



6-1-1974

Restrictive Covenants in Eminent Domain Proceedings: Southern California Edison Co. v. Bourgerie

Carolyn M. Huestis

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Carolyn M. Huestis, *Restrictive Covenants in Eminent Domain Proceedings: Southern California Edison Co. v. Bourgerie*, 7 Loy. L.A. L. Rev. 327 (1974).

Available at: <https://digitalcommons.lmu.edu/llr/vol7/iss2/5>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

RESTRICTIVE COVENANTS IN EMINENT DOMAIN PROCEEDINGS:

*SOUTHERN CALIFORNIA EDISON CO. v. BOURGERIE*¹

The extent to which negative building restrictions should be compensable² in eminent domain³ proceedings is a matter which has divided American courts. The majority view is that restrictive covenants create *property rights* and, therefore, are compensable when taken by eminent domain.⁴ The minority position, however, is that such restrictions are “mere” *contractual rights* enforceable against private parties in equity but not binding upon the sovereign.⁵ In *Southern Cali-*

1. 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).

2. Illustrative of other interests deemed compensable are (1) easements, *People ex rel. Dept. of Pub. Works v. Buelton Dev. Co.*, 58 Cal. App. 2d 178, 136 P.2d 793 (1943); (2) right of access, *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943); *Liddick v. Council Bluffs*, 5 N.W.2d 361 (Iowa 1942); (3) reversionary interests, *East-San Mateo Land Co. v. Southern Pac. R.R.*, 30 Cal. App. 223, 157 P. 634 (1916); (4) leasehold estates, *Kishlar v. Southern Pac. R.R.*, 134 Cal. 636, 66 P. 848 (1901); *F.W. Woolworth Co. v. Berlin*, 130 A. 741 (N.H. 1925).

3. See *Gilmer v. Lime Point*, 18 Cal. 229 (1861), wherein the court explains the derivation of the phrase “eminent domain”:

To each and every sovereignty belong certain rights which are deemed essential to its existence. These are called by the civilians *jura majestatis*, or rights of sovereignty. Among them is the *jus eminens*, or the supreme power of the state over its members and whatever belongs to them. When applied to property alone, it is called *dominium eminens*, or the right of eminent domain; that is, the right of the sovereignty to use the property of its members for the public good or public necessity.

Id. at 250.

4. See, e.g., *Bauby v. Krasow*, 139 A. 508 (Conn. 1927); C. CLARK, *COVENANTS AND INTERESTS RUNNING WITH THE LAND* 171-74 (2d ed. 1947); Ames, *Specific Performance for and Against Strangers to the Contract*, 17 HARV. L. REV. 174, 177 (1904); Stone, *Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291, 293 (1918).

5. *Moses v. Hazen*, 69 F.2d 842, 844 (D.C. Cir. 1934); Pound, *The Progress of the Law, 1918-1919 Equity*, 33 HARV. L. REV. 813 (1919-1920); Annot., 4 A.L.R.3d 1137 (1965). Because building restrictions are equitable in nature, their enforcement is governed by equitable principles (*Wing v. Forest Lawn Cemetery Ass'n*, 15 Cal. 2d 472, 101 P.2d 1099 (1940)), and the granting of relief is governed by the general principles which control the power to compel specific performance of contracts. *Ludgate v. Somerville*, 256 P. 1043 (Ore. 1927). Injunctive relief is also available as a remedy against the breach of a restrictive covenant. *Brown v. Huber*, 88 N.E. 322 (Ohio 1909). When equitable relief has for some reason been refused, some courts will require the parties to seek their remedies at law. *Bickell v. Morais*, 167 A. 722 (Conn. 1933). Other courts, however, have said that such restrictive covenants can be enforced at law only between the original parties (*Welitoff v. Kohl*, 147 A. 390

*for*nia Edison Co. v. Bourgerie,⁶ the California Supreme Court rejected the minority view⁷ and held for the first time that restrictive covenants are compensable property rights.⁸ Not only does the decision provide a new compensable interest in property, it arguably affords a foundation permitting awards of compensation for the loss of other interests not presently compensable in eminent domain.⁹ Furthermore, *Bourgerie* appears to reflect a trend on the part of the Supreme Court of California to maximize the remedies of local residents disadvantaged by environmentally disruptive developments.

In providing a basis for compensation, Justice Mosk, writing for the majority, suggested that the most productive analysis was not to be located in a distinction between contract and property rights, for "pragmatic considerations of public policy, rather than abstract doctrines of property law,"¹⁰ guide decision making in this area. By rejecting the argument that provision for compensation would discourage development, the court has produced a decision which refashions the balance between the necessity for public projects and the desirability of local control over local development through private zoning, *i.e.*, restrictive covenants. This Note will trace the background leading to the decision, evaluate the arguments relating to it, and explore its potential consequences for land development and local control in California.

I. THE TAKING OF INTANGIBLE PROPERTY RIGHTS

Eminent domain is defined as the "right of the people or government to take private property for public use."¹¹ The exercise of this power is subject to the prohibitions found in the Constitution of the United States.¹² Considerable controversy, however, has arisen as to

(N.J. 1929)), and that other parties to a conveyance which contains a covenant in their favor cannot sue at law upon the covenant. *Giliert v. Reteler*, 38 N.Y. 165 (1867).

6. 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).

7. The court in *Bourgerie* expressly overruled *Friesen v. City of Glendale*, 209 Cal. 524, 288 P. 1080 (1930) and impliedly disapproved of *Sackett v. Los Angeles School Dist.*, 118 Cal. App. 254, 5 P.2d 23 (1931). The latter had stated:

The courts of California have, however, declined to recognize a building restriction of the character here under consideration as a positive easement or right in the land, but have defined it to be merely a right enforceable in equity as between the parties to the contract, or their successors with notice, and have said that it is in the nature of a negative easement or equitable servitude.

Id. at 255, 5 P.2d at 24.

8. 9 Cal. 3d at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77.

9. See notes 102-08 *infra* and accompanying text.

10. 9 Cal. 3d at 173, 507 P.2d at 967, 107 Cal. Rptr. at 79.

11. CAL. CODE CIV. PRO. § 1237 (West 1967).

12. U.S. CONST. amend. V; "No person shall . . . be deprived of life, liberty, or

the meaning of the term "property" and its relationship to the concept of "taking."

Historically, "taking" required a direct physical appropriation of property.¹³ This rigid approach often resulted in a denial of compensation, despite obvious loss, on the grounds that there was no taking of possession, no physical invasion of the property, or no substantial interference with a clearly defined property interest or estate.¹⁴

In an effort to afford compensation in situations where the above requirements were not satisfied, state courts sought to expand the scope of the term "taking" by further clarifying its relationship to the concept of "property." An early case exemplifying this more liberal interpretation is *Eaton v. Boston C. & M.R.R. Co.*¹⁵ wherein the New Hampshire Supreme Court, in allowing recovery for damage from the overflow of water onto plaintiff's land caused by the construction of a railroad, rejected the physical appropriation approach to "taking of property" and, instead, stressed interference with "use" as the crucial inquiry. The court stated:

The vital issue then is, whether the injuries complained of amount to a taking . . . within the constitutional meaning The constitutional prohibition . . . has received . . . a construction which renders it of comparatively little worth, being interpreted much as if it read: "No person shall be divested of the formal title to property without compen-

property, without due process of law; nor shall private property be taken for public use, without just compensation."

