

Some Observations on Building Restrictions

Allen Scott Crigler

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SOME OBSERVATIONS ON BUILDING RESTRICTIONS

The laws regulating building restrictions and subdivision planning in Louisiana were made more logical and coherent by the adoption in 1977 of articles 775-83 of the Civil Code as Book II, Title V: Building Restrictions. However, a number of difficult problem areas remain. To understand these problems, one must consider the public policy concerns behind the statutory and jurisprudential rules governing building restrictions. These jurisprudential rules must strike "a balance between individual demands for the recognition of modifications of property rights to suit individual needs and social demands for the preservation of a relatively simple system of unencumbered property."¹ The cornerstone of the theoretical framework used to strike this public policy balance is the requirement of a feasible general plan of development. This requirement will be discussed in connection with the rules regulating the creation and enforcement of building restrictions and the extent to which "affirmative duties" can be imposed upon lot owners. Furthermore, this public policy analysis will also be used in discussing the frequent conflicts between subdivision plans and governmental activities such as expropriation and zoning.

The Origins of Building Restrictions

The Louisiana Civil Code of 1870 reflected a somewhat hostile attitude toward the creation of diverse real rights. This hostility was reflected in articles limiting the effect of predial servitudes² and prohibiting the creation of servitudes in favor of a person.³ It was feared that the exercise of contractual freedom might result in property being placed out of commerce or locked into unproductive uses.⁴ As modern society created almost irresistible demands for new modifications of property rights, it became necessary to develop new ways to regulate these new forms. For example, the recognition

1. Yiannopoulos, *Real Rights: Limits of Contractual and Testamentary Freedom*, 30 LA. L. REV. 44 (1969).

2. *E.g.*, LA. CIV. CODE art. 655 (as it appeared prior to 1977 La. Acts, No 514).

3. LA. CIV. CODE art. 709 (as it appeared prior to 1977 La. Acts, No. 514).

4. This concern is reflected in the following quote from *Queensborough Land Company v. Cazeaux*, 136 La. 724, 729, 67 So. 641, 643 (1915):

The question of how far such a condition [one restraining the use or alienation of property] will be sustained is one dependent very much upon the facts of each particular case. If the condition is founded upon no substantial reason but merely in caprice, and is of a character to tie up property to the detriment of public interest, it will not be sustained; otherwise it will.

of mineral servitudes as real rights was accompanied by the rule that they be subject to a ten-year prescription of non-use.⁵

The Louisiana courts developed the law of building restrictions in response to pressing needs for providing effective means for land-owners to plan and control the development of residential and commercial subdivisions.⁶ Because neither the Civil Code provisions on predial servitudes nor the use of local zoning laws provided an adequate answer, the Louisiana courts borrowed from the common law concepts of equitable servitudes and covenants running with the land. The concept of covenants running with the land has caused a great deal of analytical difficulty in the common law, especially in the interpretation of the requirements that the covenants "touch and concern the land" and that there be "privity of estate." The effort to govern restrictions by contractual principles proved almost unworkable. To avoid these problems, the common law developed the concept of equitable servitudes, so as to place the regulation of "restrictive covenants" within the domain of property law.⁷

The law of building restrictions developed by the courts of Louisiana is similar to the law of equitable servitudes. However, the concept of land burdens which are enforceable only in equity does not fit well into Louisiana's civil law of property.⁸ Therefore, in enacting the Civil Code articles on building restrictions, the legislature sought to reduce the influence of the law of equity by defining building restrictions as "incorporeal immovables and real rights likened to predial servitudes."⁹ Building restrictions are similar to predial servitudes, except that each lot is in effect both a dominant and servient estate for every other lot in the subdivision.¹⁰ Each owner of property in a restricted subdivision has a limited property right in all of the lots in the subdivision. This real right is the right

5. See LA. R.S. 31:27 (Supp. 1974). For other examples of new forms of property ownership and their accompanying limitations, see the detailed requirements for the establishment of condominium ownership, LA. R.S. 9:1122.101-106 (Supp. 1979), and the application of the rules governing predial servitudes and usufructs to the recently established concept of rights of use. LA. CIV. CODE arts. 640 & 645. The legislature has also provided new forms of ownership to conserve esthetic and historical resources. See LA. R.S. 9:1252 (Supp. 1979) (insuring that historical facades are preserved).

