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Legal and Policy Conflicts Between Deed Covenants and Subsequently Enacted Zoning Ordinances

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I. INTRODUCTION

Increases in population density during the past several decades have sharply focused the need for effective devices of land use control. As a matter of private law, the practice of restricting land in new residential developments by means of uniform, mutually enforceable deed covenants has developed into the science of "private zoning."[1] At the public law level, the need for long-range planning, for regulation of the increasing demand for public services, and for orderly control over the dispersion of urban population groups has engendered a vast matrix of zoning and allied regulations.[2] With increasing frequency, the real estate lawyer is confronted with the need to determine the effect of a newly enacted zoning ordinance upon the enforceability of prior restrictive covenants affecting property in the zoned area. If the enforceability of the covenant is cut off by the ordinance, the further question arises whether the city must compensate the landowner for interfering with his property rights. Existing rules provide largely unsatisfactory answers and conclusions reached do not always reflect the balancing of public against private interests fundamental to all zoning. Moreover, new types of zoning regulations have been found to generate conflicts between public and private interests that were not foreseen when these regulations were first promulgated. This Note will set forth the present state of the law and will analyze the existing rules in terms of judicial approach and the constitutionally permissible scope of zoning under a state's police power. It also will suggest possible legislative and judicial innovation that might clarify and facilitate solution of the problems in this area.

II. PRESENT STATE OF THE LAW

Generally, in real estate law, the more restrictive regulatory device governs[3] when it merely circumscribes uses allowed under a less

1. *See* Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WIS. L. REV. 612.

2. *See* C. HAAR, LAND USE PLANNING ch. 3 (1959); 1 J. METZENBAUM, THE LAW OF ZONING ch. 1 (2d ed. 1955).

3. *See* Bluett v. County of Cook, 19 Ill. App. 2d 172, 153 N.E.2d 305 (1958) (zoning ordinance prevailed over approved, but less restrictive plat); City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950) (less stringent zoning ordinance did not impair legal effect of private building restrictions); Szilvasy v. Saviers, 70 Ohio App. 34, 44 N.E.2d 732 (1942) (restrictive covenant prevented commercial use allowed by zoning ordinance).

restrictive device, and does not totally displace them. The operation of this rule is best understood with reference to cumulative zoning, the classic pattern of zoning, whereby a hierarchy of land uses is recognized within one zone.[4] Residential uses are the highest, or most restrictive; industrial uses are the lowest, or least restrictive; and commercial uses are intermediate. Residential zones for single family dwellings, for example, are protected from encroachment by multiple family dwellings, apartment houses, business establishments, and industry of any kind. Zones designed for each lesser land use, however, are cumulative—any higher use is permitted, but lesser uses are prohibited.

A. More Restrictive Covenant

When the covenant is more restrictive than the ordinance, the operation of the general rule presents no conceptual difficulties since all higher uses are by definition in conformity with a less restrictive cumulative zoning ordinance. Covenant rights are independently enforceable, and the ordinance is construed to mean that only landowners not burdened with covenant restrictions may use their properties for purposes contemplated by the zoning ordinance.[5] For example, when a landowner in a newly zoned commercial district sought, in reliance upon the ordinance, to erect a gasoline service station on land restricted by deed covenants to residential uses, the court properly enjoined this use at the request of other landowners in the restricted area.[6]

Despite the general enforceability of the more restrictive private covenant, at least one court has allowed a landowner relying on a less restrictive ordinance to prevail. In *Taylor v. City of Hackensack,*[7] land originally restricted by mutual deed covenants to single-family residences was subsequently zoned for apartments. Before the zoning ordinance was enacted, the land was sold to the city, and then by the city to a private developer. In upholding the validity of the ordinance and allowing the lesser use, the court declared that a private covenant could not place a limitation on the power to zone.[8] Twenty years later,

4. E. BASSETT, ZONING 63 (1940).

5. Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 YALE L.J. 407, 422 (1928).

6. Clintwood Manor, Inc. v. Adams, 54 Misc. 2d 141, 282 N.Y.S.2d 109 (Sup. Ct. 1967), *rev'd*, 29 App. Div. 2d 278, 287 N.Y.S.2d 235 (1968), *aff'd*, 24 N.Y.2d 759, 247 N.E.2d 667, 299 N.Y.S.2d 853 (1969). *See also* Morton v. Sayles, 304 S.W.2d 759 (Tex. Civ. App. 1957) (commercial zoning could not override prior existing residential restrictive covenant).

7. 137 N.J.L. 139, 58 A.2d 788 (Sup. Ct.), *aff'd*, 1 N.J. 211, 62 A.2d 686 (1948), *noted in* 48 MICH. L. REV. 103 (1949).

8. 137 N.J.L. at 142, 58 A.2d at 791.

however, the same court decided a similar issue in favor of the beneficiaries of a restrictive covenant.[9] Citing and distinguishing *Taylor*, the court stated: "[I]n the only cases in which the zoning ordinance overcame private restrictions, the municipality was the beneficiary of the covenants."[10] Although this distinction may not be valid, at least one authority[11] has suggested that once title has passed through a city, the municipality, unlike a private owner, may impliedly waive covenant restrictions. Some decisions, moreover, have indicated that the mere presence of a less restrictive zoning ordinance tends to show that the property in question is better adapted for uses other than the restricted use required by the covenant.[12] Courts that take this view could easily go one step further and invalidate the covenant on the basis of changed condition,[13] thereby allowing parties relying on the ordinance to erect a lesser use than the covenant would have allowed.

B. More Restrictive Ordinance

Unlike the more restrictive covenant, the more restrictive ordinance impliedly does not allow the continued enforcement of covenant rights that require less restrictive uses. The conceptual difficulty caused by this construction has resulted in inconsistent judicial treatment. Thus, while a more restrictive ordinance generally prevails and renders unenforceable less restrictive deed covenants, this rule is not based upon a solid body of authority. As recently as 1970, it was authoritatively stated that "[t]he question of whether a zoning ordinance, enacted subsequent to the creation of a restrictive promise respecting the use of land and directly conflicting with it, extinguishes the promise, has never been answered in an American court."[14] Although there is a dearth of case law squarely in point, several courts have approached the area through dicta.[15] In a

9. Union County Indus. Park v. Union County Park Comm'rs, 95 N.J. Super. 448, 231 A.2d 812 (Super. Ct. 1967).

10. *Id.* at 454, 231 A.2d at 815.

11. 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 74-6, § 2 (3d ed. 1971) [hereinafter cited as RATHKOPF].