13. For a modern approach, see, e.g., CAL. CONST. art. I, § 14, which provides in part: "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner"

14. See *Bakken v. State Highway Comm'n*, 382 P.2d 550 (Mont. 1963). There plaintiff brought an action against the State Highway Commission alleging damages caused by the depreciation of his real property and personal hardship by reason of the proposed construction of an interstate highway through Glendive, Montana. Plaintiff, a home building contractor, had been unable to sell, lease, develop, or finance his real property for building homes since 1957 because of the proposed interstate highway. The Montana constitution provided that the actual value as of the date of service of summons was to be the measure of compensation for all property to be actually taken and the basis of depreciation in value of property not actually taken, but injuriously affected. MONT. CONST. art. III, § 14 (1889). The court found that the plaintiff had no cause of action for the taking or damaging of his property as land and was not damaged by reason of preliminary procedure looking to its appropriation to a public use. Although plaintiff's land had in fact depreciated in value, compensation for diminution in value of property was held not to include infringements of the owner's personal use or enjoyment. 382 P.2d at 551.

15. 12 Am. R. 147 (N.H. 1872). A railroad corporation acting under legislative authority removed a natural barrier situated south of Eaton's land, which served to protect his property from the effect of floods from a neighboring river. As a result, in time of flood, water flowed onto the land carrying sand, gravel, and stone.

sation, but he may without compensation, be deprived of all that makes the title valuable."

To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property . . . "Property is the right of any person to possess, use, enjoy, and dispose of a thing."

If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," *pro tanto*, the owner's "property." . . . "Use is the real side of property."¹⁶

Although the damage due to overflowing was consequential in the sense that it did not follow immediately after construction, the court allowed recovery. The damage was considered to be an actual interference with Eaton's use and possession, and one which would have been actionable if done by a private party without judicial authority.¹⁷

Thus, the question of whether or not an injury constituted a "taking" of property became dependent upon the character of the invasion and the effect of the invasion upon proprietary rights. These proprietary rights were no longer limited to the physical land itself, but included those rights incident to ownership. A "taking" no longer required a direct physical appropriation, but included injuries which constituted a substantial interference with the rights of use, enjoyment, and possession.¹⁸

This liberalizing trend initiated by state courts was given further impetus by a series of Supreme Court decisions which attempted to expand the scope of the taking requirement. In *Pumpelly v. Green Bay Co.*,¹⁹ *United States v. Lynah*,²⁰ and *United States v. Cress*,²¹ the Court held that there were constitutional "takings," even though the government had not directly appropriated the title, possession, or use of the properties. The decisive factor in each case was that an overflow of water onto the claimant's land, during governmental dam con-

16. *Id.* at 151 (emphasis added and citations omitted).

17. *Id.* See *Stock v. Cox*, 6 A.2d 346 (Conn. 1939); *Eller v. Board of Educ.*, 89 S.E.2d 144 (N.C. 1955); *Griswold v. Town School Dist.*, 88 A.2d 829 (Vt. 1952).

18. See *Town of Bedford v. United States*, 23 F.2d 453 (1st Cir. 1927); *Woodside v. City of Atlanta*, 103 S.E.2d 108 (Ga. 1958); *Schuster v. Pennsylvania Turnpike Comm'n*, 149 A.2d 447 (Pa. 1959); *Great N. Ry. Co. v. State*, 173 P. 40 (Wash. 1918); *Fruth v. Board of Affairs*, 84 S.E. 105 (W. Va. 1915).

19. 80 U.S. 166 (1871).

20. 188 U.S. 445 (1903).

21. 243 U.S. 316 (1917).

struction, caused a permanent or recurring physical invasion which materially destroyed or substantially impaired the usefulness of the land.²²

Notwithstanding widespread liberalization as to the conception of the "taking" concept, compensation has been denied in some cases on the questionable rationale that the losses were only "incidental" consequences and not actual "takings."²³ Justice Sutherland in *Sanguinetti v. United States*,²⁴ while recognizing the expansion of the taking concept,²⁵ limited its scope in a case which held that an overflow onto claimant's land was not compensable. The Court held that the overflow must be at least "the direct result of the . . . [government activity] and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."²⁶ Further, the Court required a demonstration that the overflow was not within the contemplation or reasonable anticipation of the government.²⁷ The situation was distinguished from *Pumpelly* and *Lynah* where there was said to be an actual invasion and appropriation as a direct result of the works. The overflowing of the canal, the Court reasoned, could have occurred without such construction; therefore, the injury was held to be indirect and consequential; thus no implied eminent domain obligation to compensate the owner could arise.²⁸

Questions of directness and the extent of invasion became determinative factors in distinguishing a "taking" from mere consequential "damages." According to *Sanguinetti*²⁹ and cases following that line of reasoning³⁰ there was no taking unless the property had been in-

22. 80 U.S. at 181; 188 U.S. at 470; 243 U.S. at 328.

23. *Bothwell v. United States*, 254 U.S. 231, 233 (1920) (no requirement to compensate persons engaged in stock raising for the destruction of their business, or loss sustained through the forced sale of their cattle, as a result of the inundation of their lands by the construction of a dam which made stock raising on them impossible); *Richert v. Board of Educ.*, 280 P.2d 596 (Kan. 1955) (depreciation in value of property owners' home caused by the condemnation proceedings for school construction not a taking of their property, since the depreciation was only consequential damage); *Sester v. Belvue Drainage Dist.*, 173 P.2d 619 (Kan. 1946) (drainage district held not liable for the overflow of water onto plaintiff's land as a result of erosion of the banks of a drainage ditch constructed by the corporation).

24. 264 U.S. 146 (1924).

25. *Id.* at 148-49.

26. *Id.* at 149.

27. *Id.*

28. *Id.* at 148-49.

29. *Id.*

30. *Southern Pac. Co. v. United States*, 266 U.S. 586 (1924); *Christman v. United States*, 74 F.2d 112, 113 (7th Cir. 1934); *Sponenbarger v. United States*, 21 F. Supp. 28, 35 (E.D. Ark. 1937); *Franklin v. United States*, 16 F. Supp. 253, 260 (W.D. Tenn. 1936).

vaded so as to "effectively destroy or impair"³¹ its use.

It was obvious that such a limitation, allowing compensation for direct interference resulting in injury but denying that which was consequential, often resulted in hardship to landowners.³² As a result, Illinois in 1870 became the first state to adopt a constitutional provision³³ providing that private property could not be "taken" or "damaged" for public use without compensation.

The purpose of such constitutional amendments was not to change the substantive law of damages or to enlarge the definition of the term.³⁴ The result was to make the law of damages uniform, so that the property owner might recover against persons or corporations having the power of eminent domain under the same circumstances that would have authorized recovery against one without such power. State after state, following the lead of Illinois, amended its constitution so that today the majority of states require that compensation must be paid for property "damaged" as well as "taken."³⁵

The end result of the expansion of the taking requirement is that compensation for damage has been extended to every species of right and interest which is the subject of ownership, corporeal, or incorporeal, tangible or intangible, real or personal, any interest that has an exchangeable value or that goes to make up wealth or estate.³⁶ The term

31. 264 U.S. at 149.

32. See, e.g., *Bothwell v. United States*, 254 U.S. 231 (1920); *Sester v. Belvue Drainage Dist.*, 173 P.2d 619 (Kan. 1946).

33. ILL. CONST. art. II, § 15 (1870).

34. *Stuhl v. Great N. Ry. Co.*, 161 N.W. 501, 502 (Minn. 1917).