6. See generally LA. CIV. CODE art. 775, comments (a)-(e).

7. For a comprehensive analysis of covenants running with the land and equitable servitudes, see 2 AMERICAN LAW OF PROPERTY §§ 9.8-9.40 (A. Casner ed. 1952, Supp. 1977).

8. See Yiannopoulos, *supra* note 1, at 62-63.

9. LA. CIV. CODE art. 777. See also Yiannopoulos, *supra* note 1, at 75.

10. Technically speaking, building restrictions do not require the existence of a dominant estate and can be created before any lots are sold. See LA. CIV. CODE art. 775, comment (d).

to bring an enforcement action to prevent any use of the land that does not comport with the plan of development.

The legislature did absorb from the common law a requirement that is probably the most important limiting factor in the law of building restrictions: the requirement that the restrictions reflect a general plan of development.¹¹ This general plan must be "feasible and capable of being preserved."¹² In order to make such a plan more effective, the restrictions can impose directly affirmative duties on the lot owners.¹³ Absent a general plan, purported restrictions can be enforced only as predial servitudes or rights of use (if they qualify as such), and no affirmative duties can be imposed.¹⁴

The Creation of Building Restrictions

Article 783 of the Civil Code states that "[d]oubt as to the existence, validity, or extent of building restrictions is resolved in favor of the unrestricted use of the immovable."¹⁵ Fortunately, the courts have not interpreted this "principle" as requiring a rigid rule of strict construction in all instances.¹⁶ The article does imply that building restrictions can be created only by the clearly expressed intention to establish a feasible general plan of development and that the restrictions may not pose unreasonable restraints on the use of real property.¹⁷ Since building restrictions can exist only as a set of interdependent property rights and obligations that comprise a comprehensive plan of development, it would seem logical that doubt as to the *meaning* of particular restrictions should be resolved in light of the purposes of the general plan of development. Thus, a restriction that, standing alone, might be ambiguous should not be ruled invalid by the operation of article 783 if the meaning is clear when read in light of the general plan of development.

11. LA. CIV. CODE art. 775. See Comment, *The Civil Code Articles on Building Restrictions: A Critical Analysis*, 53 TUL. L. REV. 583, 586-87 (1979).

12. LA. CIV. CODE art. 775.

13. LA. CIV. CODE art. 778.

14. LA. CIV. CODE art. 777, comments (b) & (c).

15. LA. CIV. CODE art. 783.

16. For example, the courts have required a large number of substantial violations of the restrictive plan before being willing to find that the plan has been abandoned under Civil Code article 782. See text at notes 29-32, *infra*. Also, the "existence" and "validity" of restrictions have been upheld in spite of local zoning ordinances. See text at notes 64-67, *infra*.

17. The courts have been fairly strict in determining whether the requirements for the creation of building restrictions have been satisfied. See LA. CIV. CODE art. 783, comment (b); *Murphy v. Marino*, 60 So. 2d 129 (La. App. 1st Cir. 1952) (restrictions must be "uniform" and "known" to create a plan of development); *Harper v. Buckelew*, 355 So. 2d 68 (La. App. 1st Cir. 1978) (a lot is restricted only if it is clearly included in the subdivision).

Article 776 provides that "[b]uilding restrictions may be established only by juridical act executed by the owner of an immovable or by all the owners of the affected immovables."¹⁸ The more common practice is for the developer to record the restrictions along with the subdivision plat before the first lot is sold. The juridical act, if properly recorded, is effective against third-party purchasers even if the restrictions are not mentioned in the chain of title or the subdivision plat.¹⁹ To prevent the restrictions from being a trap for unwary purchasers, however, the developer should refer to the restrictions in the initial acts of sale and in the subdivision plat.

It is sometimes said that restrictions can be imposed only by an ancestor in title.²⁰ This simply means that the owners of all affected property must agree to be bound.²¹ Thus, a developer is not able to impose or modify restrictions as to lots that have already been sold. If the developer attempts to retain the power to modify restrictions in the future, then he creates only a personal right between himself and the initial purchaser, not a building restriction (a real right) that would be binding upon subsequent owners.²²

Modification and Termination of Restrictions

Of course, there is a need for effective ways to modify or terminate restrictions that no longer comport with changed circumstances in the neighborhood. To satisfy this public policy need, the Civil Code provides three modes of termination of building restrictions: 1) by agreement of the owners,²³ 2) by abandonment,²⁴ or 3) by the liberative prescription of two years.²⁵ Each of these can lead to the extinction of the entire restrictive plan or of only a portion thereof.

