

Condemnation of Property with Deed Restrictions or Covenants

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Via Email

Dear MTAS client,

You have asked if the city condemns property that has deed restrictions or covenants requiring that the property only be used for residential development, if such restrictions are lifted or nullified by the condemnation. Although there is no Tennessee case directly on point with your question, analysis in a case cited later in this email grows from the prevailing common law principle that condemning governments are not bound by deed restrictions, *City of Shelbyville v. Kilpatrick*, 204 Tenn. 484, 322 S.W.2d 203, (1959). It does appear from my research that it is a well-settled and largely applied principle that condemnation of fee simple interests in property for public purposes extinguishes deed restrictions and covenants.

From the leading municipal law treatise, McQuillin's:

The nature of the interest in lands acquired by a municipality for public use through the exercise of eminent domain is to be determined by the language of the statute authorizing the taking.¹ A condemnor takes only the estate in the property condemned that is necessary for the purpose of the condemnation.² Generally, where it is sufficient, only an easement is taken, except perhaps where the statute contemplates and authorizes the taking of a fee.³ For instance, usually only an easement is acquired when land is condemned for: a water supply,⁴ street or highway purposes,⁵ an aqueduct,⁶ a sewer or ditch,⁷ levee purposes,⁸ improvements to a stream,⁹ or, although there is authority contrary,¹⁰ for school buildings.¹¹ However, in the same instances, the municipality has been found to have acquired a fee title.¹²

On condemning property, the municipality cannot obtain a greater interest than that possessed by the one against whom the proceeding is instituted,¹³ and those subsequently acquiring title take subject to the city's claim.¹⁴

§ 32:127. Title acquired by municipality, 11A McQuillin Mun. Corp. § 32:127 (3d ed.)

At first glance, that last sentence causes concern, but the cases footnoted hold otherwise – that a city cannot be held to a deed restriction after condemnation:

The trial court also held that the proposed use of the property by the Chamber would violate existing restrictive covenants in effect in the Meadowbrook subdivision. However, when a municipality acquires land that is subject to an enforceable covenant, the condemning authority acquires the land free from the burden of the covenant. 5 *Powell on Real Property*, § 679(4) (1987). That rule was adopted by this Court in *Burma Hills Development Co. v. Marr*, 285 Ala. 141, 145, 229 So.2d 776, 779 (1969):

“It has been argued that such restrictions were not intended to apply as against public improvements;—that, since all property is held subject to the power of eminent domain the rights of the condemnor are impliedly excepted from the operation of the restrictive covenant.

“It has further been held that such restrictions could not possibly inhibit the action of the sovereign because any such attempt would be void as against public policy since they

constitute an attempt to prohibit the exercise of the sovereign power of eminent domain.’

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*519 (Quoting 2 *Nichols on Eminent Domain*, § 5.73) (1985).

Dothan Area Chamber of Commerce, Inc. v. Shealy, 561 So. 2d 515, 518–19 (Ala. 1990)

The following West Virginia court opinion reviews cases from several jurisdictions before adopting the rule applied by most states– that eminent domain nullifies restrictive covenants:

In *Deutsch and Cohen v. Mortgage Securities Co.*, 96 W.Va. 676, 123 S.E. 793, this Court held: ‘2. Restrictive covenants are to be strictly construed against the person seeking to enforce them, and all doubt must be resolved in favor of natural rights and a free use of property, and against restrictions.’ See *Neekamp v. Huntington Chamber of Commerce*, 99 W.Va. 388, 129 S.E. 314. In *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W.Va. 600, this Court held: ‘4. Whenever the Legislature by statute-law has authorized any person or corporation to condemn the lands of others in order to carry on its business, the courts will regard this as a legislative declaration, that this character of business is such, as that the public has so great and direct an interest in, that the courts must hold it as contrary to public policy to permit any restriction of it by private contract.’

In *City of Houston v. Wynne*, 279 S.W. 916, 919, the Court of Civil Appeals of Texas, First District, disposed of a similar question in this language: ‘We have reached the conclusion that the contention of appellees cannot be *337 sustained, but, on the contrary, that it should be held that appellees had and owned no such rights in lots 4 and 5, as they claim, as against the right of the city to take them under its right of eminent domain for a public fire station. Before and at the time the covenants were entered into by which the appellees and all other lot owners in said addition and their vendor were bound, the statutes of our state empowered the city by condemnation suits against the owner of land to take so much thereof as it, in good faith, deemed necessary for the erection of a public fire station or other public buildings. All such contracting parties were charged with knowledge of such law, and hence it must be assumed, we think, that all such parties contracted understanding that the restrictions entered into between them, which were binding as between themselves and all private parties, did in no manner affect the rights of the city to take such lots as it needed for a public fire station, by virtue of the condemnation statutes.’