35. "Damaged" or equivalent words appear in the following state constitutions: ALA. CONST. art. XII, § 235 (applies only to damages by municipal, private corporations, and individuals vested with the power of eminent domain); ALAS. CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. 2, § 22; CAL. CONST. art. I, § 14; COLO. CONST. art. II, § 15; GA. CONST. art. I, § III, par. I; ILL. CONST. art. I, § 13; KY. CONST. § 242 (applies only to damages by municipal and private corporations and individuals); LA. CONST. art. I, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. 3, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. III, § 14; NEB. CONST. art. I, § 21; N.M. CONST. art. II, § 20; N.D. CONST. art. I, § 14; OKLA. CONST. art. II, § 24; PA. CONST. art. I, § 10 (applies only to damages by municipal and private corporations and individuals); S.D. CONST. art. VI, § 13; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WYO. CONST. art. I, § 33. Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 IOWA L. REV. 293, 294 n.6 (1970) [hereinafter cited as Stoebuck].

36. *Globe Indem. Co. v. Bruce*, 81 F.2d 143, 150 (10th Cir. 1935); *Samet v. Farmers & Merchants Nat'l Bank*, 247 F. 669, 671 (4th Cir. 1917). See BLACK'S LAW DICTIONARY 1382 (rev. 4th ed. 1968).

thus comprehends not only the thing possessed, but also the rights of the owner *in relation* to the land or thing including the right to exclude others from the use.³⁷

In keeping with these developments, restrictive covenants or equitable servitudes became a compensable property interest in many states.³⁸ California, however, until March, 1973, was among the states which had denied compensation.

II. RESTRICTIVE COVENANTS IN CALIFORNIA

The question of whether or not a building restriction in a deed constitutes "property" under Article I, section 14, of the California constitution,³⁹ thereby requiring compensation to a landowner who has been

37. See generally *Town of Bedford v. United States*, 23 F.2d 453 (1st Cir. 1927); *Woodside v. City of Atlanta*, 103 S.E.2d 108 (Ga. 1958). Just as there may be a "taking" if the condemnee's property interest is less than a corporeal fee simple, so may the condemner "take" property interests of a novel kind which are less than corporeal fee simples. See *United States v. Causby*, 328 U.S. 256 (1946) (repeated low flights by government planes constitute taking of an easement of airspace); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (firing guns over plaintiff's land constituting a similar taking). Of interest is the conflict between *Ackerman v. Port of Seattle*, 329 P.2d 210 (Wash. 1960) and *Griggs v. County of Allegheny*, 168 A.2d 123 (Pa. 1961). In both cases, repeated low flights, if attributed to an agency with the power of condemnation, would clearly constitute takings under the ruling of *Causby*. In *Ackerman*, the Washington Supreme Court held that the municipality had taken an easement of navigation even though it neither owned nor operated any of the planes. 329 P.2d at 217. In *Griggs*, the Pennsylvania Supreme Court held that there was no constitutional taking of property by the county (168 A.2d at 127), but suggested that the injured landowner might recover in tort from the pilots or airlines. *Id.* The conflict was resolved when the United States Supreme Court reversed the judgment in *Griggs*. *Griggs v. County of Allegheny*, 369 U.S. 84 (1962). There Justice Douglas writing for the majority observed:

A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned?

Id. at 89-90.

38. See, e.g., *Town of Stamford v. Vuono*, 143 A. 245 (Conn. 1928); *Allen v. City of Detroit*, 133 N.W. 317 (Mich. 1911); *City of Raleigh v. Edwards*, 71 S.E.2d 396 (N.C. 1952); *Meagher v. Appalachian Elec. Power Co.*, 77 S.E.2d 461 (Va. 1953). *Contra*, *United States v. Certain Lands*, 112 F. 622 (C.C.D.R.I. 1899), *aff'd sub nom.*, *Wharton v. United States*, 153 F. 876 (1st Cir. 1907); *Friesen v. City of Glendale*, 209 Cal. 524, 288 P. 1080 (1930); *State ex rel. Wells v. City of Dunbar*, 95 S.E.2d 457 (W. Va. 1956). See generally Aigler, *Measure of Compensation For Extinguishment of Easement by Condemnation*, 1945 Wis. L. REV. 5 [hereinafter cited as Aigler]; Brickman, *The Compensability of Restrictive Covenants in Eminent Domain*, 13 U. FLA. L. REV. 147 (1960) [hereinafter cited as Brickman].

39. CAL. CONST. art. I, § 14 provides in part, "Private property . . . shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . ."

damaged by the construction of an improvement which violated the restriction, was presented to the California Supreme Court in *Southern California Edison Co. v. Bourgerie*.⁴⁰ In 1964 Bourgerie purchased a tract of land in Santa Barbara from the Bank of America. The deed contained a provision that "property transferred [could not] be used for an electric transmission station."⁴¹ Land retained by the Bank adjacent to the defendant's property was subject to the same provision.⁴² Plaintiff, Southern California Edison Co., sought to acquire the bank's land by eminent domain in order to build an electric substation.⁴³ Southern California Edison joined defendant Bourgerie in its complaint against the bank,⁴⁴ alleging that Bourgerie owned or claimed some "right, title or interest" in the bank's land. Bourgerie answered, claiming that the bank's land was burdened with a restriction

40. 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).

41. *Id.* at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77. The deed also prohibited the use of the land for

nurseries, greenhouses, the keeping of animals or poultry for commercial purposes; commercial beehives; the sale of used automobiles; auto wrecking yard; commercial schools; funeral parlor or mortuary; pawn shop; pet shop; animal hospital; gas, gasoline or oil distributing plant; agricultural processing or packing plant; blacksmith shop; trailer court; feed and fuel store; bath house or commercial dance hall.

Grant deed, Santa Barbara County, Book 2061, at 1251 (July 21, 1964) [hereinafter cited as Grant Deed].

42. Grant Deed, *supra* note 41.

43. *Id.* CAL. CIV. CODE § 1001 (West 1970) provides that any person may acquire private property by eminent domain for any use specified in CAL. CODE CIV. PRO. § 1238 (West Supp. 1974). The section states that this right may be exercised by any public utility for electric power facilities. Bourgerie, in addition to its claim for compensation for violation of the restriction, had claimed that there was collusion between Southern California Edison and the Bank of America:

Before commencing the instant condemnation, SCE and the bank had arrived at an agreement whereby the bank would sell its land to SCE. . . . However, since the bank feared that its sale for a use forbidden by the deed restrictions which the bank had exacted from the owners, would expose the bank to an action for breach of the restrictions, the bank thereupon prevailed on SCE to bring the instant condemnation action to get rid of the owners' restrictions on use of the bank's land. . . . Mr. Peacock, the SCE employee in charge of its land acquisition, characterized the instant condemnation action naming the bank as a defendant, as a "friendly" condemnation, unprecedented in his experience,

Brief for Defendant at 3, 103 Cal. Rptr. 719 (1972).