Article 780 of the Civil Code, as amended in 1980, states that:

18. LA. CIV. CODE art. 776.

19. See LA. CIV. CODE art. 776, comment (c); *McGuffey v. Weil*, 240 La. 758, 125 So. 2d 154 (1960); *Clark v. Reed*, 122 So. 2d 344 (La. App. 2d Cir. 1960). The lack of a requirement that the chain of title include at least a reference to the restrictions has been criticized as placing an unreasonable burden on purchasers to check all juridical acts of the subdivider. Comment, *supra* note 11, at 588-89. See also *Holloway v. Ransome*, 216 La. 317, 43 So. 2d 673 (1949).

20. LA. CIV. CODE art. 775, comment (d); *Salerno v. DeLucca*, 211 La. 659, 30 So. 2d 678, 679-80 (1947).

21. LA. CIV. CODE art. 776.

22. *LeBlanc v. Palmisano*, 43 So. 2d 263 (La. App. Orl. Cir. 1949).

23. LA. CIV. CODE art. 780.

24. LA. CIV. CODE art. 782.

25. LA. CIV. CODE art. 781.

Building restrictions terminate as provided in the act that establishes them. In the absence of such provision, owners representing more than one-half of the land area, excluding streets and their rights-of-way, affected by the restrictions may amend or terminate by agreement, for a whole or a part of the restricted area, building restrictions that have been in effect for at least fifteen years.²⁶

The article clearly allows termination of the plan as to any or all parts of the subdivision. Although article 780 does not provide specifically for individual changes, the courts also have indicated that the plan may set out procedures for the modification or termination of individual restrictions.²⁷ For modifications of the plan which make it more restrictive, however, it arguably is necessary to obtain the consent of all the owners, since the effect of tightening the existing restrictions is the same as creating new ones, and the creation of restrictions does require universal consent.²⁸ In any event, the courts should not allow the majority to impose unreasonable burdens on the property rights of their neighbors.

According to article 782 of the Civil Code, even absent any action by the lot owners, restrictions can be terminated by abandonment. This provision provides another way in which restrictions which no longer serve a valid purpose in the plan of development can be avoided. The entire plan or a particular restriction can be abandoned as to "the affected area."²⁹ Thus, article 782 gives the courts a great deal of flexibility in determining what part of the plan has been abandoned and in what part of the subdivision.

The courts in Louisiana have been fairly reluctant to find the abandonment of a restrictive plan even when there has been a substantial number of individual violations.³⁰ However, the courts have been willing to find an abandonment when great changes in the surroundings and uses of a subdivision have occurred over the years.³¹ For example, a restriction to residential use was found to be

26. LA. CIV. CODE art. 780.

27. See *Gerde v. Simonson Investments, Inc.*, 251 La. 893, 207 So. 2d 360 (1968); *Roccaforte v. Lewis*, 286 So. 2d 490 (La. App. 1st Cir. 1973); *Robinson v. Morris*, 272 So. 2d 444 (La. App. 2d Cir. 1973).

28. See text at notes 18-20, *supra*.

29. LA. CIV. CODE art. 782.

30. See, e.g., *Gwatney v. Miller*, 371 So. 2d 1355 (La. App. 3d Cir. 1979); *Allen v. Forbess*, 345 So. 2d 950 (La. App. 2d Cir. 1977); *East Parker Properties, Inc. v. Pelican Realty Co.*, 335 So. 2d 466 (La. App. 1st Cir. 1976), *cert. denied*, 338 So. 2d 699 (La. 1976).

31. *Robinson v. Donnell*, 374 So. 2d 691 (La. App. 1st Cir. 1979). *Alfortish v. Wagner*, 208 La. 198, 7 So. 2d 708 (1942), also illustrates that the abandonment of a particular restriction does not necessarily negate the feasibility of the general plan; therefore other restrictions may still be enforceable.

abandoned where the surrounding area had developed and been zoned as a commercial district.³² The courts have not yet articulated a clear standard by which to determine whether an abandonment has occurred. This determination should be made in light of its probable effect on the general plan of development. For example, if the violations are so numerous and significant that they make the plan unfeasible in all or a part of the subdivision, then the restrictions should be terminated in the affected area. If only one particular restriction has been violated on a number of occasions, then the determination as to whether that specific restriction has been abandoned should be based on the importance of the restriction to the general plan, as well as on the number and severity of the violations.

