidden by a covenant an invalid attempt to change private law? It is submitted that it should not be so regarded because the change in private law relationships is only an incidental effect of the exercise of the power to regulate land use. Thus, in tort law, the municipality could not effectively legislate to declare what shall subject a person to tort liability but state courts can and do declare that, as a matter of state law, violation of a municipal ordinance is negligence per se or is evidence of negligence. It is the state, then, through its courts that may declare which municipal ordinances shall be given private law effect and which

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51 But see Comment, The Power of Ohio Municipalities to Enact Private Law, 9 Ohio St. L.J. 152 (1948).
52 See 1 McQuillin, Municipal Corporations § 1.93 (3d ed. 1949) and note 37 supra.
53 See 6 McQuillin, Municipal Corporations § 22.01 (3d ed. 1949) and cases therein cited.
54 Id. at §§ 22.02-.04.
shall not. The question, thus, is whether courts should, as a matter of policy, apply ordinances to abrogate covenants. The analogy to the doctrines of negligence per se is not perfect. The latter incorporates a municipal standard of care into state law. It might be argued that giving covenant-abrogating effect to zoning ordinances would be a much more drastic "delegation" of private law making to the city, because the ordinance could restrict an owner in the accustomed use of his property. But, is this really true? Even without an inconsistent covenant, courts, legislatures, and municipalities themselves have refused to impose the effect of zoning ordinances upon a prior nonconforming use. So the pure problem of covenant versus ordinance would arise only where the actual prior use is not purportedly eliminated by the covenant. For example, assume a present use for industry, a restrictive covenant against use other than for industry purposes and a subsequent zoning ordinance requiring residential use. In such a situation, the fact that there is a covenant present is almost irrelevant to a determination of whether the ordinance is valid because of the rule that prior nonconforming uses shall not be eliminated by zoning ordinances. But change the facts and assume the land is idle at the time of the enactment of the ordinance and the problem of which land use control governs is of paramount significance.

Therefore, the legal effect of the ordinance would be prospective in the sense that it would not prevent an already established use. Even so, it can be argued that giving it that much effect is too much an abdication by the state to municipal control. The satisfactory answer to that argument is that we have entrusted land use control to the cities and to fully effectuate that control, state courts as a matter of policy should, in appropriate circumstances, give legal effect to ordinances which conflict with covenants.

Does that mean that all subsequent ordinances should as a matter of law be deemed controlling over prior covenants? To what extent should compensation be required? To answer these questions, it is appropriate to deal with several hypothetical cases where the conflicting interests and policies will more readily appear.

**ZONING ORDINANCES PRIOR IN TIME**

**Case I — Ordinance More Restrictive**

Blackacre is zoned residential. Subsequent to enactment of the ordinance, A, owner of Blackacre, sells it to B with a restrictive

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covenant saying that Blackacre may be used for any purpose other
than as a slaughterhouse. B goes into possession and plans to con-
struct a light industrial plant. The city refuses to issue a building
permit for such construction. B sues to compel issuance of the
permit.

This case presents one of the simpler problems. It is perfectly
clear that B is bound by the prior ordinance and takes subject to
its provisions. No one would argue that the parties could rid them-

CASE II—ORDINANCES AND COVENANT MUTUALLY EXCLUSIVE

Greenacre is zoned for light industrial uses only, under a non-
cumulative zoning ordinance. Subsequent to enactment of the
ordinance, C, owner of Greenacre, sells it to D with a restrictive
covenant saying that Greenacre may be used for residence purposes
only. D seeks a building permit for construction of a one-family
residence which is refused by the municipal officer. D sues to
compel issuance of the permit.

