Hastings Law Journal

Volume 13 | Issue 3 Article 13

1-1962

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J. Thomas Talbot

the grantor not only could change restrictions in the deeds but could put different restrictions in subsequent deeds. Were this case to have come before the New Mexico court, using *Suttle* as precedent, it certainly would not have been upheld on the basis of an equitable servitude. Here the requirement of tract uniformity could not be found due to the grantor's reservation of a power to place different restrictions in subsequent deeds as well as his reservation of a power to modify or change any restrictions in existing deeds.

In summation, if the same fact situation as appeared in *Suttle* were to come before the California court, the decision would be the same but for a different reason. The California court would not find a valid equitable servitude because of the requirement that the deed must expressly state that the restrictions were for the benefit of the grantees. The New Mexico court and the majority of courts would imply this intent from the uniformity of the deeds and the general tract plan, but the California courts require this intent to be expressly manifested in the deed. If the grantor's reservation of a power to change the restrictions were in issue, the California court would not deny enforcement on the grounds that this was a personal covenant. The later California cases base their decisions on the intention of the grantor as manifested in the deed and whether the subsequent grantee took with notice of the equitable claim or interest, therefore himself being bound. The California cases uniformly hold that a reservation of the right to change the restrictions by the grantor has no effect on the validity of the equitable servitudes set up in the deed, contrary to the majority of the United States courts, and uphold the reservation as well.

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BRINGLE v. BOARD OF SUPERVISORS. CONDEMNATION WITHOUT COMPENSATION?

Bringle v. Board of Supervisors,[1] held that an individual's land could be taken without compensation, as a condition precedent to the granting of a zoning variance. The plaintiff, who owned four acres in an agriculturally zoned area, had, in 1952, obtained a five-year variance which allowed him to use the land for storage and in connection with his excavating business. At the expiration of the five-year period, he applied to the board of supervisors for another five-year variance, since the land was unfit for farming. The board granted the variance, but only upon the condition that the owner dedicate a perpetual easement, thirty by one hundred thirty-two feet, to the county for the widening of a road upon which the property abutted. The land was situated in a rapidly growing part of Orange County and was increasingly used as a thoroughfare. At the time of the application the county master plan had scheduled this street for widening.[2]

[1] 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960).

[2] *Id.*

This decision overruled a unanimous appellate court decision which had based its decision on Article I, section 14 of the California Constitution which provides, "Private property shall not be taken or damaged for public use without just compensation having first been made to the owner"; and upon the due process clause of the 14th amendment to the United States Constitution. The appellate court had held the board of supervisors' demand to be an invasion of a landowner's right to his land until taken by due process of law, and was beyond a proper exercise of the police power.[3]

Conditions Precedent to Variances

There are good reasons for granting the power to attach *reasonable* conditions precedent to the granting of a variance. Many zoning authorities permit reasonable conditions precedent to a variance grant which will allow the owner to substantially use the property as he desires while at the same time preserving the integrity and purpose of the zoning ordinance.[4] If the board could not attach conditions, it might, for lack of this power, be forced to deny variances in situations which require relief. For example, in granting variances in connection with set-back lines, boards frequently require the applicant, as a condition precedent to granting the variance, to prepare, execute, and file at his own expense, a covenant running with the land by which he agrees to set back his proposed building or structure at no cost to the city, whenever the city should require all property to be set back in compliance with the established set-back line.[5] The zoning board has broad discretion in fixing appropriate conditions and safeguards, but such power is not unlimited.[6]

In the *Bringle* opinion, the court states that conditions may be imposed. The court cites three cases in support of this rule. In two cases,[7] it is mere dicta; and in none of the three cases is there a proposed dedication of land or even anything analogous.

In a Pennsylvania case[8] conditions were imposed to the granting of a variance allowing the operation of a laundromat in a residentially zoned district. The conditions were that an attendant be on duty at all times, and the hours of operation be restricted. In a well reasoned opinion the court held the conditions exceeded the police power. It held that they bore no reasonable relation to the health, safety, morals, and general welfare of the public and would cause unnecessary, unreasonable, and unwarranted intermeddling with the applicant's ownership of his property.