Individual building restrictions also are terminated by the sufferance of a noticeable violation for a period of two years.³³ The liberative prescription of article 781 not only bars an action for enforcement, "it extinguishes the real right itself . . ."³⁴ For example, the courts have held that more than two years of commercial use will terminate a restriction to residential purposes such that subsequently a new commercial building³⁵ or even a church³⁶ can be built on the lot. However, a second violation on the lot should not be allowed if it is substantially more detrimental to the general plan than was the first. Therefore, the existence of a small commercial sign for over two years does not abrogate a restriction to residential use to such an extent that the tract could thereafter be used for an offensive industrial or commercial use.³⁷

Enforcement

Generally, all of the lot owners in a restricted subdivision have the right to bring actions for damages and to enjoin violations.³⁸ The

32. *Lamana-Panno-Fallo, Inc. v. Heebe*, 352 So. 2d 1303 (La. App. 4th Cir. 1977). The enactment of a subsequent zoning ordinance is usually held to be only evidence of abandonment, *see* LA. CIV. CODE art. 782, comment (c), and not an abrogation of the restrictions. *See* text at notes 63-67, *infra*.

33. LA. CIV. CODE art. 781.

34. LA. CIV. CODE art. 781, comment (b).

35. *LeBlanc v. Bowen*, 238 So. 2d 369 (La. App. 4th Cir. 1970).

36. *Cush v. Southern Acres Missionary Baptist Church, Inc.*, 194 So. 2d 788 (La. App. 2d Cir. 1967).

37. *Fortson v. Lawrence*, 254 So. 2d 115 (La. App. 3d Cir. 1971), *cert. denied*, 260 La. 280, 255 So. 2d 769 (1972). *See The Work of the Louisiana Supreme Court for the 1946-1947 Term—Property*, 8 LA. L. REV. 234, 238 (1948) (discussing *Salerno v. DeLucca*, 211 La. 659, 30 So. 2d 678 (1947)).

38. LA. CIV. CODE art. 779, comments (b)-(d). Irreparable injury is not a prerequisite to injunctive relief under article 779.

general plan of development can be viewed as evidence of the developer's intention to benefit all the lots in the subdivision and to convey the right to enforce the restrictions to all lot owners. However, this real right is not dependent on any mutuality of obligations; all lot owners within the subdivision can enforce the restrictions, even those restrictions with which their lot is not burdened.³⁹ Although there are no cases on the issue, it would seem that the holders of other real rights in less than full ownership in the property should be able to enforce the restrictions if their status is sufficient to satisfy the general standing requirement of a "real and actual interest" in the subject matter of the suit.⁴⁰

Also, the developer can repose the right to enforce the restrictions in a homeowners association or an "architectural control committee." As part of the general plan of development, these groups are sometimes given broad powers to enforce the restrictions as representatives of the lot owners and to supervise the plan.⁴¹ The fact that an association or committee is given the power to enforce the restrictions does not exclude the rights of the lot owners to bring their own actions for enforcement.⁴²

The restrictive plan may also vest enforcement rights in the hands of the original subdivider or developer. It can be argued that his right to enforce the restrictions is extinguished when he sells the last lot and therefore no longer owns any land in the subdivision. This follows from the definition of building restrictions as "real rights likened to predial servitudes"—a definition which implies that the rights must be attached to an ownership interest in real property. In any event, the developer may still be able to enforce non-affirmative restrictions under the theory that he retains a *right of use* (a limited personal servitude) in the subdivision.⁴³

Affirmative Duties

Probably the most effective planning tool made available to the developer by the law of building restrictions is the power to impose affirmative duties on lot owners. This option is generally not available under the law of predial servitudes or rights of use.⁴⁴ In

39. LA. CIV. CODE art. 779, comment (c).

40. LA. CODE CIV. P. art. 681. The Louisiana courts have shown a fairly pragmatic and functional approach to standing requirements in general. See, e.g., Lambert v. Donald G. Lambert Constr. Co., 370 So. 2d 1254 (La. 1979).