This case is somewhat analogous to Case I in that there is an
absolute inconsistency between the covenanted use and the mandate
of the ordinance. The difference is that in Case I there were possi-
ble uses of the property which would not violate either the ordi-
nance or the covenant. In this case there is no conceivable use that
would not violate one or the other. There is thus presented the
clearest clash between the two instrumentalities of control, public

56 A noncumulative or single-use zoning ordinance is one which excludes
all other uses from the zone. The cumulative ordinance is, of course, one
that sets up zones of "higher" to "lower" uses (residence being
higher than commercial and commercial being higher than industrial)
and permits the higher use in areas zoned for the lower uses but not
the reverse. Thus under a cumulative zoning ordinance, residential use
would be permitted in an area zoned industrial, but industrial use would
not be permitted in an area zoned residential. Historically in the United
States, zoning ordinances have been cumulative. A recent tendency
toward noncumulative ordinances has been noted. Such ordinances
generally exclude residential uses from areas zoned industrial. See
WEBSTER, URBAN PLANNING AND MUNICIPAL PUBLIC POLICY 384-87 (1958);
Madsen, Noncumulative Zoning in Illinois, 37 CHI.-KENT L. REV. 108
(1960); 52 Mich. L. Rev. 925 (1954); Comment, Industrial Zoning to Ex-
clude Higher Uses, 32 N.Y.U.L. REV. 1261 (1957); Note, Non-Cumulative
ORDINANCES AND COVENANTS

and private. But the result should be controlled by the reasoning of Case I. Since when D bought, he knew or should have known of the fact that Greenacre is zoned for industrial use, he should be deemed to be bound by this knowledge. Again, if one wanted to evade the mandate of an ordinance which allowed no use but industrial, this would be an easy way to do so. The seller could be instructed to insert a restrictive covenant against nonresidential construction and the ordinance could be circumvented. It is for these reasons that the ordinance ought to control no matter what the subsequent restrictive covenant purports to do.

CASE III — ORDINANCE LESS RESTRICTIVE

Whiteacre is zoned for light industrial use which includes all "higher" uses such as residential. Subsequent to enactment of the ordinance, E, owner of Whitacre sells it to F with a restrictive covenant saying that Whiteacre may be used for residential purposes only. F goes into possession and plans to construct a light industrial plant. E, who retained property adjacent to Whiteacre, seeks an injunction to restrain F from breaching his covenant.

In this case, F's argument would be that the zoning ordinance represents the public mandate as to the type of land uses which are appropriate to the area, and, therefore, the ordinance should control, else landowners could repeal ordinances at will. E could reply that one of our societal values is the maximization of individual decision. Here, the parties may contract with respect to the use of land, as the contracted use is not inconsistent with the uses permitted by the ordinance but is merely more restrictive. F's rejoinder would be that the law does not give parties untrammeled rights to contract with respect to the law (witness the rules against contracting away liability for negligence). Here the public will is affirmative that industrial as well as residential uses shall be permitted, and this public will should not be frustrated unless it is desired to take completely from the government the power to regulate the use of land.

E might say in reply that the public mandate is an important value that must be protected but not at the expense of allowing F to breach his contractual obligation personally entered into. Therefore, the argument goes, E should be allowed to enforce the covenant at least against F, the original party to the covenant, though argu-

57 See note 56 supra.
ably the law might refuse to enforce it against a purchaser from F. In other words, the law might refuse to allow the burden of the inconsistent covenant to run with the land. Such an approach has been suggested in another connection, and it has the virtue of being a compromise between the two basic contending values: the freedom of individual action versus the power of the state to control a limited resource. It is suggested, however, that this is not an appropriate solution. Cities have been given power over land use for the strongest reasons of policy, and if the city deems it appropriate to permit a certain land use, private parties should not have the power subsequently to forbid it. This, of course, is not to say that a city can force an owner to use his land for the zoned purpose. The owner can always leave his land idle. But on the other hand, the covenantee should not be able to enjoin a use specifically permitted by the city, if the city truly desires to have more than one use in the zoned area. Historically, zoning has been cumulative, i.e., each less restricted zone contains all "higher" uses. In practice, however, each zone tended to contain primarily the "lowest" use. In modern city planning theory, multiple uses within an area are deemed to present important values to the entire community.