In *Doan v. Cleveland Short Line Ry. Co.*, 92 Ohio St. 461, 112 N.E. 505, the Supreme Court of Ohio held: ‘1. Where an allotter adopts a plan for the improvement of his allotment whereby the use of the lots is restricted exclusively for residence purposes, such restriction cannot be construed as applying to the state or any of its *338 agencies vested with the right of eminent domain in the use of the lots for public purposes. 2. Where a company or any agency of the state vested with the right of eminent domain has acquired lots in such an allotment and is using the same for public purposes, no claim for damages arises in favor of the owners of the other lots on account of such use.’ The holding was approved in *Norfolk & Western Ry. Co. v. Gale*, 119 Ohio St. 110, 162 N.E. 385, and certiorari was denied, 278 U.S. 571, 49 S.Ct. 93, 73 L.Ed. 512. See **461 *Sackett v. Los Angeles City School Dist.*, 118 Cal.App. 254, 5 P.2d 23; *Board of Public Instruction v. Town of Bay Harbor Islands, Fla.*, 81 So.2d 637; *Herr v. Board of Education of Newark*, 82 N.J.L. 610, 83 A. 173; *Application of Board of Education*, 20 N.J.Super. 272, 89 A.2d 720; *Moses v. Hazen*, 63 App.D.C. 104, 69 F.2d 842, 98 A.L.R. 386; *United States v. Certain Lands, C.C.*, 112 F. 622. See also *Anderson v. Lunch*, 188 Ga. 154, 3 S.E.2d 85, 122 A.L.R. 1456, where numerous other cases are cited.

We find ourselves in accord with the view that covenants of the nature of those here involved should not be so construed or applied as to required the government, or one of its agencies, in the taking or acquiring of private property for a governmental use, to respond in damages either on the theory of a taking of a vested right, or for breach of such a covenant. To hold otherwise would enable those having title to real estate often to greatly inconvenience and, perhaps, defeat the proper and orderly exercise by the government of the right of eminent domain, guaranteed to it by the Constitution, and absolutely necessary for the operation of the government in a manner best for the interests of all its citizens.

State ex rel. Wells v. City of Dunbar, 142 W. Va. 332, 336–38, 95 S.E.2d 457, 460–61 (1956)

Although it does appear that a condemnation of residential property with deed restrictions for a public works project would essentially lift or dissolve those deed restrictions on the land, other property owners in the development may be entitled to compensation for violation of the restrictions. The condemnation of the parcel in their subdivision results in these owners being denied the right to enforce the covenants, which is viewed as a compensable property right. In this case, the court determined a water tower could be built on property restricted to residential development, but the neighbors in the subdivision would be entitled to compensation:

But when it comes to the question of whether the violation of this restriction by the sovereign in the taking of the servient lot by eminent domain (or by voluntary conveyance to it) for a public purpose those who say that it is not the taking of property within the meaning of the constitutional requirement mentioned place this conclusion upon the ground that the easement is not one which 'would permit the physical use or occupation thereof' by the other lot owners in the tract, 122 A.L.R. 1465, nor is it a 'true easement, as right of passage or rights to light and air, which are land and subject to condemnation as other interests in land'. 63 App.D.C. 104, 69 F.2d 842, 844, 98 A.L.R. 389. Hence, for each reason, no interest in land, they say, is taken.

When it comes to the fact that those from whom the sovereign acquires the servient lot have agreed with the owner of every other lot in that sub-division to the easement in question, the above jurisdictions, or some of them, say that an individual cannot impose upon the sovereign 'the burden of compensating him for damage resulting from that public use which does **205 not directly invade his land'. 17 A.L.R. 555, and that the parties may not 'in private contract create for themselves an estate in land not known to our law and thus entitle them *488 to compensation where no such right existed before.' 122 A.L.R. 1465.

Others upon that side go so far as to say that since the sovereign cannot be restricted in its use of the land for a public use, short of a nuisance, at least, it follows that an intention between the contracting parties not to include the sovereign will be implied. 188 Ga. 154, 3 S.E.2d 85, 122 A.L.R. 1462.

The contrary view is that when all the lots in a sub-division are subject to this restrictive easement, and one is taken for a public use, the owners of the other lots for whose benefit the restriction is imposed are entitled to compensation, if damaged, because such an easement constitutes an interest in the land upon which it is imposed.

The Michigan case of *Johnstone v. Detroit, Grand Haven, etc.*, 245 Mich. 65, 222 N.W. 325, 327, 67 A.L.R. 373, in taking this last stated view of the matter, discusses the question in quite some detail.

In response to the argument that it is against public policy to apply such restrictive easements to the sovereign in the taking of land for a public use the Court pointed out that the police power is restrictive, only limiting the owner's use of property to public safety, etc. 'but never extends to depriving him of it for public benefit'.

The Court recognized the fact that building restrictions 'did not constitute easements known to the common law'. But then called attention to the fact that the 'easement of light, air, and access in property abutting on a public street is not a common-law easement, but its impairment by public use in the street is a taking of property.'