44. 9 Cal. 3d at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77; *see* CAL. CODE CIV. PRO. § 1244 (West 1967) providing, "The complaint must contain . . . the names of all owners and claimants, of the property, if known or a statement that they are unknown" *See also* CAL. CODE CIV. PRO. § 1246 (West 1967) which provides:

All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

in his favor and that he would be damaged by the proposed construction.⁴⁵

The lower court rendered a verdict in Edison's favor. It observed that the property sought to be condemned would be applied to uses authorized by law,⁴⁶ and, on the authority of *Friesen v. City of Glendale*,⁴⁷ held that the restriction did not create a compensable property interest in the defendants.⁴⁸

In overruling *Friesen*, the California Supreme Court held that the grantees of land burdened with a building restriction against use for a specific purpose have a "property right" with respect to a like restriction on the adjoining parcel retained by the grantor⁴⁹ and are therefore entitled to compensation under Article I, section 14⁵⁰ whenever damage results from a violation of the restriction.⁵¹ The basis for the court's decision was that a building restriction is substantially equivalent to an easement, which unquestionably is compensable "property."⁵² The court felt that to make a substantive distinction between an easement and a building restriction by merely labeling the former a property interest, for which compensation must be made, and the latter a contractual right, which could be appropriated by a condemner without any compensation, was "inequitable and rationally indefensible."⁵³

In dissent, Justice Burke remarked:

The majority opinion extends the provision of Article I, section 14, of the California Constitution to a degree previously unrecognized in this state, thereby substantially affecting future eminent domain proceedings. This case alters longstanding California law to conform with the rule in the "majority" of American jurisdictions on the issue of compensability of a "taking" of building restrictions in eminent domain proceedings. However, in doing so, the majority discards the conceptual basis supporting the prior California position without submitting persuasive reasons justifying the change.⁵⁴

45. 9 Cal. 3d at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77.

46. 103 Cal. Rptr. 719, 720 (1972). CAL. CIV. CODE § 1001 (West 1970); CAL. CODE CIV. PRO. § 1238 (West Supp. 1974); see note 57 *infra*.

47. 209 Cal. 524, 288 P. 1080 (1930).

48. 103 Cal. Rptr. 719, 720 (1972).

49. 9 Cal. 3d at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77.

50. See note 39 *supra*.

51. 9 Cal. 3d at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77.

52. *Id.* at 172, 507 P.2d at 966, 107 Cal. Rptr. at 78-79; see 2 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 5.72 (3d ed. Rev. J. Sackman 1970) [hereinafter cited as NICHOLS].

53. 9 Cal. 3d at 173, 507 P.2d at 966-67, 107 Cal. Rptr. at 78-79.

54. *Id.* at 175, 507 P.2d at 968, 107 Cal. Rptr. at 80.

Justice Burke⁵⁵ relied primarily on *Friesen v. City of Glendale*,⁵⁶ in which the California doctrine denying compensation for a taking of building restrictions was first announced.

In *Friesen*, a lot subject to a restriction to be used "for residence purposes only" was acquired by the city for street use. In an action brought by other lot owners in the neighborhood, the plaintiffs claimed that the restriction was binding on the city unless their rights were condemned, in which case they were entitled to compensation for their proprietary interests in the lot taken.⁵⁷ Although the case was decided by a narrow interpretation of the covenant (*i.e.*, that street construction did not violate the restriction),⁵⁸ the court, in dictum, declared that:

The interest sought to be imposed . . . is no more than a negative easement or an equitable servitude. It does not rise to the dignity of an estate in land itself. It is not a property right, but is a contractual right cognizable in equity as between the contracting parties, not binding on the sovereign contemplating a public use of the particular property taken.⁵⁹

Nor was support for Justice Burke's dissent limited to the *Friesen* decision. The proposition that building restrictions are mere contractual rights has been relied upon by other courts in denying compensation for the extinguishment of these equitable servitudes. The proposition was first expressed in *United States v. Certain Lands*.⁶⁰ The plaintiffs claimed that some of the land taken was subject to restrictions which would be violated by the proposed use, and, therefore, that they were entitled to compensation for the violation of the restriction. The deeds to the land contained a provision that

55. Justice McComb also joined in the dissent.

56. 209 Cal. 524, 288 P. 1080 (1930).

57. *Id.* at 528, 288 P. at 1081.

58. *Id.*, 288 P. at 1081-82.

59. *Id.* at 531, 288 P. at 1083. The defendants in *Bourgerie* had sought to distinguish *Friesen* on the ground that the condemner in that case was a political subdivision (*i.e.*, City of Glendale), whereas, in the principal case, the condemning body was a "private, profit-making corporation," and, therefore, did not come within the rule of *Friesen*. 9 Cal. 3d at 171, 507 P.2d at 966, 107 Cal. Rptr. at 77. The defendants argued that when the *sovereign is not* the condemner, the rule denying compensation should not apply. Thus defendants sought to limit *Friesen* to its facts and claimed that language in that case to the effect that restrictive covenants are not compensable was dictum. Defendant's Petition for Hearing before the California Supreme Court at 8. Inasmuch as the instant case was ultimately decided on the grounds that restrictive covenants were compensable "property" rights, the validity of the defendant's argument was not determined. 9 Cal. 3d at 172, 507 P.2d 966, 107 Cal. Rptr. at 78.

60. 112 F. 622 (C.C.D.R.I. 1899), *aff'd sub nom.*, Wharton v. United States, 153 F. 876 (1st Cir. 1907).

"no slaughter house, smith shop, steam engine, furnace, forge, bone boiling establishment . . . drinking saloon . . . shall ever be located . . . upon any part of said granted land, and that no noxious, dangerous, or offensive trade or business whatever shall ever be done . . . on any part thereof"61

After analyzing the restrictive language the court declared that it

has no reference to structures as structures, but rather has a reference to uses of the lands . . . and we would be going far beyond the bounds of common experience were we to say that what the government has acquired the right to do by virtue of the public necessity for national defense is, in substance, what was contemplated and provided against by the framers of the deed.⁶²

Given this interpretation, the government's use was found not to violate the restriction, but the court went on to indicate that even if the restriction were violated, no "property" rights would have been taken since parties could not by mutual covenants in private contracts create for themselves an estate in land entitling them to compensation by the state.⁶³

On appeal the First Circuit Court of Appeals⁶⁴ sanctioned the lower court's finding that the contemplated use would not violate the restriction, and stated, in dictum:

[S]uch rights are often incorrectly spoken of as negative easements If they were in fact easements, they would constitute true hereditaments, and the plaintiff in error would be entitled to the allowance of damages, even if nominal.⁶⁵

61. *Quoted in* 112 F. at 624-25.

62. *Id.* at 627.

63. *Id.* at 629. The court stated:

While the owners may so contract as to control private business, and thereby increase the value of their estates, they are not entitled to so contract as to control the action of the government, or to increase the values of their lands by any expectation or belief that the government will not carry on public works in their vicinity, or that in case it does it will compensate them for loss due to the defeat of their expectation that it would not Each landowner holds his estate subject to the public necessity for the exercise of the right of eminent domain for public purposes. He cannot evade this by *any agreement with his neighbor, nor can his neighbor acquire a right from a private individual which imposes a new burden upon the public* in the exercise of the right to eminent domain.

Id. (emphasis added).

64. *Wharton v. United States*, 153 F. 876 (1st Cir. 1907).