59 "The point of difficulty comes with respect to those agreements which needlessly impede the liquidity of land or interfere with its most rational use and development, but which because of the community's traditional preference for honoring private volition are held enforceable between the original parties. It is superficially plausible to argue that if an agreement is enforceable as between the original parties, if no policy outlaws it with respect to them, it should be equally enforceable against third parties, assuming all formalities and procedures to have been complied with, since as indicated above, little reason appears why the personality of any particular record title owner should make any difference to the parties' reasonable expectations. A more pragmatic approach would appear to suggest, however, that even though it may be impossible to persuade the courts to withdraw their protection for these agreements as between the immediate parties, and to impose limits beyond crime and immorality as between promisor and promisee, it may still be advisable, as the next best step, to urge them to withdraw protection from such agreements against third parties. The refusal by courts to extend protection to such agreements against third parties would of course be a great deterrent to their making." McDOUGAL & HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 596 (1948).

60 Among these could be listed reduction in crime and juvenile delinquency, increase in the cultural values of the community, ridding the city dweller of his anonymity and increasing neighborhood civic responsibility. The outstanding theoretician espousing these views is Jane Jacobs. See JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES ch. 8 (1961); WRIGHT, WHEN DEMOCRACY BUILDS 66, 67 (1945); Crompton, Layout, 32 TOWN PLANNING REVIEW 213 (1961).
These values the city should be able to attain through its zoning laws. With this in mind, it is submitted that the court should refuse enforcement of the covenant by damages or injunction in this type of case where it is manifest that the city planners intend the zoned area to contain mixed uses. Of course, judicial ascertainment of the planner's state of mind poses some practical problems, but it seems they would be no more difficult than any other task of interpretation. On the other hand, if it is found that there is no intent to have mixed uses in the area, there would be no reason not to enforce the covenant as in any other case.

RESTRICTIVE COVENANTS PRIOR IN TIME

Case IV — Ordinance Less Restrictive or Ordinance and Covenant Mutually Exclusive

G, owner of a large subdivision which he plans to develop for residence purposes, conveys a parcel thereof to H with a covenant that H, his heirs and assigns shall use the property for residence purposes only. Subsequently, the city enacts an ordinance zoning the parcel within a light industrial area which includes residences. H, after obtaining a building permit, proceeds to construct a building for the manufacture of pharmaceuticals. G sues H to enjoin the construction as a violation of the covenant. H defends that the subsequent ordinance abrogated the covenant.

As noted above, almost all of the case law that has been handed down has involved circumstances similar to these: i.e., a prior covenant more restrictive than a subsequent zoning ordinance, and the courts have been almost unanimous in holding the covenant to control. It is submitted that the courts are, in a sense, right but for the wrong reason. As shown above, there is only one constitutional ground upon which the courts could and should rest: i.e., that property may not be taken for a public purpose without payment of compensation. Here it is apparent that the entire value of the covenant has been destroyed, that it has no reasonable purpose left, and that, therefore, compensation would be mandatory. A court, then, would be correct in ruling such an ordinance, as in this case, to be an unconstitutional taking. Thus, the ordinance would not be a defense for H in a suit by G. But suppose that with statutory authority the ordinance provided for compensation to all in-

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61 In general, it would be best if the zoning ordinance itself specifically provided whether mixed uses were an affirmative goal.
62 See cases at notes 5-9 supra.
jured dominant tenants owning restrictive covenants covering lands within the zoned area. G's interest would cease, since it would have been lawfully taken by the state for a fair compensation. H with impunity could breach the covenant. The rules would obviously be the same where the covenant and ordinance are mutually exclusive as it is apparent that in such case the covenant would be completely abrogated if the mandate of the ordinance is obeyed.

The use of the eminent domain device poses a myriad of theoretical problems in timing, measurement of damages and assessment of costs and benefits. A discussion of many of these problems is necessary for an understanding of the ramifications of the proposed solution.