41. The extent of these groups' power to regulate the plan is discussed along with affirmative duties. See text at note 47, *infra*.

42. See Emonet v. Tomlinson, 163 So. 2d 382 (La. App. 3d Cir. 1964).

43. See LA. CIV. CODE arts. 639-45.

44. LA. CIV. CODE arts. 651 & 640.

order to prevent the abuse of the power to impose affirmative duties, article 778 of the Civil Code requires that they be "reasonable and necessary for the maintenance of the general plan." Thus, affirmative duties can be imposed only as part of a general plan of development and can be reviewed judicially by the application of the "reasonable and necessary" standard.⁴⁵ The word "necessary" probably should not be interpreted too strictly, since affirmative duties would seldom be absolutely necessary to the plan.

It is unclear what duties should be classified as affirmative. The distinction between affirmative and non-affirmative duties may be important if restrictions involving affirmative duties are judged by a more stringent standard than other restrictions, as the language of article 778 seems to suggest. Comment (b) to article 777 states that restrictions as to the value or type of building to be erected involve affirmative duties, while restrictions as to residential use or as to set back lines do not.⁴⁶ Such subtle distinctions may prove to be difficult to make, especially considering the fact that the same restrictions often can be couched in either positive or negative terms.

However, there are some restrictions that clearly seem affirmative and probably should be subject to a stricter standard. The two most common are: 1) a requirement that building plans be submitted for approval by an architectural control committee, and 2) a requirement that the homeowners pay regular dues to a homeowners' association for the maintenance of common areas. Both of these requirements involve what may be termed "quasi-governmental" powers which may justify closer judicial scrutiny to insure that they are not abused. At least one writer has suggested that if homeowners' associations are given these and other broad powers similar to those exercised by local political subdivisions, the associations may be subject to constitutional limits on the exercise of these powers.⁴⁷

45. See LA. CIV. CODE art. 778, comment (b).

46. LA. CIV. CODE art. 777, comment (b).

47. See Comment, *An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions*, 21 U.C.L.A. L. REV. 1655, 1688 (1974). The comment concludes that:

This need for court intervention permeates much of the constitutional doctrine surrounding zoning law It is much more difficult to separate the private and public sectors when the case involves a homeowner's association having wide quasi-governmental power. The actions of these associations can significantly and capriciously abridge individual rights with few safeguards in a manner similar to zoning. Reliance is not such an important factor because the permissible boundaries of homeowners' actions associations are often not explicitly set forth in the original declaration of restrictions. Thus as the private restriction takes on the

A common provision of many modern building restriction schemes is to set aside common areas in the subdivision to be owned and operated by an association of homeowners. The plans often call for mandatory membership in these associations for all lot owners and for the imposition of periodic dues or assessments on each lot owner. These funds are generally used for the maintenance and beautification of the subdivision, especially of common areas owned by the association. There are no specific limitations on the use of these funds by the association other than those provided by the restrictions themselves; however, since the obligation to pay the dues probably is an affirmative duty, then the funds may be subject to the general requirement that they be spent only as is "reasonable and necessary for the maintenance of the general plan."⁴⁸

The courts have upheld and enforced restriction provisions which imposed this obligation to pay dues, apparently as an affirmative real obligation.⁴⁹ The legislature in 1979 implicitly recognized the validity of these obligations by establishing a procedure for recording a privilege on the immovable for which dues are delinquent.⁵⁰ At least one case has described the obligation to pay an upkeep assessment as a personal obligation of the lot owner.⁵¹ However, this has been criticized on the ground that lot owners subsequent to the original vendee may not have expressed the requisite intent to assume a personal obligation.⁵² Also, the provision for a recorded privilege on the property itself should provide an adequate remedy for collection without the necessity of a personal obligation.

The new legislation provides for the collection of interest and attorney fees along with the unpaid dues.⁵³ The privilege exists for five years after the date of recordation.⁵⁴ However, the statute does not provide a prescriptive period within which the association must either record the privilege or bring an action to collect the dues. The two-year prescriptive period for bringing actions to curtail

aspects of governmental action, judicial review based on zoning law becomes more compelling.