65. *Id.* at 878. A similar result was reached in *Moses v. Hazen*, 69 F.2d 842 (D.C. Cir. 1934). In that case, land was condemned for school purposes in the District of Columbia. The question was whether or not the claimants were entitled to compensation for the violation of their right to insist upon certain restrictions upon the use of the land taken. The restrictive language provided that buildings erected on the lots shall be "built for residence purposes exclusively [and] that neither the land nor any buildings which may be erected thereon shall be used for any trade, business, manufac-

Those state courts which follow this precedent have concluded that such restrictions do not fall within the category of true easements, such as the right of passage or use.⁶⁶ They are looked upon, not as affirmative rights, but as wholly negative in character. As such, they are held not to be easements in the strict sense of the word, but are classified by these courts as rights arising out of contract, which are enforceable in equity only between parties in privity.⁶⁷ They are said to create no property interests.⁶⁸

In rejecting this approach, Justice Mosk, in *Bourgerie*, stressed the similarity between easements and building restrictions and the relative damage occasioned by their violation.⁶⁹

Both easements and building restrictions may be created by agreements made between private parties and, therefore, upon condemnation in both situations the financial burden of the condemner is increased

turing, or mercantile purposes.'" *Id.* at 843. After noting that covenants must be "strictly construed," the court concluded that "parks, playgrounds, and schools are not within the limitation." *Id.* at 844. The court went on to say:

There is also a further ground on which the judgment of the trial court should be sustained, which is that, as against the sovereign in discharge of a governmental function, rights such as are here claimed are not enforceable to restrict or burden the exercise of eminent domain; for the claims of these appellants are not for damage to what are sometimes called true easements, as right of passage or rights to light and air, which are land and subject to condemnation as other interests in land, but the restrictions on which appellants rely are not truly property rights, but contractual rights, which the government in the exercise of its sovereign power may take without payment of compensation.

Id. The court heavily relied upon the dicta in *Certain Lands* and *Wharton*. No other authority was cited. More recent federal cases have rejected this view and have held restrictive covenants compensable in eminent domain. *Adaman Mut. Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960); *United States v. Murphy*, 220 F. Supp. 701 (D. Me. 1963); *United States v. 11.06 Acres of Land*, 89 F. Supp. 852 (E.D. Mo. 1950); RESTATEMENT OF PROPERTY § 539, comment *a* (1944).

66. See AM. JUR. *Eminent Domain* §§ 173-75 (1966); Annot. 4 A.L.R.3d 1137 (1965).

67. See *Moses v. Hazen*, 69 F.2d 842, 844 (D.C. Cir. 1934); *Friesen v. City of Glendale*, 209 Cal. 524, 530, 288 P. 1080, 1082-83 (1930) (dictum); *Smith v. Clifton Sanitation Dist.*, 300 P.2d 548, 550 (Colo. 1956), noted in 26 *FORDHAM L. REV.* 130 (1957) and 1957 U. ILL. L.F. 133; *Board of Pub. Instruction v. Town of Bay Harbor Island*, 81 So. 2d 637, 642 (Fla. 1955); *Anderson v. Lynch*, 3 S.E.2d 85, 89-90 (Ga. 1939), noted in 24 *MINN. L. REV.* 425 (1940) and 1 *WASH. & LEE L. REV.* 121 (1939); *In re Bd. of Educ.*, 89 A.2d 720, 722 (N.J. 1952); *City of Houston v. Wynne*, 279 S.W. 916, 920 (Tex. Civ. App. 1925), noted in 4 *TEXAS L. REV.* 531 (1926).

68. See *NICHOLS*, *supra* note 52, § 5.73; Annot., 4 A.L.R.3d 1137, 1146 (1969). For a discussion of the contention that some contracts create property rights within the meaning of the fifth amendment, see *Brickman*, *supra* note 38, at 164-65, citing *International Paper Co. v. United States*, 282 U.S. 399 (1931). See also the general dictum of *Lynch v. United States*, 292 U.S. 571, 579 (1934), "Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."

69. 9 Cal. 3d at 174, 507 P.2d at 967, 107 Cal. Rptr. at 79.

solely by virtue of agreements made between private parties. Equally important, the violation of a building restriction could cause far greater damage in monetary value to a property owner than the appropriation of a mere right of way.⁷⁰

Obviously landowners are entitled to compensation if they have acquired legal easements appurtenant to the land taken, which are for the benefit of their land. That being so, there seems to be no rational reason why compensation should be denied when the increase in value or the interest extinguished was created by a covenant instead of a deed, and is called an equitable rather than a legal easement. Furthermore, covenants are placed on the land to enhance the marketable value by restricting prospective uses. Consequently, a valuable equitable interest is created. The proprietary characteristics of this interest have long been recognized by courts in this country. In *Sanborn v. McLean*,⁷¹ the Supreme Court of Michigan characterized a restrictive covenant as follows:

It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land, subject to its affirmative or negative mandates. It originates for mutual benefit and exists with vigor sufficient to work its ends.⁷²

Inasmuch as use is the major right of a property owner, it follows that the ownership of a right to restrict the use of a certain parcel is, to that extent, a property right. As stated in *Johnstone v. Detroit, G.H. & M.Ry.*:⁷³ "As the right to restrict the use of real estate is an invasion of ownership, it would seem logical that it is done by virtue of a right or interest in such real estate."⁷⁴

III. THE CONSEQUENCES OF COMPENSATION

Notwithstanding the force of the arguments characterizing restrictive

70. *Id.* at 173, 507 P.2d at 966, 107 Cal. Rptr. at 78 (footnote omitted), wherein Aigler, note 38 *supra*, at 23-24 is cited. In his dissent, Justice Burke rejects this rationale by arguing: "[A]n easement is an affirmative right of use, whereas a building restriction is wholly negative in character, amounting to no more than a promise not to use property in a particular manner." *Id.* at 177, 507 P.2d at 969, 107 Cal. Rptr. at 81.

71. 206 N.W. 496 (Mich. 1925).

72. *Id.* at 497.

73. 222 N.W. 325 (Mich. 1928).

74. *Id.* at 330.

covenants as compensable interests, courts have set forth various reasons for denying compensation. The substance of the principal objection is that the right of eminent domain rests on *public necessity* and that any attempt to deter the exercise of eminent domain by public agencies should be considered an interference with sovereign authority and, therefore, void.⁷⁵ The restriction is declared void from its inception, and thus no property right justifying compensation is recognized.

The court in *Bourgerie* alluded to these considerations by noting:

We need not contemplate in depth the somewhat esoteric dialogue on the appropriate characterization of a building restriction, . . . An objective analysis reveals the real basis for the decisions which deny compensation for the violation of building restrictions by a condemner relates to *pragmatic considerations of public policy rather than abstract doctrines of property law*, and it is upon these issues of policy that jurisdictions choose between the minority and majority views.⁷⁶

Thus, the dissent contended that "the right of eminent domain could be defeated if the condemning authority had to respond in damages,"⁷⁷ and concluded that the scope of compensation in eminent domain is a question of policy which is better left to the legislature.⁷⁸ The "public policy" rationale has been heavily relied upon by other courts.

In *Doan v. Cleveland Short Line Ry.*⁷⁹ the Supreme Court of Ohio denied recovery on "public policy" grounds. In that case, lots in a subdivision were sold subject to a restriction that they would be "used exclusively for residence purposes."⁸⁰ The railway company, with notice thereof, acquired by purchase a number of these lots for the purpose of constructing a four-track railroad. The plaintiff was the owner of another lot in the subdivision and sought to recover compensation by way of damages resulting from the taking of an alleged property right.⁸¹ The court held that the plaintiff was not entitled to recovery noting:

No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to prevent the state, or any

75. See, e.g., *Doan v. Cleveland Short Line Ry.*, 112 N.E. 505 (Ohio 1915).

76. 9 Cal. 3d at 173, 507 P.2d at 967, 107 Cal. Rptr. at 79 (emphasis added).

77. *Id.* at 177, 507 P.2d at 969, 107 Cal. Rptr. at 81, quoting *Smith v. Clifton Sanitation Dist.*, 300 P.2d 548, 550 (Colo. 1964).