12. *See, e.g.*, Bard v. Rose, 203 Cal. App. 2d 232, 21 Cal. Rptr. 382 (1962); Gordon v. Caldwell, 235 Ill. App. 170, 174 (1924).

13. *See* text accompanying notes 38-42 *infra*.

14. 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 686, at 230.4 (rev. ed. P. Rohan 1970). It was noted that a less restrictive subsequent zoning ordinance does not "directly conflict" with a prior covenant because the ordinance only allows but does not require a lower use. *Id.*

15. *See* Bluett v. County of Cook, 19 Ill. App. 2d 172, 153 N.E.2d 305 (1958) (restrictive covenants do not supersede requirements of zoning ordinance; if covenants are more restrictive than zoning requirements, they prevail as to purchasers, but if they are less restrictive, zoning

Wyoming case,[16] for example, the land in question was originally restricted by deed covenant to business uses, but the municipality subsequently zoned the same property solely for residential use. The court upheld a landowner's right to use his property for business purposes consonant with the covenant restriction, but did not base its decision on a ground that would contravene the general rule that a more restrictive ordinance should render unenforceable less restrictive covenant rights.[17] The court instead pointed out obiter dictum:

> Whether [a case] where the building restriction is for business purposes only and 'the zoning is for residential purposes—the case at bar—should invoke the same ruling [that the more restrictive device governs], we do not under the present facts find it necessary to decide. General expressions . . . would seem to indicate an affirmative answer to this query.[18]

Similarly, in a Kentucky case[19] the court first determined that a declaration of restriction filed by a landowner, allowing some business uses, would not be validly enforceable as a covenant even if no zoning ordinance were present. The court added, however, that it was unable to see how a declaration of restriction could give a right to develop the property for business use when the land was restricted solely to residential use.[20]

Although courts have failed to formulate a comprehensive general rule with respect to the more restrictive ordinance, the *Restatement of Property* has taken a firm position on the issue. Section 568 provides that:

> The obligation arising out of the making of a promise that land of the promisor shall be used in a specified way is extinguished by a zoning ordinance or similar legislation only to the extent to which the observance of the promise is rendered unlawful by the ordinance or other legislation.[21]

A comment to this section notes that "[s]uch effectiveness is dependent upon the satisfaction of constitutional limitations upon the destruction by legislative action of vested property interests."[22] This comment

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ordinance prevails); City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950) (zoning ordinance restricting use of land to residential purposes only does not impair vested rights of owner of unimproved land under prior declaration restricting land usage to residences and certain classes of business only); Szilvasy v. Saviers, 70 Ohio App. 34, 44 N.E.2d 732 (1942) (deed restrictions are not abrogated by a zoning ordinance if the ordinance is less restrictive).

16. Weber v. City of Cheyenne, 55 Wyo. 202, 97 P.2d 667 (1940).

17. The court found that since petitioner's residentially zoned property was in a predominantly commercial neighborhood, to allow the ordinance to govern would effectively deny petitioner not just some uses, but all reasonable beneficial uses of his property, and would therefore be unreasonably arbitrary and oppressive as applied. 55 Wyo. at 216, 97 P.2d at 672.

18. 55 Wyo. at 215, 97 P.2d at 672.

19. City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950).

20. 313 Ky. at 270, 230 S.W.2d at 906.

21. RESTATEMENT OF PROPERTY § 568 (1944).

22. *Id.*, comment *d* at 3326.

properly qualifies the operation of the rule as applied to both the more restrictive cumulative ordinance, and to the increasingly popular noncumulative ordinance.[23]

C. *Ordinances Blocking All Reasonable Uses of Land*

One step beyond the more restrictive zoning ordinance is the ordinance that not only restricts, but renders totally nugatory the rights of a landowner to make reasonable use of his property. In one class of cases, the restriction on use is occasioned solely by the ordinance, and the aggrieved landowner can successfully attack the validity of the ordinance only by showing that if it were enforced, the resulting restriction on his property would preclude its use for any purpose to which the property is reasonably adapted.[24] When, for example, a county zoned an area including plaintiff's land for the single authorized use of quarrying, and plaintiff was unable to sell the land for quarrying purposes, the court held the zoning restraint confiscatory in its operation.[25] In these cases, the state must compensate the owner for the value of his property and must include the value of restrictive covenants, if any, as an additional increment of value.[26]

In a second class of cases, the land is suitable for the single authorized use for which it is zoned, but it is burdened by a restrictive covenant which forbids that use. Although the landowner may desire to use his property in conformity with the zoning ordinance, he is prevented from so doing by the threat of his neighbors asserting their beneficial interests in covenants affecting the use of his land. In this class of cases, unless the landowner is accorded relief by the courts, the land stands idle because he cannot violate either the zoning or the covenant restriction. The effect is the same as in the first class of cases—eminent domain compensation is required.

Cases of this second type are relatively infrequent and some of those said to be in this class fail to withstand closer scrutiny. In one case,[27] for example, decided on the basis that the landowner would be denied

23. *See* text accompanying notes 32-34 *infra*.

24. *E.g.*, Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) (undeveloped, unrestricted area zoned residential); Buckley v. Fasbender, 118 N.Y.S.2d 799 (Sup. Ct. 1952), *modified*, 281 App. Div. 985, 121 N.Y.S.2d 3 (1953) (area rezoned from residential to industrial); Sundlun v. Zoning Bd. of Review, 50 R.I. 108, 145 A. 451 (1929) (residential zoning allowing installation of gasoline station if approved; denial of petition reversed as unconstitutional deprivation of property).

25. Kozesnik v. Montgomery Township, 24 N.J. 154, 131 A.2d 1 (1957).

26. Brickman, *The Compensability of Restrictive Covenants in Eminent Domain*, 13 U. FLA. L. REV. 147 (1960). *See also* text accompanying notes 72-78 *infra*.

27. Weber v. City of Cheyenne, 55 Wyo. 202, 97 P.2d 667 (1940).

all reasonable uses if the ordinance were to prevail, statements regarding the superiority of the covenant were mere dicta because the same restrictions on use would have been present by virtue of the ordinance even without the effect of the covenant. One writer, on the other hand, would have reached the same result by applying the rule that favors the covenant and would have struck down the ordinance as confiscatory, even though the ordinance was cumulative.[28] It also has been suggested that a better view would require a finding that the covenant is unenforceable, thereby deferring to public policy as expressed in the zoning ordinance.[29] A recent condemnation case lends support for this position by stating that "the law frowns on a sterile stalemate on the use of land."[30] In that case, the landowner's property apparently was burdened by a residential use covenant and subsequently was zoned solely for industrial use. The state contended that the proper measure of value was as residential property, since that was the only use allowed under the covenant. The landowner, however, relying on the ordinance, sought to have the land valued as industrial property. The court held that the proper basis for valuation was as industrial property, thereby disregarding the effect of the covenant. Unfortunately, the court chose to support its decision on three different grounds,[31] without indicating whether any single ground would be controlling. The case does suggest, however, that in conflicts of this nature courts tend to look more to the public interest and to the hardship on the landowner, and accord less sanctity to covenant rights.