In a prior California case[9] the zoning board ordered a subdivider, as a condition precedent to granting approval, to make payments for the improvement of certain city parks. The court held that such a condition was

[3] 345 P.2d 983 (1959), *rev'd*, 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960).

[4] Edmonds v. County of Los Angeles, 40 Cal. 2d 642, 255 P.2d 772 (1953); Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Metcalf v. County of Los Angeles, 24 Cal. 2d 267, 148 P.2d 645 (1944); Rubin v. Board of Directors, 16 Cal. 2d 119, 104 P.2d 1041 (1940).

[5] 1 YOKELY, ZONING LAW AND PRACTICE 354 (2d ed. 1953).

[6] *Id.* at 355.

[7] Metcalf v. County of Los Angeles, 24 Cal. 2d 267, 148 P.2d 645 (1944); Rubin v. Board of Directors, 16 Cal. 2d 119, 104 P.2d 1041 (1940).

[8] Van Sciver v. Zoning Board of Adjustment, 365 Pa. 646, 152 A.2d 717 (1959).

[9] Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

beyond the power and jurisdiction of the city and that the fees paid pursuant to the conditions should be returned.

The case most relied upon in *Bringle* is *Ayres v. City Council of Los Angeles.*[10] In that case the city planning commission attached four conditions precedent to granting approval of a subdivision map. The conditions were that certain portions of the individual's land be dedicated free of charge to the city for widening of streets and beautification of the area. A city master plan already called for the widening of one of the streets. The *Bringle* court calls *Ayres* an analogous situation. It is a different situation, however, because there the land was being divided into separate parcels for different owners. Such a subdivision must make a reasonable provision for access by streets. The purpose is protection of the purchasers of lots in the subdivision.[11] It is not analogous to the situation where one applies for a variance in order to permit the continued use of the property in a way for which it is fitted.

Criticism of Bringle

A device used by the court in the *Bringle* decision is the presumption that the condition imposed by the zoning board is reasonable and that the board did not show a clear abuse of discretion in imposing it. The facts, however, themselves show a clear abuse of discretion which should be sufficient to rebutt all but a conclusive presumption. The widening of the street was planned *before* the variance was sought; and the land was about to be condemned in an eminent domain proceeding. This shows that the taking was nothing other than a veiled attempt to seize property about to be condemned without paying.

A company operating in a farming area for a period of only five years with only five units of rolling stock such as Bringle had, on a major thoroughfare, does not place such a burden on the roads by its use that it must permanently dedicate a thirty foot strip of its land. At any rate, an analogous case held that because a development will increase the surrounding traffic it need not bear the burden of providing for this traffic.[12]

The cases cited by the court to support this presumption were alike in that both the zoning board and their adversaries had several obvious, valid arguments for their respective stands.[13] In the cited cases the courts merely refused to substitute their judgment for that of duly constituted zoning authorities. The effect of the presumption is to put the burden on the appellant to show that the additional use of the road made by him would not necessitate widening. In another California case, concerning abutting landowner's rights to the public way, the court said, "It is not incumbent upon him [the property owner] to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them."[14]

The court uses the same presumption to the same illogical extreme when it dismisses the argument that the applicant seeks only a five-year variance

[10] 34 Cal. 2d 31, 207 P.2d 1; 11 A.L.R. 2d 503 (1949).

[11] 34 Cal. 2d 31, 207 P.2d 1, 11 A.L.R.2d 503 (1949).

[12] Mansfield & Swett v. Town of West Orange, 120, N.J.L. 145, 198 Atl. 225 (1938).

[13] City and County of San Francisco v. Superior Court, 53 Cal. 2d 236, 1 Cal. Rptr. 158, 347 P.2d 294 (1959); Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 144 P.2d 4 (1943).

[14] Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307 (1896).

while the dedication would be permanent. The use of this presumption puts the burden on the property owner to show why his land should *not* be taken from permanently.