78. *Id.* at 178, 507 P.2d at 970, 107 Cal. Rptr. at 82. Recognizing the complex economic variables involved in the formulation of a judicially created rule, the dissent argued that the necessary information for a sound judgment was beyond the reach of the court. *Id.*

79. 112 N.E. 505 (Ohio 1915).

80. *Id.* at 506.

81. *Id.*

body politic or corporate having the authority to exercise the right of eminent domain, from devoting such property to a public use. *The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void.*⁸²

The court implied that the plaintiff was seeking to prevent the government from exercising its right of eminent domain. It cited *United States v. Certain Lands*⁸³ to the effect that such an application of restrictive covenants is void.⁸⁴ A void covenant could not confer a property right, and, therefore, the plaintiff had no basis for a claim of damages.⁸⁵

A basic weakness in utilizing the public policy argument to deny compensation lies in the mistaken assumption that recognizing the validity of restrictive covenants will necessarily prevent the furtherance of essential public activity. As one court⁸⁶ has stated:

The fallacy of the argument lies in the assumption of its minor premise that the requirement that the state compensate the owner of the dominant tenement for the taking of his interest in the servient tenement actually interferes with the exercise of any governmental function.⁸⁷

Indeed, if the minor premise were assumed, its logical extension would result in the denial of compensation in any eminent domain proceeding.

There is, however, no such "interference" since the purpose of this constitutional provision is to facilitate the appropriation of private property for the public use, and to *afford compensation to persons therefor*.⁸⁸ The only effect of allowing compensation for restrictive covenants would be to increase the financial and procedural burdens of the condemner,⁸⁹ but this should not necessarily preclude compen-

82. *Id.* at 506-07 (emphasis added).

83. 112 F. 622 (C.C.D.R.I. 1899), *aff'd sub nom.*, *Wharton v. United States*, 153 F. 876 (1st Cir. 1907).

84. 112 N.E. at 506-07.

85. *Id.* Cf. *Ward v. Cleveland Ry.*, 112 N.E. 507 (Ohio 1915) (suit to enjoin a railroad from constructing tracts until compensation was paid).

86. *Town of Stamford v. Vuono*, 143 A. 245 (Conn. 1928).

87. *Id.* at 247.

88. *Town of Sheridan v. Valley Sanitation Dist.*, 324 P.2d 1038, 1042 (Colo. 1928).

89. Two courts denying compensation appeared to have been greatly influenced by the possibilities of multitudinous claims against the condemning body. *Anderson v. Lynch*, 3 S.E.2d 85 (Ga. 1939); *City of Houston v. Wynne*, 279 S.W. 916 (Tex. Civ. App. 1925). As a practical matter relatively few owners would receive more than nominal damages for most governmental interferences.

sation. If landowners may increase that burden by the creation of legal easements or by adding physical improvements to their land, it is difficult to understand why public policy should prevent the same result merely because restrictive covenants are involved.⁹⁰

But the contention of those who would deny compensation for restrictive covenants is that, unlike other interests, the legitimate compensatory demands for the taking of equitable servitudes would be so substantial as to inhibit necessary projects. Some courts have justified the denial of compensation on the grounds that a condemner might be required to join a large number of landowners as defendants in cases where the benefit of the restriction runs to numerous lots.⁹¹ It is argued that such procedure would result in inhibiting the condemner's ability to acquire essential property.⁹² This aspect can best

90. A leading case rejecting the public policy argument is *Johnstone v. Detroit, G.H. & M. Ry. Co.*, 222 N.W. 325 (Mich. 1928). There, the Supreme Court of Michigan held that owners of property within a restricted subdivision whose property was not actually taken were nevertheless entitled to compensation upon a taking of a portion of the subdivision for railroad purposes. The court discussed the various cases supporting the public policy rationale, and in rejecting it as a basis for the denial of compensation stated:

We cannot approve the application made in these cases of the doctrine of public policy. The usual conveyance or contract affecting real estate contemplates its use by persons to the exclusion of all other persons and the public. In the right of use lies its value. The reasoning pursued, by reading the exclusive purpose out of the instrument as illegal, would read into it an exception of public use. In direct point, it would enable the state to destroy a common-law negative easement of light, air, and prospect without compensation. By analogy, it would deny payment for the destruction of an easement of way, an unexpired rental term, increased values due to attractive leases or uses, and, if pursued to its conclusion, injury to the residue of a freehold when part is taken. All the authorities agree that these interests are compensable.

Id. at 328. See generally *Stoebuck*, *supra* note 35; *Horst v. Housing Authority*, 166 N.W.2d 119 (Neb. 1969).

91. *Board of Pub. Instruction v. Town Bay Harbor Island*, 81 So. 2d 637 (Ala. 1955) (stating that a right of compensation for the construction of a public school in violation of a covenant would present an obstacle of an unwarranted nature in the exercise of the sovereign power); *Friesen v. City of Glendale*, 209 Cal. 245, 388 P. 1080 (1930); *Smith v. Clifton Sanitation Dist.*, 300 P.2d 548 (Colo. 1956) (restrictive covenants prohibiting use of properties for sanitary disposal system not enforceable against a sanitation district, for to do so could defeat right of eminent domain in a large subdivision situation); *State ex rel. Wells v. Dunbar*, 95 S.E.2d 457 (W. Va. 1956) (construction and maintenance of toll bridge on property for residential purpose held not to require damages since to do so would greatly inconvenience or defeat exercise of eminent domain). See also CAL. CODE CIV. PRO. § 1246 (West 1967) which provides in part:

All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

92. 9 Cal. 3d at 174, 507 P.2d at 967, 107 Cal. Rptr. at 79. See also *Friesen v. City of Glendale*, 209 Cal. 524, 288 P. 1080 (1930), wherein the court noted:

be illustrated by the following remarks in *City of Houston v. Wynne*:⁹³

Appellees' contention, if carried to its extreme, is that, if there . . . were 10,000 lots, the city would be required to serve the owner or owners of each lot in a suit to condemn any one of such lots for public purposes. Such contention, if established as the law governing such matters, would be practically to prohibit the city from condemning property so situated for public use⁹⁴

It is this hurdle that the dissent in *Bourgerie* asserts will "return to haunt us in the near future."⁹⁵ A quick answer to this position is that the constitutional guarantee of compensation for the taking of private property is not limited to inexpensive takings. It is undoubtedly true that in a number of cases the requirement of compensation would place a heavy burden upon the state in its exercise of the power of eminent domain. Yet a burden equally as heavy would be placed

The plaintiffs expressly "do not contend that parties may by private contract restrict the exercise of the power of eminent domain," yet by private contract with their neighbors they have created, if their position be sustained, an estate inherent in each lot in the tract protected against the taking or damaging thereof without compensation and have brought about a situation where the number of the parties defendant and of the interests to be appraised in condemnation would be manifold. In cases of large tracts the increase in number would practically be prohibitive. . . . [S]uch results may be considered where we approach a contention that by private contract an estate in land unknown to the common law or the law of this state is created which would have the result of greatly increasing the cost of condemnation proceedings and making them more burdensome on the public.

Id. at 530, 288 P. at 1082-83 (emphasis added).

93. 279 S.W. 916 (Tex. Civ. App. 1925).

94. *Id.* at 920.