D. Likelihood of Increasing Litigation

Although cases involving a more restrictive or totally displacing ordinance are rare under the traditional pattern of cumulative zoning, the increasing popularity of new techniques, such as noncumulative or single-use zoning,[32] promises to result in increased litigation. Single-use

28. Berger, *Conflicts Between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 NEB. L. REV. 449, 465 (1964).

29. *See* note 78 *infra* and accompanying text.

30. 1.77 Acres of Land v. State *ex rel.* State Highway Dep't, 241 A.2d 513, 516 (Del. Super. Ct. 1968) (residential restrictive covenant held inapplicable when, because of industrial zoning, enforcing the covenant would render land unusable).

31. The bases of the court's decision were (1) that the neighborhood had changed, thereby rendering the continued validity of the covenant doubtful, (2) that there was some question concerning the applicability of the deed restrictions to the land in question, and (3) that all use of the land would be denied the landowner if the covenant were permitted to be enforced. *Id.*

32. Note, *Industrial Zoning to Exclude Higher Uses*, 32 N.Y.U.L. REV. 1261 (1957); Comment, *Non-cumulative Zoning Ordinances Upheld*, 20 OHIO ST. L.J. 708 (1959); 52 MICH. L. REV. 925 (1954); Annot., 38 A.L.R.2d 1141 (1954).

zoning may take a number of forms. When an area is declining in value, a municipality may zone that area for single family residential uses in order to maintain the land values or the aesthetics of a particular neighborhood.[33] More frequently, a municipality may desire to create an industrial park, excluding higher uses. In either case, the presence of private covenants almost certainly will give rise to litigation. When these important public policy goals are in issue they must be balanced to determine whether rights enjoyed under private covenants will be cut off, and whether compensation is required. Through single-use zoning, for example, a high tax base may be preserved for areas of a city with a heavy demand for particular types of city services, traffic and industrial safety hazards can be more easily isolated and regulated, and the overall aesthetic goals of a community can be more readily achieved.[34]

III. Analysis of Present Law

Three major questions confront a court when covenant rights and ordinances apparently conflict: first, whether any rights of the landowner are circumscribed by the ordinances; secondly, whether any rights so circumscribed are derived solely from the covenant rather than from land ownership generally; and thirdly, whether compensation is constitutionally required when rights ascribed to a private promise respecting the use of land are infringed or abrogated by a subsequently enacted ordinance.

A. Interference with the Rights of a Landowner

Since every zoning ordinance in some measure restricts private land use,[35] landowners' rights frequently are circumscribed by zoning ordinances. There is no problem of interference with the rights of a landowner, however, when the covenant is more restrictive than the ordinance, since by definition, under a cumulative zoning scheme the more restrictive use is approved under a less restrictive ordinance.[36]

33. *See, e.g.*, City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969) (use of private property can be restricted for the public purpose of preventing deterioration of the neighborhood and depreciation of property values); Kansas City v. Liebi, 298 Mo. 569, 252 S.W. 404 (1923) (zoning ordinance restricting land to residential use for the purpose of enhancing the value of property and adding to the beautification of an adjacent highway held constitutional).

34. *See* Katobimar Realty Co. v. Webster, 20 N.J. 114, 129, 118 A.2d 824, 832 (1955) (Brennan, J., dissenting) (duty of selecting particular uses vested by legislature in the municipal officials rather than the courts).

35. It is well settled that government has the power to abridge private rights for the public benefit. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

36. *See* text accompanying notes 5-6 *supra*.

Similarly, rights of a landowner are not cut off by an ordinance when the covenant itself is found to be outdated and therefore no longer enforceable. This is simply an expression of the traditional doctrine of changed conditions.[37] While zoning is one factor that courts will consider in determining whether covenant restrictions should be terminated because of changed conditions,[38] the prevailing view is that a change of zoning classifications alone is not determinative of this issue.[39] Some courts, however, have stated that the mere existence of a zoning ordinance tends to show that the covenant is outdated and should no longer be enforced.[40] It has been further suggested[41] that these courts accord undue evidentiary weight to zoning classifications because it allows them to dispose of cases easily on the basis of changed conditions. In this manner a zoning ordinance does effectively extinguish rights of the landowner. Many courts, however, seem to have lost sight of the public policy bases of zoning when deciding cases in which deed covenants are present.[42] As a result, their opinions seldom reflect a policy preference in favor of zoning ordinances, but they similarly rarely reach the question whether any validly subsisting rights of a landowner are being circumscribed. Using this basic procedure, a Florida court[43] has declared, contrary to the weight of authority, that a restrictive covenant is not a compensable property right. In that case the question was whether restrictive covenants prohibiting the nonresidential use of certain property were applicable to a school board in its attempt to use the property for a school building. Rejecting the majority view, the court held that the building restrictions were not true easements, but rather negative easements or equitable servitudes, and thus were analogous to contract rights. As such, they were enforceable only as against individuals, and not as against the state.[44] The court stated:

37. Lincoln Sav. & Loan Ass'n v. Riviera Estates Ass'n, 7 Cal. App. 3d 449, 87 Cal. Rptr. 150 (1970) (neighborhood unchanged); Exchange Nat'l Bank v. City of Des Plaines, 127 Ill. App. 2d 122, 262 N.E.2d 48 (1970) (changed character or environment of property); Annot., 4 A.L.R.2d 1111 (1949).

38. Wolff v. Fallon, 44 Cal. 2d 695, 284 P.2d 802 (1955) (numerous factors considered).

39. Schulman v. Sherrill, 432 Pa. 206, 246 A.2d 643 (1968) (change in character of neighborhood is only one factor affecting zoning changes).

40. Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W.2d 1024 (1938) (covenant not enforced); Szilvasy v. Saviers, 70 Ohio App. 34, 44 N.E.2d 732 (1942) (covenant not enforced); Hysinger v. Mullinax, 204 Tenn. 181, 319 S.W.2d 79 (1958) (covenant not enforced). *But see* Gordon v. Caldwell, 235 Ill. App. 170 (1924) (covenant enforced); Bachman v. Colpaert Realty Co., 101 Ind. App. 306, 194 N.E. 783 (1935) (covenant enforced).

41. Comment, *The Effect of Private Restrictive Covenants on Exercise of the Public Powers of Zoning and Eminent Domain*, 1963 WIS. L. REV. 321, 324.

42. *See generally* Brickman, *supra* note 26, at 162 n.65.

43. Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955).

44. *Id.* at 640-41.

> The recent trend, and we think the better view, if it is not actually the majority view, is that so ably presented and adopted . . . in the case of *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85, 122 A.L.R. 1456 . . . . There it was concluded . . . that restrictions of the kind we are concerned with here . . . convey no interest in the land, are not true easements, and at best may be relied upon and enforced between the parties thereto and their successors with notice. That Court concluded, and we think correctly, that such restrictions do not vest in the owners of other lands in the subdivision a property right for which compensation must be made in the event such lands are taken for and devoted to a public use even though such use is inconsistent with the use to which said lands are restricted by private agreement.[45]

Two criticisms of this approach help to focus upon the need for a rationale that goes beyond shallow preliminary construction. First, there is a point beyond which a property right becomes so substantial that efforts by a court to construe it away become unconvincing. Secondly, to hold, as these courts do, that a particular type of covenant right is no longer enforceable because outdated, or that it is not a compensable right, is to go too far, without regard to the traditional "balancing" tests required for a noncompensable taking under the police power.[46] Moreover, many courts still tend to accompany their decisions with confusing dicta[47] indicating that zoning ordinances cannot override, annul, abrogate, or relieve land from building restrictions placed thereupon.[48] A more forthright approach might begin with the premise that private rights can be restricted by valid zoning ordinances, and then

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45. *Id.* at 642.

46. Action by a municipality in this area can generally be classified as either noncompensable taking under the police power, or compensable taking under the eminent domain power. For a more complete discussion see text accompanying notes 64-70 *infra*.

47. *See, e.g.*, Hirsch v. Hancock, 173 Cal. App. 2d 745, 343 P.2d 959 (1959) (residential restriction in commercial area); Exchange Nat'l Bank v. City of Des Plaines, 127 Ill. App. 2d 122, 262 N.E.2d 48 (1970) (zoning changes are factors to be considered in suit to enforce deed restrictions); Winfrey v. Marks, 14 Ohio App. 2d 127, 237 N.E.2d 324 (1968) (zoning change does not invalidate deed restriction of substantial value to other lots); Schulman v. Serrill, 432 Pa. 206, 246 A.2d 643 (1968) (zoning change does not serve as evidence of a change in the character of the neighborhood); Hysinger v. Mullinax, 204 Tenn. 181, 319 S.W.2d 79 (1958) (change in character and zoning of area will not preclude suit for damages even though equity will not enforce deed restrictions); Fox v. Miner, 467 P.2d 595 (Wyo. 1970) (zoning change does not destroy deed restrictions, but is a factor to be considered when determining whether equitable enforcement is justified); Annot., 54 A.L.R. 843 (1928).

48. Many zoning ordinances, particularly early ones, contain recitals expressly disavowing any purpose to interfere with existing deed covenants. *See, e.g.*, Burgess v. Magarian, 214 Iowa 694, 243 N.W. 356 (1932); Kramer v. Nelson, 189 Wis. 560, 208 N.W. 252 (1926). The zoning ordinances are strikingly similar. The Des Moines ordinance provided that: "It is not intended by this ordinance to interfere with or abrogate or annul any easements, covenants or other agreement between parties." 214 Iowa at 699, 243 N.W. at 358. The Milwaukee ordinance provided that: "It is not intended by this chapter to interfere with or abrogate or annul any easements, covenants or other agreements between parties." 189 Wis. at 565, 208 N.W. at 254.

proceed to inquire into the validity of the ordinance as it infringes on the property rights in question.

B. Status of the Covenant Right

Statements that zoning ordinances can never supersede private agreements often convey the idea that some peculiar sanctity is attached to the concept of a private covenant and that a zoning ordinance is invalid to the extent that it interferes with covenant rights.[49] It thus becomes appropriate to address the second question posed—whether a deed covenant constitutes a separate property right above and in addition to rights generally arising out of land ownership. More narrowly stated, the inquiry is whether the addition of a covenant right on a particular parcel of land will render unduly oppressive or confiscatory that which would otherwise constitute a valid, noncompensable exercise of police power.[50]

The view that a valid deed restriction "is neither nullified nor superseded by the adoption or enactment of a zoning ordinance"[51] is often proclaimed to be a creature of dicta.[52] This position, however, finds some support in the rationale that any rights of the owner cut off by the zoning ordinance are derived from land ownership generally, rather than from the covenant.[53] According to this approach, the covenant is not relevant, since it can neither increase nor diminish rights inherent in land ownership to which no covenants are attached. It is this latter bundle of rights against which an ordinance should be measured in determining whether the ordinance is within the police power. One noted authority,[54] moreover, has rejected the view that the validity of an ordinance is related to the existence of a private promise respecting the use of land, and has asserted that covenants and ordinances are entirely

49. *See, e.g.*, Annot., 54 A.L.R. 843 (1928).

50. It should be noted that a negative answer to this question does not preclude the possibility that a covenant right may yet be a conceptually separate property right, since the test of when a property right is of such magnitude that it cannot be restricted without compensation is not absolute, but is determined by the relative restrictions of use imposed by the ordinance. For a discussion of this test see text accompanying notes 61-63 *infra*.

51. Dolan v. Brown, 338 Ill. 412, 419, 170 N.E. 425, 428 (1930) (residential restriction in area zoned commercial).

52. Berger, *supra* note 28; 1963 WIS. L. REV. 321.

53. Van Hecke, *supra* note 5, at 421.

54. "The zoning restrictions imposed upon a property owner's land are the measure of his obligations to the community; the obligation of a private covenant is merely an indication of the measure of his obligation to a private party, which may or may not be enforceable, but which cannot, in either event, affect the necessity of conforming to the comprehensive plan set forth in the ordinance." Rathkopf 74-3.

separate and independent obligations.[55] This view is significant in recognizing that the rule firmly entrenched by *Village of Euclid v. Ambler Realty Co.*,[56] establishing priority for zoning ordinances that conflict with private rights, also places zoning ordinances in a position superior to rights acquired under private covenants. Thus a covenant right is not a distinct interest in land that must be approached with some device other than the zoning ordinance if it is to be in any way restricted. What remains unclear is whether the covenant right represents some element of value, other than a separate property right, which courts may freely disregard without compensation to the owner.