The court relied upon *Ayres* in holding that this is not a taking of property without just compensation. In *Ayres*, however, the court ducks the issue, holding that the proceeding was not one of eminent domain and therefore the problem need not be considered. The court thereby eluded the question altogether by considering only the *form* of the proceeding. Are we to believe that because the condition was *said* to have been imposed under the police power, the court should be precluded from determining whether or not such was the case? If this is the case it would follow that when the zoning authority finds it to be a matter of police power to take private property for streets, then why not for hospitals, freeways, reservoirs, or any other public project so long as the guise of the police power proceeding is used?

Emminent Domain and the Police Power

This same court six years earlier, in a case relating to land use and the exercise of the police power said: "The exercise of the police power, though an essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case, and be made a cloak to destroy constitutional rights as the inviolateness of private property."[15] It must be agreed that the police power and eminent domain are overlapping powers. As has been suggested,[16] would it not be better to leave the police power in the realm of regulation? Here, under the pretense of regulation the use of this power has deprived individuals of their property. The police power to take land without compensation should extend only to emergency situations such as destruction of homes to prevent the spread of fire,[17] the destruction of diseased animals,[18] or related necessity. When the power passes beyond these proper bounds in its invasion of property rights, it in effect becomes eminent domain and its exercise requires compensation.[19] If the courts find public necessity in such cases, then the constitutional guarantee of just compensation for the taking of private property is forever abrogated.

As more specifically applied to taking private property to be used for streets, the rule is well settled that the use of the abutting landowner's property clearly gives the owner a right to compensation.[20] Even the more

[15] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

[16] 1 LEWIS, EMINENT DOMAIN 14 (3d ed. 1888): "Under one (police power), the public welfare is prompted (sic) by regulation and restricting the use and enjoyment of property by the owner; under the other (eminent domain), the public welfare is promoted by taking property from the owner and appropriating it to some particular use."

[17] Sorocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385 (1853); Conwell v. Emrie, 2 Ind. 35 (1850).

[18] Putnam v. Payne, 13 Johns. R. 312 (N.Y. 1816).

[19] Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119 (1913); Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867 (1909).

[20] Terrell v. York, 127 Ga. 166, 56 S.E. 309 (1906); Fulton County v. Amorous, 89 Ga. 614, 16 S.E. 201 (1892); Barnhart v. City of Grand Rapids, 237 Mich. 90, 211 N.W.

intangible land use rights, such as ingress and egress, have been heretofore zealously protected by the California courts. Leading California cases have held that an abutting landowner on a public highway has a right of access to the road which cannot be taken away without due compensation.[21]

Conclusion

In *Ayres,* the court says it is the petitioner who seeks the advantage of approval of a subdivision map, and upon him rests the duty of compliance with reasonable conditions. This duty plus the presumption that the board has not abused its discretion gives the board an extreme advantage over the one seeking the variance. This superior bargaining position leaves the board in such a situation that it is almost foolish not to fulfill future needs while they have the upper hand. The result of the presumption is to place the integrity of the board above proper surveillance by the judiciary.

It is clear that there is great inherent danger in a decision that goes so far in infringing upon individual rights. In conclusion, the words which draw the best guidelines are those of the California Supreme Court: "the tendency under our system is too often to sacrifice the individual to the community, and it seems very difficult in reason to show why the state should not pay for property which it destroys or impairs the value, as well as for what it physically takes."[22]

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96 (1926); Dow Arneson Co. v. City of St. Paul, 117 Minn. 164, 225 N.W. 92 (1929); City of Raleigh v. Harcher, 220 N.C. 613, 18 S.E.2d 207 (1942); Watkins v. Welch Grape Juice Corp., 96 App. Div. 114, 89 N.Y.S. 47 (1904).

[21] Beals v. City of Los Angeles, 23 Cal. 2d 381, 144 P.2d 839 (1943); Wilcox v. Engebretson, 160 Cal. 288, 116 Pac. 750 (1911); Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661 (1904); Guerkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570 (1896).

[22] Bacich v. Board of Control, 23 Cal. 2d 343, 351, 144 P.2d 818, 823 (1943).

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