Timing of and Conditions Precedent For Compensation

The first question that obviously presents itself is upon what event would the obligation to compensate become fixed? There are two possible views: first, that compensation should be made when the ordinance is passed; second, that compensation should be made when someone violates the covenant to the detriment of the dominant tenant. For the former view, it may be argued that the moment the ordinance is passed such ordinance may have the effect of lowering the value of the dominant property no longer protected by the covenant, and that this is a "taking" within the meaning of the Constitution which must be compensated for. The argument for the other view would be that until the covenant is actually violated, there is no loss and further, until one knows exactly what the violation will be, there is no way to measure the diminution in value. In answer to this, it might be said that there is a most plausible way to make an immediate measurement, i.e., to take the difference in market values of the dominant property before and after passage of the ordinance. It may be in some cases there will be no difference. But, if the property is less desirable because it is no longer protected by a covenant, its value will be discounted through market forces by an amount equal to the

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63 See generally 3 Nichols, Eminent Domain § 8.5 (1950).
64 But see 4 Nichols, Eminent Domain § 12.321 (1962). It is there argued that the covenantee should receive the amount of the diminution in value of the servient estate caused by the existence of the covenant on the theory that compensation is awarded for the land itself and not for the sum of the different interests in the land. See also 4 Nichols, op. cit. supra note 64, at §§ 12.3151, 12.36[1]. Cf. Herr v. Board of Educ., 82 N.J.L. 610, 83 Atl. 173 (Ct. Err. & App. 1912).
market assessment of the probability and extent of violation. Therefore, payment can and should be made immediately. Of course, if the removal of the covenant either enhances or does not affect the value of the dominant property no payment would be made.

Assessment of Social Costs and Benefits

Let us examine the alternatives as to how the social costs and values arising out of the ordinance can be assessed. In the hypothetical, assume that G, the owner of the dominant tenement is the only dominant tenant, that there are several score of servient tenements whose properties are being enhanced in value a total of one million dollars by shedding the burden of the restrictive covenants, and that the value of the dominant tenement is decreased a total of one million dollars by the loss of the covenants in its favor. There are theoretically two possible ways of assessing the costs. First, we can say that the government, after paying G one million dollars as a condemnation award, should assess the servient tenements one million dollars for the benefits they have reaped from the condemnation. The second alternative is to allow the government to bear the cost while the servient tenants receive gratis, an increase in value. The argument for the first alternative is that when the servient tenants bought the land, they bought subject to the covenants. It is thus inequitable for them to gain the advantage of having the covenant lifted by governmental action and have society bear the cost of their special advantage.

There are several arguments in answer. First, it is true that the servient tenants are getting a "windfall" advantage from the

65 This approach, though not utilized in the United States, was a part of English law for 100 years. The English attempted to collect "betterment" from those who benefited from governmental land activities. The theory was that the government would compensate those whose land was taken and this amount would be balanced by collections from neighbors whose land values went up as a result of the improvement. The experiments in collection of betterment were a failure and were substantially abandoned in the Town and Country Planning Act of 1954, 2 & 3 Eliz. 2, c. 72. See Report of the Expert Committee on Compensation and Betterment (The Uthwatt Report 1942); Pooley, The Evolution of British Planning Legislation 17-25, 82-86, 91-92 (1960); Haar, Land Use Planning 545-56 (1959); Haar, Planning Law, 32 Town Planning Review 95, 106-14 (1961); Mandelker, Notes from the English: Compensation in Town and Country Planning, 49 Calif. L. Rev. 698 (1961); Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650, 668-69 (1958). Cf. Bishop & Phelps, Enhancement in Condemnation Cases, 13 Ala. L. Rev. 122 (1960); Note, 21 U. Pitt. L. Rev. 60 (1959).
condemnation, but this is also true in any condemnation proceeding. There is always some abutting or nearby landowner who benefits by a new highway. At present we do not assess such people. Where the method has been tried, it has been found cumbersome and unworkable. Second, it is unfair to emphasize the special advantage that accrues to the servient owner. Society, by hypothesis, benefits from removal of the covenant, else the municipality would not seek its abrogation. Again, if society is to charge people specially benefiting from the exercise of its activities, it would seem logically to follow that it should confiscate all other windfall receipts and unearned income such as the fortuitous discovery of oil upon property. This the government has not done and should not do. One other factor might be mentioned; i.e., it would seem unfair for an assessment to be charged against a servient tenement “benefited” by a release from the burdens of the covenant when the owner of the tenement does not desire to sell or utilize it in its more “valuable” use. He would in effect be paying for a benefit he never receives. It is submitted, therefore, that these arguments and the British experience point to a continuance of present rules. Society should bear the cost of abrogating the benefits of a covenant.