The view that all landowners' rights are derived from general ownership is not in harmony with eminent domain cases.[57] These cases continue to treat a covenant right as something qualitatively different from rights arising from general ownership, and consider it an element of value possessed by the landowner that cannot be violated by the municipality without compensation to the landowner. Moreover, both courts and municipalities often recognize some right or element of value in the landowner in addition to rights arising out of land ownership by allowing certain existing uses[58] to remain for a period of time after they have been formally disallowed by a zoning ordinance.[59] Thus, insofar as restrictive covenants are not imposed expressly to block or to increase the award in eminent domain proceedings, they are generally viewed as constituting a distinct and separate property right.[60] Even though this rule may not be desirable in all cases, at least a beneficiary whose covenant right is rendered worthless by a zoning ordinance probably can obtain compensation therefor on the ground that a vested right has been taken for public use.

C. *Is Compensation Constitutionally Required?*

Constitutional guarantees of private rights are subject to the

55. Mr. Rathkopf has stated that: "The absurdity of a claim that a zoning restriction which is fully operative against land theretofore wholly free from any restriction, is ineffective against land burdened with a private restriction is obvious." *Id.* at 74-4 n.4.

56. 272 U.S. 365 (1926).

57. *See* text accompanying notes 72-78 *infra*.

58. *E.g.*, Rehfeld v. City & County of San Francisco, 218 Cal. 83, 21 P.2d 419 (1933) (grocery store in area rezoned residential); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958) (nonconforming junkyard business to terminate within 3 years).

59. *See generally* Anderson, *Nonconforming Uses—A Product of Euclidian Zoning*, 10 SYRACUSE L. REV. 214 (1959); Katarincic, *Elimination of Non-conforming Uses, Buildings, and Structures by Amortization-Concept Versus Law*, 2 DUQUESNE L. REV. 1 (1963); Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305 (1955).

60. Smith v. Clifton Sanitation Dist., 134 Colo. 116, 300 P.2d 548 (1956).

qualification that they may be restricted by governmental agencies acting under the police power of the state.[61] In order for a zoning ordinance to so restrict property rights, the ordinance must satisfy two conditions. First, the purpose for which the ordinance is enacted must bear a substantial relationship to the public health, safety, morals, or general welfare.[62] Secondly, the ordinance must not permanently restrict the use of the property involved so that it cannot be used for any reasonable purpose. Even if the ordinance satisfies the first constitutional test, failure to meet the second requirement is generally regarded as a taking of property without just compensation, and therefore beyond the permissible scope of police power.[63] The constitutional validity of a zoning ordinance that is imposed on an area subject to pre-existing restrictive covenants, primarily turns on whether the ordinance satisfies the second test, relative to the burden of the regulation on the landowner.

At least one article has stated that the difference between noncompensable, constitutionally permissible damage to a property owner under the police power, and a deprivation of property rights that requires compensation under the power of eminent domain is merely one of degree.[64] A recent Missouri decision[65] similarly has recognized that these two concepts inevitably shade over into one another. That case upheld the validity of a single statute providing for joint exercise of zoning and eminent domain powers in a municipality's efforts to revive an old residential area of the city by zoning it exclusively for single family residences. The case makes the significant suggestion that a balancing test must be employed to determine whether compensation is required, and that the loss in value to the landowner in having to comply with the ordinance must vary with the balance. Thus, a single exercise of public authority may require compensation for some landowners but not for others.

1. *Diminution in Value Test.*—The heart of the problem whether

61. Eleopoulos v. City of Chicago, 3 Ill. 2d 247, 250, 120 N.E.2d 555, 557 (1954) (zoning ordinance that prohibited commercial use within residentially zoned area held reasonable and in the public interest).

62. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

63. Symonds v. Bucklin, 197 F. Supp. 682 (D. Md. 1961) (plaintiff failed to prove that he could not receive a reasonable return on the fair value of the property if he had to comply with the zoning ordinance). *See also* Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) (residence-zoning restriction held invalid when plaintiff showed he could not make a reasonable use of the property within the zoning requirement).

64. Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 609 (1954).

65. City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969).

to require compensation is describing the point at which an uncompensated interference with private rights in land constitutes an unconstitutional taking. One formula, designed to define this point, requires a balancing of the urgency of the condition sought to be corrected against the cost to the property owner of complying with the new ordinance—the diminution in value of the landowner's property.[66] One California court has attempted to apply this formula by instructing that:

> The fact that plaintiff's property may depreciate in value as a result of rezoning does not establish unreasonableness or invalidity, for "damages caused by a proper exercise of the police power is merely one of the prices an individual must pay as a member of society."[67]

This cost of societal membership is not unlimited, however, and it is generally held that substantial decreases in property value will warrant compensation. In one case,[68] for example, the value of a parcel of land zoned solely for residential use increased from 8,728 dollars to 28,000 dollars over a seven year period. The ordinance was held not to require compensation as being confiscatory, even though at the end of the same period the land would have been worth between 100,000 and 125,000 dollars if used for industrial purposes. Although cases continue to hold that there is a limit to the extent to which a city can properly destroy or diminish property values without compensation,[69] it is difficult to predict, in any one case, precisely where this limit will be drawn.[70]

Every court faced with an ordinance, which, if upheld, would render covenant rights either unenforceable or of less value, must come down on one side or the other of the line dividing noncompensable police power

66. Incorporated Village v. Paulgene Realty Corp., 24 Misc. 2d 790, 200 N.Y.S.2d 126 (Sup. Ct. 1960) (defendants were not compelled to erect an expensive fence beeause there would be no justifiable corresponding benefit to the general public).

67. Robinson v. City of Los Angeles, 146 Cal. App. 2d 810, 304 P.2d 814 (1956). This application, however, may be criticized as circular, since the validity of the exercise of police power is the very question that is posed.

68. Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961).

69. *See, e.g.*, Vartelas v. Water Resources Comm'n, 146 Conn. 650, 153 A.2d 822 (1959) (no unconstitutional taking of property when only one particular type of structure was denied a construction permit); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (statute prohibiting sub-surface coal mining where it would cause subsidence of dwellings was an unconstitutional extension of the police powers when the landowner had deeded the land with express reservation of the right to remove all coal beneath the surface).