48. LA. CIV. CODE art. 778.

49. Tall Timbers Owners' Ass'n v. Merrit, 376 So. 2d 586 (La. App. 4th Cir. 1979); Town South Estate Homes Ass'n v. Walker, 332 So. 2d 889 (La. App. 2d Cir. 1976); Metryclub Gardens Ass'n v. Council, 36 So. 2d 56 (La. App. Or. Cir. 1948).

50. LA. R.S. 9:1145-48 (Supp. 1979).

51. Town South Estates Homes Ass'n v. Walker, 332 So. 2d 889 (La. App. 2d Cir. 1976).

52. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Property*, 37 LA. L. REV 317, 329-30 (1977).

53. LA. R.S. 9:1145 (Supp. 1979).

54. LA. R.S. 9:1147 (Supp. 1979).

noticeable violations of the restrictions may be applicable,⁵⁵ or the three-year period of Civil Code article 3538 may apply.

A related provision of some plans requires the lot owner to maintain his property properly or to allow representatives of the association to enter his premises and to perform the desired maintenance at his expense. The association might be able to collect its costs through the privilege mechanism used to collect dues.⁵⁶ This would seem to be a permissible affirmative duty provision of a general plan. A similar method of enforcing maintenance is contemplated in the code articles dealing with predial servitudes⁵⁷ and usufructs;⁵⁸ therefore, this "self-help" remedy probably is not against public policy if reasonably exercised.

Another common provision of building restriction schemes is to require that building designs be submitted for approval by an architectural control committee. The committee may be appointed by the developer or may be under the auspices of a homeowners' association. In addition to the power of approval over building plans, the committee also may be given the right to bring other enforcement actions on behalf of the lot owners.⁵⁹

The jurisprudence is unsettled as to the standard the courts should apply in reviewing the actions of architectural control committees. The Third Circuit Court of Appeal has held that a vague requirement of approval by a neighborhood committee is unenforceable when the restrictive plan fails to dictate how the committee is to be organized or on what basis it is to make its decision.⁶⁰ More recently, the fourth circuit has refused to enforce a requirement that the approval of the developer be obtained as to the design and quality of a proposed improvement.⁶¹ The requirement was deemed to be too vague and ambiguous to be enforceable because it provided no guidelines as to what design would be acceptable. However, the first circuit has upheld the decision of a similar committee, even though the restrictive plan provided no guidelines for decisionmaking.⁶² The court felt that the committee's decision to disapprove the

55. LA. CIV. CODE art. 781. See text at notes 33-37, *supra*.

56. LA. R.S. 9:1145-48 (Supp. 1979).

57. See LA. CIV. CODE art. 745. See LA. CIV. CODE art. 744, comment (b).

58. See LA. CIV. CODE art. 579.

59. The committee's enforcement powers would have to be derivative of those of the lot owners. See text at notes 38-43, *supra*.

60. *Community Builders, Inc. v. Scarborough*, 149 So. 2d 141 (La. App. 3d Cir. 1962).

61. *Lake Forest, Inc. v. Drury*, 352 So. 2d 305 (La. App. 4th Cir. 1977) (review of denial of preliminary injunction), 378 So. 2d 1071 (La. App. 4th Cir. 1979) (denial of permanent injunction).

62. *4626 Corp. v. Merriam*, 329 So. 2d 885 (La. App. 1st Cir.), *cert. denied*, 332 So. 2d 800 (La. 1976).

design should be upheld because the decision was reasonable under the circumstances.

Thus, the courts of appeal are in conflict as to whether the general plan of development must enumerate explicitly the criteria for decisionmaking by the committee or whether it is sufficient that the power be exercised reasonably in light of the general plan of development. In any event, the plan must set out the composition of the committee and the procedure for obtaining approval. The plan probably should be as explicit as possible as to the powers and discretion of the committee in order to give prospective builders an idea of what to expect.