95. 9 Cal. 3d at 178, 507 P.2d at 970, 107 Cal. Rptr. at 82. The majority in *Bourgerie* in rejecting this contention observed:

As to the procedural difficulties, while they are here not involved and we need not decide the issue, it has been posited by some authorities that a condemner need only selectively join in the action landowners whose property is most likely to be damaged by the violation of the building restriction; there are other remedies for excluded owners who anticipate the improvement will result in damage to their property.

Id. at 174-75, 507 P.2d at 968, 107 Cal. Rptr. at 80.

The number of parties can further be reduced by analyzing the remoteness of the claimant's land from the property condemned. Even if there were 10,000 lots burdened with building restrictions, the public taking of any one for an inconsistent use would not necessarily result in the destruction of the negative easements in favor of all other lot owners. Those lots adjacent to or in close proximity would be the only ones to suffer a loss in most instances. As one commentator notes, "[A]s the distance of the claimant's lot from the invaded tract increased, the amount of compensation would rapidly diminish soon to the vanishing point." Aigler, *supra* note 38, at 32. Also what would be a substantial injury to a lot in close proximity would actually benefit more remote lot owners. For example, the location of a school in the division could be of advantage to the neighborhood as a whole. *Meredith v. Washoe School Dist.*, 435 P.2d 750 (Nev. 1968). Other types of public takings, such as for the purpose of a nonrecreational park or a tree-lined highway divider would cause little or no damage and, therefore, the number of intervenors would presumably be insubstantial.

upon the landowner by refusing him compensation when the taking of property in which he has an interest, by way of a restrictive covenant, would result in a sharp decline in the value of his own property. If the choice is between the government's convenience and the citizen's economic loss, it would seem that a balancing of equities would favor compensation.⁹⁶

The difficulty with this response is that the dissent regarded the problem in terms of governmental need, not convenience, and implied that questions such as these must be resolved in terms of a realistic balance rather than through mechanical recitations of constitutional language. But the majority was unwilling to assume that compensation for equitable servitudes would be uniquely burdensome.⁹⁷ It con-

96. See 38 MICH. L. REV. 357 (1940). Bourgerie had also argued that where the "damage inflicting party [*i.e.*, Southern California Edison] possesses the means to spread the cost of the injury, it should bear the burden thereof." Petition for Hearing before California Supreme Court at 22 n.21, *citing inter alia*, *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Furthermore, Bourgerie claimed that:

The policy of cost-spreading forms the essence of eminent domain law—namely, that the damaged owner should not contribute disproportionately to the true cost of the project for which expropriation is undertaken, and that the cost should be spread upon members of the public who benefit from the project.

Petition for Hearing before California Supreme Court at 22.

97. Given the court's acceptance of restrictive covenants as compensable interests, the measure of compensation becomes crucial. "Market value" is the *prima facie* measure of damages. *People v. Buelton Dev. Co.*, 58 Cal. App. 2d 178, 136 P.2d 793 (1943). In eminent domain proceedings, this value is the price that would be paid in the open market by a purchaser with full knowledge of all of the uses and purposes for which the property is reasonably adapted. *Daley City v. Smith*, 110 Cal. App. 2d 524, 531, 243 P.2d 46, 50 (1952). Appurtenant easements have their value determined in connection with, and as part, of the dominant land, but the appropriate yardstick for the measure of compensation for restrictive covenants has not been uniformly discerned.

American courts have split between two rules of compensation. The majority and better reasoned rule looks to the value of the dominant tenement before and after the taking. As expressed in *Meredith v. Washoe County School Dist.*, 435 P.2d 750 (Nev. 1970):

The measure of compensation is the value of the interest that is extinguished. But since the value of a restrictive covenant cannot be in the abstract, we must look to the market value of the dominant tenement before and after the taking. In substance, the value of the loss offset by the value of the benefits is the amount of compensation to be awarded.

Id. at 753.

A few jurisdictions have adopted a different yardstick for the measure of damages, which provides compensation for the market value of the servient tenement only. This second view is grounded on the theory that:

As the sum of the parts can be no greater than the whole, it follows that when the public has paid full value for the property taken, it has paid full value for every estate or interest therein.

Fuller v. Town Bd., 214 N.W. 324, 325 (Wis. 1927). See *Herr v. Board of Educ.*, 83 A. 173 (N.J. Ct. Err. & App. 1912).

ceded that the cost of condemning the property might be somewhat increased, but concluded that such increases would not significantly burden the exercise of eminent domain:

As a practical matter some takings would result in negligible damage to the owners of the restriction (e.g., public works such as parks or access roads); if the character of the improvement were such that damage to some landowners would result (e.g., schools or fire stations), it is likely that only those immediately adjoining or in close proximity to the improvement would suffer substantial injury, even in highly restricted areas.⁹⁸

But to suggest that the construction of parks, access roads, schools and fire stations would cause negligible or limited damage not only fails to provide a comprehensive answer to the argument of the dissent, but also fails to respond to the problem presented by the facts of the case. For the facts in *Bourgerie* involved not the construction of a school or a fire station but the construction of an electric power facility.⁹⁹ Although the damage implicated by the construction of a school or fire station can be said to be limited to a confined area, it is surely reasonable to suppose that the damage involved by the construction of facilities such as electric power plants or nuclear generating plants might engulf a substantial amount of property.

By avoiding the thrust of the dissent's argument, the majority concealed the ultimate scope of its opinion and simultaneously left its options open. If the court meant to imply that the only property owners who could recover would be those "immediately adjoining or in close proximity to the improvement,"¹⁰⁰ the court has avoided the necessity for substantial compensation by adopting a fictional theory of damages. Such a result would hardly comport with the court's desire to harmon-

This measure of recovery set forth by the minority of jurisdictions appears inequitable as it would leave the property owner only partially compensated. For example, suppose hillside homes are subject to a height restriction designed to preserve the view of upper hillside homes, and a lower lot is taken for the purpose of building a power station in excess of the height limitation. The market value of the servient lot is \$30,000 if unrestricted and \$15,000 if restricted, whereas the value of the dominant tenement, immediately above, is \$45,000 with the restriction, but only \$20,000 without. What is the value of the building restriction, \$15,000 or \$25,000? The actual loss suffered by the dominant tenement owner would be \$25,000; however, under the minority view, only \$15,000 would be recovered on the questionable rationale that the value of the restriction vis-a-vis the servient lot is the only legitimate inquiry. The compensation under the majority view clearly appears more equitable in that the compensation is commensurate with the loss suffered.

98. 9 Cal. 3d at 174, 507 P.2d at 967, 107 Cal. Rptr. at 80.

99. *Id.* at 171, 507 P.2d at 965, 107 Cal. Rptr. at 77.

100. *Id.* at 174, 507 P.2d at 967, 107 Cal. Rptr. at 79.

ize its theory of compensation with "basic equitable principles of fairness."¹⁰¹ Perhaps the underlying premise of the court is that if the compensation necessitated by a governmental project is so substantial that the cost would become prohibitive, the project should not be implemented. If this is the position of the court, *Bourgerie* can be read as a decision maximizing the potential for local control of local development. In fact, the court has left the question open. If it wishes to permit government development, it can limit the damages or claim that the restrictive covenants were entered into in bad faith. If it wishes to protect landowners from environmentally disruptive developments, it can threaten the condemner with substantial damages. In short, *Bourgerie* provides California courts with a powerful instrument to influence land development and local control.

IV. COMPENSATION FOR OTHER LAND INTERESTS

The rationale of *Bourgerie* might well afford a basis for compensation for other interests in land which have heretofore been non-compensable in eminent domain proceedings.¹⁰² In particular, possibilities of reverter¹⁰³ and powers of termination¹⁰⁴ would appear to justify such compensation when such interests have been taken.