70. In State v. Hillman, 110 Conn. 92, 105, 147 A. 294, 299 (1929), there appeared to be no limit whatsoever upon nonconfiscatory police power taking. In that case, the city refused to allow restoration after more than 50% of a company's buildings were destroyed by fire. This was held to be a fair exercise of the police power when the restoration, if permitted, would have continued a nuisance in a zoned area.

taking from compensable eminent domain taking.[71] The primary obstacle to characterizing violations of private promises as noncompensable police power takings is not as most courts conclude that a private promise respecting the use of land represents an element of value in addition to other values arising out of land ownership. It is, rather, that many courts seem to apply the diminution in value test to covenant rights separately, rather than considering the covenant right, and the value thereof that inures to the beneficiary, as an integral part of the entire bundle of property rights.

If the value of a private promise respecting the use of land is viewed as a separate right for the purpose of balancing it against the public purpose sought to be achieved by a zoning ordinance, then it is difficult to see how any diminution of that value by a public authority could be less than a complete taking and a total restriction of use, requiring compensation under eminent domain power. In one early case,[72] a Michigan court determined that when a municipality sought to erect a fire station on land restricted to residential use, the violation of private covenants was more than a mere permissible regulation under the police power; it amounted to an appropriation of private rights requiring compensation to the beneficiaries of the covenants. Rejecting the defense that a municipality is not bound by such covenants, the court held that the validity of a building restriction is affected neither by the character of the parties in interest nor by the nature of the public interest sought to be promoted.[73] Similarly, compensation was required when beneficiaries of restrictive covenants objected to the building of a public school in a restricted residential area.[74] Finally, in a Tennessee decision,[75] a municipality proceeded to erect a water tower on one of several lots subject to residential restrictions. The court, however, held that compensation was required, stating: "[T]he ownership of the right to restrict the use of a given parcel of land to a certain use is, to that extent, a property right in that lot, for which, when deprived thereof, he [the landowner] should be compensated."[76]

71. This, of course, assumes that the court does not construe away the covenant right without reaching the question whether the ordinance should prevail. *See* text accompanying notes 37-49 *supra*.

72. Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911).

73. *Id.* at 473, 133 N.W. at 320.

74. Town of Stamford v. Vuono, 108 Conn. 359, 143 A. 245 (1928).

75. City of Shelbyville v. Kilpatrick, 204 Tenn. 484, 322 S.W.2d 203 (1959). *Contra*, Moses v. Hazen, 69 F.2d 842, 843 (D.C. Cir. 1934); Arkansas State Highway Comm'n v. McNeill, 238 Ark. 244, 381 S.W.2d 425 (1964).

76. 204 Tenn. at 490, 322 S.W.2d at 206.

Courts following the majority rule,[77] that a restrictive covenant is a compensable interest for the purpose of eminent domain proceedings, have created a logical straightjacket that makes it conceptually difficult ever to treat the abrogation of covenant rights as a noncompensable taking within the police power. It is difficult to imagine a fact situation in which a court taking this approach and viewing the covenant as a separate property right would consider the abrogation of a covenant right as a mere restriction rather than as an appropriation or taking. It would seem that a private promise, if it is isolated conceptually as a separate right, must either exist as an enforceable right, or not exist at all. Moreover, because of the strained fiscal condition of many state and local governments, the persistence of this view, as a practical matter, might cause the total obstruction of much public planning.

2. *Proposed Standard.*—It is suggested that a better formula for determining whether compensation is required is by measuring the diminution in value of a landowner's property against the entire bundle of rights, or value, to which he is entitled by virtue of: (1) land ownership generally; and (2) any substantial value arising out of private promises regarding use of the land. Were courts to consider the value of the remaining range of uses available to a landowner, then a finding that a violation of a covenant right constitutes a valid noncompensable taking would be at once easier, and more equitable. Moreover, under a "total value" approach it might be found that the source of diminution in value in many cases is due to a change in neighborhood conditions rather than to the enactment of the zoning ordinance. When an area previously restricted by deed covenants to residential use is later zoned exclusively for industrial purposes, the diminution in value caused by the ordinance is necessarily slight if the area is already becoming industrial, and property values for residential uses were declining even before the passage of the ordinance.[78]

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77. *See generally* Brickman, *supra* note 26.

78. *See* RATHKOPF 74-4, -5 which states: "The rule expressed above would meet its sternest test in a situation in which land restricted by covenant to one family dwelling use was placed by the zoning ordinance in a district in which only industrial uses were permitted and from which dwellings were expressly excluded. Two different contrary approaches to this problem are possible:

1. That in the light of the existence of the covenant prohibiting uses other than for one family residence, the operation of the ordinance renders the land unuseable for any purpose; consequently the ordinance operates in confiscatory manner and is unconstitutional.

2. That the private covenant is unenforceable (a) because of public policy, and (b) because those conditions which uphold the zoning restriction itself as reasonable, including the ordinance restriction itself, and the actual industrial use of the other lands in the district inspired by the zoning ordinance render the private covenant restriction unreasonably oppressive and incapable of enforcement. Of the two approaches, undoubtedly the latter would be the one adopted by the

This reasoning, however, does not withstand critical analysis in all situations. It is not at all clear, for example, that a change in neighborhood from multiple family dwellings to single family residential units works any diminution in value when the covenants previously allowed multiple family uses and the subsequent ordinance established a district exclusively for single family dwellings. In all probability, the land unrestricted by the ordinance would be of more value for apartments than for single family dwellings. Thus any diminution in value when the ordinance attempts to impose a higher use than required by deed covenants, is clearly traceable to the ordinance.

Although this source-of-the-detriment test does not always absolve the city of a causal relation to any loss in value of the landowner's total property right, it is an important, and in fact quite equitable approach that every court should consider when deciding whether compensation is required. As a component of the overall approach that courts should be taking, this test rejects mechanical rules and reinstates a case-by-case balancing approach, ultimately producing decisions more just to both the municipality and the private landowner.