The Reciprocal Covenant Situation

In the most common situation, the covenantors and covenantees are not separate groups. Rather, there is a large subdivision in which each owner is both a covenantor and covenantee; i.e., each may enforce the covenant against a violating neighbor and each neighbor may enforce it against him. In such circumstance, the problems of compensation are less complex, because there are no separate groups of those who benefit and those who lose. It is probable that each owner would gain or lose approximately as much as his neighbor. In such a case compensation, if any, would be based again upon the total loss in value resulting from the removal of both the benefit and burden of the covenant.

66 The arguments against collection of betterment are stated in POOLEY, THE EVOLUTION OF BRITISH PLANNING LEGISLATION 17, 22 (1960) and may be summarized as follows:
1. The idea is clearly at variance with other common law principles of quasi-contract.
2. There is no effective way of collecting betterment. Attempts in England were never successful.
3. Political repercussions were constant when attempts to collect were made.
4. Floating or potential betterment is, as a practical matter; uncollectible.

67 See note 66 supra.
CASE V—PRIOR COVENANT WITH SUBSEQUENT MORE RESTRICTIVE ORDINANCE

J, owner of a large subdivision which he plans to develop for low cost single family dwellings, conveys a parcel thereof to K with a covenant that K shall use the property only for single family dwelling purposes. Subsequently, the city zones the subdivision in a residential area, where one-family houses of 2,000 square feet or greater may be constructed. When the city denies K's application for a building permit to construct a home of 1,000 square feet, K brings suit to compel issuance of the permit and for a declaratory judgment that the ordinance is unconstitutional as applied to him. J joins as a party plaintiff.

Again, the only possible constitutional ground which J and K might successfully argue is that they are entitled to compensation for the loss they sustained from the abrogation of the covenant. The question resolves itself to whether the ordinance so restricts the property right (the covenant) as to render it useless for any reasonable purpose. If it does, compensation ought constitutionally be required. If it does not, then it ought to be upheld as a reasonable exercise of the police power. In this case, the covenant is not rendered nugatory by the ordinance, because the ordinance does not purport to authorize that which the covenant prohibits, but rather permits in more limited fashion that which the covenant allows. The property right then is not "taken" in a constitutional sense, as there is no attempt to abrogate it.

On the other hand, the landowners might argue that substantially all their interest in the covenant has been negated by a provision severely narrowing its scope, that in fact the subdivision was planned to contain the very types of housing the ordinance proscribes, and, therefore, the benefits of the covenant have been "taken" by the ordinance. In answer, it might be said that it is not their interest in the covenant but their interest in the unfettered use of their land that is affected by the ordinance. The covenant does not purport to allow large residences but to forbid nonresidential construction. And this stricture the ordinance does not attempt to overrule. Hence, it would appear that when the subsequent ordinance is more restrictive, it would constitute a valid exercise of the police power and no compensation would be necessary.

68 See text accompanying notes 23-24 supra.
CONCLUSION

Conflicts between zoning ordinances and restrictive covenants pose difficult problems for the courts not well solved by the present simple formula that a covenant cannot be abrogated by an ordinance. The law should give greater recognition of society's interest in the rational use of land by giving greater effect to society's chief means of regulation, the zoning ordinance. There is no constitutional barrier to allowing ordinances to prevail over covenants except for the requirement that property shall not be taken for public use without payment of compensation. This provision applies only when the ordinance is subsequent in time to the covenant and the ordinance is less restrictive or mutually exclusive to the covenant. When the ordinance is subsequent in time and more restrictive no compensation is necessary. On the other hand, when the ordinance is prior in time it should govern as against subsequent less restrictive or mutually exclusive covenants. When a prior ordinance is less restrictive than a subsequent covenant, the ordinance should govern where it is manifest that the city intends that the zoned area should have a broad spectrum of uses.