Conflicts with Zoning Laws

Conflicting zoning laws provide one of the most important limits to the use of building restrictions. If the general plan of development is in direct conflict with a preexisting local zoning law, then the entire restrictive plan is probably invalid, since zoning laws are public laws and, as such, provide mandatory rules of law that cannot be avoided by private agreement.⁶³ Even preexisting building restrictions should not be allowed to interfere unduly with the governmental power to enact zoning laws in the public interest.⁶⁴ However, Louisiana courts have given effect to seemingly conflicting building restrictions by interpreting the cumulative type zoning that is predominant in Louisiana as "permissive."⁶⁵ For example, in subdivisions zoned "commercial" (allowing both commercial and residential uses), the courts have enforced restrictions which allow only residential use.⁶⁶ One wishing to contest the validity of such a restriction could argue that it subverts the purpose of the zoning law, if that purpose is to provide for mixed commercial and residential uses. Unless faced with a direct conflict, however, the courts probably will continue to find that building restrictions are neither ter-

63. See LA. CIV. CODE arts. 11 & 12.

64. See Berger, *Conflicts Between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 NEB. L. REV. 449 (1964). Professor Berger contends that since zoning is a valid exercise of the police power and is in the overall public interest, it should be given precedence over private restrictions. He also argues that the abrogation of restrictions neither violates substantive due process nor impairs the obligations of contracts, while admitting that in some instances this may be a "taking" that requires the payment of just compensation. See also *Ransome v. Police Jury of Parish of Jefferson*, 216 La. 994, 45 So. 2d 601 (1950).

65. *Oak Ridge Builders, Inc. v. Bryant*, 252 So. 2d 169 (La. App. 3d Cir. 1971), *cert. denied*, 259 La. 945, 253 So. 2d 384 (1971).

66. See, e.g., *Alfortish v. Wagner*, 200 La. 198, 7 So. 2d 708 (1942); *Hargroder v. City of Eunice*, 341 So. 2d 463 (La. App. 3d Cir. 1976), *cert. denied*, 344 So. 2d 378 (La. 1977). See also *Oliver v. Berggren*, 136 So. 2d 325 (La. App. 4th Cir. 1962).

minated nor superseded by zoning ordinances and that restrictions can still be created in an area previously zoned as long as they are not incompatible with the purpose of the zoning ordinance.⁶⁷

Where existing restrictions are totally incompatible with a subsequent zoning ordinance, such that the combined effect would be to exclude all reasonable uses of the property, then a more difficult problem is presented. From a policy standpoint it would seem that the zoning law should be given precedence, since it, at least theoretically, serves the broader public interest. If the restrictions are abrogated in order to give full force to the zoning law, this might conceivably constitute an unconstitutional "taking" of a real right unless accompanied by the payment of just compensation. However, this area of the law is very unsettled and will receive only brief mention here.⁶⁸

The issue of the compensability of building restrictions did arise in Louisiana when part of a restricted subdivision was expropriated and converted to a use that violated the restriction. In *Hospital Service District No. 2 of St. Landry Parish v. Dean*⁶⁹ the third circuit held that building restrictions are not effective against the sovereign and that upon condemnation the other property owners in the subdivision can claim no compensation for the breach of the restriction. This is inconsistent with the theory of building restrictions as real rights, since property cannot be expropriated without the payment of just compensation.⁷⁰ The *Dean* court did not address this issue, but relied instead on the public policy rationale that restrictions are void as against the state.⁷¹

Conclusion

As the preceding discussion indicates, there is a need for a more consistent method of interpreting and analyzing building restrictions. Although the code requires that ambiguities be interpreted in favor of the unrestricted use of the immovable, this principle should

67. LA. CIV. CODE art. 782, comment (c).

68. See note 64, *supra*.

69. 345 So. 2d 234 (La. App. 3d Cir.), *cert. denied*, 346 So. 2d 1106 (La. 1977).

70. *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Property*, 38 LA. L. REV. 332, 341 (1978). The status of building restrictions as real rights is set out in Civil Code article 777 and the requirement that property not be taken without the payment of just compensation is found in article I, section 4 of the Louisiana Constitution and the fifth amendment to the United States Constitution.

71. Article I, section 4's requirement that a property owner be compensated "to the full extent of his loss" makes this public policy rationale somewhat dubious. See Note, *Expropriation: Compensating the Landowner to the Full Extent of His Loss*, 40 LA. L. REV. 817, 826 (1980).

not be carried to an extreme. Individual restrictions should be interpreted in light of and with an eye toward the furtherance of the purposes of the general plan of development. Because affirmative duties can be overly burdensome or oppressive, they probably deserve close judicial scrutiny to see that they are "reasonable and necessary to the maintenance of the general plan." A reasonableness standard, it is submitted, is necessary to properly balance the need of subdivision planners for flexible building restrictions against the public policy concern that property not be unduly encumbered or placed out of commerce.

Allen Scott Crigler