IV. Suggestions for New Legislative and Judicial Approaches

Private promises respecting the use of land do not preclude the effectuation of public zoning ordinances. Deed covenants merely interfere with zoning ordinances by imposing a potential burden of compensation on the municipality. Since a majority of courts regard the covenant right as a compensable interest and since conflicts between covenants and zoning ordinances promise to become more frequent with increased employment of new zoning techniques, new approaches for dealing with the covenant-zoning conflict are needed to insure an equitable balancing of competing interests and to develop a set of rules more useful to bench and bar alike. Unless the legislature intervenes with some legally acceptable plan for terminating deed restrictions or unless the courts develop an innovative approach that balances the competing interests and resolves the conflict, private promises respecting the use of land in many cases will be made to yield only at a cost to the city far in excess of any benefit to be derived from the termination

courts. Assuming an industrially zoned district reasonably developed as such and with land values for such use obtainable with respect to lands not burdened by such covenant, it is apparent that the confiscation of value does not arise through operation of the zoning restriction. It is also obvious that land, situated in a district zoned 'industrial' and substantially used for such purpose, would have little, if any, value for single family residences, and that this would be the source of any confiscation of value that might exist." *Cf.* Hirsch v. Hancock, 173 Cal. App. 2d 745, 343 P.2d 959 (1959); Clintwood Manor, Inc. v. Adams, 29 App. Div. 2d 278, 287 N.Y.S.2d 235 (1968).

of the restrictions.[79] Traditional means of discharging outdated deed covenants will not operate on all such covenants.[80] Moreover, the impoverished fiscal condition of most state and local governments precludes, as a practical matter, resort to eminent domain to terminate obstructive deed covenants.

A. Suggestions for Legislative Innovation

Although the power to zone generally is delegated by the state to municipalities, any discussion of zoning would be incomplete without a consideration of other means by which a state legislature can exercise its police power for the purpose of affecting efficient land use. A number of states have enacted statutes that purport to limit the effective duration of land control devices such as restrictive covenants, rights of entry, and powers of termination.[81] Most authorities agree[82] that there is no constitutional bar to the prospective application of these statutes.[83] It is generally held, however, that the retroactive application of these statutes is unconstitutional as a violation of due process of law and impairment of contractual obligations.[84] Nonetheless, legislation of this nature is an eminently workable solution to many of the problems that arise in this area. Legislation with prospective application will, over a

79. "Were we to recognize a right of compensation in such instances, it would place upon the public an intolerable burden wholly out of proportion to any conceivable benefits to those who might be entitled to compensation." Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637, 643 (Fla. 1955).

80. *See* Winfrey v. Marks, 14 Ohio App. 2d 127, 237 N.E.2d 324 (1968) (covenant or restriction is still of substantial value to the dominant lot, notwithstanding the changed conditions of the neighborhood in which the lot is situated and equity will restrain violation of the covenant).

81. The following states limit the duration of restrictive covenants, rights of entry, and powers of termination: ARIZ. REV. STAT. ANN. § 33-436 (1956); COLO. REV. STAT. ANN. § 118-8-4 (1963); CONN. GEN. STAT. REV. § 45-97 (1958); FLA. STAT. ANN. § 689.18 (1969); GA. CODE ANN. § 29-301 (1969); ILL. ANN. STAT. ch. 30, §§ 37(g)-(h) (Smith-Hurd 1969); IOWA CODE ANN. §§ 614.24-.25 (Supp. 1971); KY. STAT. ANN. § 381.219 (1970); ME. REV. STAT. ANN. tit. 33, § 103 (1964); MASS. ANN. LAWS ch. 184A, § 3 (1970); MICH. STAT. ANN. § 26.46 (1957); MINN. STAT. ANN. § 500.20 (1947); NEB. REV. STAT. § 76-2,102 (1966); N.Y. REAL PROP. ACTIONS LAW §§ 1951, 1953-55 (McKinney 1963); N.Y. REAL PROP. LAW § 345 (McKinney 1968); R.I. GEN. LAWS ANN. §§ 34-4-19 to -21 (1969).

82. *See* Comment, *Legislative Limitation of Reverter and Forfeiture Provisions In Conveyances and Devises of Land—A Proposed Statute for Kansas*, 15 U. KAN. L. REV. 346, 349-51 (1967); *cf.* Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951).

83. Georgia, for example, enacted one such statute in 1935. [1935] Ga. Acts 112. Although 27 years later it materially altered the scope of this statute, there were no reported cases challenging its prospective application. *See* [1962] Ga. Acts 540.

84. *See, e.g.*, Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954); Board of Educ. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965). Courts may be prepared to uphold the retroactive application of these statutes when the termination of rights fits within the bounds of noncompensable police power taking. *See* text accompanying notes 91-92 *infra*.

period of time, begin to yield its rewards in the form of fewer outdated covenants. As an added precaution, a clear statement of legislative intent should accompany any legislation terminating property interests in order to provide a stronger basis for a subsequent judicial holding that the legislative action was a proper exercise of police power.[85] Another type of statute, generally referred to as a "marketable title act,"[86] requires periodic recordation of a declaration of intention to reserve certain interests in land in order to maintain the effectiveness of the interests.[87] Generally, however, the purpose of this kind of statute is to enable landowners, not public zoning authorities, to remove or prevent enforcement of obsolete, uncertain, or otherwise objectionable restrictions.[88] The same constitutional principles as discussed above apply a fortiori when such restrictions are sought to be removed in the name of public planning.

In addition to directly regulating property interests by limiting the duration of their enforceability, state legislatures also might consider the feasibility of indirect regulation. First, legislatures might alter certain evidentiary rules in order to assure that the collective benefit to the public receives adequate consideration in determining whether compensation should be required. A legislature, for example, might declare that zoning is rebuttably presumed to constitute a change of condition within the zoned area for the purpose of applying the well-recognized change of neighborhood doctrine. By shifting the burden of proof, a statute of this kind would more readily give effect to the public policy expressed in the zoning ordinance and would keep many otherwise frivolous challenges to zoning ordinances out of the courts. The

85. W. LEACH & J. LOGAN, FUTURE INTERESTS AND ESTATE PLANNING 75 n.45 (1961): "The statement could well be expanded by stressing that: (a) Land is the one basic resource of the economy and that any private arrangement which prevents its most economical use is against the public interest, (b) Unrealistic or obsolete restrictions reduce the value of land and thus reduce the tax base and require proportionately higher taxes on unrestricted land, and (c) Land use planning by public authorities in the public interest has now reduced the need for, and utility of, private restrictions for private purposes."

86. *See, e.g.*, Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957); Note, *The Massachusetts Marketable Title Act*, 44 B.U.L. REV. 201 (1964).