*489 *Johnstone v. Detroit, etc.*, supra, asserts that its holding 'is supported by the weight of authority'. The first annotation following the report of the case, after calling attention to the annotation in 17 A.L.R., supra, makes this statement:—'The few cases decided since the earlier annotation uphold the rule that compensation must be made where the taking of property under eminent domain violates building restrictions on the land adjacent thereto'.

The reasoning of the cases holding that compensation must be made where the taking of property under eminent domain violates building restrictions placed thereon for the benefit of every other lot in the sub-division is, in the opinion of this Court, more consistent with the realities of the situation. Each of the respective owners of the respective lots entered into this restrictive agreement because each regarded it as something which added to the value of his or her own lot. Our case of *Ridley v. Haiman*, 164 Tenn. 239, 258, 47 S.W.2d 750, 756, recognizes it to be a fact

that such a restriction is 'an interest or right created by the deed itself', meaning an interest or right in the servient lot.

Certainly it is not within the spirit of our eminent domain law that such interest created by the deed may be taken away from its owner without compensation, if that owner is damaged. Not being within the spirit of the law, it ought not to be so held, unless required by the letter of the law. This Court finds nothing in the letter of our eminent domain law forbidding compensation to the owner under such circumstances. Nor is there anything in Article 1, Section 21, exhibiting an intention that *490 this right in the servient lot may be taken by the sovereign without paying just compensation.

It does not seem accurate to hold that the owner of the right to restrict the use of the servient lot to a certain use for the benefit of the dominant lot is not a property right in that servient lot. The **206 only right, broadly speaking, that any owner of any real estate has in land is the right to use it. So, it would seem to follow that the 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 should be compensated. Or, as better stated in *Johnstone v. Detroit, etc. supra*,—'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.'

City of Shelbyville v. Kilpatrick, 204 Tenn. 484, 487–90, 322 S.W.2d 203, 205–06 (1959)

In another case, a school board purchased property to use for parking for a school, and the property had restrictive covenants directing the lots could only be used for residential development. The court held that since the school board bought the property, instead of using eminent domain, the restrictive covenants remain in effect, and the board would have to purchase all other lots in the subdivision to avoid enforcement of the covenants:

The plain, unambiguous language of the covenant limits the use of the property to residential purposes and uses incidental to private dwellings. Nor do "changed circumstances", as advanced by the trial judge, aid defendant's position. While there were fewer automobiles when the restrictions were imposed, the restrictions protect against such change. When the character of a neighborhood has so radically changed that covenants no longer benefit any landowner, changed circumstances will permit equitable action to relieve the landowners of the restrictive burden. The record does not establish change sufficient to permit equitable intervention. See *Caudill v. Hamlet*, 490 S.W.2d 538 (Tenn.App.1972) and *Laughlin*.

It is next argued plaintiffs are estopped from enforcing the restriction because their predecessors apparently did not object to the construction of the school more than 60 years ago. We cannot agree. The parties to this action did not own the lots at the time the school was constructed and their acts or omissions created no detrimental reliance by the defendant. Moreover, the school was constructed long before the lots at issue were purchased by the board. In this connection see *Laughlin* and *Carson*.

Finally, the school board argues it should not be restrained from developing the lots because it could have condemned the property had it not owned the property and no eminent domain proceedings have been commenced. A similar issue arose in *City of Shelbyville v. Kilpatrick*, 204 Tenn. 484, 322 S.W.2d 203 (1959), where the city had acquired property subject to residential restrictions and constructed a water tower. The city then filed an action for declaratory judgment to determine whether the construction of the tower was a "taking" such that other subdivision property owners should be compensated. The court held the restriction constituted an interest owned by the remaining lot owners in the city's realty for which compensation was required. In this connection, see Annot., *Eminent Domain; Restrictive covenant or Right to Enforcement Thereof as Compensable Property Right*, 4 A.L.R.3d 1137; also see *Britton v. School Dist. of University City*, 44 S.W.2d 33 (Mo.1931), *writ of prohibition granted*, 61 S.W.2d 741 (Mo.1933).

*3 The judgment of the trial court is reversed and the cause remanded for entry of judgment establishing plaintiffs' interest, but the appellee will be required to acquire plaintiffs' interest in the lots if appellee elects to proceed with construction of the parking area.

Gann v. Bd. of Educ. of Unicoi Cty., Tennessee, No. C.A. 15, 1989 WL 153260, at *2-3 (Tenn. Ct. App. Dec. 18, 1989), aff'd sub nom. Gann v. Bd. of Educ. of Unicoi Cty., No. 2, 1991 WL 6409 (Tenn. Jan. 28, 1991)

Research leads me to conclude that property acquired by eminent domain or condemnation is taken without restriction, and any covenants tied to that property are nullified. This is not the case when the property is merely purchased by the local government, as such a voluntary transaction leaves deed restrictions intact. It also appears that owners of other lots in the subdivision would be entitled to compensation for removing the deed restrictions, as they are deprived of their right to enforce such restrictions on development of the lot in their subdivision.

I hope this information is helpful,

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