When a possibility of reverter or power of termination is reserved, the entire estate of the grantor is transferred, and the grantee, in effect, owns a fee simple absolute subject only to the possibility of termination or defeat by the fulfillment of the condition precedent or breach of the condition subsequent.¹⁰⁵ The interest of the grantor is merely a possibility that ownership may revert to him if the condition

101. *Id.* at 175, 507 P.2d at 968, 107 Cal. Rptr. at 80, quoting *United States v. Fuller*, 409 U.S. 488 (1973).

102. See 29 CALIF. L. REV. 525 (1941).

103. RESTATEMENT OF PROPERTY § 154 (1936) defines a reversionary interest as "any future interest left in a transferor or his successor in interest." It further states that "a possibility of reverter is any reversionary interest which is subject to a condition precedent."

104. RESTATEMENT OF PROPERTY § 155 (1936) notes that "a power of termination is the future interest created in the transferor, or his successors in interest, by a transfer of either an estate in land or an analogous interest in a thing other than land, subject to a condition subsequent."

105. A basic distinction between a possibility of reverter and a power of termination is that the former results from the expiration of a fee simple determinable, which terminates automatically on the happening of the condition (*Renner v. Huntington Hawthorne Oil & Gas Co.*, 39 Cal. 2d 93, 244 P.2d 895, 899 (1951)), whereas the latter results from the divestment of a fee simple subject to a condition subsequent, and requires affirmative action on the part of the grantor. *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 232 P.2d 55 (1950).

precedent is fulfilled or that a power to terminate the grantee's estate and retake the property may arise if a breach of the condition subsequent should ensue.¹⁰⁶ These conditions, like restrictive covenants, are used in conveyances to restrict the size and character of buildings or the use to which the property may be put. Although clearly property rights,¹⁰⁷ compensation has been denied in eminent domain proceedings on the ground that they are not "property interests" within the meaning of the constitutional prohibition against the taking of private property without compensation.¹⁰⁸ In view of *Bourgerie*, recognition of these interests as compensable property rights would appear appropriate.

CONCLUSION

The potential dimensions of *Bourgerie* appear unclear. The ostensible result is merely the adoption of the so-called majority view. However, California in this case may have afforded a scope of compensation for covenants beyond that which has heretofore been recognized in other jurisdictions. The covenant in the instant case, unlike covenants in prior cases,¹⁰⁹ was one which presumably could be violated *only* by an entity with the power of eminent domain. Prior cases have dealt with covenants which could have been violated by not only such an entity, but also by a private grantee for non-public purposes. For example, in *United States v. Certain Lands*¹¹⁰ the deed contained *inter alia* a provision that "no furnace . . . or other noxious, dangerous or offensive trade shall ever be located on the premises." Clearly, such a provision could be violated by public or by private entities. On the other hand, in *Bourgerie* the restriction could *only* be violated by a governmental or quasi governmental body with the power of eminent domain. It appears, therefore, that private landowners who mutually covenant in good faith to prohibit the use of their respective parcels for a public function (*e.g.*, prohibition of freeways, nuclear power plants, airports) will be afforded compensation when one parcel

106. *Parry v. Berkeley Hall School Foundation*, 10 Cal. 2d 422, 425, 74 P.2d 738, 740 (1937); *Schultz v. Beers*, 111 Cal. App. 2d 820, 823, 245 P.2d 334, 336 (1952); *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 473, 232 P.2d 55, 61-62 (1951).

107. See RESTATEMENT OF PROPERTY § 163 (1936), which states that "a future interest is an interest in land"

108. *Santa Monica v. Jones*, 104 Cal. App. 2d 463, 473, 232 P.2d 55, 61-62 (1951). See 29 CALIF. L. REV. 525, 528 (1941).

109. See generally Annot., 4 A.L.R.3d 1137 (1970).

110. 112 F. 622 (C.C.D.R.I. 1899), *aff'd sub nom.*, *Wharton v. United States*, 153 F. 876 (1st Cir. 1907).

is condemned for the prohibited purpose. Such a result will undoubtedly encourage landowners to covenant against any and all public activities in the hope of receiving greater compensation in the event of condemnation proceedings. An increase in the cost of condemnation is inevitable. The question remaining to be answered, however, is whether or not this increase will be so substantial as to actually inhibit or discourage public projects.

While compensation is arguably justified for the development of a power plant directly adjacent to one's property, perhaps a more logical basis for compensation could be founded on inverse condemnation rather than on the violation of a covenant.¹¹¹ While recognizing the possibly inadequate development of inverse condemnation as a viable alternative, it seems that violation of restrictive covenants as the sole foundation for compensation might lead to arguably unjust results since *only* those who have contracted against such development would be compensated. For example, where two individuals own land adjacent to a power plant, compensation for the harm caused therefrom would inure only to the party who covenanted against such use. To provide maximum protection under the presently adopted rationale,

111. In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses, and the invasion or appropriation must directly and specially affect the landowner to his injury. See *Hilltop Properties v. State*, 233 Cal. App. 2d 349, 355-56, 43 Cal. Rptr. 605, 612 (1965). In the recent California case of *Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), the City of Whittier initiated condemnation proceedings against the plaintiff's property. Subsequently, the city dismissed the action but declared its intention to take the property in the future. Plaintiffs sued in inverse condemnation, alleging that the fair market value of their properties had declined as a result of the city's announcement of its intention to condemn. It was held that if the city had acted unreasonably in issuing precondemnation statements, either by delaying eminent domain proceedings or by other oppressive conduct, the plaintiff could maintain an action in inverse condemnation. The California Supreme Court severely limited this holding in *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973), wherein the plaintiff asserted that the county's action in adopting a general plan amounted to a "taking" of its property. The court rejected this contention by noting:

If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no hyperbole to suggest that if every landowner whose property must be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect of the plan upon his land, the courts of this state would be inundated with futile litigation. It is clear, under all the circumstances, that plaintiff has not stated a cause of action against the county defendants for their declaratory relief or inverse condemnation.

Id. at 120-21, 514 P.2d at 117-18, 109 Cal. Rptr. at 805-06.

mutual covenants should be entered into against any kind of possible takings.

Bourgerie is one of several recent California Supreme Court cases¹¹² in which judicial progressiveness has created a framework for environmental protection; it is also seemingly unique in the interests protected. Not only are private property rights vindicated, but the environmentalists' interest in preserving the climate of private neighborhoods¹¹³ are similarly enhanced by greater, perhaps prohibitive, potential expense in building environmentally disfavored projects. That the *Bourgerie* case will in fact prove to inhibit environmentally disfavored projects remains to be seen, but its impact will certainly be felt in eminent domain proceedings.

Carolyn M. Huestis

112. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 1, 50 P.2d 1049, 104 Cal. Rptr. 761 (1972); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1971).

113. A commentator has recently suggested that the holding of *Bourgerie* might be limited to commercial property. 14 SANTA CLARA LAW. 417, 422-23 (1974). Thus the writer would suggest that commercial property owners should be compensated while non-commercial property owners should not. It is difficult to reconcile this reading of *Bourgerie* with that opinion's renunciation of *Friesen v. City of Glendale*, 209 Cal. 524, 288 P. 1080 (1930), a case which denied compensation to residential owners, and it surely would be difficult to square it with the language and history surrounding the law of eminent domain.