87. The following state statutes provide for marketable title acts which require rerecording: CONN. GEN. STAT. REV. §§ 47-33(c) to (g) (Supp. 1969); FLA. STAT. ANN. §§ 712.01-.06 (Supp. 1971-72); ILL. ANN. STAT. ch. 30, §§ 27-29 (Smith-Hurd 1969); IND. ANN. STAT. §§ 56-1101 to -1106 (Supp. 1970); IOWA CODE ANN. § 614.17 (Supp. 1971); MICH. STAT. ANN. §§ 26.1271-.1279 (1970); MINN. STAT. ANN. § 541.023 (Supp. 1971); NEB. REV. STAT. §§ 76-288 to -298 (1966); N.D. CENT. CODE § 47-19A-01 (1960); OHIO REV. CODE ANN. §§ 5301.47-.56 (Baldwin 1964); OKLA. STAT. ANN. tit. 16, §§ 61-66 (Supp. 1970-71); S.D. COMPILED LAWS ANN. §§ 43-30-1 to -15 (1967); UTAH CODE ANN. §§ 57-9-1 to -6 (1953), *as amended*, (Supp. 1969); WIS. STAT. ANN. § 893.15 (Supp. 1971-72).

88. Labounty v. Vickers, 352 Mass. 337, 225 N.E.2d 333 (1967).

landowner, moreover, would not be denied an opportunity to obtain compensation for the violation of the covenant if he could establish that the private promise was of substantial value to him even when viewed as a part of the total value of his parcel.

Secondly, legislatures might consider subjecting private covenants to mandatory judicial or administrative review[89] as a condition precedent to their creation or enforceability. Presently the only requirements for creating mutually enforceable restrictions are (1) the intent of the parties, and (2) some form of notice thereof to owners and subsequent purchasers.[90] There seems to be a compelling public policy argument that, to be allowed effect, the deed covenants should be subject to the same judicial review as zoning ordinances. It is beyond doubt that officials who draft zoning plans are more politically responsible than private developers, and even their designs are almost uniformly subjected to judicial or administrative review. It is equally important that privately imposed plans for land use conform to the general development scheme of the community.

B. Suggestions for Judicial Innovation

In addition to legislative approaches, courts can open the door, within constitutional limits, to the timely resolution of problems caused by conflicting land use techniques. Initially, courts should conscientiously attempt, within the bounds of the police power, to uphold the retroactive application of statutes that restrict undesirable property interests. Despite the general rule to the contrary, some courts have succeeded in justifying interference with covenant rights without requiring compensation by holding that the interest abrogated is a species of property rather than a vested property interest, and that there has not been a sufficient interference with that property to constitute a compensable taking. A Florida court,[91] for example, has declared, at least in cases of destruction of covenant rights when public buildings are involved, that a covenant is not a true easement and therefore not a compensable property right. Similarly, an Illinois court[92] has dealt creatively with the question of permissible interference. School trustees

89. Note, *Validity Rules Concerning Public Zoning and Private Covenants: A Comparison and Critique*, 39 S. CAL. L. REV. 409 (1966).

90. Comment, *Removing Old Restrictive Covenants—An Analysis and Recommendation*, 15 U. KAN. L. REV. 582, 583 (1971).

91. Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955); *see* text accompanying notes 44-48 *supra*.

92. Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

brought suit under the Illinois Reverter Act[93] to have any possibilities of reverter in connection with the school board's property declared invalid. Defendants attacked the retroactive application of the statute on constitutional grounds. Upholding the validity of the Reverter Act, the court commented:

> The statute reflects the General Assembly's appraisal of the actual economic significance of these interests, weighed against the inconvenience and expense caused by their continued existence for unlimited periods of time without regard to altered circumstances.[94]

The rationale adopted by the court is unique in that it squarely decides the issue in terms of the operation of police power upon otherwise valid private property rights. Moreover, in using language like "actual economic significance" the court appears to view the possibility of reverter as just one element of value arising from land ownership generally, rather than falling into the trap of treating the interest as a separate bundle of property rights. The interpretative techniques employed by these courts may someday provide the basis for judicial expansion of the power of the state to terminate certain types of property interests constitutionally without compensation.

No case has yet arisen in which a municipality has sought to enjoin a landowner from using his own property for a purpose consistent with his own deed covenants, but contrary to a subsequent, more restrictive, zoning ordinance. It is unclear whether covenant rights can be overridden so readily when no public building project is involved. It is submitted, however, that this extension was made, by implication, in *Taylor v. City of Hackensack*,[95] and that this approach might be useful for courts desiring to reach similar conclusions. The crucial question is whether the private use comes within the penumbra of "public purpose." In most instances in which private developers seek to put property to uses inconsistent with a subsequent comprehensive zoning plan, the courts are armed with a sufficiently strong "public purpose" argument to enjoin enforcement of the covenants attached to the property without requiring compensation.

V. CONCLUSION

The sole constitutional barrier to allowing ordinances to prevail over covenants is the requirement that property shall not be taken for public use without the payment of just compensation. Applying the two

93. ILL. ANN. STAT. ch. 30 § 37e (Smith-Hurd 1969).
94. Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 492, 130 N.E.2d 111, 115 (1955).
95. 137 N.J.L. 139, 58 A.2d 788 (Sup. Ct. 1948).

accepted modes of state action to the private covenant produces a rule that finds (1) a noncompensable taking within the police power when the covenant is merely regulated, and (2) a compensable eminent domain situation when the covenant is taken. It is suggested that in all cases, what is being "acted upon" by state action is not the covenant, but rights arising out of ownership generally. Therefore the determination whether a "regulation" or a "taking" has occurred must be made by comparing the total value of the landowner's rights before the governmental restrictions are imposed with the value after the restrictions are taken into account.

Under the present law this method of balancing interests generally is not followed. As a result governmental restriction is often obtained at a high cost that far overcompensates the private landowner for the amount of detriment actually suffered. If the gain to the public is small when compared to the hardship imposed upon an individual property owner, then there is no valid basis for a noncompensable taking. If it appears plainly, however, that the benefit to the public is substantial when compared to the detriment to the private owner, then courts should be able to authorize the imposition of the ordinance without the requirement of compensation despite violation of covenant rights. The better view seems to be that a covenant right is not a property right in the traditional sense of being something possessed by virtue of ownership, and it is clear that the zoning power cannot be impeded by such rights. It is suggested, however, that American courts find some element of value in these rights that must be thrown into the balance on the side of the landowner in determining whether an ordinance constitutes a taking.

The suggestions offered herein are directed toward finding techniques to insure a more equitable balancing of interests when the compensability of an ordinance restriction is in question. The problem whether compensation is required when deed covenants conflict with zoning ordinances or otherwise impede public planning is one with which courts will have to live for some time. It should be made clear, however, that there are few if any areas in which the weight of the public interest does not justify at least some noncompensable takings in a society in which private property rights have become so deeply interwoven in public planning and necessity.

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